
The Separation of State Powers in Liberal Polity: *Vriend v. Alberta*

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This comment criticizes the Supreme Court of Canada's view of the separation of powers and its understanding of the proper place of the judicial branch in the liberal State, as both were recently expressed in *Vriend v. Alberta*. Against the Court's claim that both the separation of powers and the role of the courts must now be understood in terms of the political sea change occasioned by the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, the author argues that the Court not only mistakes recent Canadian legal history, but does so on grounds which fundamentally misconceive and diminish the singular achievement of Anglo-North American legal history, namely, the rule of law. Against the Court's other claim that democratic objections to judicial review are predicated on an unacceptably narrow conception of democracy, the author submits that, while the Court is right not to confine democracy to majoritarian politics, the expanded conception of democracy which it offers is itself unacceptable on democratic grounds. The comment concludes with the author's views on the minimal requirements of any theory which would take seriously the democratic accountability of the judicial branch.

Cette chronique présente une critique à la fois de l'opinion de la Cour suprême du Canada sur la séparation des pouvoirs et de sa compréhension de la place appropriée de l'organe judiciaire dans un État libéral, exprimées récemment dans l'arrêt *Vriend c. Alberta*. Contrairement à la prétention de la Cour que la séparation des pouvoirs et le rôle des tribunaux doivent maintenant être compris à la lumière du changement politique occasionné par l'adoption en 1982 de la *Charte canadienne des droits et libertés*, l'auteur soumet que la Cour confond la récente histoire légale canadienne et que cette confusion se base sur des prémisses qui dévalorisent et conçoivent de façon erronée les surprenants accomplissements de l'histoire légale nord américaine, dont notamment la règle de droit. Contrairement à l'autre prétention de la Cour que les objections démocratiques à l'examen judiciaire sont basées sur une conception trop étroite de la démocratie, l'auteur soumet que, même si la Cour a raison de ne pas limiter la démocratie aux politiques majoritaires, la conception élargie qu'elle offre de la démocratie est inacceptable d'après les principes démocratiques. La chronique se termine avec l'opinion de l'auteur sur les exigences minimales de toute théorie qui prendrait au sérieux la responsabilité démocratique de l'organe judiciaire.

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Introduction

Though unremarkable¹ in its result,² the majority judgment of the Supreme Court in *Vriend v. Alberta*³ does provide a rare and significant glimpse into the present Court's understanding of its place in Canadian democracy.⁴ In the opinion delivered by Iacobucci J., the Court seems intent on articulating and defending a self-conception which accords with what it perceives as the jurisprudential sea change occasioned by the adoption in 1982 of the *Canadian Charter of Rights and Freedoms*.⁵ Unhappily, the position which the Court finally adopts is premised upon a profoundly mistaken view of legal history and upon a largely unattractive—and indefensible—understanding of the legal present.

Part I of this comment will present the arguments out of which the Court fashions its proposal concerning the separation of powers. Part II will criticize that proposal. In

¹ Unremarkable in light of the Court's prior decisions in *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 and *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1.

² Cory and Iacobucci JJ. were joined by Lamer C.J. and Gonthier, McLachlin, and Bastarache JJ. in holding that the exclusion in the Alberta *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2 [hereinafter the *Act*] of sexual orientation as a prohibited ground of discrimination violated s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*], that the violation was not saved by s. 1, and that the proper remedy was to read "sexual orientation" into the relevant sections of the *Act*. L'Heureux-Dubé J. delivered a concurring opinion, and Major J. wrote in dissent.

³ [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [hereinafter *Vriend* cited to S.C.R.].

⁴ The judgment is noteworthy in several other respects, only one of which will be pursued here. Firstly, though it expressly declines to decide the matter, on several occasions the Court comes very close to asserting that legislatures are not merely bound by the *Charter*, but bound to it as well: see *Vriend*, *ibid.* at 532-33, 566-67, 577-78. This would mean that the Constitution is more than a limitation on State power since it would also comprise an instruction to the State on how it ought to exercise its power. Such a novel view raises, of course, a requirement of legislative integrity which, without more, would appear to be at loggerheads with majoritarian rule. The implications of this view, as it regards the issue of accountability, will be discussed elsewhere in this comment. Secondly, the judgment is praiseworthy in proceeding on the view that legislation carries real sociological significance, and may indeed, as did the legislation at issue in *Vriend*, constitute "a strong and sinister message ... of condoning or even encouraging discrimination" (*ibid.* at 550-52). Finally, the judgment should be marked for the Court's painstaking bowdlerization of the views of McClung J.A. of the Alberta Court of Appeal, views so provocative that one intervener prayed the Supreme Court to admonish them: see *Vriend*, *ibid.* (Canadian Association of Statutory Human Rights Agencies (CASHRA), intervener's factum at 12). This careful sanitization of McClung J.A.'s judgment is all the more remarkable given the Court's considered assessment of the impact of legislative speech. For other of McClung J.A.'s views, see *R. v. Ewanchuk* (1998), 212 A.R. 81, 13 C.R. (5th) 324 (C.A.) (on male-female erotic relations); and *R. v. J.T.S.* (1996), 193 A.R. 35 at 39, (1996) 112 C.C.C. (3d) 184 (C.A.) (on the Reign of Terror and on the Third Reich). For my commentary on his Lordship's judgment in *Vriend v. Alberta* (1996), 181 A.R. 16, 132 D.L.R. (4th) 595 (C.A.), see "Sexual Orientation and Liberal Polity" (1996) 34 Alta. L. Rev. 950.

⁵ *Vriend*, *supra* note 3 at 563-67.

light of the Court's decision in *Vriend*, Part III of this comment will conclude with an inquiry about the nature of judicial accountability.

I. The Arguments

Iacobucci J. frames the Court's proposal about the role of the judicial branch, and about the separation of powers more generally, in terms both of legal history and political morality. The historical argument is directed against the view—forcefully argued by McClung J.A. of the Alberta Court of Appeal—that “under the *Charter*, courts are wrongfully usurping the role of the legislatures.”⁶ According to Iacobucci J., any such view “misunderstands what took place and what was intended when our country adopted the *Charter* in 1981-82.” In adopting the *Charter*, Canada was forging “a new social contract” in which “our constitutional design was refashioned as part of a redefinition of our democracy.” Individual rights and freedoms were the basis of this new model of governance. Through the *Charter*, “each Canadian was given individual rights and freedoms which no government or legislature could take away.” Hence in 1982, Canada “went ... from a system of Parliamentary supremacy to constitutional supremacy.”⁷ Judicial power to declare unconstitutional legislation invalid is democratically legitimate, according to this argument, because it was the will of the Canadian people to grant courts that power.

The other defence against the charge of judicial illegitimacy is an argument based on political morality. The Court's intent under this argument is to rebut what Alexander Bickel long ago termed “the countermajoritarian difficulty” which attaches to judicial review, *i.e.*, the objection to unelected judges invalidating legislation and thereby negating the will of the people.⁸ The Court attempts to do this by redefining the requirements of democratic rule, claiming that “the concept of democracy is broader than the notion of majority rule, fundamental as that may be,” and that this wider conception contemplates intervention by courts “to protect these democratic values as appropriate.”⁹

The Court's views of the role of the judiciary and of the separation of powers devolve from these arguments. The historical argument concerning the redefinition of “governance” in 1982 forms the basis for its view that courts thereupon became the “interpreters”, “arbiter[s]”, and “trustee[s]” of the rights and freedoms enshrined in the *Charter*.¹⁰ This is so, the Court reasons, not only because sections 52 and 24 of the

⁶ *Ibid.* at 562-63. See also 577-78.

⁷ *Ibid.* at 563. The intentionalist part of his Lordship's argument will be explored in Part III of this comment.

⁸ *Ibid.* at 564.

⁹ *Ibid.* at 563. His Lordship cites Dickson C.J. when talking about this shift.

¹⁰ A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York: Bobbs-Merrill, 1962) at 16-23.

¹¹ *Vriend*, *supra* note 3 at 566-67. See also 577-78.

¹² *Ibid.* at 563-64.

Charter impliedly so declare, but more importantly because “disputes over the meaning of the rights and their justification would have to [inevitably] be settled” by the judiciary.¹³

The Court’s wider views concerning the separation of powers build upon its argument derived from political morality. Since democratic governance subsequent to the *Charter* exceeds simple majority rule, the Court is led to articulate what it takes to be the revised relationship between the judicial, legislative and executive branches of the Canadian polity. This is a revision in two parts. First, since the *Charter* requires the judiciary to uphold “[d]emocratic values and principles” and “to intervene ... as appropriate,”¹⁴ whatever may have been the relationship between the branches prior to 1982, the relationship is now “more dynamic,”¹⁵ and may be “aptly described as a ‘dialogue.’”¹⁶ Though the relationship continues to be predicated upon “mutual respect,”¹⁷ under the dialogue compelled by the *Charter*’s refashioning of democracy, “courts speak to the legislative and executive branches,” and “the legislature responds to the courts.”¹⁸ This dialogue, in turn, compels accountability. Because “[t]he work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature” each of the branches is made somewhat accountable to the other.¹⁹ The first part of the Court’s separation of powers proposal is, therefore,

¹³ *Ibid.* at 563.

¹⁴ *Ibid.* at 566-67.

¹⁵ *Ibid.* at 565.

¹⁶ *Ibid.* The Court adopts the term “dialogue” from P.W. Hogg & A.A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures” (1997) 35 *Osgoode Hall L.J.* 75. To the considerable extent that that essay elides engaging theory and, on other purely descriptive grounds, proposes a relationship of near equality between the legislative and judicial branches, the Supreme Court could not have chosen an adoption less wise. Incidentally, Dicey long ago offered a more realistic take on the *de facto* “dialogue” which, independent from any constitutional instrument such as the *Charter*, occurs between courts and legislatures:

In studying the development of the law we must allow at every turn for the effect exercised by the cross-current of judicial opinion which may sometimes stimulate, which may often retard, and which constantly moulds or affects, the action of that general legislative opinion which tells immediately on the course of parliamentary legislation (A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England during the Nineteenth Century* (London: MacMillan, 1905) at 396 [hereinafter *Lectures*]).

In any event, the aftermath in Alberta of the Court’s decision to read “sexual orientation” into the *Act* has been anything but dialogic. Instead of the democratic discourse which would in all likelihood have followed a decision to strike down, with time to amend—a course wisely counselled by Major J. in his dissent—the Court’s decision has led to the formation of a special Cabinet committee (chaired by two of the government’s leading ministers) whose mission it is to confine the effects of *Vriend* in each and every statute and regulatory regime in Alberta. Rather than dialogue, then, *Vriend* provides a stern lesson on the political significance and social futility of such judicial over-reaching.

¹⁷ *Vriend*, *supra* note 3 at 565.

¹⁸ *Ibid.*

¹⁹ *Ibid.* at 566.

that the post-*Charter* relationship among the branches of government is one of communicative responsiveness and not one of antagonism.

The second part of the Court's proposal deals with the obligations of the branches beyond their accountability to each other. Because the *Charter* "is concerned with the promotion and protection of inherent dignity and inalienable rights"²⁰—*i.e.*, because it is both a limitation and a prescription²¹—the *Charter*'s "[d]emocratic values and principles ... demand that legislators and the executive take these into account."²² When, for example, they fail the democratic requirement of "tak[ing] into account the interests of majorities and minorities alike, ... judicial intervention is warranted to correct a democratic process that has acted improperly."²³ The *Charter* draws the branches of government into a common value system by obliging the legislature and the executive to toe a line drawn by principles interpreted and enforced by the judiciary.

Such, then, are the justifications Iacobucci J. provides for judicial review in a democracy. The validity of each of the two arguments, the arguments derived from history and political morality, will now be considered in turn.

The Court makes two historical claims: (i) that the *Charter* ended one regime, parliamentary supremacy, and ushered in another, constitutional supremacy, and (ii) that, through this foundational change, the judicial branch became charged—as trustee, arbiter, and interpreter—with safeguarding constitutional rights from legislative and executive encroachment. The historical veracity of this familiar story is best tested by asking what this view presumes regarding the conditions of governance generally, and of judicial governance in particular, prior to 1982. If these background assumptions themselves prove to be historically unsound, then the arguments which they inform must fail as well.

What must the Court mean by "parliamentary supremacy"? What must it think were the obligations of judges prior to the *Charter*? With regard to the first question, the Court must be taken to mean that—sections 91 and 92 of the *Constitution Act, 1867*²⁴ competencies aside—legislatures could enact whatever laws they wished, on

²⁰ *Ibid.* at 570.

²¹ It is at just this point that the Court comes closest to declaring that the legislative and executive branches are bound both *by and to* the *Charter* (see *supra* note 4). Though Cory J. is careful in his part of the majority judgment to indicate that the Court is not "decid[ing] ... whether the *Charter* might impose positive obligations on the legislatures or on Parliament," he does leave the matter "open in some cases" (*ibid.* at 534). However, when Iacobucci J. articulates, in his part of the judgment, the Court's view of the significance of the *Charter* and of the separation of powers, he appears very much to be declaring that the *Charter* must not merely limit, but inform, legislative power. While in the final analysis the argument in this comment does not depend on the matter, the text of Iacobucci J.'s judgment will be taken at face value and as establishing a view of the *Charter* as a source of positive duties on the legislative and executive branches. See *infra* notes 54, 86 and accompanying texts.

²² *Vriend, supra* note 3 at 566.

²³ *Ibid.* at 577.

²⁴ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

whatever grounds they wished. As regards judges, the Court's meaning must be that prior to the *Charter*, their exclusive burden was to follow the rules laid down by the sovereign. These must be the assumptions, since otherwise the Court's contrast between the pre- and post-1982 regimes is meaningless. In any event, though, the Court's argument from history necessarily fails, since these assumptions drastically misrepresent—indeed they are an affront to—the achievements of Anglo-Canadian legal history.

The rule of law predates the *Charter* and the rule of law, not legislative supremacy, defined the substance of democratic governance prior to the *Charter*.²⁵ Dicey describes the rule of law as characterized by “the predominance of the legal spirit” from which flow certain institutional requirements.²⁶ Law exists in those societies moved by a desire to constrain power, the power of the State and the power of persons. In the Anglo-legal world, it is this very spirit which has, over the centuries, developed the institutional and moral requirements of governance by law. Institutionally, the rule of law demands both the separation of powers as between the legislative, executive, and judicial branches, and a regime of rights.²⁷ Morally, it requires that governance serve the good of the governed.²⁸ These requirements combine, as Dicey again points out, to comprise the constitution of free societies.²⁹

²⁵ For an intellectual history of the rule of law, see F.A. Hayek, *The Rule of Law* (Menlo Park, Cal.: Institute For Humane Studies, 1975). For a political and social history, see J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 1957); and J. Brewer & J. Styles, eds., *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (London: Hutchinson, 1980). For a philosophical inquiry, see W.E. Scheuerman, *Between Norm and Exception: The Frankfurt School and the Rule of Law* (Cambridge, Mass.: M.I.T. Press, 1994); I. Shapiro, ed., *The Rule of Law, NOMOS XXXVI* (New York: New York University Press, 1994); R.L. Cunningham, ed., *Liberty and the Rule of Law* (College Station, Tex.: Texas A&M University Press, 1979); and G. Dietze, *Two Concepts of the Rule of Law* (Indianapolis: Liberty Fund, 1973).

²⁶ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: MacMillan, 1915) at 185, 189, 191 [hereinafter *Law of the Constitution*]. According to Dicey, the legal spirit requires “the absence of arbitrary power;” “legal equality;” and the separation of powers.

²⁷ Blackstone offers a wonderful codification of these requirements: see Sir William Blackstone, *Commentaries on the Laws of England* (Philadelphia: Rees Welsh, 1898) at 34, 242. See also Sir Edward Coke, *Institutes of the Laws of England*, 4th ed. (London: M.F.I.H. and R.T. Assignes, 1639); Lord Acton, *The History of Freedom and Other Essays* (London: MacMillan, 1907); and F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1913).

²⁸ See Blackstone, *ibid.* at 42-45; and C.H. McIlwain, “Government By Law” in C.H. McIlwain, ed., *Constitutionalism and the Changing World* (Cambridge: Cambridge University Press, 1939) 266.

²⁹ *Law of the Constitution*, *supra* note 26 at 197. This is not to imply that the rule of law is exclusive to English legal history. Though the English case is primary and dominant, other legal cultures have produced comparable conceptions of the idea. For a discussion of the German notion of *Rechtsstaat*, see Dietze, *supra* note 25.

The rule of law has fallen on hard times.³⁰ The diminishing popularity of the rule of law is due in part to a general loss of faith in law, a phenomenon especially widespread among members of the legal community.³¹ This "decline of law" is, however, the intellectual companion of a more powerful force ranged against the rule of law, namely, legal instrumentalism, which would reduce the law to function, and the rule of law to sovereign will. According to this view—which in English law can be traced from Hobbes through Austin to Dicey³²—the law is an empty vessel into which are poured the products of power, and the rule of law is simply "whatever the state dictates."³³ In consequence, rights at law exist at the sufferance of the State and "the state cannot ... violate the rule of law, because it appears as its embodiment."³⁴ Governance by law, of course, requires something different from, and more than, anything permitted by this silly positivist monism. It requires, first of all, that law be seen as "something permanent, uniform, and universal,"³⁵ something which, by its very nature, conceives of authority in terms other than power.³⁶ Furthermore, it demands, through the separation of powers, that judges be more than the State functionaries which legal instrumentalism requires them to be. It demands, rather, that they be "regulated only ... by ... fundamental principles of law; which, though legislatures may depart from them, yet judges are bound to observe."³⁷

In contrasting the *ancien régime* of legislative supremacy to the post-*Charter* regime of constitutional supremacy, the Supreme Court appears to be subscribing to some version of these corrupted views of the rule of law; and, in doing so, it overlooks the "unqualified human good" which is the "true and important cultural achievement" of Anglo-Canadian legal history.³⁸ This oversight has important consequences because the Court's impoverished view of legal history prevents it from conceptualizing any relationship beyond cleavage between our legal inheritance and the legal present. The Court is conceiving the present by abandoning the good of the past

³⁰ For Hayek's insightful analysis of "the decline of the law," see *supra* note 25 at 19-34. For an altogether too accurate view of the rule as "a football in a game between friends and enemies of free-market liberalism," see J.N. Shklar, "Political Theory and the Rule of Law" in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 1 at 16.

³¹ See H.J. Berman, "The Crisis of Legal Education in America" (1985) 26 *Boston Coll. L. Rev.* 347; and H.J. Berman, "Religious Foundations of Law in the West: An Historical Perspective" (1983) 1 *J. of Law & Relig.* 3 at 39-43.

³² See W.E. Scheuerman, "The Rule of Law at Century's End" (1997) 25 *Political Theory* 740; J. Hampton, "Democracy and the Rule of Law" in Shapiro, *supra* note 25 at 13; and C.H. McIlwain, "The Reconstruction of Liberalism" in McIlwain, *supra* note 28 at 290-93.

³³ B. Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (London: Pinto Press, 1984) at 173.

³⁴ *Ibid.* at 174.

³⁵ Blackstone, *supra* note 27 at 34.

³⁶ See McIlwain, *supra* note 28 at 291-92.

³⁷ Blackstone, *supra* note 27 at 242.

³⁸ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Middlesex: Penguin, 1975) at 265-66.

in a number of very significant ways.³⁹ More particularly, the Court's view of an unconnected past of boundless sovereignty makes possible the sorry view it adopts of the separation of powers, as will later be shown.

The Court's argument derived from political morality also has significant ramifications for the separation of powers. As was discussed above, in seeking to defend the democratic credentials of the judicial branch, the Court here argues that "the concept of democracy is broader than the notion of majority rule, fundamental as that may be."⁴⁰ It then proceeds to identify the requirements, in excess of majority rule, of this expanded conception of democracy. "[A] democracy," the Court explains, "requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make."⁴¹ The Court is less precise regarding any remaining requirements. Although it thinks it "[un]necessary to articulate the complete list of democratic attributes,"⁴² the Court does say that it approves of Dickson C.J.'s enumeration of the matter in *R. v. Oakes*,⁴³ which it cites at length. There, Dickson C.J. named "a few" of

the values and principles essential to a free and democratic society: respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.⁴⁴

These democratic principles are seen to set limits to legislative and executive action. Accordingly, the Court argues that when governmental action exceeds the limits of democratic principle, judicial invalidation is not undemocratic.

This argument—both as it regards the notion of democracy and as regards its interpretation of liberal political morality—is unconvincing. By using liberal values to impart democratic legitimacy to judicial review, the argument confuses political liberalism with democratic practice and, in the process, distorts and diminishes both. Though democracy and liberalism in the modern period are historical bedfellows, the two are far from synonymous as political doctrines. Indeed, the politics required by

³⁹ For a view of the American legal present based on the Anglo-American past, see N.F. Cantor, *Imagining The Law: Common Law and the Foundations of the American Legal System* (New York: Harper Collins, 1997).

⁴⁰ *Vriend*, *supra* note 3 at 566. Neither its general attitude towards democracy nor the "may" which qualifies "majority rule" prevents the Court from invoking majority rule to buttress its historical argument for the legitimacy of judicial power (*ibid.* at 564). The significance of this argument for legislative intention will be considered in Part III, below.

⁴¹ *Ibid.* at 577.

⁴² *Ibid.* at 566.

⁴³ [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.]. The enumeration is reproduced in *Vriend*, *supra* note 3 at 566.

⁴⁴ *Oakes*, *ibid.* at 136.

liberalism is famously in tension with democratic politics.⁴⁵ To claim then—as does the Court—both that democracy serves wider “liberal” values, and that those values somehow serve to legitimate judicial review, is straightaway suspect. Nothing that the Court further says manages to resolve these suspicions. Indeed, its views of both liberalism and democracy tend instead to worsen matters.

Consider first the “[in]complete list of democratic attributes”⁴⁶ which, if it is taken—as it must⁴⁷—as an inventory of liberal values, simply misrepresents liberal politics. Liberal politics is, indeed, about “respect for the inherent dignity of the human person” if by that is meant respect for the moral equality of persons in spite of, and beyond, difference.⁴⁸ Liberal politics, however, is not about—nor can it ever be about—“social justice” (whatever that might mean),⁴⁹ or “respect for cultural and group identity” (whatever that might require),⁵⁰ or “enhanc[ing] the participation of individuals and groups in society,” or any other such positive endorsement of views, including one which would seek a place for a “wide variety of beliefs.”⁵¹ This is so because liberal politics serves moral equality through negative, not positive, toleration⁵² and because the regime of rights which is its mark constructs tolerance out of negative, not positive, liberty.⁵³ The values which the Court claims for liberalism and the liberal State exceed these liberal boundaries; were they ever to be taken seriously as a

⁴⁵ See e.g. N. Bobbio, *Liberalism and Democracy*, trans. M. Ryle & K. Soper (London: Verso, 1990); P. Manent, *An Intellectual History of Liberalism*, trans. R. Balinski (Princeton: Princeton University Press, 1994); and J.H. Hallowell, *The Moral Foundation of Democracy* (Chicago: University of Chicago Press, 1954) at 68.

⁴⁶ *Vriend*, *supra* note 3 at 566.

⁴⁷ These values must be taken as an inventory of liberal values, not only because the text otherwise demands it—the Court does, after all, identify them as “the values and principles essential to a free and democratic society” (*ibid.*)—but also because any claim that they devolve independently from democracy as such would require a theory of democracy which, as will be discussed, the Court fails to provide. This is not to say that such a theory is impossible. Dworkin, for one, has constructed what he terms “the constitutional conception of democracy” which makes liberal values a part of democratic rule. See R. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996) at 15-20, 70-71 [hereinafter *Freedom’s Law*].

⁴⁸ *Oakes*, *supra* note 43 at 136; quoted in *Vriend*, *supra* note 3 at 566.

⁴⁹ *Oakes*, *ibid.*; *Vriend*, *ibid.* See T.W. Simon, “A Theory of Social Injustice” in D.S. Caudill & S.J. Gold, eds., *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice* (Atlantic Highlands, N.J.: Humanities Press, 1995) 54.

⁵⁰ *Oakes*, *ibid.*; *Vriend*, *ibid.* For cautions regarding enthusiasms of this kind, see S.P. Mohanty, “Us and Them: On the Philosophical Bases of Political Criticism” (1989) 2:2 *Yale J. Criticism* 1; C. Kukathas, “Liberalism and Multiculturalism: The Politics of Indifference” (1998) 26 *Political Theory* 686.

⁵¹ *Oakes*, *ibid.*; *Vriend*, *ibid.*

⁵² See I. Lazari-Pawłowska, “Three Concepts of Tolerance” (1987) 14 *Dialectics & Humanism* 133. On the concept of toleration more generally, see D. Heyd, ed., *Toleration: An Elusive Virtue* (Princeton: Princeton University Press, 1996).

⁵³ See I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) at c. 4, “Two Concepts of Liberty”. See also J.N. Shklar, “The Liberalism of Fear” in N.L. Rosenblum, ed., *Liberalism and the Moral Life* (Cambridge, Mass.: Harvard University Press, 1991) 21.

source of law and politics, they would entail violating the most fundamental of liberties and, in a significant measure, abandoning our commitment to moral equality.⁵⁴

Matters do not improve when the Court turns its hand to “the concept of democracy.”⁵⁵ Now, “the ideal of democracy,” it is true, “is complex and contested, as are its justifications and practical implications.”⁵⁶ Yet, despite that contestability, the concept of democracy—as opposed to the various conceptions of what that concept requires—is itself uncontroversial, readily accessible, and easily stated. “Democracy means government by the people.”⁵⁷ Unaccountably, the Court misses this core meaning and fails, in consequence, to recognize that the various theories of democracy—including its own—are but conceptions of it. It does this by adopting the view that democracy is essentially a matter of majoritarian rule.⁵⁸ Under this view, whatever else democracy may demand, it demands it in addition to majority rule. To conceive of democracy in this fashion may accord with the dominant (and clearly correct) view that “majoritarian decision-making ... cannot be a sufficient democratic standard.”⁵⁹ Nonetheless, by placing majoritarianism, rather than rule by the people, at the centre of matters, the court misses the fundamental moral force of democracy, and misconstrues the place of majoritarianism in any proper view of democratic requirements. Not only is democracy not exhausted by majority rule, majoritarianism carries no independent moral force in, nor is it a freestanding end of, the democratic ideal. This is so because democracy means rule *by* the people and because its end and force is accountability *to* the people. Under this view, the hallmark of democratic procedures is not statistical

⁵⁴ Though it is very nearly impossible to tell from the text of the judgment, the Court’s enthusiasm for positive toleration and liberty might have compelled its enthusiasm for positive constitutional duties on the State: see *supra* notes 4, 21. For a definitive statement of the paternalism courted by positive liberty, see Berlin, *ibid.* See also I. Berlin, “The Pursuit of the Ideal” in I. Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (London: Fontana Press, 1991) 1.

⁵⁵ *Vriend*, *supra* note 3 at 566.

⁵⁶ A. Gutmann, “Democracy” in R.E. Goodin & P. Pettit, eds., *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell, 1993) 411 at 411. After claiming, rightly, that though “[m]ajoritarian decision-making may be a presumptive means of democratic rule, ... it cannot be a sufficient democratic standard” (*ibid.*), Gutmann goes on to identify and discuss the “six types of democracy”—Schumpeterian democracy, populist democracy, liberal democracy, participatory democracy, social democracy, and deliberative democracy—which have “gained currency in contemporary political theory” (*ibid.* at 412-18). Remarkably, the Supreme Court’s list of democratic values resonates, but only in part, in five of these models.

⁵⁷ *Freedom’s Law*, *supra* note 47 at 15. Dworkin is expressing an ancient view. Montesquieu, for instance, put the matter thus: “when the people as a body have sovereign power, it is a democracy” (A.M. Cohler, B.C. Miller & H.S. Stone, eds., *Montesquieu: The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989) at 10 (Book II, c. 2)).

⁵⁸ This must be the Court’s view, not only because of its proclamation that “democracy is broader than the notion of majority rule, fundamental as that may be” but also, and more importantly, because it elsewhere presents its “democratic values” as qualifications to majority rule (*Vriend*, *supra* note 3 at 566).

⁵⁹ Gutmann, *supra* note 56 at 411.

plurality but the morality of consent.⁶⁰ The ideal of government by the people consists of a commitment to the supremacy of the governed over the government,⁶¹ and it compels, at its very core, the principle that “no government is legitimate which does not derive its powers and functions from the consent of the governed.”⁶² By misconstruing the concept of democracy, the Supreme Court misses this essential moral requirement. By resorting instead to its peculiar list of qualifiers to majority rule, the Court diminishes the point of democracy, and, as will be discussed, provides itself with a reason (in addition to its view of legal history) to take the legislative function as a matter of will that must be contained through an appropriate separation of powers.

II. The Supreme Court's View of the Separation of Powers

No less than rights, the separation of powers is foundational to democratic politics. Whereas rights limit governmental (and private) power by protecting each person within a sphere of inviolability founded on justice, the separation of powers ensures that State power is not exercised arbitrarily. By thus prohibiting tyranny—which is to say, a government whose “end [is] the good of the government, not of the governed”⁶³—both rights and the separation of powers serve government by the people by rendering power accountable to the people. It is the purpose of this Part of the comment to argue that the view of separation of powers which the Supreme Court articulates in *Vriend* fundamentally diminishes the value of democratic accountability which the doctrine of separation of powers, both historically and in principle, is pledged to serve. More particularly, it will be argued that the Court's theory of the separation of powers is premised upon a view of the legislative branch as inherently despotic, and leads to a view of judicial obligation as aristocratic. However, in order to make that argument it will be necessary briefly to review the doctrine of separation in finer detail.

Since at least the time of Locke,⁶⁴ the chief problem for democratic theory and practice has been to prevent abuse of authority. Locke himself proposed the separation of powers as the answer to this problem. Though his overall democratic sentiment is clear—the end of “choos[ing] and authoriz[ing] a legislative is that there may be laws made, and rules set ... to limit the power and moderate the dominion of every part and

⁶⁰ For a telling criticism of statistical views of democracy, see *Freedom's Law*, *supra* note 47 at 19-20.

⁶¹ And, for reasons which will appear, it must be added that “government” here includes the State in all of its manifestations, judicial as well as legislative and executive.

⁶² Hallowell, *supra* note 45 at 49.

⁶³ McIlwain, *supra* note 28 at 267.

⁶⁴ For a discussion of the ancient and medieval sources of the doctrine, see Hayek, *supra* note 25 at 5-10. For an excellent analysis of its place in a more general theory of constitutionalism, see M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 2nd ed. (Indianapolis: Liberty Fund, 1998).

member of that society”⁶⁵—it fell to others to conceptualize the doctrine more fully. Montesquieu’s contribution, in particular, remains seminal in this regard.⁶⁶

Montesquieu claimed that “political liberty ... is present only when power is not abused,” and that for power not to be abused, “power must check power by the arrangement of things.”⁶⁷ “In order,” he thought, “to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist the other.”⁶⁸ These insights led Montesquieu to distinguish between the legislative, executive, and judicial powers of the State and to propose⁶⁹ that “liberty is formed by a certain distribution of the three powers.”⁷⁰ “When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty. ... Nor is there liberty if the power of judging is not separate from the legislative power and from the executive power.”⁷¹ This is so, he thought, because power will inevitably be abused, unless one power “is chained to the other by their reciprocal power of vetoing”⁷² or unless they are “counter-balanced.”⁷³

According, then, to the classic, agonistic view of the separation of powers, the proper relationship between the powers of a State devoted to liberty is one of struggle and resistance. Each of the powers should, therefore, be a centre of resistance—one against the other⁷⁴—to the power of the State to serve its own good rather than the good of the people. This view of matters alone permits the doctrine of separation of powers to inform a practice of democratic accountability, since it alone makes it possible to conceive of the branches of the State as serving the people’s good and not their own.

However, conceiving the democratic credentials of the judicial branch becomes difficult when particulars are demanded in the place of abstraction. Clearly, an ap-

⁶⁵ J. Locke, *The Second Treatise of Civil Government*, ed. by J.W. Gough (Oxford: Basil Blackwell, 1946) at 107, s. 222.

⁶⁶ According to Hayek, *supra* note 25 at 15, David Hume’s views—especially his view that “the history of England was the evolution from a ‘government of will to a government of law’”—were “the most influential” of English views on the matter.

⁶⁷ *The Spirit of the Laws*, *supra* note 57 at 155 (Book XI, c. 4).

⁶⁸ *Ibid.* at 63 (Book V, c. 14).

⁶⁹ Notably, Montesquieu offers this conclusion in the context of discussing “the one nation in the world”—England—“whose constitution has political liberty for its direct purpose” (*ibid.* at 156 (Book XI, c. 5)).

⁷⁰ *Ibid.* at 187 (Book XII, c. 1).

⁷¹ *Ibid.* at 157 (Book XI, c. 6).

⁷² *Ibid.* at 164 (Book XI, c. 6).

⁷³ *Ibid.* at 182 (Book XI, c. 18).

⁷⁴ The oppositional imagination and practice which this requires does not preclude respect. However, the respect exhibited by the branches will be fundamentally different from the “mutual respect” which the Supreme Court thinks proper (*Vriend*, *supra* note 3 at 565). Under the separation of powers, rather, the branches must have respect for the constitutional whole, namely, government by the people under the conditions of liberty and in service to moral equality.

pointed judiciary lacks the easy correspondence that prevails between elected government and rule by the people. This disparity has been a concern since the beginning of modern democratic rule. Montesquieu, for instance, thought "the power of judging so terrible among men" that he recommended it "should not be given a permanent estate, but should be exercised by persons drawn from the body of the people at certain times of the year in the manner prescribed by law to form a tribunal which lasts only as long as necessity requires."⁷⁵ Though this sort of optimism has not weathered the complexities of the modern State, the issue of judicial legitimacy has, of course, not only endured, but served as perennial cause for seemingly endless views and theories. The point, for present purposes, is however not those details of intellectual history but rather the essential requirements of any acceptable view of the separation of powers. Such a view must not only take seriously the constitutive tension between the branches, it must also provide some further account of judicial legitimacy which accords with democratic principles.⁷⁶

The Supreme Court in *Vriend* presents a very different view of the matter. Not only does its conception of the separation of powers fail both of these conceptual requirements, it fails in a fashion which compromises the democratic credentials of the whole of the State. In the Court's version of the doctrine, the legislative branch is portrayed as despotic while the judicial branch is portrayed as an aristocracy of final resort. Each matter will be considered in turn.

Recall the first part of the Court's proposal concerning the separation of powers: that the relation between the branches consists of a dialogue and reciprocal accountability. Under this conception—in which the State converses with, and accounts to, itself—the tension which defines the separation of powers is displaced by joint sovereignty as between the legislative/executive branch and the judicial branch. This surprising debasement of the core of the doctrine is the consequence of the Court's mistaken views of legal history and democracy; and it is those very views which finally compel what appears to be the Court's view of the legislative branch as a forum of rule by will.

As was noted above, according to the Court, legal history prior to the *Charter* was characterized on the legislative side by boundless sovereignty and on the judicial side by endless deference. This view of the past inevitably led to the Court's view of the legal present. Since the legislative branch was purely sovereign prior to 1982, the effect of the *Charter* was to somewhat limit that sovereignty in favour of the judicial branch. Yet, if this explains the Court's view that the separation of powers means co-sovereignty under the *Charter*, it also implies a view of the content of that sover-

⁷⁵ *The Spirit of the Laws*, *supra* note 57 at 158 (Book XI, c. 6).

⁷⁶ For a view which takes both requirements seriously, see B.A. Ackerman, *We the People*, vol. 1 (Cambridge, Mass.: Harvard University Press, 1991) at c. 1. Ackerman offers what he terms a "dualist" conception of constitutional democracy, according to which constitutional politics—including those which take place in the judicial branch—serve as a radically democratic, though extraordinary, alternative to the "normal" interest group politics.

eignty, *i.e.*, of what the legislature, at least,⁷⁷ possessed when it had full sovereignty. This understanding of legislative sovereignty is further reinforced by the Court's view of democracy.

The Court's understanding of legislation in a democracy makes clear its conception of the content of sovereignty. At one point in his judgment, Iacobucci J. comments that "by definition, *Charter* scrutiny will always involve some interference with the legislative will."⁷⁸ This choice of words is part and parcel of a view of legislation as wilful power—*i.e.*, despotic⁷⁹—that inheres in the whole of the judgment as a product of the Court's view of legal history. If sovereignty means supremacy of will⁸⁰—as the Court (with Hobbes, Austin, and Dicey) believes⁸¹—then the view that legislation is itself an expression of will cannot be far behind. Dicey himself puts the matter well. Legislation, he tells us, "is the work of legislators who are much influenced by the immediate opinion of the moment, who make laws with little regard either to general principles or to logical consistency, and who are deficient in the skill and knowledge of experts."⁸² By virtue alone of its view of the legal past, the Court is stuck with some such view of legislation. That the Court then takes democracy statistically as majoritarian power, rather than morally as rule by the people, simply confirms this view of legislation. If democracy—at least in its legislative precincts—means the will of the majority, then democratic legislation too is purely a matter of will.⁸³

The Court considers the content of its own share of sovereignty in a fundamentally different light. Whereas legislative sovereignty is wilful, judicial sovereignty is moral. Where, therefore, legislative will happens not to sound in moral principle, the courts, as "the trustees" and "interpret[ers]" of political morality, will intervene "to correct a democratic process that has acted improperly."⁸⁴ The locus for this transfiguration of sovereignty from wilful power into moral principle is the Court's theory of constitutional obligation. As indicated earlier,⁸⁵ despite its stated intentions to the con-

⁷⁷ As will soon be noted, through its conception of positive constitutional obligations, the Court claims that its share of sovereignty alone is principled.

⁷⁸ *Vriend*, *supra* note 3 at 574.

⁷⁹ A despotic form of government is one in which its will is supreme. See McIlwain, *supra* note 28 at 266, 272; and *The Spirit of the Laws*, *supra* note 57 at 63 (Book I, c. 14): "only passions are needed" for despotic government.

⁸⁰ Austin's view of the matter—that sovereignty means supreme will, because sovereignty means the absence of obedience or submission to the will of another—is typical. See J. Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicholson, 1954) at 193-200 (Lecture VI).

⁸¹ For Dicey's view of "legal" and "political" sovereignty as expressions of will, see *Law of the Constitution*, *supra* note 26 at 424-26.

⁸² *Lectures*, *supra* note 16 at 395-96.

⁸³ Ever the crude, yet consistent, realist, Dicey argues that, though "the opinion of the governed is the real foundation of all government," "the public opinion which governs a country is the opinion of the sovereign, whether the sovereign be a monarch, an aristocracy, or the mass of the people" (*ibid.* at 3, 10).

⁸⁴ *Vriend*, *supra* note 3 at 564, 563, 577.

⁸⁵ *Supra* notes 4, 21, 54 and accompanying text.

trary,⁸⁶ the Court appears to impose a positive constitutional obligation on the legislative and executive powers to “take ... into account” the “[d]emocratic values and principles under the *Charter*.”⁸⁷ Indeed, the Court’s theory of the legitimacy of judicial review turns entirely on there being just such an obligation.⁸⁸

According to the Supreme Court, the judicial branch’s moral authority to review the conduct of the other branches is democratic in substance and in purpose. Because the *Charter* imposes positive democratic obligations on the legislative and executive branches, and because the judicial branch is the “trustee” of those “[d]emocratic values and principles,” and, especially, of the democratic obligations of the other branches, judicial review in fact and in theory “promotes democratic values.”⁸⁹ This solution to the riddle of judicial review comes, however, at the cost of contradiction. By casting itself in the role of defender of final resort of democratic values, the Court is also, perforce,⁹⁰ assuming for itself the mantle of the benevolent aristocracy of the Canadian polity.

“When sovereign power is in the hands of a part of the people, it is called an aristocracy.”⁹¹ By claiming itself sovereign over the other branches—no matter, for the present, that the nature of sovereignty is declared democratic, or that its exercise is defeasible at the Court’s pleasure—the Court is designating itself as that portion of the people which is singularly seized of aristocratic power.⁹² Absent a convincing view to the contrary, this alone weakens the accountability on which the democratic morality of government by consent depends. Before proceeding in the conclusion to pursue the possibilities of such a view, it will be necessary to pause to consider the manner of, and reason for, the Court’s failure in this regard in *Vriend*.

Democracy is “essentially the political dogma of popular sovereignty.”⁹³ This is so, not because political morality is mindlessly joined to a somehow brutish majoritarianism, but rather because democratic morality requires popular rule. This in turn is so because the morality of government by consent, which is democracy, requires that

⁸⁶ *Vriend*, *supra* note 3 at 534, Cory J.: “It has not yet been necessary to decide ... whether the *Charter* might impose positive obligations on the legislatures or on Parliament.”

⁸⁷ *Ibid.* at 566.

⁸⁸ This is to put aside, for the moment, the Court’s curious argument based on the historic intention attending the adoption of the *Charter*. Whether, assuming it to be true, such an intention can found the democratic legitimacy of judicial review will be considered in Part III of this comment.

⁸⁹ *Vriend*, *supra* note 3 at 564, 565.

⁹⁰ “Perforce”, that is, absent a theory which countervails the aristocratic implications by arguing that appointed judges can yet be democratically accountable. This will be pursued in Part III, below.

⁹¹ *The Spirit of the Laws*, *supra* note 57 at I0 (Book II, c. 2). See also Austin, *supra* note 80 at 217ff.

⁹² In *Vriend*, the Court simply presumes its aristocratic credentials. For a view of the judicial branch as aristocracy, which is candid and explicitly argued rather than inferred and presumed, see R. Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 407: “The courts are the capitals of law’s empire, and judges are its princes.”

⁹³ Manent, *supra* note 45 at 105.

“each person obeys only himself or his representative.”⁹⁴ All of this is to say that accountability (or responsible government, as we used to say) is the foundation and mark of democratic politics.

This foundation establishes the measure of theories of judicial review. The success of these theories—in terms of democratic morality—then turns on their capacity to persuasively argue that judges, despite their not being subject to popular rule, are nonetheless democratically accountable, that they nonetheless are somehow representatives of the people.⁹⁵ The Supreme Court in *Vriend* not only fails to live up to this measure, it also presents a theory of the separation of powers that would fundamentally diminish the morality of accountability across the whole of politics.

There is a great difference, morally as well as practically, between government by the people and government for the people.⁹⁶ Neither notion exhausts democratic morality in majoritarian rule. The first notion, for instance, compels a commitment to equality before the law and to equality of rights,⁹⁷ and the second, whatever practical requirements happen to prevail, largely dismisses majority rule as being moral. However, the two notions differ markedly in their respective understandings of what government for the good of the governed requires. Government by the people is an instrument for individual liberty through the twin requirements of consent and accountability. On the other hand, government for the people serves the people’s good in a thicker sense; it does not require consent, but accountability to whichever higher abstract principles are declared to be the people’s good by those who govern. The former produces a politics of popular sovereignty; the latter compels a view of a politics which Foucault aptly describes as “pastoral power”.⁹⁸ According to this understanding, the good of the governed is served not when the people consent to government, but when government acts for the “good” of the people.

The Supreme Court in *Vriend* appears to subscribe to the view that government for the good of the governed requires government for the people. In general terms, the Court’s adoption of this view of “governance” is a consequence of its aristocratic presumptions, if only because those presumptions permit it to avoid the difficult task of articulating a view premised upon democratic accountability. More particularly, however, the Court is led to this result because of its view of the relations between the

⁹⁴ *Ibid.*

⁹⁵ Part III of this comment will suggest that a transparent appointment process is a necessary ingredient in any acceptable theory of democratic accountability in the judicial branch.

⁹⁶ For a discussion which identifies government by the people with the liberal project, see Bobbio, *supra* note 45 at 31-35.

⁹⁷ *Ibid.* at 33.

⁹⁸ See M. Foucault, *Power/Knowledge*, ed. by C. Gordon, trans. C. Gordon *et al.* (New York: Pantheon Books, 1972). See also Z. Bauman, *Legislators and Interpreters: On Modernity, Postmodernity, and Intellectuals* (Ithaca: Cornell University Press, 1987) at 19-20 describing pastoral power as power “exercised for the benefit of the dominated, in their interest, for the sake of the proper and complete conduct of their life business”. See also Berlin’s discussion of the politics of paternalism associated with positive liberty in “Two Concepts of Liberty”, *supra* note 53 at 131-34, 141-62.

branches which it offers in place of a democratic account. As was noted earlier, the Court thinks that accountability in politics prevails as between the branches and that, therefore, the relations between the branches are properly collegial because it thinks the branches are co-sovereign. Neither view is acceptable democratically. The branches cannot be accountable to one another because, in a democracy, the whole of government must account, and account only, to the people. The branches cannot serve, corporately, as a college about the public good because, in a democracy, opposition between the branches and not their collaboration is a public good. It is only possible to think otherwise under a view of governance which confuses government for the people with government by the people. If this is the case, then one is confusing with democracy something which, though it has credentials in political thought, is something other than democracy. Whatever else may be claimed about the matter, democracy is government by the people and not ever government according to some version of what is good for them.

The erosion of democratic principle and accountability does not end there. As was discussed above, the Court constructs its view of governance in part out of a view of sovereignty, according to which sovereignty is empowered will. Yet to define legislative and executive authority as "wilful" is in a democracy not merely to denigrate standing practices of accountability, but to dismiss or diminish the democratic capabilities of citizens. If governance is in the final analysis a matter of will, not only are standing practices and procedures of popular rule robbed of moral authority, but by inference, the people are reduced to a source of will and cease to be the source of legitimacy which democracy requires. Furthermore, unless, *per impossible*, majoritarianism without more counts morally, these results are compelled once sovereignty is conceded to will.

III. Toward a Truly Democratic Theory of Judicial Review

The view of the separation of powers offered by the Supreme Court in *Vriend*, especially its view of the judicial branch, is unacceptable on grounds of democratic principle. Any adequate account of judicial authority and obligation must conceive of judges not as aristocrats who wield principle to cleanse legislative will of majoritarian mistakes, but democratically as representatives of the people. This comment will now seek to set the requirements of such a democratic view of judging in finer relief. First, however, it will be salutary to canvass the one argument which the Court musters in the direction of democracy, namely, its argument derived from historic intention. The Court's argument here, though mistaken, does shed further light on what a democratic theory might look like.

The Court thinks that a certain intention with respect to the authority of the judicial branch was part and parcel of what it takes to have been the legal transformation occasioned by the adoption of the *Charter* in 1982. Expanded judicial authority "was the deliberate choice of our provincial and federal legislatures in adopting the *Char-*

ter.”⁹⁹ Also, “our *Charter*’s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy.”¹⁰⁰ Finally, we are told that the “courts in their trustee and arbiter role must perforce scrutinize the work of the legislature and the executive, not in the name of the courts, but in the interests of the new social contract that was democratically chosen.”¹⁰¹ This curious argument will not do. Its confession and avoidance—the judicial branch now sometimes defeats democratic will, but, remember, it was democratically “invited”, indeed, “command[ed]” to do so¹⁰²—neither satisfies the democratic objection to judicial authority, nor has it anything to offer to a theory of judicial review.¹⁰³ Whatever were the intentions of the framers of the 1982 Constitution,¹⁰⁴ and whatever, if anything, might be inferred about the intentions of the Canadian people at the time, those intentions, even if they could ever be conclusively settled, can make no difference to the question of the legitimacy of the judicial branch. This is so simply because that question concerns political morality and because the intentions, real or imagined, of fleeting historical actors carry no force with respect to political morality. What is required, rather, is a normative theory of the judicial branch which, as put by Dworkin, makes “law belong to the community, not just passively, because its members hold certain views about what is right and wrong, but as a matter of active commitment, because its officials have taken decisions that commit the community to the rights and obligations that make up the law.”¹⁰⁵ What a theory of judging must provide are reasons why the decisions made by judges, and especially those decisions which nullify popular preference, nonetheless bind the people and become their decisions. This is again to say that what is required is a view of judges as political actors who are bound to and by the people as their representatives.

Any theory of the separation of powers which would take democracy seriously must begin not with apocrypha about national founding¹⁰⁶ but with a thorough understanding and appreciation of the rule of law. This is so, not just because the happenstance of founding is immaterial to issues of political morality, but also because acts of national founding, at least those which take liberal democratic form, are simply in-

⁹⁹ *Vriend*, *supra* note 3 at 563.

¹⁰⁰ *Ibid.* at 564.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* at 565, 563.

¹⁰³ Nor, incidentally, does the Court’s other argument derived from democracy—its invocation of the s. 33 override provision as the final solution to democratic challenges—either satisfy those challenges or constitute an acceptable defence of judicial review. Whether or not s. 33 is “the ultimate ‘parliamentary safeguard’” as the Court thinks, simply has nothing at all to do with the democratic legitimacy of the judicial branch. Indeed, to argue s. 33 would seem straightaway to concede illegitimacy. See *ibid.* at 578.

¹⁰⁴ Furthermore, from the federal perspective at least, the undertaking appears to have had more to do with pan-Canadian unity than with any arcane niceties such as the separation of powers.

¹⁰⁵ *Law’s Empire*, *supra* note 92 at 97.

¹⁰⁶ Such apocrypha have, since 1982, been fed, in large anti-democratic doses, to several generations of law students.

stantiations of a larger phenomenon which is intelligible only with reference to the inheritance of the rule of law.¹⁰⁷ The most that can be offered in this brief comment is an outline of the attitude such a theory would have to take as regards judicial appointment, judicial accountability, and judicial attitude to the legislative and executive branches.

Appointment is a critical variable in such a theory because, however democratic accountability might finally be conceived, it can only be conceived on the basis of a transparent appointment process; otherwise, of course, accountability is negated at the start on the most elemental of democratic grounds. Canadian citizens do not, nor can they, participate in determining whom it will be who governs them judicially. In contrast to the American practice—which constrains executive power by subjecting judicial nominees, in open democratic forum, to tests of “jurisprudential integrity and commitment”¹⁰⁸—appointment to Canadian superior courts is entirely a matter for the federal executive, which has pursued its untrammelled power in a process and on grounds distinguished, above all else, by secrecy.¹⁰⁹ In consequence, the “constitutional convictions”¹¹⁰ of our superior court judges are accessible only after their appointment, but by then, of course, the matter is closed and citizens are simply stuck with whatever quality of governance happens to ensue for the term of the appointment. This situation not only affronts the rule of law, it renders otiose in the Canadian context any proposal which would prescribe democratic obligations for judges. That—in defending the democratic credentials of the judicial branch—the Supreme Court manages to miss the democratic significance of the process of appointment is, to understate the matter, remarkable. That this omission alone fundamentally compromises the Court’s proposal, whatever otherwise might have been its merits, should be obvious.

Assuming the threshold of transparency has been met, how, then, might a doctrine of democratic accountability be conceived? Two kinds of answers have been tendered to this question.¹¹¹ The first answer—what may be termed, following John Hart Ely,¹¹²

¹⁰⁷ T.C. Halliday & L. Karpik, eds., *Lawyers and the Rise of Western Political Liberalism* (Oxford: Clarendon Press, 1997) at 13.

¹⁰⁸ *Freedom’s Law*, *supra* note 47 at 331.

¹⁰⁹ This concealment is in no way diminished by the executive’s voluntary vetting of nominees through a committee which itself is appointed and deliberates in secret.

¹¹⁰ *Freedom’s Law*, *supra* note 47 at 263.

¹¹¹ This, of course, is to categorize an abundance of views, any one of which may diverge, in its particulars, from the ideal types which are being described. The answer first offered by Bickel, *supra* note 10, and more recently renewed and amended by Ackerman, *supra* note 76—what Philip Bobbitt terms “the prudential argument”—might constitute a third type of reply. Since, however, that answer appears simply to mix what will be here termed the “substantive values and representation” approaches, it will not be considered further. For the prudential approach, see P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982) at 59-73. For Ely’s claim that the prudential approach mixes the values and representation approaches, see J.H. Ely, “Toward a Representation-Reinforcing Mode of Judicial Review” (1978) 37 *Maryland L. Rev.* 451 at 487 [here-

the “substantive values proposal”—seeks legitimacy in abstract political morality and is perhaps best exemplified by Dworkin’s view of law as integrity.¹¹³ According to this view, though they are not elected and though they have authority to countermand popular preference, judges are still representatives of the people, because, unlike the legislative and executive branches which account to the empirical people, judges account to the people morally considered, or more precisely, to the higher principles of the people as a political community devoted to moral equality through personal and political liberty. This understanding answers the democratic challenge with sophisticated abstraction, and though in many ways attractive, it tends both to denigrate *de facto* democratic procedures and preferences and to compel an aristocratic view of the judicial branch.¹¹⁴ Indeed, as Bickel once pointed out, in “the heavenly city” of abstraction, which is this answer’s natural home, “the democratic ideal” tends not merely to get lost, but to be viewed as somewhat of “a necessary evil.”¹¹⁵

Though no less an expression of political morality than the fundamental values answer, the second answer to accountability is, at first blush, more modest in its aspirations and more concrete in its proposals.¹¹⁶ Typified by John Hart Ely’s theory of judicial review,¹¹⁷ this answer seeks to reconcile the judicial branch “with the underlying democratic assumptions of our system”¹¹⁸ by confining judicial supervision of the other branches to matters having to do with the proper functioning of the democratic system. As Ely puts it, because “appointed and life-tenured judges are [not] better reflectors of conventional values than elected representatives,” they had better “devot[e] themselves] instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent.”¹¹⁹ This approach, then, piles

inafter “Representation-Reinforcing Mode”]. Incidentally, Bobbitt identifies the representation approach as “structural” (*ibid.* at 231).

¹¹² See “Representation-Reinforcing Mode”, *ibid.*

¹¹³ See *Law’s Empire*, *supra* note 92.

¹¹⁴ For instance, in *Law’s Empire*, *ibid.*, Dworkin largely fails in his attempt to articulate a theory of legislative integrity, and concludes with an aristocratic view of judging. It appears that a correspondence prevails between premising judicial legitimacy on an abstract conception of the people and elevating the judiciary above an invariably degraded legislative branch.

¹¹⁵ A.M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970) at 16.

¹¹⁶ At first blush, this appears to be the case because the answer’s claim to comparative precision may be less certain a virtue in practice than in theory. For an argument along these lines, see C. Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security?* (Lanham, Md.: Rowman & Littlefield, 1997) at 111-18 (arguing that, in practice, the two views produce much the same results).

¹¹⁷ See J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980) [hereinafter *Democracy and Distrust*]; and “Representation-Reinforcing Mode”, *supra* note 111.

¹¹⁸ *Democracy and Distrust*, *ibid.* at vii.

¹¹⁹ “Representation-Reinforcing Mode”, *supra* note 111 at 485. Or, as alternately put at *ibid.* at 453: The Warren Court’s role was not “to vindicate particular substantive values [which] it had determined were important or fundamental, but rather ... to ensure that the political process (which is where such

accountability on accountability: judges are democratically accountable because, even when they countermand legislation enacted by the people's representatives, they are reinforcing the representatives' accountability to the people. Though this understanding has the considerable merit of intellectual precision, when it comes to the nuts and bolts of judicial governance, things appear considerably less tidy. More particularly, as applied to actual cases, the results compelled by the representation approach either do not differ from the results produced by the values approach or, if they do, appear to be otherwise unacceptable.¹²⁰

In *Vriend*, the Supreme Court offers a hodgepodge of the two standing views of democratic accountability. At certain points, it takes what is clearly a representational stance. We are told, for instance, that "democracy requires that legislators take into account the interests of majorities and minorities alike," where they then fail to do so, "the interests of a minority have been denied consideration, [and] judicial intervention is warranted to correct a democratic process that has acted improperly."¹²¹ At other points, of course, the Court invokes substantive values.¹²² Intellectual rigour and integrity aside, in the final analysis, the Court's floundering in this fashion really does not matter, since neither of the views of accountability offered are democratically acceptable. An acceptable view, rather, must depend upon, and devolve from, the rule of law. Though we cannot dwell upon the matter here, informed by the rule of law, accountability would turn on legal morality, upon those "fundamental principles of law" of which Blackstone spoke;¹²³ accountability would not, therefore, be based upon any particular expression of law (at least not initially), and especially not on any constitutional instrument.

The "legal spirit" would also inform the attitude of the judicial branch toward the legislative and executive branches.¹²⁴ Because the relation between the branches would then be known as agonistic, and quite different from the collegiality envisioned by the Court in *Vriend*,¹²⁵ all the empty talk about deference and "mutual respect"¹²⁶ would be replaced by articulate speech about "institutional constraint" on power.¹²⁷ Under the rule of law, each branch, including the judicial branch, would question and test the

values are properly identified, weighed, and accommodated) was open to those of all viewpoints on an equal basis" [emphasis in original].

¹²⁰ This over- and under-inclusiveness is nowhere better demonstrated than in Ely's criticism of the United States Supreme Court decision on abortion in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973). See *Democracy and Distrust*, *supra* note 117 at 2ff., 15ff., 21ff. But see A. Cox, Book Review of *Democracy and Distrust*, *ibid.* (1981) 94 Harv. L. Rev. 700.

¹²¹ *Vriend*, *supra* note 3 at 577. Though, even here, the Court fudges its approach with substantive values by adding that judicial intervention will be particularly warranted where the minority "has historically been the target of prejudice and discrimination" (*ibid.*).

¹²² *Ibid.* at 566-67, especially the enumeration, at 566, of "democratic values".

¹²³ *Supra* note 27.

¹²⁴ *Ibid.*

¹²⁵ *Vriend*, *supra* note 3 at 565-66.

¹²⁶ *Ibid.* at 565.

¹²⁷ *Law's Empire*, *supra* note 92 at 401.

limits of its authority as against the boundaries of legitimacy set by the very existence of the other branches, and out of this constitutive tension would perhaps flow the law's promise of liberty under the conditions of political equality.

Conclusion

In *Vriend v. Alberta*, the Supreme Court took the opportunity to speak about its place in the Canadian polity. Unhappily, as appears so often to be the case, the Court spoke on the basis of much too little reflection. Whereas it should have offered informed history and theory, it instead offered a discourse impoverished by clichés and disfigured by misinformation and misunderstanding. The rule of law minimally requires that each branch understand its proper place in democratic politics. It is the Supreme Court's failing in this regard that, in the final analysis, renders *Vriend* an opportunity lost, and the Court's decision a matter for so much regret.
