
The Problem of Majoritarianism in Constitutional Law: A Symbolic Perspective

Philip Zylherberg*

The countermajoritarian character of judicial review has been a source of theoretical debate since the entrenchment of the *Canadian Charter of Rights and Freedoms* in the Canadian Constitution. The unaccountable nature of judicial invalidation of statutes is not easily reconciled with our democratic tradition. The author surveys the academic responses to this "mighty problem" and identifies three currents of argument. Rationalist theories attempt to justify judicial review by identifying the judiciary as a superior forum for principled normative debate. Structural theories claim that judicial review should seek to enhance and protect the democratic process. Institutional arguments attempt to ground judicial review in the distinct role and focus of the judiciary. The author argues that these currents of thought remain unpersuasive. He submits, however, that the undemocratic nature of judicial review is somewhat tempered by interpretive and formal constraints. The author argues that a potential solution to the "mighty problem" lies in the symbolic value of the *Charter*. By placing the problem in an international perspective, he demonstrates that the symbolic potency of an entrenched bill of rights is so great that, in the eyes of Western democratic states, it outweighs concerns about its countermajoritarian character. Judicial review is instrumental in communicating a fundamental value of Western democratic society: the Rule of Law.

Depuis l'enchéassement de la *Charte canadienne des droits et libertés* dans la Constitution canadienne, le caractère antidémocratique de la révision judiciaire a été une source constante de débats. L'invalidation de lois par un corps non-élu est difficile à réconcilier avec notre tradition démocratique. L'auteur passe en revue les réponses académiques à cette question fondamentale et les regroupe en trois courants de pensée. Les théories rationalistes tentent de justifier la révision judiciaire en identifiant le pouvoir judiciaire comme la tribune privilégiée des débats normatifs. Les théories structuralistes lui voient comme mission de promouvoir et renforcer le processus démocratique. Dans la perspective institutionnelle, la révision judiciaire trouverait sa justification dans la perspective et le rôle distincts des tribunaux. L'auteur soutient qu'une solution potentielle au problème repose dans la valeur symbolique de la *Charte*. Situait le problème dans une perspective internationale, il démontre que la valeur symbolique d'une charte constitutionnelle est si grande que dans les États démocratiques occidentaux, elle compense pour le caractère antimajoritaire de la révision judiciaire. Elle contribue enfin à communiquer une valeur fondamentale de la société démocratique occidentale: le principe de la primauté du droit.

* B.A., Clark, 1971; LL.B., University of Toronto, 1974; LL.M., University of Michigan, 1991; member of the Ontario Bar since 1976.

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Introduction

In the ten years since the *Canadian Charter of Rights and Freedoms*¹ became entrenched in the Canadian Constitution, it has been a source not only of judicial inspiration, but also of much theoretical debate. While most academic literature considers the *Charter* in a positive light, a small but significant left wing school is steadfastly opposed to it. Among the criticisms made by this school, which includes Michael Mandel,² Andrew Petter,³ Harry Glasbeek⁴ and others, is the problem that has bedeviled constitutional scholars, both left and right wing, in the United States for many years, namely the problem of majoritarianism: given the unaccountable nature of the judiciary, judicial invalidation of legislation is necessarily undemocratic.⁵

¹Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

²*The Canadian Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) [hereinafter *Legalization of Politics*].

³"The Politics of the Charter" (1986) 8 Sup. Ct L. Rev. 473; A. Petter & A.C. Hutchinson, "Rights in Conflict: the Dilemma of Charter Legitimacy" (1989) 23 U.B.C. L. Rev. 531 [hereinafter "Rights in Conflict"]; A. Petter, "Canada's Charter Flight: Soaring Backwards into the Future" (1989) 16 J. L. & Society 151 [hereinafter "Canada's Charter Flight"]; A. Petter, "Legitimizing Sexual Inequality: Three Early Charter Cases" (1989) 34 McGill L.J. 358.

⁴"A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality" (1990) 9 Windsor Y.B. Access Just. 293, where the author refers to the *Charter* as "A Real Rogues' Charter" at 294; H.J. Glasbeek & M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2 Socialist Studies 84.

⁵Any comprehensive list of U.S. authorities would be extremely long. As one interesting work, see M. Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989). I will adopt Cappelletti's phrase in which he describes the majoritarian issue as "the mighty problem of judicial review" at 150. Others include: B.A. Ackerman, "The Storrs Lectures: Discovering the Constitution" (1984) 93 Yale L.J. 1013 [hereinafter "The Storrs Lectures"]; A.M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962); R.H. Bork, *The Tempting of America* (New York: The Free Press, 1990); R.A. Dahl, *A Preface to Democratic Theory* (Chicago: U. of Chicago Press, 1956); R. Dworkin, "The Forum of Principle" (1981) 56 N.Y.U. L. Rev. 469; *Law's Empire* (Cambridge, MA: Belknap Press, 1986); "Equality, Democracy, and Constitution: We the People in Court" (1990) 28 Alta L. Rev. 324 [hereinafter "Equality, Democracy, and Constitution"]; J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard U. Press, 1980); M.J. Perry, *The Constitution, the Courts, and Human Rights* (New Haven: Yale U. Press, 1982); L.G. Sager, "The Incurable Constitution" (1990) 65 N.Y.U. L. Rev. 893; T. Sandalow, "Judicial Protection of Minorities" (1977) 75 Mich. L. Rev. 1162; "Constitutional Interpretation" (1981) 79 Mich. L. Rev. 1033; C.R. Sunstein, "Naked Preferences and the Constitution" (1984) 84 Colum. L. Rev. 1689; L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: The Foundation Press, 1988); M.V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 Harvard L. Rev. 781; R. West, "Progressive and Conservative Constitutionalism" (1990) 88 Mich. L. Rev. 641.

This list is personal to the author only: hundreds of books and articles have been left out. As to the Petter/Mandel/Glasbeek school, see *Legalization of Politics*, *supra*, note 2 at 39 and "Canada's Charter Flight," *supra*, note 3 at 161.

Democracy may be seen in two ways, either as a set of values — tolerance, equality, dignity — or as a process. In the latter conception, democracy is equated with majoritarianism (Dworkin uses the phrase “statistical democracy”⁶), such that the electoral process is not only its primary but almost its sole manifestation.

Judicial review is undoubtedly “undemocratic” in the second sense, since it gives judges power to invalidate legislation. While it *may* be democratic in the first sense, this depends on the values the court enforces, and on a determination of what values democracy requires. In an era of general value skepticism, there will not be universal acceptance of such a standard, in which case judicial review, no matter how popular to some, will always appear to others as the arbitrary imposition of judicially selected norms against those chosen by elected officials.

The democratic critique makes three essential points:

(1) Judging is generally not a value-free exercise in applying scientific concepts to new facts. This is most notably the case in constitutional adjudication, in which one finds “mostly a collection of vague incantations of lofty but entirely abstract ideals, incapable of either restraining or guiding the judges in their application to everyday life.”⁷

Accordingly, judges are engaged in lawmaking rather than in simply applying the law.⁸ This insight is now too widespread to be much contested;⁹ what is controversial is the lesson to be derived from it. To proponents of judicial activism, this is a liberating phenomenon, in that it permits courts to move beyond sterile legal doctrines to become more creative in enforcing human rights. To its opponents, it opens up the possibility of judicial tyranny.

⁶“Equality, Democracy, and Constitution,” *ibid.* at 329.

⁷*Legalization of Politics, supra*, note 2 at 39.

⁸This point is made both by critical and pluralist legal scholars. For instance, this is how two prominent U.S. theorists phrase it:

Over time, however, it became clear — as a result, for example, of the first era of substantive due process and the legal realists’ destructive rule skepticism — that judges no less than legislators were political actors, motivated primarily by their own interests and values (Tushnet, *supra*, note 5 at 784).

There is simply no way for courts to review legislation in terms of the constitution without repeatedly making difficult substantive choices among competing values, and indeed, among inevitably controverted political, social, and moral conceptions (Tribe, *supra*, note 5 at 452).

⁹[B]oth the progressives and conservatives seem increasingly willing to grant to the critics of liberal theory their main point — that liberal neutrality in judging is illusory, and that constitutional adjudication is consequently necessarily political,” West, *supra*, note 5 at 644. Dworkin can be read in opposition to this contention, *Law’s Empire, supra*, note 5 at viii-ix. Given his stature in contemporary jurisprudence, this exception is significant indeed.

(2) The issues on which constitutional courts rule are often contentious and sensitive, in effect representing a transfer of major policy-making power from legislators to courts.¹⁰

Indeed, one can look to the history of the past 37 years in the United States to note the nature of the decisions made by the courts regarding: integrated schools,¹¹ abortion rights,¹² affirmative action programmes,¹³ admissibility of confessions,¹⁴ tolerance of hate propaganda¹⁵ and obscene matter,¹⁶ school and other public prayer and religious displays,¹⁷ and so on. A similar list in Canada would already, despite the relatively short lifetime of the *Charter*, point to the following: abortion rights,¹⁸ school prayer and religious instruction,¹⁹ hate propaganda,²⁰ mandatory retirement,²¹ constructive murder,²² welfare²³ and unemployment insurance entitlement,²⁴ and many more.

(3) The courts lack "legitimacy" for making controversial normative decisions, being themselves unelected, unaccountable, and inherently conservative:

In this context, the principle that the judges are not accountable for their decisions loses all democratic justification. When this is combined with the fact that it is not only that the judges are given the power to solve questions not addressed by legislatures, but actually to nullify laws that elected legislatures have made, it is clear that we are closer to the rule of *lawyers* than the rule of law.²⁵

Petter phrases his challenge to constitutionalism in eloquent terms:

Suppose tomorrow it were announced that a Political Entitlements Tribunal would be established; that the tribunal would be given sweeping powers to curtail the

¹⁰"Excessive reliance on litigation and the judicial process for settling contentious policy issues can weaken the sinews of our democracy." P.H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 30 at 52.

¹¹*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

¹²*Roe v. Wade*, 410 U.S. 113 (1973).

¹³*Bakke v. University of California Board of Regents*, 438 U.S. 265 (1978).

¹⁴*Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁵*Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁶*Miller v. California*, 413 U.S. 15 (1973).

¹⁷*School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

¹⁸*R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler*].

¹⁹*Zylberberg v. Sudbury Board of Education* (1989), 65 O.R. (2d) 641, 52 D.L.R. (4th) 577 (C.A.) [hereinafter *Zylberberg*]; *Canadian Civil Liberties Association v. Ontario* (1990), 71 O.R. (2d) 341, 65 D.L.R. (4th) 1 (C.A.) [hereinafter *Canadian Civil Liberties Association*].

²⁰*R. v. Keegstra*, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1 [hereinafter *Keegstra*].

²¹*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 [hereinafter *McKinney* cited to S.C.R.].

²²*R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399.

²³*Attorney General of Nova Scotia v. Phillips* (1987), 76 N.S.R. (2d) 240, 34 D.L.R. (4th) 633 (C.A.).

²⁴*Schachter v. R.*, [1990] 2 F.C. 129, 66 D.L.R. (4th) 635 (C.A.) (leave to appeal granted November 15, 1990).

²⁵*Legalization of Politics*, *supra*, note 2 at 39.

activities of modern government in the name of protecting such vaguely defined entitlements as "liberty," "equality," and "freedom of association"; that the tribunal would be composed of nine affluent lawyers, the majority of whom would be men, all of whom would be of or beyond middle age; that members of the tribunal would be able to remain in office until the age of seventy-five and would be accountable only to themselves; and that the cost of bringing a claim before the tribunal would amount to more than five times the average annual income of a Canadian family. What would one's reaction to such a proposal be?²⁶

It should be plain that the "mighty problem" of judicial review does not arise upon control of state practices, only upon scrutiny of legislation.²⁷ Well before the *Charter*, courts were charged with the responsibility of supervising state practices, in order to enforce compliance with both statute and common law. Consider, for example, the law of confessions. This had been created by the judiciary,²⁸ and was therefore open to amendment either by the judiciary or by Parliament. The *Charter*-induced changes to it, both as to the need for conscious awareness of the waiving of rights,²⁹ and as to the general primacy of the right of silence,³⁰ would have been open to the Court even without a Bill of Rights. Absent a *Charter*, Parliament could have enacted legislation that led to the same result. It is hard to argue that the process is less legitimate when the clause that the court applied was approved by the federal government and 9 of 10 provinces, and deemed fundamental enough by them to be placed in the Constitution.

Unlike legislators, who must account to the public at election time (in theory at least), administrative bodies, and especially the police, do not. It is largely through the courts that they are made accountable: legislatures are busy places in which the rules are debated; they rely on the courts to enforce them for society's benefit. Presumably, legislatures are free to enact new legislation to deal with the practices of which the courts disapprove. It is only when the ability to set the rules is beyond legislative authority that one can be concerned about majoritarianism.³¹

In this perspective the countermajoritarian character of judicial review poses a quandary to those who take Canada's democratic traditions seriously. A wealth of academic literature has evolved in an attempt to resolve this "mighty

²⁶"Canada's Charter Flight," *supra*, note 3 at 161. He attributes inspiration for this passage to R. Martin, "The Judges and the Charter" (1984) 2 *Socialist Studies* 66 at 78.

²⁷"Judicial Protection of Minorities," *supra*, note 5 at 1187.

²⁸In England, the leading case is *Ibrahim v. R.*, [1914] A.C. 599 (H.L.), incorporated into the Canadian common law by *Prosko v. R.* (1922), 63 S.C.R. 226, 66 D.L.R. (1st) 340.

²⁹*Clarkson v. R.*, [1986] 1 S.C.R. 383, 26 D.L.R. (4th) 493.

³⁰*R. v. Hebert*, [1990] 2 S.C.R. 151, 49 C.R.R. 114.

³¹I am aware of other serious problems that arise when courts invalidate administrative tribunal judgments on constitutional, or more traditional, bases. Most significantly, courts often lack the specialized knowledge necessary both to assess the reasonableness of those judgments and to find appropriate remedies when legal breaches are found. These problems are, however, of a very different order than the "mighty problem" with which this paper deals.

problem.” This paper has two objectives. The first is to critically examine the broad schools of academic literature. The second objective is to consider the problem of judicial review in light of the very strong trend towards constitutionalism in Western democracies post-World War II. The discussion will proceed as follows: first, I identify two broad trends of academic thought which I refer to as Rationalist and Structuralist. Upon examination, I find these justifications are inadequate. I also confront other justifications of judicial review that focus on the institutional qualities of the judiciary, specifically its centralizing effect and specialized focus. I find these arguments similarly lacking. Second, I argue that the countermajoritarian difficulty with judicial review, while unsolvable, admits of partial resolution which diminishes its scope. Finally, placing this problem in an international perspective, I argue that the symbolic potency of a judicially supervised entrenched bill of rights is so great that democratic states feel that its countermajoritarian effects are outweighed. Judicial review is an important means of communicating a commitment to the primacy of the Rule of Law.

I. Academic Responses to the “Mighty Problem”

A. Introduction

The problem of democracy and accountability with regard to judicial review has led to a number of responses which attempt to resolve the tension between constitutionality and democracy. It is my contention that these responses are only partially successful. They do, however, enable us to develop an analysis of the constraints upon judicial subjectivity and unaccountability, thus putting the problem in a clearer light.

With some trepidation, I would divide those responses into two general categories but with porous boundaries, through which some scholars readily pass. I would call them “Rationalist” and “Structural” theories. They have their headquarters in the United States, but can readily be found in Canada as well.³² I will also address two general arguments that focus on the centralizing function

³²I have chosen not to dwell on the school sometimes called “textualist,” or based in “original intention.” This school (see R. Berger, *Government by Judiciary* (Cambridge: Harvard U. Press, 1977); R.H. Bork, “Neutral Principles and Some First Amendment Problems” (1971) 47 *Ind. L.J.* 1) is not presently strong in the U.S. Its central tenets, that the *Constitution’s* text is capable of determining what judges should do, and that the meaning placed on the words in the text in 1791, when the *Bill of Rights* was first enacted, or in 1868, the time of the enactment of the *Fourteenth Amendment*, should still govern, are incapable of being maintained in the face either of actual court behaviour or of the controversies the court must face. Sandalow deals with the argument thus: If the intention of the framers is cast in specific terms, it is impossible to apply to conditions that were unforeseen at the time of their enactment. If it is cast in general terms, “the more general the statement of the framers’ intentions, the weaker is the claim that those intentions circumscribe present judgment” (“Constitutional Interpretation,” *supra*, note 5 at 1046).

of judicial review and its specialized perspective in reviewing legislative choices.

Rationalist theories can be described as those analyses which argue that courts are superior forums for normative debate than legislatures because the courts are places where "principle" can best be protected. Structural theories, on the other hand, can be described as those analyses which argue that constitutionalism is essentially about the protection of democracy, and that it should be both embraced for the enhancement of democracy and limited to instances in which it can accomplish this objective. The latter school emphasizes "process," while the former emphasizes "value" or "principle."

B. Rationalist Arguments

1. Preferences and Principles

One common Rationalist argument distinguishes between "preferences" and "principles," arguing that legislatures are best capable of making "preference-based" decisions,³³ while notions of "justice" are questions of "principle" which cannot "depend upon the political support of political majorities."³⁴ Constitutional choices "search for the fundamental values that shape the foundations of our political society,"³⁵ and thereby "describe the political and social conditions which comprise the package of political virtue we call democracy."³⁶

Courts are said to be an institutional projection of the method of reflective equilibrium that is the best method of serious moral thought. The requirement of coherence in judicial decisions is said to require that individual cases be put in the context of past and future cases, thereby enabling principled decisions to be made.³⁷ In addition, the judicial perspective is superior because of its political impartiality: it is "not understood as a simple matter of the force of will or wel-

³³Sager, *supra*, note 5 at 897. See also Sunstein, *supra*, note 5; *Law's Empire*, *supra*, note 5.

³⁴Sager, *ibid.* at 936, 944.

³⁵*Ibid.* at 942.

³⁶*Ibid.* at 944. This point is also made by J. Whyte, "Legality and Legitimacy: The Problem of Judicial Review of Legislation" (1987) 12 *Queens L.J.* 1 at 11:

at some place in the range of human action and relationship there are matters over which the legitimacy of institutional political authority is doubted ... it would be unreasonable to assume that matters affecting the most essential attributes of personal autonomy have been delegated to majoritarian political institutions.

To the same effect, see P. Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1983) 18 *U. Mich. J. L. Ref.* 51 at 67-68. He states that majoritarian democracy only deserves support if there are restraints that "flow from a decent respect for the fundamental rights of the individual"; democratic government involves "a regime limited by a number of constituent moral principles."

³⁷Sager, *ibid.* at 958. He cites *Law's Empire*, *supra*, note 5 at 176.

fare multiplied by the number of persons who advance either, but as a matter of fairness to each person, separately considered."³⁸

One must be skeptical about the argument that the judicial forum is the best place to argue about moral values, despite its regular repetition in the literature.³⁹ Judges are, after all, not deciding in a vacuum. They are limited by the facts in issue, time pressures, the quality of the advocacy before them (indeed, the quality of advocacy and preparation the litigants can afford). One might say that their limitations are precisely those needed to individualize justice, and as we will see, this idea is often argued as an alternative justification for judicial review.

Judges are inevitably constrained by their relative inabilities to conduct research; legislative committees are a far better forum for determining the facts upon which judgments must be based. They are also inevitably limited by the partisan nature of the arguments before them, unlike academics, who also have the virtue of much weaker time pressures.⁴⁰

Despite occasional claims that courts are highly accessible entities⁴¹ in which citizens are better able to be heard, in fact they are available only to the parties to the dispute and to occasional intervenors. Furthermore, access to the legal process is generally mediated by lawyers,⁴² thus reducing the immediacy

³⁸*Ibid.* Whyte, for instance, supports constitutionalism because the courts, being removed from the political process, are immune from factional pressures, *supra*, note 36 at 3, citing James Madison. Also see Weiler, *supra*, note 36 at 72:

courts can move the law forward to a more enlightened viewpoint on a controversial subject. They can stake out a position that the people may well accept only once they see it spelled out, but that an electorally accountable body would have been loathe to risk proposing in the face of current attitudes.

One may ask Weiler what the sources of such a judicial viewpoint are, and what the people can do if they do not come to accept it. Weinrib also makes the same argument:

While judges admittedly do not possess the political mandate that derives from the consent of the populace, their independence, expertise, and the state of their institutional process enables them to determine if the impugned state policy is consistent with the values that allow all individuals to live their lives as free and equal citizens.

L. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 *Sup. Ct. L. Rev.* 469 at 508.

³⁹See, for example, the republican school of constitutionalism, as represented by F. Michelman, "Law's Republic" (1988) 97 *Yale L.J.* 1493; C.R. Sunstein, "Beyond the Republican Revival" (1988) 97 *Yale L.J.* 1539.

⁴⁰Cappelletti, *supra*, note 5 at 35. He also lists as weaknesses of judicial lawmaking the inability of judges to monitor the effects of their pronouncements, and, to a lesser extent, their generally conservative nature.

⁴¹*Ibid.* at 44. He argues that courts themselves provide citizens with a sense of participation in the process of decision-making as courts must abide by the rule of *audi alteram partem*.

⁴²In a case to which I will return, *Airey Case* (1978), *Eur. Court H.R. Ser. A, No. 41*, (*sub nom. Airey v. Ireland*) 3 *E.H.R.R.* 592, the European Court of Human Rights held Ireland in violation of s. 6(1) for not providing lawyers for wives who desired legal remedies upon separation, since

of the participation of lay individuals. Moreover, lawyers do not come cheap: a Canadian report in 1985 estimated the cost of litigating a criminal case to the Supreme Court of Canada at \$34 500 and of a civil case at \$200 000.⁴³

Even where access to the courts is permitted, those who arrive there do not find a participatory forum, in which ideas are carefully debated, but a process that "is profoundly elitist, hierarchic, and non-participatory. It is itself a form of domination that creates experiences of subordination."⁴⁴

Given both the financial and institutional alienation of the judiciary from most of the citizenry, courts should be seen as a final, and not a first, resort. If a powerful social planner wished to design a society in which major moral decisions were made in the most suitable environment, it is unlikely that he or she would have chosen the Anglo-American courtroom complete with its adversarial process and its very expensive advocates.

The argument that "workaday, preference-driven matters" are the stuff of normal politics,⁴⁵ while principles are the subject of constitutional law, is both demeaning to the democratic process and inaccurate. Since this is Sager's argument, let us consider his example. To him, a choice between a new stadium and a new museum is a matter of preference, while questions of whether blacks, or women, can vote, or whether the State can establish a church, or whether one person can claim other ethnic groups are inferior, are fundamentally different.⁴⁶

It is obvious that there are differences between these decisions; the former decision is about allocating scarce resources while the latter group is more about deciding what non-economic principles should govern relations between diverse groups in society. Not surprisingly, constitutions deal more with the latter type of choices than with the former. Yet the claim that courts are superior institutions for the latter group is not self-evident.

Legislatures do more than collect and spend money. They also make the very laws that constitutional courts review. In the process, they make all the non-preference-driven choices that Sager wishes reserved to the courts. *They*

access to the courts is not *effective* absent access to counsel. Constitutionalism is generally anti-pathetic to the notion that the courts are places for the unmediated participation of citizens. It sees them (correctly, I would urge) as dangerous places for lay people, to which they need guides for their own safety.

⁴³"Canada's Charter Flight," *supra*, note 5 at 155.

⁴⁴West, *supra*, note 5 at 715.

⁴⁵Sager, *supra*, note 5 at 937. See also "The Storrs Lectures," *supra*, note 5 at 1013, where Ackerman distinguishes two types of politics: normal politics, which involves routine expressions of self-interest, and constitutional politics, in which society gets involved out of concern as to public policy. In these periods, large numbers of electors transcend their normal passivity and "assume the mantle of engaged civic virtues" (Sager, *ibid.* at 924). Sager goes so far as to say that "popular will in times of ordinary politics hardly deserves the name" (*ibid.*).

⁴⁶Sager, *ibid.* at 936.

decide whether theft is illegal; *they* decide whether to set up enforcement structures to truly allow blacks or women to vote; *they* decide whether there shall be mandatory retirement. Constitutionalism cannot remove this power from them; nor the need to answer to their electors for them. Instead, constitutionalism means that in cases of "principle," they are subject to judicial review which determines if their principles coincide with how the judges interpret the constitution. This merely restates the problem; it does not solve it.

Furthermore, the claim that budgetary allocations are not "judgment-driven" hardly accords with most people's experiences of government. When the government of Michigan decided recently to reduce welfare payments by 20% while also cutting property taxes,⁴⁷ did it not make an ethical judgment as to what and who deserve priority? Is not the decision of the United States federal government as to how much to spend on the military at a time of homelessness and hunger in the United States a decision of principle? Are these choices simply as between a stadium and a museum, *i.e.* as to whose leisure activities are given priority?

If there exists a distinction between preference and principle, it is surely not a striking one. *Who* decides if a matter is one of principle or of preference? If the courts do so, they are themselves determining the extent of their authority, and thereby finessing the problems of methodology and institutional competence.⁴⁸

2. Courts and Consistency

A somewhat stronger rationalist argument deals with the value of consistency, which corresponds to our intuition that one aspect of fairness is consistent treatment. Reliance on this point, however, abstracts from too many questions. At most, consistency ensures that rules are applied equally in equal cases. It does not argue for fairer rules, provides no guidance for determining what cases are equal, and makes no allowance for the need for superior treatment to overcome disadvantage.

Assuming that courts are more consistent than legislatures, this is only a morally beneficial state of affairs if they are also animated by a value system that leads to consistently *moral* rather than *immoral* results. Whether results are moral may be a matter of debate within a society, in which case the promotion of consistency serves only to repeat a preference for judicial authority without justifying it.

⁴⁷See "More recall efforts target Engler on budget cuts" *Ann Arbor News* (2 April 1991) C4. A family of five, including a disabled adult, now receives \$590/mo. instead of the \$740 it received hitherto.

⁴⁸R. Elliot, "The Supreme Court of Canada and Section One: the Erosion of the Common Front" (1987) 12 *Queen's L.J.* 277.

Consistency is also difficult to apply to statutes, which are rarely identical, and only a few (compared, for example, to the number of tort actions or criminal indictments) come to the courts for review.⁴⁹ How can difference or consistency of treatment be determined without an adequate base? Furthermore, since no two statutes placed before it for review are identical, determining similarity or dissimilarity is a normative exercise, involving choices based on individual perception of what is most or least important. This is not to argue, as does Tushnet, that precedent is an illusory concept.⁵⁰ Precedent constrains future choices such that choices that are inconsistent with prior principle, either logically (which is rare) or by virtue of social understandings of both principles, cease to be available. This is, however, only a partial constraint.

A simple example will reveal the limits of "consistency." In *R. v. Hufsky*,⁵¹ the Supreme Court of Canada upheld random stops of drivers at organized check points to search for driver's licenses, mechanical fitness of motor vehicles, and sobriety of drivers. Two years later, *R. v. Ladouceur*⁵² was argued, in which the stop was random, without an organized check point, and no "articulable cause" for suspicion.

Hufsky operated as a precedent, such that it excluded certain results. The Court could not have decided that "reasonable and probable grounds" were required before vehicles could be stopped without reversing its judgment in *Hufsky*. Instead, the Court was limited to determining whether the absence of a checkpoint made *any* individualized suspicion necessary. On that point, the Court split 5 to 4, with the majority deciding that none was required, and determining that *Hufsky* necessitated this finding.

How would one relate this history to the claim that courts are a superior forum because of their need for consistency? Would it have been inconsistent to require some articulable cause in cases of otherwise untrammelled police discretion?⁵³ The answer to that depends, at least in part, on what other values are

⁴⁹In the first seven years of the *Charter's* life, 375 cases of scrutiny of statutes reached the 10 provincial courts of appeal and the Supreme Court of Canada (some obviously were heard by both and are double counted in this sample). In 63 of these, provisions were invalidated, 42 on procedural grounds, F.L. Morton *et al.*, "Judicial Nullification of Statutes under the Charter of Rights and Freedoms, 1982-88" (1990) 28 *Alta L. Rev.* 396.

⁵⁰*Supra*, note 5 at 815:

The central problem here is that, given the difficulty of isolating a single principle for which a given precedent stands, we lack any criteria for distinguishing between cases that depart from and those that conform to the principles of their precedents. In fact, any case can compellingly be placed in either category.

⁵¹[1988] 1 S.C.R. 621, 27 O.A.C. 103.

⁵²[1990] 1 S.C.R. 1257, 40 O.A.C. 1 [hereinafter cited to S.C.R.].

⁵³Per Sopinka J., *ibid.* at 1267 (dissenting):

the roving random stop would permit any individual officer to stop any vehicle, at any time, at any place. The decision may be based on any whim. Individual officers may

involved in the case. Are the courts concerned about police discretion? Do car drivers have any privacy rights? While *Hufsky* constrained the choice in *Ladouceur*, the latter case required consideration of other legal doctrine and other sources of value choices as well. If, perhaps, there were some finite and accessible place where judges could find all those sources, adjudication could be said to be "consistent." Absent such a resource, each judge will determine for himself or herself the extent of similarity, or dissimilarity, between an impugned statute and one dealt with in earlier cases. The Rationalist appeal to consistency offers no insight into the countermajoritarian problem of judicial review.

3. Individual Justice

While the argument for consistency supports judicial review on the basis that it ensures that no person (or statute) is treated differently without rational basis, judicial review is also defended on the ground that it alone ensures individual justice:

The subtle pervasiveness of principle in the hands of a judiciary committed to coherence requires that a judge at once understand the distinct claim of the entitlement of the litigant before her and see the reach of that claim to other very different sorts of causes and litigants. There is a native drive to generality, to the abstraction of principles to the very logic or grammar of rights.⁵⁴

Where the state is opposed to a litigant, courts are indeed well poised to hear out the litigant and ensure that his or her individual needs have not been ignored. This is not always a strength in the case of statutes in which large numbers of people are affected. Consider, for example, *McKinney*.⁵⁵

In that case, a group of aging academics did not wish to retire at age 65, but were forced to do so by the regulations of their universities. The *Ontario Human Rights Code* did not assist them, in that it specifically permits workplace age-related discrimination against employees over 65 or under 18.⁵⁶ The courts heard the employees' constitutional challenge to the validity of both the university regulations and the *Human Rights Code* exclusion.

In such a case, what would it mean to say that the courts are alert to the "distinct claim of entitlement of the litigant"? Presumably, it means that the full impact of mandatory retirement on the individuals affected can be felt: the effect on their sense of self-worth and dignity, as well as on their incomes. However, this legislation represents a compromise between competing interests, including

have different reasons. Some may tend to stop younger drivers, others older cars, and so on. Indeed, as pointed out by Tarnopolsky J.A. [at the Ontario Court of Appeal], racial considerations may be a factor too.

⁵⁴Sager, *supra*, note 5 at 959.

⁵⁵See *McKinney*, *supra*, note 21.

⁵⁶Cited in *ibid.* at 255-57.

the need for faculty renewal, the need to ensure integrity of the pension plan, the avoidance of the indignity of quality assessments of tenured faculty (and the concomitant ability to leave with dignity without having one's competence impugned), all factors considered by La Forest J. in his majority judgment.⁵⁷ Each of those factors can be seen generally or can be seen in the context of the individuals who will be adversely affected by invalidation of the statute. There is at least some basis for fear that focusing on the individual litigants, *i.e.* the claimant and the State, will tend to skew normative decisions away from collective interests.

Sager's argument starts from the perception that the individual can easily be forgotten by the legislature. In its attempt to balance the interests of which it is conscious, the legislature may harm the interests to which it has not turned its collective mind. The difficulty, as seen previously, is that the courts may well do the opposite: confronted with the vivid complaint of an individual whose interests have been overlooked, or deemed less important by the politicians, judges may readily ignore the interests that motivated the legislation.

A resolution to this problem has been proposed by Sandalow.⁵⁸ He urges that the courts be given a suspensive veto if they feel that the legislature did not adequately consider the impact on the litigant and others in his or her situation, while deferring to the legislature if the matter had indeed been given enough thought. While this may work when the effects upon the litigant were not foreseen by the legislature, the Sandalow proposal is of little value when the legislature consciously chose not to protect those interests.⁵⁹ In those cases, the problem is not the need to focus attention on the individual, but rather that the court disagrees with the ethical judgment made by the legislature. In those instances, the claim that judicial review is warranted as a means of individuating justice is simply a restatement of the perceived advantage of the judiciary as a forum for moral discourse generally.

A similar proposal is made by A.F. Bayefsky,⁶⁰ namely that the courts should, where possible, avoid constitutional pronouncements in favour of a "colloquy" with "society at large." She suggests the following mechanisms: floating trial balloons through *obiter dicta* or a multitude of concurring decisions, thereby avoiding definite statements; using non-*Charter* mechanisms such as *ultra vires* invalidation, strict "standing" requirements, and statutory construction techniques to invalidate legislation, or avoid litigation; and using the s. 1 "prescribed by law" phrase to invalidate legislation on the basis of

⁵⁷*Ibid.* at 281-89.

⁵⁸"Judicial Protection of Minorities," *supra*, note 5 at 1189.

⁵⁹As in abortion statutes: see *Morgentaler*, *supra*, note 18; *Roe v. Wade*, *supra*, note 12.

⁶⁰"The Judicial Function under the *Canadian Charter of Rights and Freedoms*" (1987) 32 *McGill L.J.* 791. Her proposal is derived from A.M. Bickel, *The Supreme Court and the Idea of Progress*, 2d ed. (New Haven: Yale U. Press, 1978); Bickel, *supra*, note 5.

vagueness.⁶¹ These techniques all share one fundamental characteristic: they avoid direct confrontation with the legislatures and generally allow them to reconsider, and even re-enact, substantively the same legislation as was challenged. In other words, they represent an attempt to avoid the “mighty problem” through returning power to the legislatures after first providing them with *some, non-binding* view of the court’s opinion as to the merits.

At some point, the court may not be able to avoid deciding on the merits; Bayefsky recommends that the courts be activist when that occurs, adopting a purposive attitude towards the *Charter*, being “moral and unafraid.”⁶²

The question remains as to how the court is to know when this point has been reached. Bayefsky answers that

decisions should be made only when a mounting number of incidents exemplifying a problem have a cumulative effect on the judicial mind, as well as on public and professional opinion, and account has been taken of whether a conclusion will be a proposition to which widespread acceptance may fairly be attributed.⁶³

This fails to answer the question. If widespread acceptance may fairly be attributed, why would the legislature fail to use the opportunity Bayefsky gives it to reconsider? Why should the court need to wait for a “mounting” number of incidents, if in its “moral and unafraid” view, fundamental principles of justice have been violated?

Furthermore, Bayefsky’s proposal has serious practical flaws, most notably its encouragement of relitigation. Given the costs of constitutional challenges, litigants might reasonably complain if courts ducked their questions. It might be that her proposal, if enacted, would discourage *Charter* challenges generally. This would ease the majoritarian dilemma, but it would do so at the expense of the positive value of a constitution: the reassurance of the citizenry that at least some of its “rights” have been elevated in importance.

4. Superior Judicial Expertise

A related rationalist argument⁶⁴ would defer generally to legislatures, but not on those issues regarding which courts have superior knowledge and expertise, or with regard to those in which government might be more prone to downplay constitutional standards in the interests of other goals.⁶⁵ This argument is less ambitious than many others and therefore seeks to do no more than partially

⁶¹Bayefsky, *ibid.* at 826-27.

⁶²*Ibid.* at 828. On this point she cites Dworkin, “The Forum of Principle,” *supra*, note 5.

⁶³Bayefsky, *ibid.* at 832.

⁶⁴B. Slatery, “A Theory of the Charter” (1987) 25 Osgoode Hall L.J. 701 at 734-35.

⁶⁵This argument has been incorporated into the s. 1 jurisprudence of the Supreme Court of Canada in *Irwin Toy Ltd. v. A.G. Quebec*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577.

resolve the “mighty problem.” To that extent it succeeds; it is easier to justify countermajoritarian actions when the political branch is less likely to give full effect to protected constitutional interests. One might think, for example, of the criminal law, in which the State is both a legislator and a prosecutor, and provide greater scrutiny in those areas to ensure that it is not abusing its legislative power.

While this approach partially resolves the “mighty problem” by delineating occasions on which legislatures might need to be supervised to ensure that they have acted fairly, its limitation can be seen by asking where the judiciary derives the norms with which to effect such supervision. If the norms are based on consensus,⁶⁶ legislatures would not be prone to violate them. If they are not, courts have become empowered to impose controversial values upon elected legislatures. Delineating areas in which such power serves as a counterweight to potential State tyranny does not allay legitimate concern as to judicial tyranny. At best, it can be said that constitutions mandate judicial review, and that this is done most effectively when review is limited to where it is most appropriate. However, the essence of constitutionalism, namely that State tyranny in the democratic era is best controlled by empowering an unaccountable elite with authority derived from the capacious language of an entrenched bill of rights, remains problematic.

5. Moral Strengthening

It is also argued that judicial review forces all political actors to be conscious of the “fundamental principles” of society, thereby improving the moral basis of society generally.⁶⁷ It is difficult to disagree with the claim that a constitution shapes political debate such that legislatures strive to comply with it. Reluctant to have legislation invalidated, legislatures operate in the shadow of the courts; more importantly, if the values expressed in the constitution are held to be fundamental in society, legislators will perforce share them. This is a point made by Sager and he puts it more strongly, namely, that the existence of a judicially enforceable constitution places legislators in the position of asking not merely what they believe to be best for society, but also what they believe to be in compliance with that document. Thus, for example, when a wiretap statute is being debated, the legislature will be required by its constitution to place primacy on privacy rights of potential wiretap targets, whether or not it would otherwise have wished to do so.

In the Canadian context, Slattery makes the same point when he argues that the judiciary is not “the only ‘principled’ branch of government;”⁶⁸ however, as

⁶⁶This argument supposes that there are consensus values as to constitutionally protected interests, a highly debatable proposition, West, *supra*, note 5 at 713.

⁶⁷Sager, *supra*, note 5 at 958.

⁶⁸*Supra*, note 64 at 728.

he states the point, it cuts in favour of deference. If the *Charter* has a normative effect on non-judicial bodies as they strive to comply with it,⁶⁹ invalidation of statutes should rarely be required.

Accordingly, this argument misses a fundamental point in respect of norms generally, namely that the entrenchment of certain principles in the *Charter* serves to strengthen *those* values in the political life of the nation.

What does such entrenchment do to those values which are left out? Before he entered politics, Pierre Trudeau argued for the entrenchment of basic economic rights in the Constitution,⁷⁰ a position he abandoned as Prime Minister. Accordingly, the right to be tried within a reasonable time is constitutionally entrenched,⁷¹ while the right to food and shelter is not. If the *Charter* has changed political life so as to increase the importance of entrenched rights relative to others, some critics may be legitimately displeased.⁷²

6. A Less Dangerous Branch?⁷³

Another argument⁷⁴ sometimes made is that one need not fear judicial tyranny because its own institutional limitations, such as a lack of executive authority, render courts less potentially dangerous than legislatures. Furthermore, it argues that the worst that courts can do if they act out of self-interest is to expand constitutional limits, which is a tolerably safe measure by which to check potential State tyranny.⁷⁵

While courts may not set their own budgets or direct their own police forces, their reliance on the executive and legislative branches for their administrative needs hardly solves the problem of majoritarianism. While an unhappy government could in theory cut off the electricity or refuse to enforce court orders, a government that treated its highest courts that way would lose the credibility that stems from the "Rule of Law."⁷⁶ As to the potential harm that courts can

⁶⁹*Ibid.* at 718.

⁷⁰"Economic Rights" (1961) 8 McGill L.J. 121. See also Weiler, *supra*, note 36 at 70.

⁷¹*Charter*, s. 11(b).

⁷²A related concern is that the entrenchment of constitutional rights has shifted society's moral and political discourse in the direction of such rights, thus shifting the energy of political progressives into those struggles that can be described in *Charter* terms. See West, *supra*, note 5 at 716; J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1988) 25 Osgoode Hall L.J. 485 at 533. As to this danger I agree with the Mandel/Petter/Glasbeek school; see *Legalization of Politics*, *supra*, note 2 at 308.

⁷³This phrase is used by Bickel, *supra*, note 5.

⁷⁴Whyte, *supra*, note 36 at 5. See also Dahl, *supra*, note 5.

⁷⁵Whyte, *ibid.*

⁷⁶I will deal with this vague but potent concept below in sections III and IV. At the very least, Western citizens assume that it means some measure of independence and autonomy for the judicial system such that it cannot be directly bullied or paralyzed by the political branches of government.

do, it is true that they cannot themselves enslave or tyrannize. However, their capacity for mischief is precisely that they can prevent the State from protecting its citizens from exploitation and "private" tyranny.⁷⁷ This is by no means trivial; it is unlikely that the victims of court interventions to invalidate protective legislation would see this form of "judicial tyranny" as benign.

The argument as to the independence of judges is also a weak means of avoiding the democratic critique. If they are out of sync with contemporary notions of justice and equality, there is little that can be done about it. Their expertise, significant in the area of individual rights, is lacking in wider areas of social policy.⁷⁸

7. Minority Control of the Parliamentary System

Weiler argues that the Canadian parliamentary system is in more need of judicial scrutiny than its United States counterpart.⁷⁹ He points to two significant differences in the political process. Firstly, the electoral system in the United

⁷⁷In the U.S., this is well demonstrated by the 40 years of the *Lochner* era (*Lochner v. New York*, 198 U.S. 45 (1905)), in which the court invalidated large numbers of statutes aimed at regulating labour and market relations. In Canada, the same process has occurred. However, where the U.S. court relied on the "due process" clause of the *Fourteenth Amendment*, the Privy Council used the doctrine of *ultra vires*: *A.G. Canada v. A.G. Alberta*, [1916] 1 A.C. 588, in which federal regulation of the insurance industry was deemed *ultra vires*; *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, in which federal anti-monopoly statutes were held *ultra vires*; *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326, striking down a federal labour relations statute; *A.G. Canada v. A.G. Ontario*, [1937] A.C. 355, invalidating federal unemployment insurance legislation; *A.G. British Columbia v. A.G. Canada*, [1937] A.C. 368, striking down national products marketing legislation; *A.G. British Columbia v. A.G. Canada*, [1937] A.C. 377, holding federal legislation regulating price spreads to be *ultra vires*; *A.G. British Columbia v. A.G. Canada*, [1937] A.C. 391, invalidating a federal farmers' creditors arrangement statute; *A.G. Ontario v. A.G. Canada*, [1937] A.C. 405, declaring *ultra vires* the *Dominion Trade and Industry Commission Act*. It was said by a writer of the time that "the plea of *ultra vires* has been the defence impartially applied to both legislatures by a system of free enterprise concerned with preventing the government from regulating it in the public interest" (J.R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament" (1944) 10 Can. J. Econ. & Pol. Sci. 165 at 169). This history is well explained both by *Legalization of Politics*, *supra*, note 2 at 9-10 and by P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117 at 141.

⁷⁸These have been termed "polycentric" problems, L.L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353 at 394, following M. Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (Chicago: U. of Chicago Press, 1951). Fuller describes them as follows:

We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" — each crossing of strands is a distinct center for distributing tensions (*ibid.* at 395).

⁷⁹*Supra*, note 36 at 69.

States requires that legislation receive triple approval, from the House of Representatives, the Senate, and the President. The result of this system of "checks and balances" is that it is harder for any group to secure legislation in its favour than would be the case in Canada, in which all power rests in the hands of Parliament. Since the President need not be from the same party as the majority in either house (and often is not), control of one party or the other is insufficient to control legislation. While this does not prevent tyrannical behaviour (witness the McCarthy era), it tends to weaken the legislative branch generally. In these circumstances, scrutiny of executive authority is more necessary; scrutiny of Congress less so.

Canada, on the other hand, is a country in which legislation is relatively easier to pass. Where a majority government rules, a statute need only meet with the approval of the government of the day. Given the three-party system (and sometimes more), the government of the day may have a majority of seats with a minority of electoral support,⁸⁰ and yet be unimpeded in its ability to enact such legislation as it wishes.

Secondly, the British system, shared by Canada, of party discipline, causes parties ordinarily to vote *en bloc* in the legislatures. This weakens the influence of individual politicians and increases the power of the Prime Minister or provincial Premier. The result is that a bare majority within the governing party, or, in some cases, a minority that includes the Prime Minister, is capable of enforcing party discipline to secure a unanimous vote of its caucus. Considering the possibility of majority government with 40% (or less) of the vote, and considering the effect of party discipline on the government caucus, legislation can be enacted with only minority support in the country. Thus, the argument runs, the majoritarian nature of the democratic process may be more apparent than real. Parliamentary control may more easily be used to defeat the claims of minorities,⁸¹ without the type of systematic resistance found in the United States.

This argument, appealing on its face, is more successful at demonstrating the potentially countermajoritarian behaviour of the Canadian system, than at

⁸⁰For example, the N.D.P. won a majority of 75 out of 130 seats in the Ontario legislature with about 38% of the vote in the 1990 election.

⁸¹Even though women are not a minority, their subordinate socio-economic status and gross underrepresentation in both legislature and government cause them to be treated more like a minority than like a majority. I will, from time to time, talk of "minorities" with the intention that women be included.

I am thus taking the same liberties with the language as the Supreme Court of Canada in its talk of "discrete and insular minorities," which, as pointed out in D. Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) at 151, is an inappropriate phrase. "Discrete" merely means "distinctive," hardly a useful criterion in itself. "Insular" harks back to an earlier time when ethnic groups were physically separate. As for "minorities," this would exclude women. One must be impressed that the phrase has both a meaning and a history in constitutional law that goes so far beyond the meaning of its terms.

demonstrating the more majoritarian nature of the American system. Chronically low voting percentages in the United States, caused by the relative disaffection of much of the population, and especially its poorest sections,⁸² cause its elected officials to represent only minorities of the population in most instances. The lack of effective control over campaign spending⁸³ enables the wealthy to dominate the electoral arena, while the lack of strong party structures means that each successful politician is beholden to his own financial contributors.⁸⁴ In the result, while it is more difficult to pass legislation generally, the system as a whole favours the rich (who are more often than not white, non-immigrant, and male) minority, who, due to the lack of party discipline and resulting blurring of party ideological lines, are able to exercise enormous influence over both parties.

Seen from this perspective, the Canadian three-party system, which allows for minority domination of Parliament, is more democratic than the United States two-party system. Citizens have more hope of influencing the political parties in Canada; the lower campaign spending figures enable parties to run without major networks in the wealthy enclave; and the greater ideological differences between the parties enable minorities (or majorities) to have more real choice at the ballot box. What it loses in "log rolling" it gains in accountability.

⁸²The low voter turnout in the U.S. is a problem of long standing. Even Choper, a strong defender of the electoral process, states that many citizens do not vote, are uninvolved in political life, and are uninformed as to both minor and major policy matters: J. Choper, *Judicial Review and the National Process* (Chicago: U. of Chicago Press, 1980) at 15. Differences in social and economic status are the most important variables that account for lesser political participation. See R.A. Dahl, *Democracy in the United States* (Chicago: Rand McNally, 1976) at 488.

R. Parker's point is well taken:

These articles of "process-oriented" theory are blind to the likelihood that the "choice" of political passivity by inactive citizens and service of their interests by the government may be significantly undermined by inequalities of power, wealth, status, and education ("The Past of Constitutional Theory — and its Future" (1981) 42 Ohio St. L.J. 223 at 242).

⁸³Exacerbated by the shocking U.S. Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), in which it held that the *First Amendment* required that "political action committees" be allowed to spend unlimited sums in the support of their candidates. The direct spending limits permitted candidates themselves (even before the aid of these committees) are enormous: for presidential candidates, for instance, the limits are \$10 000 000 to secure a nomination, and \$20 000 000 for a general election.

While the federal judiciary is not elected, many states conduct elections for their judges, with the same result. This is much criticized in Canada. For example, Lamer C.J., in a 1991 speech, pointed to one election in which a judge had spent over \$1 000 000 in his campaign. Lamer asked: "Where did that come from and who is he saying thanks to for the next seven years?", "Judicial Appointment System here 'as good as you can get,' Lamer says" *The Lawyers Weekly* (29 March 1991) 6.

⁸⁴The "Keating 5" is merely the last in a long series of scandals (or near-scandals) in which the ability to provide campaign contributions has given wealthy, and not always honest, Americans preferential access to their elected officials. See R.L. Berke, "In Senate Ethics Inquiry, the Larger Issues went Unaddressed" *New York Times* (3 March 1991) A24.

This response does not undermine the entire force of Weiler's argument, since his point continues to undercut the distinction between "unrepresentative" courts and "representative" legislatures. It does, however, turn the same light on the United States system, revealing its own undemocratic aspects.

It is not clear that judicial power is an effective response to the weaknesses of North American democracy. If the fear in Canada is that a powerful idea in the mind of the Prime Minister can lead to legislation that many may oppose, this is little allayed by a system of judicial review in which a powerful idea in the minds of five judges can lead to "law" that many may oppose. Similarly, if the fear in the United States is that the systemic bias in favour of the wealthy will lead to the routine ignoring of the needs of the poor, this is little allayed by a system of judicial review in which nine (or as few as five) wealthy and well-established lawyers will make rules for all of society. Indeed, this is even less allayed when one realizes that when Congress attempted to reduce the power that money had over its own process, this was stymied by the very process of judicial review that is said to protect the underrepresented (read "poor") from Congressional overreaching.

Weiler's point is only a partial answer to the "mighty problem." If legislatures are not as democratic as they could (should) be, a second look at their legislation can be in the interest not only of ignored minorities but indeed of ignored majorities. However, the ability of the courts to perform this role depends on the substantive values with which they approach their task, as certain values are prone to aggravate the problems of the electoral sector rather than alleviate them. It behooves judges, therefore, to adopt a value system that protects the weaker in society. Yet even here the problem of subjectivity still looms large: is it up to nine fine lawyers, generally male, almost always white, privileged and well-educated, to determine what norms accomplish that task? Where the judges that are appointed by those same unrepresentative executive branches do not see their role as it would behoove them, are the weaker better off or worse off?

8. Conclusion

In this perspective, Rationalist theories remain unpersuasive as a solution to the counter-majoritarian problem. These theories have their own allure; it is appealing to regard the judiciary as a superior forum for normative debate, focused on higher moral principles and channelled by particular expertise. However, in the final analysis, it is impossible to surmount the fact that the very definition of democracy itself invests supreme normative authority in the majoritarian legislative process. If the legislative process is given little respect in

Rationalist theory,⁸⁵ and if the judicial process is deemed superior at ethical decision-making, I submit that that theory is either elitist or Platonic. It is elitist if it believes that nine bright men and women are truly superior to the community as a whole at determining the contentious questions that face us; Platonic if it believes that moral inquiry leads us to the “correct” interpretation of values that guide our society.⁸⁶

C. Structural Arguments

1. Protecting Democracy from Legislatures

The structural argument, best made by Ely, provides a different approach to solving the “mighty problem,” namely the argument that constitutionalism is needed to *protect* democracy from majorities. In particular, Ely sees judicial review as being necessary to protect the democratic *process* from erosion, and, most significantly, sees this as something other than “old-fashioned value imposition.”⁸⁷

Accordingly, he argues that the political process is almost wholly responsible for selecting and accommodating substantive values which leaves the constitutional courts with the task of reinforcing representation. He sees the courts as being close to mechanics of the political machine:

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.⁸⁸

On this analysis, the fact that judges are outside the political system and thus beyond the need for accountability to the electorate becomes a virtue

⁸⁵An extreme example of the attitudes of some constitutionalists towards legislatures is given by Cappelletti:

much “institutional incompetence” has been shown by the political branches themselves. Take, for instance, the areas of economic law in which most often legislators have proven to be unable to resist the temptations of demagoguery and to engage in objective balancing of costs and benefits. It is arguable that in these areas, judges would be less vulnerable both to demagoguery and to merely local, or pressure-group, values and priorities (*supra*, note 5 at 38).

This goes further than most members of the school.

⁸⁶See, for example, Perry, *supra*, note 5. Tribe describes Perry’s vision of the courts as having a prophetic function to objectively seek correct answers to moral and political questions: Tribe, *supra*, note 5 at 1.

⁸⁷*Supra*, note 5 at 75.

⁸⁸*Ibid.* at 103.

and not a flaw,⁸⁹ despite the elitist bias of which he has accused the judiciary.⁹⁰

Were it truly possible to cordon off “process” from “value,” and were it truly possible to read a constitution (or the *Charter*) as if “process” were all it protected, Ely’s thesis would be unanswerable. Unfortunately, neither of those conditions holds.⁹¹

Firstly, Ely’s efforts to read such protections as freedom of speech, religious liberty, or the abolition of slavery, as entirely process-based⁹² is unconvincing. These clauses of the *Constitution* exist for the purpose of protecting human dignity or autonomy in some sphere chosen as particularly important.⁹³

Secondly, “process” is not value-free. Even in administrative cases in which “due process” is required, the nature of that process depends on the personal interests at stake. One might think of prison discipline cases. A full adversarial hearing is not needed, but some type of fair procedure is.⁹⁴ Were “process” entirely value-free, how could one assess what process a particular type of case warranted?

Thirdly, “due process” itself is only a value if it serves some purpose. Tribe comments that constitutional protections interfere to some extent with the fact-finding accuracy of the criminal law, yet they are protected “to prevent the government from treating individuals in the criminal process as though they were objects.”⁹⁵ How, he asks, can Ely’s project be achieved when “process itself, therefore, becomes substantive?”⁹⁶

⁸⁹*Ibid.*

⁹⁰*Ibid.* at 58-59:

Experience suggests that in fact there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favour of the values of the upper-middle, professional class from which most lawyers and judges, and for that matter most moral philosophers, are drawn. People understandably think that what is important to them is what is important, and people like us are no exception. Thus the list of values the Court and the commentators have tended to enshrine as fundamental is a list with which readers of this book will have little trouble identifying: expression, association, education, academic freedom, the privacy of the home, personal autonomy, even the right to not be locked in a stereotypically female sex role and supported by one’s husband. But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren’t *fundamental*.

⁹¹This particular critique follows the form of L.H. Tribe, “The Puzzling Persistence of Process-Based Constitutional Theories” (1980) 89 Yale L.J. 1063. However, critiques are very common in the literature and generally follow similar lines.

⁹²*Supra*, note 5, c. 5, especially at 105.

⁹³Tribe, *supra*, note 91 at 1065-67.

⁹⁴*Gallant v. Canada*, [1989] 3 F.C. 329 (C.A.).

⁹⁵*Supra*, note 91 at 1070.

⁹⁶*Ibid.* at 1070-71.

Fourthly, how is one to distinguish a “discrete and insular minority” from any other kind? At the very least, the distinction requires a normative judgment as to whether the group is adequately included or excluded, is subject to genuine disadvantage, and deserves better treatment. This may be an attractive approach to problems of equality, but it is hardly a solution to the problem of judicial subjectivity.

Stripped of its claims to objectivity, Ely’s thesis becomes unable to answer why judges, as opposed to legislatures, should be in the business of deciding whether draft cards can be burned⁹⁷ or dentists allowed to advertise.⁹⁸ It is hard to see these cases as the unclogging of blocked political plumbing.

2. Monahan: Democracy and Community

Monahan has framed a theory of judicial review that puts the structural argument in a distinct Canadian perspective. Specifically, he follows Dworkin⁹⁹ in looking for the best “fit” between *Charter* values and Canada’s political tradition, concluding that “the best interpretation of the *Charter* — the interpretation which makes sense of the document as a whole — is an interpretation which gives primacy to values of democracy and community.”¹⁰⁰ The *Charter* consequently offers a vehicle for democratizing legislatures and other political institutions. Judicial review acts as a “mechanism to protect existing opportunities for democratic debate and dialogue as well as to open new avenues for such debate.”¹⁰¹ The “mighty problem” is said to be resolved, as judicial review reinforces rather than frustrates majoritarian processes.

Like Ely’s theory, and structural theories generally, Monahan’s approach suffers from a simple flaw. One cannot talk of “democracy” and “community” as if they were self-explanatory concepts; nor are the notions made much more specific by concentrating on contemporary models of electoral democracy. Like “justice,” “reasonableness,” or goodness itself, “democracy” and “community” can have significantly different meanings to different members of society. While his analysis of the democratic ideal as participatory and accountable is laudable,¹⁰² no theory of democracy is uncontroversial.

Bakan criticizes Monahan, arguing aptly that “the ideal of democracy as articulated by Monahan is radically inconsistent with government by an elite

⁹⁷*U.S. v. O’Brien*, 391 U.S. 367 (1968).

⁹⁸*Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68.

⁹⁹See “Equality, Democracy, and Constitution,” *supra*, note 5.

¹⁰⁰P. Monahan, *Politics and the Constitution* (Toronto: Carswell/Methuen, 1987) at 102.

¹⁰¹*Ibid.* at 105.

¹⁰²*Ibid.* at 124.

cadre of judges or legal and political philosophers.”¹⁰³ In brief, once any effort is made to make the twin values of “democracy” and “community” yield answers in any specific case, they cease to offer the judiciary any significant restraint. Bakan is surely correct when he says that:

Monahan asks an elitist and unrepresentative judiciary to protect and promote democratic principles in political institutions. The authors’ [Monahan and Beatty] attempts to avoid the trap are unconvincing. In each case, the principles prescribed are too vague and open-textured to compel judges to “do the right thing.”¹⁰⁴

3. Dworkin and Kerans: Protecting Democratic Values

Once the protection of democratic *process* is seen to involve more than simply “process,” any theorist desirous of advancing the structuralist claim that constitutionalism advances democracy must promote a vision of democracy that extends beyond parliamentary majoritarianism.¹⁰⁵ This conflates the Structuralist and Rationalist theories because the protection of democracy is conceived of as the protection of fundamental democratic *values*, within which judicial review requires a theory of why the courts are better equipped for that purpose.

To Dworkin, judicial review, which he calls the disabling provisions of the *Constitution*,¹⁰⁶ is justified because it is the method of ensuring the priority of democracy as he conceives of it, regardless of majority will.

Dworkin grounds his argument about democracy not on a theory of process but on a theory of interpretation, namely that “the communal conception is the best interpretive account of democracy”¹⁰⁷ (*i.e.*, that it best corresponds to our contemporary concept of what democracy means).¹⁰⁸ At this point the “mighty problem” should cease to concern us.

¹⁰³J.C. Bakan, “Strange Expectations: A Review of Two Theories of Judicial Review” (1990) 35 McGill L.J. 439 at 455.

¹⁰⁴*Ibid.* at 457.

¹⁰⁵Thus, for example, Cappelletti, *supra*, note 5 at 46, argues that democracy means not only popular sovereignty but also participation, tolerance, and freedom. A school of republican theorists considers that democracy requires “relative equality, mobilization of the citizenry, and civic virtue”: Parker, *supra*, note 82 at 258.

¹⁰⁶“Equality, Democracy, and Constitution,” *supra*, note 5 at 325:

The real threat a constitution poses to democracy is deeper, and has nothing to do with the fact that judges are not elected... Judges then claim a right and a duty to stand in the way of what the majority’s representatives think proper and in the interests of the community as a whole. So judicial review is not just undemocratic exceptionally or when it is working badly, as other institutions are, but undemocratic steadily and when it is working well. Or so most commentators and scholars think.

¹⁰⁷*Ibid.* at 342.

¹⁰⁸Much space is devoted in *Law’s Empire*, *supra*, note 5, to explaining the “interpretive” process as a means of using those reflections that derive from our participation in a society as a means of construing the meanings of words in that society. A poem can be read, but the words on the page have meaning only insofar as there is a commonality of experience that allows the reader to under-

This theory is a synthesis of Rationalism and Structuralism, using appeals to reason to provide the value structure for the democratic system the constitution is said to protect. It does, however, suffer from the same flaws as the schools it synthesizes.

Firstly, although Dworkin points in the right direction when he asks us to interpret constitutional wording and larger terms like "democracy" within our common social understanding of the terms, his assertion that his account is the "best" that can be found may be controversial. The claim that democracy is a set of values rather than a process for determining them is necessary to justify any form of judicial review other than simply policing election fairness (hence Ely's failure), but we then fall back on the problem of who is to construe those values for us. It might, for instance, be controversial as to whether the fundamental notion of equality that is a necessary component of democracy entails equality of "stake" to all *individuals*, and thus an elaborate form of equality of *opportunity*; or whether it entails a recognition of historical *subordination*, and thus a determined effort to aid the disadvantaged so as to overcome their prior mistreatment.¹⁰⁹ There are, of course, major practical differences that flow from this controversy; there are also major intellectual differences in the visions of society it embodies. Who is to choose between these competing claims? According to Dworkin, one can, through reflection and logic, determine which of these "conceptions" of equality is more integral to the contemporary "concept" that that word involves.¹¹⁰ We can therefore "understand disabling constitutional provisions not as compromising democracy but as an important part of the democratic story."¹¹¹

He does not explain why courts are better able to do this than legislatures. One would presume that if these "conceptions" indeed represent the most accurate determination of contemporary meanings of democracy, legislators would share them and judicial review would not be needed.

Assuming, however, that the meaning of democracy can be understood in the fashion he sets out, and assuming further that judicial review is required to

stand the motives, purposes and concerns it supposes the speaker to have. While it is the reader whose value-structure informs the interpretive process, our collective experience is said to permit us to "say that all interpretation strives to make an object the best it can be" (*ibid.* at 53). Dworkin believes as does Wittgenstein that we share "a form of life sufficiently concrete so that the one can recognize sense and purpose in what the other says and does" (*ibid.* at 63), such that we might disagree about what we should do, but agree as to what society generally recognizes as the content of a concept (*ibid.* at 64). It is said by Dworkin to follow from this theory of meaning that we can strive for, and recognize, superiority in interpretation within a particular culture.

¹⁰⁹See "Rights in Conflict," *supra*, note 3 at 538; West, *supra*, note 5 at 693-99.

¹¹⁰*Law's Empire*, *supra*, note 5 at 70. A concept is analogized to a tree; a conception to its branches. His example is the medieval idea of courtesy. "Courtesy is about respect" is the concept; "Courtesy requires that men rise when women enter the room" is a conception of the concept.

¹¹¹"Equality, Democracy, and Constitution," *supra*, note 5 at 344.

ensure that all legislation is "democratic" in that sense, an attempt to apply his principles readily reveals that they themselves will often be in opposition to each other. This reveals (at the very least) that there is no simple "rational" value-free way to apply them.

Consider, for example, *Keegstra*.¹¹² In that case, the Supreme Court of Canada held legislation aimed at suppressing the intentional incitement of racial hatred to be a reasonable limit on freedom of speech. How would Dworkin's theory have helped decide that case?

On the one hand, Dworkin declares that the principle of *independence* requires the state to see "moral and ethical judgment as their own [the citizens'] responsibility rather than the responsibility of the collective unit,"¹¹³ which argues for constitutional invalidation of the legislation as a measure of State imposition of its anti-racist ethical judgment on its racist citizens. On the other hand, his concept of democracy includes the principle of *stake*, which says that "a person is not a member of a collective unit sharing success and failure unless he is treated as a member by others,"¹¹⁴ in which case there ought to be constitutional protection *from* the type of speech suppressed in *Keegstra*. To resolve this contradiction, it is necessary to make reference to some principle of ranking, which places priority on one or the other of these imperatives within the context presented by the impugned statute. This involves the development of normative, substantive standards that go beyond the definition of democracy Dworkin has provided. Just as process is not everything, neither can democratic values be subsumed by any allegedly complete statement of principles.

Dworkin's failure is not one of effort; it is not as if more work, time, and paper would enable him to provide us with ways of ranking his principles and applying them to individual cases. Rather, it points out the limits of the appeal to "reason" to solve constitutional dilemmas. His agenda is to draw out our fundamental social values from our shared meanings; that he has derived any principles at all is impressive, but the breadth and vagueness of those he has found attest to the degree of real controversy within society. On his terms, our "concepts" of democracy may be shared, but our "conceptions" are not. It is the appeal to an illusory consensus that limits his work: where some consensus can truly be found, Dworkin's theories may hold. Where it cannot, he appears more as a Romantic than as a constitutional theorist.

A similar criticism can be made of Dworkin's many followers. Consider, for example, Mr. Justice Kerans (of the Alberta Court of Appeal), who wrote in 1989 that the problem of majoritarianism was serious and that "without great care, the courts in the future could make an unholy mess of the Charter."¹¹⁵

¹¹²*Supra*, note 20.

¹¹³"Equality, Democracy, and Constitution," *supra*, note 5 at 340.

¹¹⁴*Ibid.* at 339.

¹¹⁵R.P. Kerans, "The Future of Section One of the Charter" (1989) 23 U.B.C. L. Rev. 567 at 568.

Dworkin attempted to resolve the problem by stating that judicial review is tyranny in action unless the judge exercises his or her power with "integrity."¹¹⁶ To Kerans, "integrity" is "a rational attempt to tie any validation of a s. 1 limit to ideas about rights and good government that have solid *acceptance* in our society."¹¹⁷

What does it mean to say that ideas have solid acceptance in society? Does it mean that there is a consensus in favour of a conception of "rights and good government"? If so, it is hard to understand why a legislature would need review. If it contemplates something less than consensus, it does very little to constrain judicial subjectivity.

Assuming this is correct, of what value is Kerans' discussion about "solid acceptance"? It might serve to dissuade a judge from idiosyncratic value judgments that he or she knows are outside the accepted bounds of contemporary community thought, but it does not explain how to choose from competing judgments that are within those bounds. However, the majority of constitutional choices must be made in that middle realm in which there is honest disagreement between or among "solid" blocs of the community. In those circumstances, the Kerans argument, like that of his mentor Dworkin, does little to solve the "mighty problem."

4. Conclusion

The attempt to resolve the normative indeterminacy left outstanding by the Rationalists can only be commended. The Structuralists have done yeoman services in the effort to reduce judicial discretion by tying constitutional authority to values that *might* serve to empower society's weaker members. Unfortunately, their service can go no further than to stress those values. If their arguments are accepted, the courts might be guided in an egalitarian direction, but it remains the courts that must resolve the controversies about what these vague and lofty phrases mean in concrete applications. This remains a value-laden exercise despite the best efforts of the Structuralist scholars; their failure is in trying to mask the extent to which the judiciary has been given authority to make society's difficult normative choices.

¹¹⁶See *Law's Empire*, *supra*, note 5 at 95-96:

[Law as integrity] supposes that law's constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does... [Integrity] argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification.

¹¹⁷Kerans, *supra*, note 115 at 569.

D. Institutional Arguments

1. The Centralizing Function of Judicial Review

Whether or not its drafters intended it, one of the effects of judicial review is that it constitutes the judiciary as an institutional means of imposing centralized political values on local bodies across a diverse political landscape. The highest courts in Canada, the United States, and other countries that permit of judicial review are organs of the *central* government rather than any of its constituent bodies. Given authority to review statutes of constituent bodies, they do so by imposing on those lesser legislatures their interpretation of “liberty,” “fundamental justice,” and other “lofty ideals.”¹¹⁸

In a world in which different provinces (for example) have different legislation on the same subject, they have made different value-judgments respecting regulation. A constitution with a central court has the effect of requiring them to adhere to common norms in respect of those values found in the constitution. “Liberty,” and other similar constitutional phrases, are to have the same meaning from one end of the country to another. A simple example might explain the process and the reason why even United States critics like Sandalow, who are generally hostile to judicial review, might approve of it as a control over state and local legislatures.¹¹⁹

As late as 1967, the State of Virginia had legislation that prohibited “miscegenation,” the marriage of black and white. When the United States Supreme Court found that this violated the “equal protection” clause of the *Constitution*,¹²⁰ its judgment had the effect of making a backward State conform to national norms of justice. Absent a federal constitution, and a Supreme Court willing to interpret it to cover the case, the statute would have remained in force until Virginia’s own legislature felt that the prohibition could no longer be maintained.

That constitutionalism is a form of normative centralism has been made plain in judgments in various jurisdictions. For example, in *Edmonton Journal v. Alberta*,¹²¹ Alberta legislation that prevented the press from reporting on most of the details of divorce proceedings was found to be a violation of s. 2(b) of the *Charter*, not saved as a “reasonable limit” under s. 1. In part, this was because Alberta was the only province with this type of restriction.¹²²

¹¹⁸“Canada’s Charter Flight,” *supra*, note 3 at 152.

¹¹⁹“Judicial Protection of Minorities,” *supra*, note 5 at 1187- 94. To Sandalow, where large numbers of states adopt similar rules, the courts should defer as they do to Congress; however, the federal courts should not hesitate to impose their definition of constitutional values upon isolated states.

¹²⁰*Loving v. Virginia*, 388 U.S. 1 (1967) [hereinafter *Loving*].

¹²¹[1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577 [hereinafter *Edmonton Journal* cited to S.C.R.].

¹²²*Ibid.* at 1350, Cory J.

In *Griswold v. Connecticut*,¹²³ the United States Supreme Court first proclaimed that personal privacy rights were a protected form of "liberty" as defined in the 14th Amendment, and invalidated a Connecticut statute that criminalized dispensation of birth control devices. In discussing the source of authority for what was a radical innovation in constitutional law, Harlan J. stated that one of the factors that he considered was that Connecticut was the only State with similar legislation.

The European Court of Human Rights acts as a supra-national tribunal for human rights complaints from the 23 member States of the Council of Europe.¹²⁴ Its treaty authority is to construe the *European Convention on Human Rights*, a constitution-like document that promises, among other rights, protection against "degrading and inhuman treatment."¹²⁵ In *Tyrer v. United Kingdom*,¹²⁶ that court heard a complaint as to the institution of "birching" in the Isle of Man. Although corporal punishment was considered acceptable in the Isle of Man, it was held to violate an "emerging European consensus" as to what constituted degrading and inhuman treatment, and to constitute a violation of the *Convention*.

Central constitutions serve to curb local divergences from larger entity norms not only on matters of personal freedom, but also on more "political" issues, in which nationalism within a smaller body leads to distinctive legislation in matters that affect inter-cultural relations. While the desirability of this effect may be debated,¹²⁷ its existence is made most obvious in Canada by the history of the *Charter* and Quebec nationalism.

A good argument can be made that a major impetus behind the repatriation of the Canadian Constitution and the development of the *Charter* was the desire

¹²³381 U.S. 479 (1969).

¹²⁴The system is created by the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Euro. T.S. 5 [hereinafter *Convention*]. As of 1 January 1990, there were 23 States that had ratified the *Convention*: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Since then, Hungary and Czechoslovakia have joined the Council of Europe.

The *Convention* was proclaimed in force in 1953 and to 1 January 1989, 160 judgments had been given by the Court. Each member State sends one judge to the Court. It sits in panels of seven or more judges, with the judge who is a national of the responding State as a member of each panel. There is a great deal written on the *Convention* and its organs. For a particularly helpful analysis, see J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester U. Press, 1988). Since all its bodies sit in Strasbourg, France, I will sometimes refer to the *Convention* and its structures by reference to Strasbourg.

¹²⁵*Convention*, *ibid.* art. 3.

¹²⁶(1978), Eur. Court H.R. Ser. B, No. 24, (*sub nom. Tyrer v. United Kingdom*) 2 E.H.R.R. 1 [hereinafter *Tyrer*].

¹²⁷For example, Mandel sees it as a situation in which the court "was pressed into service on the side of a socially dominant minority, representing powerful outside forces, in its struggle against the dominated local majority" (*supra*, note 2 at 125).

of the Trudeau government to curb Quebec unilingualism.¹²⁸ This best explains s. 23(1)¹²⁹ of the *Charter*, and the decision in *Ford v. Attorney General of Quebec*.¹³⁰

The *Ford* case involved a challenge by English-language shopkeepers to Quebec legislation requiring that public signs be posted in French only, and that only the French version of a firm name be used in Quebec. The objective, found reasonable by the Court, was to respond to the vulnerable position of the French language in North America, and to create a "visage linguistique" that would reinforce the primacy of French in Quebec.

This statute challenged a major tenet of the federalist politics of the era, and it is therefore not surprising that the Court invalidated it. A right to "commercial freedom of expression"¹³¹ in s. 2(b) of the *Charter* was found and the

¹²⁸For example see *ibid.* at 17 where Mandel states:

It is enough to know that from very early on Trudeau felt that bilingualism was unattainable without the constitutional entrenchment of specific French/English minority language and language of education rights throughout the country. ... Trudeau believed that the attachment of the popular, indeed increasingly irresistible, idea of a general constitutional bill of rights to any amending proposal would immeasurably enhance its chances of success. And tucked away somewhere in the general bill of rights would be the key to the whole enterprise, entrenched minority language rights.

He specifically quotes Trudeau from a 1967 address to the Canadian Bar Association while he was Justice Minister: "We all agree on the familiar basic rights... . But there are rights of special importance to Canada arising, as I have said, from the fact that this country is founded on two distinct linguistic groups." P.E. Trudeau, "A Constitutional Declaration of Rights" in P.E. Trudeau, ed., *Federalism and the French Canadians* (Toronto: Macmillan, 1968) 52 at 55. See also Weiler: "The hope was that such a Charter would preserve a united Canada in the face of the serious threat imposed by French Canadian nationalism within a potentially independent Quebec" (*supra*, note 36 at 51). Language is both the major divisive force and the major national obsession in Canada, just as race is in the United States. Not surprisingly, the Constitution is expected to play a large role in resolving Canadian linguistic relations, as it is expected by Americans to play a large role in resolving race relations. In both instances, there is an official national philosophy that is not accepted in all regions: integration in the United States, bilingualism in Canada. I am not trying to make the problems out to be the same (clearly they are not), but merely to point out how the centralizing function of judicial review serves to involve the courts in the nations' most intractable political problems.

¹²⁹The section reads:

23.(1) Citizens of Canada

- (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
 - (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
- have the right to have their children receive primary and secondary school instruction in that language in that province.

¹³⁰*Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [hereinafter *Ford* cited to S.C.R.].

¹³¹*Ibid.* at 754ff.

Quebec statute was held to violate this right; furthermore, the statute was held not to be tailored so as to be a "reasonable limit" to the s. 2(b) right.

No case better exemplifies the "political" nature of constitutional adjudication. The indeterminacy of the *Charter* text may have permitted a finding that Ford's business was an "everyone," and that Quebec's s. 1 rationale was inadequate, but it certainly did not require it. This decision set off a storm in Quebec, resulting in the use of the "notwithstanding" clause¹³² and a rise in mutual antagonism between English and French Canada generally.¹³³

Looking at the *Charter*, or indeed at all central constitutions, as centralizing documents, enables us to understand both one set of objections to constitutionalism and one set of justifications. If one takes *Loving*¹³⁴ or *Tyrer*¹³⁵ as the paradigm, Sandalow's statement that "it is generally understood that those responsibilities are to be performed within the framework of norms that the larger society regards as fundamental"¹³⁶ is appealing. If, however, one takes *Ford* as the paradigm, the "mighty problem" remains unanswered: on the basis of what authority does the Supreme Court inform the elected government of a province that it cannot enact its legislative agenda?

Even where local tyranny justifies central judicial review, that review retains a problematic nature. The central courts have the uncontrolled discretion of deciding which local statutes sufficiently infringe on central norms to warrant scrutiny. In both Canada and the United States, the legislative authority of the two levels of government is fixed by the constitution; allowing wider latitude for judicial review of the statutes of the lower level has the effect of undermining the division of powers. The process permits the federal government to appoint judges with the power to vigorously enforce the constitution against the lower levels of government, even where they are acting within their allotted sphere of powers.

2. Courts and Legislatures: Differences in Focus

Although the responses to the majoritarian dilemma are incomplete, this does not mean that judicial review serves *merely* to second-guess the legislature

¹³²*Charter*, s. 33(1):

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

By s. 33(3), such declarations subsist only for 5 years, but, by s. 33(4), they are renewable. S. 33 will be discussed below, part II.C.2.

¹³³*Legalization of Politics*, *supra*, note 2 at 1-84.

¹³⁴*Supra*, note 120.

¹³⁵*Supra*, note 126.

¹³⁶"Judicial Protection of Minorities," *supra*, note 5 at 1187.

as to the wisdom of its policies. It is argued that, institutionally, judicial review has a functional role in reweighing legislative choices with a different focus. Because courts are looking at statutes from the constitutional standpoint, they are asking themselves somewhat different questions than the legislature. Where the legislature asks itself what is best for *society* as it conceives it, the court reviews that enactment on the basis of what is best for *democracy* as it conceives it. The difference is subtle, but may be real.

Consider, for example, a case like the *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Manitoba)*.¹³⁷ In that case, the Supreme Court of Canada was asked to decide on the constitutionality of a provision of the *Criminal Code* which created the offence of communicating for the purpose of prostitution. While there was some judicial disagreement as to Parliament's objectives,¹³⁸ all agreed that the legislative branch had looked at the statute from the perspective of how best to solve the social problem it identified. The Court's role, on the other hand, was different: it was to determine whether there had been sufficient compliance with the Constitution's protections of liberty, and of freedom of expression. Accordingly, its analysis did not duplicate that of Parliament: it was mandated to take a different focus on the same legislation.

This, generally, is the theory of constitutional review, and the theoretical underpinning of both s. 1 of the *Charter* and the test for its application set out in *R. v. Oakes*.¹³⁹ When the Supreme Court has applied the *Oakes* test, it has accepted the legitimacy of the legislative objectives in almost all cases. The only significant exceptions are those in which the purpose of the statute was to discriminate on the basis of religion,¹⁴⁰ and instances where the legislative objective was directly and obviously contrary to the *Charter*.¹⁴¹ In the result, the Court has claimed to avoid judging the "wisdom" of the legislation judged in

¹³⁷[1990] 1 S.C.R. 1123, 68 M.R. (2d) 1 [hereinafter *Reference Re Criminal Code (Man.)*] cited to S.C.R.].

¹³⁸Dickson C.J. for the majority found it to be to curb the exposure of prostitution and to protect women and children from that way of life; Lamer J., in his concurring opinion, found the objective to be one step towards the eradication of prostitution, an inherently degrading activity, while Wilson J., in her dissent, found it to be control of the social nuisance the public display of prostitution can create.

¹³⁹[1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes*].

¹⁴⁰*R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, invalidating the federal *Lord's Day Act*, a statute restricting Sunday shopping on an explicitly religious basis; *Zylberberg*, *supra*, note 19, invalidating mandatory recitation of the Lord's Prayer in the public schools; *Canadian Civil Liberties Association*, *supra*, note 19, following *Zylberberg* on mandatory religious instruction.

¹⁴¹In *Quebec Association of Protestant School Boards v. A.G. Quebec*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321, the Court invalidated Quebec legislation refusing access to English-language education when a very explicit s. 23, drafted with statutory rather than constitutional precision, required such access.

the abstract,¹⁴² claiming instead to be measuring that objective, its means, and its effects, against the impairment of the constitutional right.

This is only partly accurate. Even if the legislature is permitted to choose its own objectives (absent uncontroversial conflict with *Charter* requirements), the court is free to determine what those objectives are, and thereby to influence its subsequent balancing exercise.¹⁴³ Furthermore, in determining if the means are "rationally connected" to the objective, the court is ruling precisely on the *wisdom* of the statute. "In a very real sense, s. 1 can almost be said to require the courts to review the wisdom of legislation."¹⁴⁴

The proportionality questions, both as to the importance of the objective, and as to the effects of the legislation, when weighed against the impairment of the *Charter* right, are normative questions rather than accounting questions, but are not necessarily the same normative questions as those asked by the legislature. *Oakes* is a good example.

Oakes involved a challenge to the constitutionality of a provision of the *Narcotics Control Act* that placed the onus on a person accused of possession of narcotics for the purpose of trafficking to disprove that purpose if found guilty of possession. The Court found that this violated s. 11(d) of the *Charter*.¹⁴⁵ Although the objective of curbing drug trafficking by facilitating the conviction of drug traffickers was sufficiently important to pass the first part of the proportionality test, it could not justify requiring an accused known at that point to merely be a possessor, to disprove the claim that he or she was intending to traffic. This is a value choice, as is inevitable when courts are deciding if limits are reasonable and demonstrably justified under s. 1 of the *Charter*. This value choice, however, relates to a somewhat different question than the one asked by Parliament: not merely how best to curb drug traffic, but also when reverse onus offenses are unjustifiable limits on the presumption of innocence.

The impugned provision pre-dates the *Charter*, and it is therefore facile to say that Parliament did not direct itself to s. 11(d) when it enacted it. Regarding pre-1982 legislation, *Charter* review can be seen as the first opportunity for a

¹⁴²*Operation Dismantle v. Government of Canada*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 where Wilson J. stated that the Court is not to "express its opinion on the *wisdom* of the executive's exercise" of its powers, at 472.

¹⁴³Thus, in *Reference re Criminal Code (Man.)*, *supra*, note 137, Wilson J. found the means enacted in the statute disproportionate to the objective she had isolated, while the majority found it proportionate to the objective it had found. This is one example of a very common process.

¹⁴⁴See Elliot, *supra*, note 48 at 296.

¹⁴⁵The section reads as follows:

11. Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

decision-maker to explicitly weigh the statute against constitutional norms.¹⁴⁶ However, the point applies equally well to more modern statutes: while one should not *presume* legislative indifference either to the Constitution or to its underlying ethos, such indifference may often be found, even in a statute that deals with issues of "principle" rather than "preference."

In some instances the Court's inquiry will look the same as that of a legislature: is this classification "reasonable"? Is this police tactic "fair"? However, it will only be so when the legislature has given the right or freedom high priority in its own deliberations. This may fail to occur for two reasons. Firstly, the constitutional issue may have been overlooked in the debate.¹⁴⁷ Secondly, the politicians may have decided it was not politic to yield to it.

Thus, for instance, in an era of widespread concern of drug trafficking, politicians might be prone to enact legislation that aims at deterrence, while deliberately disregarding the interests of the accused. When crime is of particular concern, legislatures might pass legislation that deliberately infringes the right against self-incrimination,¹⁴⁸ having determined that the constitution gets in the way of its agenda. In these common situations, judicial review serves to alter the weight attributed to the considerations which are the same as those before the legislature, such that the constitutionally protected right receives greater weight.¹⁴⁹ Because the focus is different, so, on occasion, is the result.

Like other responses to the problem of democracy, this answer is only partially successful. It explains how judicial review is more than simply an undemocratic feature of society, but does not answer the main thrust of the majoritarian critique: if the public wants to limit the right to silence, why should it not be able to? Why should the value judgments of yesterday constrain the choices of today or tomorrow? If politicians who must stand for re-election believe that certain steps are necessary to protect the public from harm, why should unaccountable judges be able to intervene?

¹⁴⁶This may well argue for a proposal like Sandalow's, "Constitutional Interpretation," *supra*, note 5, in respect of pre-1982 statutes: invalidate them for *Charter* non-compliance, but uphold them if re-enacted thereafter.

¹⁴⁷My comments in the previous note apply equally well here.

¹⁴⁸A prominent U.S. example is the *Omnibus Crime Control Act* (1968), 18 U.S.C. 223, s. 3501, enacted in part to reduce the impact of various cases controlling police practices, namely *Miranda v. Arizona*, 384 U.S. 436 (1966); *McNabb v. U.S.*, 318 U.S. 332 (1943); *Mallory v. U.S.*, 354 U.S. 449 (1957).

¹⁴⁹*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 218, 17 D.L.R. (4th) 422, Wilson J.:

The issue in the present case is not simply whether the procedures set out in the *Immigration Act, 1976* for the adjudication of refugee claims are reasonable; it is whether it is reasonable to deprive the appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice.

The inherently countermajoritarian nature of judicial review is clearly exposed in these situations. The Constitution yields such power to the judges, and yet its text does not fully constrain the courts in their use of that power. That the judges focus on different considerations does not change the fact that the answers they provide must constrain society as a whole.

II. Diminishing the Scope of the Problem: Constraints upon Judicial Power

A. Introduction

My journey through various, although by no means all, constitutional theories in Canada and the United States has provided us with some partial responses to the “mighty problem,” in the form of arguments providing *some* explanation as to why the courts might legitimately impose values on the “democratic” structures of government. Arguments canvassed were: the otherwise unaccountable nature of the practices of state actors, the centralizing function of constitutionalism, the ability to focus on individual impact, and the ability to focus more directly upon the constitutional right rather than the more global public good. Each of these accepts the countermajoritarian nature of constitutionalism, but provides a more or less satisfactory explanation for why it might be tolerated — at least in some instances. Yet none of them has fully come to grips with the heart of the problem, namely the inability of the public to change the doctrine the court has created. In my submission, this is because the point can ultimately not be answered.

Mandel, Petter, and Tushnet argue, as seen earlier,¹⁵⁰ that judicial discretion is, for all intents and purposes, untrammelled, such that “in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants,” in that a judge is “free to enforce his or her personal values, as long as the opinions enforcing those values are well written.”¹⁵¹ If this is accurate, the failure of constitutional theory to provide an adequate answer to the claim that unaccountable courts are free to impose their values on the public should cause great fear of judicial caprice and ultimately tyranny. The purpose of this section of the paper is to consider factors that restrain judicial subjectivity.

B. Linguistic and Interpretive Constraints

A major constraint is the simple fact that judges live within society and share both a value structure and a system of “meaning” with that society. Their “grounding” within society tends to constrain their analysis and to impose view-

¹⁵⁰See *supra*, notes 2, 3, 5 and accompanying text.

¹⁵¹Tushnet, *supra*, note 5 at 819.

points that are consistent with social thinking. This is what Kerans means when he talks about ideas having solid acceptance within society.¹⁵²

Dworkin develops this analysis in *Law's Empire*.¹⁵³ To him, judges are involved in interpretation of the law. They determine the full meaning that a common law concept, statutory provision, or constitutional requirement, has in the society within which they are interpreting. Society being not merely an aggregate of unconnected individuals, but rather a collective entity within which meanings and ideals are shared, judges who live within a society are capable of determining how that *society* (not just themselves as individuals) interprets that law.¹⁵⁴ We all share paradigms of complex concepts, such that meanings that conflict with the paradigms are unacceptable interpretations. An eloquent version of the same argument is made by White:

It [the law] is a way of creating a rhetorical community over time. It is this disclosure, working in the social context of its own creation, this language in the fullest sense of the term, that *is* the law. It makes us members of a common world.¹⁵⁵

An example will likely make this more clear. I have already made reference to *Tyrer*,¹⁵⁶ the Isle of Man "birching" case. The European Court of Human Rights decided, in effect, that the meaning of "inhuman or degrading treatment" had changed in post-war Europe such that their paradigm of the concept extended beyond its earlier, more limited applications, to also include State-inflicted corporal punishment. Reference to an emerging European consensus can be understood to explain the process Dworkin describes, namely a shift in social meaning of a concept that is felt throughout society and enables judges to interpret the law, changing it in accord with social and cultural change.

If judges are interpreters rather than legislators, they should approach a constitutional problem by placing it within their understanding of the practice of the society in which they live. In other words, the *Tyrer* court should be asking itself not if it *approves* of corporal punishment, but if it believes that modern Europe would find it degrading. While the distinction may be subtle when the court is construing extremely vague terms like "fundamental justice" or "demonstrably justifiable," it is somewhat clearer in construing slightly less vague terms like "freedom of religion" or "the right to be tried without unreasonable delay."

Dworkin becomes less persuasive when he moves beyond this theory of meaning to argue that the content of a term can be understood with sufficient

¹⁵²*Supra*, note 115 at 568.

¹⁵³*Supra*, note 5 at 5-96.

¹⁵⁴*Ibid.* at 55: "a social scientist must participate in a social practice if he hopes to understand it, as distinguished from understanding its members."

¹⁵⁵J.B. White, *When Words Lose Their Meaning* (Chicago: U. of Chicago Press, 1984) at 266.

¹⁵⁶*Supra*, note 126.

certainty that a judge can identify the "best" interpretation of it, and thereby give the "right answer" to the constitutional question he has to face.¹⁵⁷ A more modest version of his claims is made by Sandalow:

No doubt, the choice is constrained. A lawyer could not convincingly argue that, in a constitutional sense, imprisonment is "cruel," nor could he convincingly deny that maiming is. The contrary judgment is in each case too widely and deeply accepted. Judgments such as these are the starting points from which one begins in constructing principles. But there are also more doubtful judgments and, in deciding which is to be taken into account and which ignored, choice is inescapable.¹⁵⁸

While it is certainly the case that shared social practice creates shared meanings, it would be wrong to view any community as if all practice within it were shared. Just as it cannot plausibly be argued that there is *no* social consensus from which to analyze moral problems (were that the case, there would be no language with which to discuss them), nor can it plausibly be argued that we have all developed the same idea of "equality," "justice," or "democracy" through common experience. To use an extreme example, a native person raised on an impoverished reserve will feel differently about these ideas than would a well-nourished and well-educated lawyer in a major city, even a lawyer that was sympathetic to the plight of the native person. There is a commonality of culture, manifested by a common language, access to similar goods and services (albeit in different quantities), education according to a common curriculum and with a similar educational philosophy (albeit with different quality), and socialization by the same films, music, and, especially, television. Yet there are also major differences in experience as to economic circumstances (hunger can be a very formative experience), family patterns, history and heritage, and experiences of racism and rejection. How can Dworkin account for these? Do they live in the same community? The answer must be "yes and no." Do they share the same values? Do they attribute the same meanings to words? Again, we must come to the same answer.

The difficulty with the argument from shared language to normative consensus is not that it is entirely wrong, since language and common practice do shape values, but that it exaggerates the extent of common experience within the societies in which judges operate. Accordingly, the constraints of culture and language operate to limit judicial subjectivity, but not to abolish it.

C. *Political and Formal Constraints*

1. Process Constraints: Amendment and Judicial Selection

In addition to the cultural and linguistic constraints I have considered, there are also certain political and formal constraints that operate upon the court as an institution.

¹⁵⁷*Law's Empire*, *supra*, note 5 at viii.

¹⁵⁸"Judicial Protection of Minorities," *supra*, note 5 at 1170.

A constitution can be amended, although this is not a simple matter. For example, in the history of the United States between the two world wars, the Constitution was amended both to require and later to repeal Prohibition.¹⁵⁹ The proposed Meech Lake amendments to the Canadian Constitution also illustrate the possibility of amendment. However, in contemporary North America it has become difficult enough that it is not a realistic response to judicial "creativity." Thus, in the United States, the *Equal Rights Amendment* failed despite receiving federal approval and the approval of 35 of 50 states (38 were needed), while in Canada the Meech Lake amendments failed despite federal approval and the approval of 8 of 10 provinces (all 10 were needed). Of course, if there is massive popular support for a constitutional amendment it will succeed; it is difficult, however, to imagine that a supreme court could be so out of touch with public opinion as to issue a judgment that would be so overwhelmingly opposed.

Although judges are appointed for life, they do turn over with some frequency. Accordingly, the executive branch (in the United States, with the concurrence of the Senate) is able to appoint judges as they die, retire, or resign. In Canada, this has enabled the present Conservative government to appoint seven of the present nine justices of the Supreme Court.¹⁶⁰ In the United States, the Reagan-Bush administration has been able to appoint five of nine.¹⁶¹ In both countries, the incumbent regime has been able to appoint its choice of Chief Justice. While this does not make any particular judge accountable, it does allow the "political" branches to retain some control over the future direction of the Court.¹⁶² In the United States, this process has become highly politicized,¹⁶³ while in Canada, despite academic calls for revising the judicial selection process,¹⁶⁴ it has remained a secretive procedure within the federal Cabinet.

There is a heavy political price to pay for exposing judicial selection to intensely ideological procedures, because the image of the Court as "above" the partisan political process (on which much of its "legitimacy" depends) can be

¹⁵⁹U.S. CONST. amend. XVIII was passed in 1919, and repealed in 1933 by the passage of U.S. CONST. amend. XXI.

¹⁶⁰Only Lamer C.J. and La Forest J. remain from the earlier period. Since 1984, Dickson C.J., Wilson, Beetz, Chouinard, McIntyre, Estey, and Le Dain, JJ., have all retired or resigned, and been replaced by Stevenson, Iacobucci, Gonthier, L'Heureux-Dubé, McLachlin, Sopinka, and Cory, JJ. The Dickson and Wilson retirements are the most recent (both participated in *Keegstra*, *supra*, note 20 and *McKinney*, *supra*, note 21) and their effect is still unknown.

¹⁶¹O'Connor, Scalia, Kennedy, Souter, Thomas JJ.

¹⁶²Cappelluti, *supra*, note 5 at 42; R.A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-maker" (1957) 6 J. Public Law 279 at 294.

¹⁶³See T. Sandalow, "The Supreme Court in Politics," Book Review of Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (1990) 88 Mich. L. Rev. 1300. The politicization of the nomination process is most recently demonstrated by the Clarence Thomas hearings.

¹⁶⁴See for example Bayefsky, *supra*, note 60 at 832.

tarnished. This paper does not argue for the United States system.¹⁶⁵ The point, however, is that *in limine* there is executive (and, in the United States, legislative) control over the future direction of the Court, but that the practical application of this constraint on the Court is costly, because the image of the “Rule of Law” suffers in the process.

2. “Made in Canada” Constraint: Section 33

In Canada, there is a constitutional constraint on judicial lawmaking that is both unique and controversial. During the Trudeau era, one of the Prime Minister’s major projects was the development of the *Charter* and the repatriation of the Canadian Constitution. The process required that he win over the provincial Premiers, many of whom were lukewarm about the project. A major objection was regarding the undemocratic nature of judicial review.¹⁶⁶ The debate continued through various drafts of the *Charter*,¹⁶⁷ during which the bargaining position of the federal government stiffened as public opinion came to be won for the project.¹⁶⁸ This enabled the federal negotiators to insist upon an activist review provision, the present s. 1 of the *Charter*.

The provinces responded by insisting on s. 33,¹⁶⁹ which enables them to “override” the *Charter* for up to five years in respect of most, but not all, *Charter* rights. Without this provision, it is unlikely that there would have been a constitutional accord with the provinces.¹⁷⁰ Thus one can see not only an intel-

¹⁶⁵I would, however, argue for the reform of the present system wherein a federal Cabinet could, if it wished, use its appointment power for blatantly political ends. That this has not been done to the Supreme Court in the *Charter* era is fortunate, but safeguards against its likelihood should be enacted. The best solution would probably be the creation of a widely representative hiring body that would take applications for both Supreme Court and provincial court of appeal positions, which would question prospective candidates as to their qualifications and, within bounds, their intellectual, legal, and ideological biases, in untelevised proceedings. This topic could be explored further, but it would require a paper of its own.

¹⁶⁶For example, the 1968 position paper of the Premier of Alberta stood for the proposition that “judicial review is a most undemocratic procedure, since it gives the court power to substitute their opinions for those of the electorate” (H. Strom, *Alberta’s Position on Reports of Sub-Committees On Fundamental Rights and Judicial Review* (Ottawa: Queen’s Printer, 1968) at 13-14, cited in J. Hiebert, “The Evolution of the Limitation Clause” (1990) 28 *Osgoode Hall L.J.* 103 at 110).

¹⁶⁷1971; 1978; 1980 (two drafts and an amendment); and the final text. Hiebert, *ibid.* at 107-27.

¹⁶⁸*Ibid.* at 126-27; see also *Legalization of Politics*, *supra*, note 2 at 23, in which he cites public opinion polls in the fall of 1981 that asked whether Canadians supported a bill of rights that would “provide individual Canadians with protection against unfair treatment by any level of government in Canada.” Not surprisingly, given the wording of the question, the polls showed 82% in favour in one poll and 72% in the other.

¹⁶⁹Note that the “notwithstanding clause” does not apply to all the protected rights and freedoms; most significantly, it does not apply to the right to minority language education. See L. Weinrib, “Learning to Live with the Override” (1990) 35 *McGill L.J.* 541 at 563, for history and analysis of the provincial positions during the pre-enactment negotiations.

¹⁷⁰*Legalization of politics*, *supra*, note 2 at 75. The Supreme Court of Canada held that the federal government could legally seek constitutional amendment without provincial concurrence, but

lectual, but in fact, a political trade-off between activist judicial review and the "notwithstanding" clause.

There has been some resort to s. 33. Saskatchewan enacted a s. 33 override to "back to work" legislation involving dairy workers, after the Saskatchewan Court of Appeal declared the statute unconstitutional and before the Supreme Court of Canada reversed that judgment.¹⁷¹

In 1982, Quebec enacted a general statute making all its legislation subject to a s. 33 override.¹⁷² The Quebec Court of Appeal¹⁷³ found this attempt to impose the override generally on all legislation, rather than on each statute individually to be unconstitutional.¹⁷⁴ This question became moot when the 1985 provincial election resulted in a victory for the more federalist Liberals, who repealed the 1982 statute.¹⁷⁵

The next, and most controversial, recourse to s. 33 arose as a result of the *Ford*¹⁷⁶ judgment, which declared the Quebec statute requiring French-only signs to be a violation of s. 2(b), a provision that is subject to s. 33. A new statute, similar in scope, was enacted by the Quebec legislature with an override provision.¹⁷⁷ This action, popular in Quebec, created an outcry in the rest of Canada, making s. 33 a "symbol of evil,"¹⁷⁸ something that the Saskatchewan override failed to do.¹⁷⁹

Because s. 33 is an unusual provision, because we have only limited experience with it, and because of the highly political nature of the Quebec "over-

that there was a "convention" that it should not do so: *Re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1. Trudeau maintains that this decision forced him to seek provincial approval for the (then) draft *Charter*, as it was "effectively impossible for the federal government to proceed to Westminster with any hope of success." He therefore agreed to include s. 33 in the *Charter* in order to win the provinces over to the document. He succeeded in the case of 9 of the 10 provinces. This aspect of the history was provided by P.E. Trudeau, "Convocation Speech at the Opening of the Bora Laskin Law Library" (1991) 41 U.T.L.J. 295.

¹⁷¹*Re Retail, Wholesale & Department Store Union and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609 (Sask. C.A.); rev'd [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277, part of the "labour trilogy." For discussion see *Legalization of Politics*, *supra*, note 2 at 77.

¹⁷²*An Act Respecting the Constitution, 1982*, S.Q. 1982, c. 21. For discussion, see *Legalization of Politics*, *ibid*.

¹⁷³Bear in mind that in Canada all provincial appellate judges are appointed by the federal government, per s. 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3.

¹⁷⁴*Alliance des Professeurs de Montreal v. A.G. Quebec*, [1985] C.A. 376, 21 D.L.R. (4th) 354 (C.A.).

¹⁷⁵However, this did not prevent the Supreme Court of Canada from overruling the Quebec Court of Appeal and holding that the "blanket" override was lawful, except in respect of provincial legislation that pre-dated its enactment: see *Ford*, *supra*, note 130. For an elaborate critique of this aspect of the *Ford* judgment, see Weinrib, *supra*, note 169.

¹⁷⁶*Ford*, *ibid*.

¹⁷⁷*An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54. The "override" provision is s. 10 of the statute.

¹⁷⁸*Legalization of Politics*, *supra*, note 2 at 82.

¹⁷⁹*Ibid*. at 77.

rides," it is difficult to predict its future as a constraint upon judicial action.¹⁸⁰ Two rather shallow points can be made at this juncture. Firstly, that its existence provides, at the least, a formal opportunity for legislatures to reenact their own value choices on most issues if the courts disagree with them. Secondly, that some political consequences would likely follow, whether in terms of the loss of prestige of the enacting government, or in terms of the loss of prestige of the Court.

That it would be dangerous for politicians to resort to s. 33 when public feelings are torn is made obvious by the failure of the federal government to attempt it in respect of the abortion laws. After the Supreme Court of Canada invalidated the 1968 statute in *Morgentaler*,¹⁸¹ the government introduced Bill C-43 in 1990, aiming to comply with the judgment by criminalizing only abortions not considered advisable by a physician.¹⁸² Had the government felt strongly about the countermajoritarian nature of the *Morgentaler* decision, in which a historic compromise was overturned by the Court,¹⁸³ it might have revealed that feeling by a s. 33 override. It did not, likely because public opinion was in fact divided, unlike the situation in Quebec at the time of the 1982 and 1989 overrides.

In short, s. 33 will protect the legislative system from judicial imposition only if the government is sufficiently sure of consensus that it is willing to risk the political consequences of its behaviour. Inevitably, if this is so, the Court's image will suffer in the process.

III. The "Mighty Problem" in an International Perspective

A. Introduction

My analysis of the "mighty problem" outlined some partial responses to it in the political theories that have attempted to resolve it, some constraints by reason of the degree of consensus common experience provides, some political

¹⁸⁰Indeed, it has been argued that the courts have the power to control the use of s. 33 to require the use of forms and procedures that guarantee that the enacting legislature will be politically accountable for its actions: Weinrib, *supra*, note 169 at 568-69. While she sees s. 33 as "an integrated instrument of rights protection" (*ibid.* at 563), within which, at a minimum, constitutional process-based values are protected, it can surely be responded that s. 33 is intended to isolate some legislative enactments from judicial review altogether. Certainly, to those provincial premiers who insisted on it because of their majoritarian criticism of the *Charter*, the argument that s. 33 exists to promote the same values as the *Charter*, and is itself subject to judicial control, might be puzzling.

¹⁸¹*Supra*, note 18.

¹⁸²The legislation was defeated on a tie vote by the Senate on Jan. 31, 1991, in an unusual move. For discussion, see "Back to Square One: the Senate Rejects new Abortion Legislation" *Macleans* (11 February 1991) 15.

¹⁸³In the U.S., a similar judgment by the Supreme Court in *Roe v. Wade*, *supra*, note 12, led to very strong statements about the unaccountable nature of the court. See, for example, J.H. Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*" (1973) 82 *Yale L.J.* 920.

and formal constraints, and a potentially problematic but novel resolution in the *Charter*. However, we have been unable to make the problem go away. Absent s. 33 overrides, constitutional courts will continue to impose their value judgments on elected bodies that cannot readily reverse them. While the spectre of "judicial tyranny" does not loom large in the modern world, the possibility of judicial activism in the face of public wishes remains unanswered.

Looking at the situation from this perspective would suggest that the enactment of the *Charter* was anomalous, imposing an unnecessary burden on the Canadian polity, or at the very least it was out of keeping with the democracy we have been building for centuries.

Canadian democracy is not radically different from Western European democracies; the largest difference is probably the relative ease with which Canadian democracy has taken ground and the greater security it enjoys. Accordingly, if constitutionalism is a hazard to democracy, one would expect that few Western democracies would enact it, and further that those most vulnerable would be most prone to avoid it.

B. The European Convention on Human Rights

That, however, is not the case at all. Post-World War II European history demonstrates a strong correlation between modern democracy and judicial review, one that reveals that the "mighty problem" is far outweighed by other considerations in the contemporary world.

The experience of the Council of Europe with a codified declaration of human rights indicates that Western democracies are willing to abdicate some of their sovereignty and voluntarily subject themselves to judicial review despite its undemocratic character. This experience strongly suggests an underlying political value in the institution of judicial review.

The Council of Europe, created in 1949, is responsible for a major human rights instrument, the *European Convention on Human Rights*.¹⁸⁴ This document, an international treaty, creates international obligations to protect the human rights it describes, which vary from the prohibition against torture¹⁸⁵ to a protection against unnecessary deprivation of property.¹⁸⁶

The obligations the treaty embodies are enforced by a structure that involves a complaint-receiving body, the European Commission of Human Rights,¹⁸⁷ which has wide jurisdiction to reject claims, including the power to

¹⁸⁴See *Convention, supra*, note 124.

¹⁸⁵*Ibid.* art. 3.

¹⁸⁶*Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, 213 U.N.T.S. 262, Euro. T.S. 9, art. 1.

¹⁸⁷*Convention, supra*, note 124, art. 19.

determine that they are "manifestly ill-founded."¹⁸⁸ Those it accepts are forwarded either to the Committee of Ministers¹⁸⁹ or to the European Court of Human Rights, a tribunal which has authority to determine if a State has violated the *Convention* and to order "just satisfaction to the injured party."¹⁹⁰

Complaints might be brought by other States,¹⁹¹ or by individuals, if they have exhausted domestic remedies¹⁹² and if the responding State has filed a declaration with the Commission agreeing to recognize the competence of individuals to file complaints in respect of them.¹⁹³ These declarations, filed under art. 25 of the *Convention*, are subject to withdrawal at any time, in accordance with the general concept that states can only be bound by treaty provisions to which they consent.

While the Commission's investigative power derives from an art. 25 declaration (in respect of individuals), or from art. 24 itself (in respect of other States), the Court's binding authority depends on the acceptance of its jurisdiction by the responding State. This might be specific to the case¹⁹⁴ or be manifested by a general declaration¹⁹⁵ recognizing the jurisdiction of the Court. Like art. 25 declarations, these art. 46 declarations can be withdrawn at any time. In other words, the jurisdiction that the *Convention* provides to its enforcement bodies is, except for investigations initiated by a State,¹⁹⁶ always subject to the consent of the States involved. The only sovereignty they yield is that which they yield voluntarily, subject to the constant opportunity to regain it without adverse legal consequences.

Since it came into force in 1953, the *Convention* has seen a steady increase in the number of States that have ratified it, as well as the number of art. 25 and art. 46 declarations. Thus, for example, 13 States ratified in the 1950s; 2 more in the 1960s; 5 more in the 1970s; and 3 in the 1980s.¹⁹⁷ As to art. 25 declara-

¹⁸⁸*Ibid.* art. 27.

¹⁸⁹*Ibid.* art. 32.

¹⁹⁰*Ibid.* arts 48, 50.

¹⁹¹*Ibid.* art. 24.

¹⁹²*Ibid.* art. 26.

¹⁹³*Ibid.* art. 25.

¹⁹⁴*Ibid.* art. 48.

¹⁹⁵*Ibid.* art. 46.

¹⁹⁶A rare event. Of the 160 judgments issued by the Court to December 31, 1988, only one (Case of *Ireland v. United Kingdom* (1978), Eur. Court H.R. Ser. A, No. 25, (*sub nom. Ireland v. United Kingdom*) 2 E.H.R.R. 25) was in response to a State-initiated complaint. The Commission has dealt with a few more, most notably the "Greek case" (1969). See "Report of the European Commission of Human Rights in the Greek Case" (1972), 12 Y.B. Eur. Conv. H.R., which was brought by Denmark, Norway, Sweden, and the Netherlands, in response to the practices of the junta then ruling Greece and before Greece had filed an art. 25 declaration. The vast bulk of Strasbourg's work is in response to complaints made by individuals.

¹⁹⁷European Commission of Human Rights, *Stock-taking on the European Convention of Human Rights* (Strasbourg: EC, 1989) at 83 [hereinafter *Stock-taking*].

tions, 9 were filed in the 1950s; 2 more in the 1960s; 3 more in the 1970s; and 8 more in the 1980s.¹⁹⁸ To the extent that the *Convention* represents a renunciation of majoritarianism in favour of constitutionalism, it is being embraced by ever more States, yielding ever more authority to the Strasbourg authorities. While it is likely that the original treaty members did not realize in 1950 that they had introduced "a legal revolution,"¹⁹⁹ States now joining must realize the nature of the supervision they are accepting. Furthermore, States like France and Greece, which only filed art. 25 declarations in the 1980s despite being original signatories in 1950, must have understood what they were taking on when they made those declarations.²⁰⁰

Not only is the *Convention* membership steadily growing, but the *Convention* itself is steadily expanding to include new protections. Protocols have been added in 1953,²⁰¹ May 1963,²⁰² September 1963,²⁰³ 1983,²⁰⁴ 1984,²⁰⁵ and 1985.²⁰⁶

It must be said that the Strasbourg experience appears worthwhile to the participants. Given that no one has withdrawn from the system,²⁰⁷ it can only be

¹⁹⁸As of December 31, 1988, Finland had not filed its art. 25 declaration.

¹⁹⁹J.A. Frowein, "European Integration through Fundamental Rights" (1983) 18 U. Mich. J. L. Ref. 5 at 7.

²⁰⁰France first declared under art. 25 on Oct. 2, 1981, and Greece on Nov. 20, 1985. Both were signatories to the initial pact in November 1950, but ratified much later: France on May 3, 1974, and Greece on November 28, 1974. See *Stock-taking, supra*, note 197 at 83-84.

²⁰¹*Supra*, note 124. Now ratified by 19 States. This protocol deals with property rights and also promises a right to education, with due respect for parents' religious and philosophical convictions (art. 2) and a guarantee of free elections by secret ballot (art. 3).

²⁰²*Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions*, May 1963, Euro. T.S. 44. Ratified by 22 States. This protocol is purely procedural.

²⁰³*Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, September 1963, Euro. T.S. 46 [hereinafter *Fourth Protocol*]. This protocol now has 15 ratifications. It forbids debtors' prisons (art. 1), guarantees freedom of movement within and between States (art. 2), forbids expulsion from one's own State (art. 3), and collective expulsion of aliens (art. 4).

²⁰⁴*Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*, 28 April 1983, Euro. T.S. 114. This protocol, which presently has 14 ratifications, abolishes the death penalty in times of peace.

²⁰⁵*Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984, Euro. T.S. 117. This protocol, which presently has 10 ratifications, protects aliens from expulsion without proper hearings (art. 1), guarantees a right of criminal appeal (art. 2), provides for compensation for persons wrongly convicted where there has been a "miscarriage of justice" (art. 3), prevents multiple prosecutions for the same crime absent new evidence (art. 4), and guarantees spouses "equality of rights and responsibilities of a private law character between them" (art. 5).

²⁰⁶*Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 19 March 1985, Euro. T.S. 118. This protocol, which presently has 22 ratifications, is purely procedural.

²⁰⁷This is almost, but not quite, true. After the *Tyrrer* case, *supra*, note 126, the United Kingdom withdrew its art. 63 declaration extending the *Convention* to the Isle of Man and of Montserrat,

presumed that the sovereignty losses it represents seem less significant to the member States than the benefits it creates.

Although some of the cases decided by the Court involved state practices, in others, States have been found in violation on the basis of statute rather than practice. For example, both Belgium²⁰⁸ and Austria²⁰⁹ have been found in breach of the *Convention* as a result of statutory discrimination against illegitimate children. In the *Belgian Linguistic Case*,²¹⁰ Belgium was held in violation for failure to permit a French-speaking student living in a Flemish-speaking area access to a French education in a nearby mixed area, when such access was permitted Flemish-speaking students in a French-speaking area. In these cases, social policy involving relations between ethnic groups and family morality was overturned on the basis of the Court's appreciation of the values created by the *Convention*.

Some cases, particularly some involving the United Kingdom, involved controversial subjects. We have already looked at *Tyrer*;²¹¹ in addition, in *Campbell and Cosans v. United Kingdom*, strapping in the Scottish public schools was condemned.²¹² In *Brogan v. United Kingdom*,²¹³ prisoners that had been detained under the *Prevention of Terrorism Act* were held without charge for up to 6 days. The Court held that the British authorities had no right to hold beyond 2 days, despite the wording of the British statute which allowed up to 7 days of pre-charge detention.

In *Soering v. United Kingdom*,²¹⁴ a West German national was arrested in Britain for extradition to Virginia on a charge of murder. Having regard to the existence of the death penalty in Virginia as well as conditions on death row:

whose dependent political status required separate declarations. However, the *Convention* remains in force in respect of the United Kingdom's other dependencies.

²⁰⁷This is almost, but not quite, true. After the *Tyrer* case, *supra*, note 126, the United Kingdom withdrew its art. 63 declaration extending the *Convention* to the Isle of Man and of Montserrat, whose dependent political status required separate declarations. However, the *Convention* remains in force in respect of the United Kingdom's other dependencies.

²⁰⁸*Marckx Case* (1978), Eur. Court. H.R. Ser. A, No. 31, (*sub nom. Marckx v. Belgium*) 2 E.H.R.R. 330.

²⁰⁹*Inze Case* (1986), Eur. Court H.R. Ser. A, No. 126, (*sub nom. Inze v. Austria*) 10 E.H.R.R. 394.

²¹⁰*Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (1968), Eur. Court. H.R. Ser. A, No. 5 and 6, (*sub nom. Belgian Linguistic Case*) 1 E.H.R.R. 241, 252.

²¹¹*Supra*, note 126.

²¹²(1982), Eur. Court H.R. Ser. A, No. 48, (*sub nom. Campbell and Cosans v. United Kingdom*) 4 E.H.R.R. 293.

²¹³(1988), Eur. Court H.R. Ser. A, No. 145B, (*sub nom. Brogan v. United Kingdom*) 11 E.H.R.R. 117.

²¹⁴(1989), Eur. Court. H.R. Ser. A, No. 161, (*sub nom. Soering v. United Kingdom*) 11 E.H.R.R. 439.

a 6 to 8 year average stay, shackles around the waist whenever out of the cells, etc., a unanimous court of 18 judges held that extradition to face the charge was itself "inhuman" treatment, and ordered that the extradition order not be implemented.

In *Dudgeon v. United Kingdom*,²¹⁵ United Kingdom legislation that criminalized homosexual conduct in Northern Ireland was held to violate "respect for personal and family life," such that it could not be accepted²¹⁶ despite local sentiment:

Democracy, then, is a poor justification for always giving the majority what they want, but it would be a perverse judge who could not accept that local sentiment may at least be relevant when deciding whether a limitation of individual rights can be justified as "necessary in a democratic society."²¹⁷

While the United Kingdom is the most common respondent, itself having no entrenched bill of rights, other States are also involved in contentious matters.

A good example is the *Airey Case*.²¹⁸ Mrs. Airey claimed that her husband was a violent alcoholic, and that she wanted to ask the Irish courts for a judicial separation from him. She could not afford a solicitor, and no civil legal aid existed in Ireland at that time. The *Convention* permits countries, in ratifying, to make reservations in respect of specific provisions "to the extent that any law then in force in its territory is not in conformity with the provision."²¹⁹ In accord with that clause, Ireland had made a reservation to art. 6(3)(c), which guarantees criminal legal aid to those who need it. Despite that reservation, the Court held that the right to a "fair and public hearing" in respect of one's civil rights²²⁰ required the assistance of counsel to be *effective*, and that the Irish authorities had an obligation to provide Mrs. Airey with a lawyer.

This judgment had the effect of imposing significant expenditures upon the Irish government, and thereby causing a significant infringement upon its national (and democratic) sovereignty. The response of that government was, however, consistent with the trend to judicial review that we have already encountered: rather than withdraw its art. 25, or art. 46 declaration, Ireland introduced a civil legal aid scheme in August 1980, in which 7 law centers, staffed by salaried lawyers, were made available to the needy public.²²¹

²¹⁵(1981), Eur. Court H.R. Ser. A, No. 45, (*sub nom. Dudgeon v. United Kingdom*) 4 E.H.R.R. 149.

²¹⁶Compare *Rees Case* (1986), Eur. Court H.R. Ser. A, No. 106, 9 E.H.R.R. 56, in which U.K. legislation discriminating against transsexuals was held not to violate the *Convention*.

²¹⁷Merrills, *supra*, note 124 at 134.

²¹⁸*Airey Case*, *supra*, note 42.

²¹⁹*Convention*, *supra*, note 124, art. 64(1).

²²⁰*Ibid.* art. 6(1).

²²¹A. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford: Clarendon Press, 1983) at 175.

The 1980s have seen not only an expansion in the treaty membership of the *Convention*, but also in the number of cases²²² and in the level of "activism" the Court displayed. Although pre-1979 cases typically upheld State discretion in all but procedural process cases, since 1979 this has changed significantly.²²³ Jurisprudence in the 1980s talks of the need for particularly serious reason for intervention in spheres deemed fundamental by the courts, such as private sexual matters.²²⁴ The Court's philosophy of intervention has required limitations on *Convention* rights to be "necessary in a democratic society,"²²⁵ such that:

the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.²²⁶

Although this brief introduction to Strasbourg law is inadequate to enable predictions as to when the Court will be "activist" and when it will be deferential, it is adequate to reveal a remarkable phenomenon. During the same period in which the Court developed a more interventionist philosophy, it attracted not only more individual claimants, but also more member States, more ratifications expanding its jurisdiction, and more protocols expanding its mandate. In other words, the forces supporting judicial review appeared even stronger in a period in which the Court was less deferential and hence more countermajoritarian; yet it is those same majorities who have granted the Court its power.

It may appear that too much has been read into the history of the *Convention*. It is not automatically part of the domestic law of the member States, and its status varies widely within them. In some, for example Austria, France, and the Netherlands, the treaty itself has automatic domestic status equal to or supe-

²²²As of Dec. 31, 1980, 30 judgments had been issued by the Court; as of Dec. 31, 1988, that number was 160. See *Stock-taking*, *supra*, note 197 at 103-07.

²²³H.C. Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence" (1987) 3 Conn. J. Int. L. 111 at 121. The turning point is the *Sunday Times Case* (1979), Eur. Court. H.R. Ser. A, No. 30, 22 Y.B. Eur. Conv. H.R. 402, (*sub nom. Sunday Times v. United Kingdom*) 2 E.H.R.R. 245, in which the Court (by a 10 to 9 vote) determined that the "freedom of expression" of the newspaper was infringed by the *sub judice* contempt of court rule, which prevented the paper from reporting on the details of thalidomide litigation that had been pending for many years before the courts.

²²⁴Yourow, *ibid.* at 134; Drzemczewski, *supra*, note 221 at 174-75.

²²⁵*Convention*, *supra*, note 124, arts 8(2), 9(2), 10(2); *Fourth Protocol*, *supra*, note 203, art. 2(3). This phrase occurs in these provisions as an introduction to the lists of factors which may be considered in determining whether a *prima facie* infringement of a right is justified, i.e. whether the statute or state practice will be upheld despite its apparent inconsistency with the *Convention*. The scrutiny is always said to be subject to a state's "margin of appreciation" (*Leander* (1987), Euro. Court H.R. Ser. A, No. 116, 9 E.H.R.R. 433, para. 59), which "margin" varies according to the place the infringed "right" has in the implicit hierarchy of rights that can be discerned by an analysis of the Court's jurisprudence since the *Sunday Times Case*: see Yourow, *supra*, note 223 at 156-57.

²²⁶*Case of W. v. The United Kingdom* (1987), Eur. Court H.R. Ser. A, No. 121, (*sub nom. W. v. United Kingdom*) 10 E.H.R.R. 29, para. 60. See also *Dudgeon*, *supra*, note 215, paras 21-22.

rior to that of ordinary statutes.²²⁷ In others, such as the United Kingdom, Ireland, and the Scandinavian countries, it has no domestic status. In these States, failure to comply would constitute an international breach, but would give citizens no domestic remedy.²²⁸ The Court is limited in remedies to ordering "just satisfaction" for claims that are upheld,²²⁹ and has no jurisdiction to directly invalidate statutes. Accordingly, where the treaty is not part of domestic law, a judgment of the Court leaves the infringing statute intact and merely awards damages to the individual.

This restriction on the Court's authority has not in fact limited its impact. States have consistently amended their statutes after being held in breach, and on occasion have amended them after complaints have been filed, to avoid being held in breach.²³⁰ Even the United Kingdom, whose tradition of parliamentary sovereignty is very strong, has amended its prison rules, changed its immigration procedures, abandoned certain interrogation techniques in Northern Ireland, paid victims of miscarriages of justice, modified the *sub judice* rule, repealed legislation prohibiting adult homosexual conduct in Northern Ireland, and amended its mental health legislation, as a result of the Strasbourg system.²³¹ Accordingly, it can be said that States have deferred to the Court's normative judgments against their own even when not strictly legally compelled to do so. The abandonment of national (and, hence, democratically accountable) sovereignty this entails is voluntary, dependent not on agreement with the decision but on a commitment to judicial review as an institution.

C. Domestic Bills of Rights in European States

Not only have European States voluntarily given sovereignty up to pan-European tribunals,²³² but European democracies have also increasingly incor-

²²⁷Drzemczewski, *supra*, note 221 at 36.

²²⁸*Ibid.* at 38.

²²⁹Convention, *supra*, note 124, art. 50.

²³⁰Drzemczewski, *supra*, note 221 at 69-70 (Belgium), 91 (Netherlands), 105-06 (Austria), 115 (Liechtenstein), 124 (Switzerland), 175 (Ireland).

²³¹Drzemczewski, *ibid.* at 186-87. This list only covers the period to September, 1982. The cases causing the changes are as follows: *Knecht* (No. 4115/69) 13 Y.B. Eur. Conv. H.R. 730, which led to a "friendly settlement," and *Golder Case* (1975), Eur. Court H.R. Ser. A, No. 18, E.H.R.R. 524, in respect of prisoner rules; *Alam and Khan* (No. 2991/66) 11 Y.B. Eur. Conv. H.R. 788, which led to a "friendly settlement," and *East African Asians v. United Kingdom* (1973), 3 E.H.R.R. 76, in respect of immigration procedures; *Case of Ireland v. United Kingdom* (1978), Eur. Court H.R. Ser. A, No. 25, (*sub nom. Ireland v. U.K.*) 2 E.H.R.R. 25, in respect of Northern Ireland interrogation techniques; *A. v. United Kingdom* (No. 6840/74) (1980), 3 E.H.R.R. 131, which led to a "friendly settlement," in respect of compensation for miscarriage of justice; *Sunday Times, supra*, note 223, in respect of *sub judice*; *Case of X v. United Kingdom* (1980), Eur. Court H.R. Ser. A, No. 46, (*sub nom. X v. U.K.*) 4 E.H.R.R. 188, involving the *Mental Health Act*; *Dudgeon, supra*, note 215, as to homosexuality in Northern Ireland.

²³²Not only the European Court of Human Rights, but also the Court of Justice of the European Communities, a binding tribunal for the 12 member States of the European Economic Community. That Court's jurisdiction, while limited by the terms of the *Treaty Establishing the European Eco-*

porated judicial review into their majoritarian domestic political structures. Again this is suggestive of the underlying political value in judicial review in the perception of the Western polities. Since World War II many European States have entrenched bills of rights, with constitutionally mandated judicial review of legislative decisions. Both Germany and Italy enacted such constitutions after the demise of Fascism,²³³ professing to see in such a system the triumph of human rights against "legislators subservient to oppressive regimes."²³⁴ Thus, for example, to the drafters of the German Constitution, constitutional justice was the "ultimate crowning of the Rule of Law."²³⁵

Austria had entrenched a bill of rights and judicial review in its 1920 Constitution. In the 1930s, this power was removed from the courts; in 1945, with the defeat of the Fascist power and the downfall of Nazism, this court was re-established.²³⁶

Totalitarian regimes survived World War II in several Western European States, but have since fallen. In Portugal, for instance, the downfall of Salazar's Fascist government led to a new constitution in 1976, in which human rights were guaranteed, to a standard "far superior to that provided by the Convention's norms,"²³⁷ with full judicial review. In Spain, the end of Francoism resulted in the 1978 Constitution, which was highly influenced by the *Convention*, and is assumed by many commentators to offer more strenuous protections than the *Convention*, also with judicial review as the means of assuring compliance.²³⁸

Similarly, in Greece, a totalitarian regime developed after World War II. However, democracy has since returned, and the *Constitution of 1975* expressly provides for judicial review.²³⁹

These courts, like those in North America, have been involved in controversial decisions as to which popular morality is divided. Thus, for example, the courts in Germany, Austria, and Italy have all had to determine the validity of abortion legislation,²⁴⁰ likely the most contentious issue to have surfaced in recent Canadian and United States constitutional jurisprudence.

omic Community, 23 November 1957, 298 U.N.T.S. 11, is applied consistently with the entrenched bills of rights of many of its member States, as well as the *Convention*, of which all the EEC States are also members: see *Nold v. Commission* [1974] 491; *Hauer v. Land Rheinland-Pfalz* [1979] 3727, [1980] 3; Cappelletti, *supra*, note 5 at 174-75.

²³³Germany in 1949, and Italy in 1948.

²³⁴Cappelletti, *supra*, note 5 at 161.

²³⁵*Ibid.* at 162.

²³⁶*Ibid.* at 161.

²³⁷Drzemczewski, *supra*, note 221 at 157.

²³⁸*Ibid.* at 161.

²³⁹*Ibid.* at 143.

²⁴⁰Cappelletti, *supra*, note 5 at 163. The cases are: in Germany, *Judgment of 25 Feb. 1975*, 39 BVerfGE 1; in Italy, *Judgment of 18 Feb. 1975*, 43 Rac. off. corte costituzionale 201; in Austria, *Judgment of 11 Oct. 1974*, [1974] Erklärungen des Verfassungsgerichtshofs 221. The German

In France, despite the very strong opposition to judicial review that has persisted since the French Revolution of 1789,²⁴¹ a Constitutional Court was created by the 1958 Constitution with power to invalidate legislation, although only before proclamation and on the application of a member of a limited class of claimants.²⁴² Although it was intended to be limited to issues of separation of powers as between executive and legislature, since 1971 it has claimed jurisdiction to review for conformity to "droits fondamentaux de l'homme."²⁴³ The highest non-constitutional court, the Cour de Cassation, determined in 1975²⁴⁴ that it had the power to review legislation on the basis of its failure to conform to international treaty, notably the EEC treaty and the *Convention*,²⁴⁵ as a result of the primacy given treaties over domestic legislation by art. 55 of the French Constitution. In the result, although France has moved more hesitantly to constitutionalism than other European States, it too has transferred power to its courts to invalidate legislation on normative grounds. Cappelletti makes the following point:

Clearly, judicial review must reflect a deeply felt need of contemporary Western societies if the phenomenon, which I have described elsewhere as the "explosion" of judicial review in the post-World War Two era, has been able to penetrate even that proud nation, notwithstanding the profound hostility it traditionally encounters there.²⁴⁶

Other States have followed suit. For example, Cyprus in 1960,²⁴⁷ Turkey in 1961,²⁴⁸ Japan in 1947,²⁴⁹ Malta in 1964²⁵⁰ and Sweden in 1980,²⁵¹ have all

court invalidated "liberal" legislation; the Austrian court upheld "liberal" legislation; and the Italian court invalidated restrictive legislation. Note that these cases were all decided within half a year of each other and within two years of the similar U.S. decision, *Roe v. Wade*, *supra*, note 12, during a period of intense debate throughout the Western world about the limits of abortion rights.

²⁴¹Cappelletti, *ibid.* at 124-26, 153. Before the Revolution, local courts called "Parlements" had the power to invalidate statutes. Judgeships in these courts were the subject of inheritance, open trade, and great abuse of powers. In essence, they were a means by which the local aristocracy maintained power against both the central government and the local population. Judges were the fiercest opponents of the Revolution. Montesquieu and Rousseau responded to this by insisting on a rigid separation of powers; this was perpetuated in the *Code Napoléon*.

²⁴²Cappelletti, *ibid.* at 156. The potential applicants are the President, the Prime Minister, the President of each house of the legislature, and a 60-member minority in either house.

²⁴³*Ibid.* at 157.

²⁴⁴Cass. Ch. mixte, 24 May 1975, *Administration des Douanes c. Société Cafés Jacques Vabre*, D.1975.Jur.497.

²⁴⁵See Cass. Ch. crim, 5 December 1978, *Baroum chérif*, D.1979.Jur.50, in which a criminal appeal was allowed on the basis of arts 6 and 13 of the *Convention*.

²⁴⁶Cappelletti, *supra*, note 5 at 154.

²⁴⁷*Ibid.* at 136.

²⁴⁸*Ibid.*

²⁴⁹*Ibid.* at 142. Although it is not a European State, its First World status makes its adoption of the judicial review process relevant to North America.

²⁵⁰*Ibid.* at 187.

²⁵¹*Ibid.* at 204.

adopted some form of constitutional review of legislation. Yugoslavia did the same in 1963, against the opposition of both its bench and its bar.²⁵² This list is by no means complete. The Western trend to constitutionalism is strong indeed; when Canada adopted the *Charter* in 1982, it was merely joining with most of the democratic world in placing judicial interpretation of "fundamental norms" on a higher footing than legislation that affects them.

The Austrian experience should tell us something that seems paradoxical in the light of the countermajoritarian nature of judicial review. Totalitarian government feels the institution to be too great a burden,²⁵³ while democratic government feels it to be a necessary adjunct. Perhaps the same conclusion can be derived from the effort of the Czech regime in 1968 to introduce constitutional review of statutes, which was unsuccessful due to the Soviet invasion.²⁵⁴

Perhaps the opposite lesson can be learned from a South African experience. In the 1950s, as South Africa was adopting explicit legal formulations of its apartheid philosophy, *i.e.* as it moved further away from Western liberalism, the judiciary applied the Constitution and invalidated one of the many racist laws, namely one that removed the franchise from "Cape Coloured" voters.²⁵⁵ Parliament attempted to avoid the judgment by declaring itself to be the final appeal court, superior in the judicial hierarchy to the courts themselves, an effort that was also rejected by the court.²⁵⁶ In the result, the Constitution was amended in 1961 to remove *all* control over legislation from the judiciary.²⁵⁷ Thus, as the laws themselves came to enact a Fascist agenda, constitutionalism was found to get in the way.

A broader perspective enables us to see that democracies increasingly view judicial review as an appropriate partner of majoritarian democratic structures. This is not, as the Austrian experience reveals, because the courts are capable of standing as a bulwark against Fascism. Inconvenient judicial power can simply be abolished by victorious totalitarian governments.²⁵⁸ Yet the value of constitutionalism must be strong indeed if so much of the democratic world is rushing to embrace it with such vigour.²⁵⁹

²⁵²*Ibid.* at 136.

²⁵³*Ibid.* at 161.

²⁵⁴*Ibid.* at 188.

²⁵⁵*Harris v. Minister of the Interior*, [1952] 2 S.A. 428 (A.D.).

²⁵⁶[1952] 4 S.A. 769 (A.D.).

²⁵⁷Cappelletti, *supra*, note 5 at 189.

²⁵⁸It may be that constitutions that are more difficult to amend could stand taller against totalitarian incursions, delaying their capacity to implement their agenda until the amendment process is completed or the government has had enough opportunity to appoint pliant judges to the highest courts. If this is so, my point, namely that modern democracy is inextricably linked with judicial review, is strengthened. I do not rely on the bulwark against Fascism argument because of the historical record.

²⁵⁹The United Kingdom seems to be the major exception, holding fast to parliamentary supremacy despite the general movement away from it. However, even in the U.K. there are loud voices

IV. The Symbolic Value of Judicial Review

An international perspective strongly suggests that the Western democratic world sees judicial review as an integral and valuable part of constitutionalism, despite its undemocratic character. This is particularly true of the experience under the *Convention*. Sovereign States have been willing to defer to a court's normative judgments over their own legislative judgments, even though they are not legally bound to do so. The underlying theme appears to be that judicial review, as an institutional mechanism of government, has an underlying functional value that outweighs concerns about its countermajoritarian character.

I submit that the political value of judicial review lies in its *symbolic* function as a vehicle for expressing the importance of the Rule of Law in Western democracy. The problem with the "mighty problem" is the way it is framed. The academic literature is centred on the premise that majoritarian democracy is the sole touchstone of political legitimacy in evaluating a governmental institution. However, political legitimacy is a much broader concept; just government is not only a function of processes, but also of the loyalties it induces. The political value of a particular institution of constitutional government must not only be judged functionally in its service to the polity but also on its ability to inspire confidence in its citizenry.

In this perspective, judicial review has an instrumental value in democratic society as a medium of communicating a fundamental premise in civil society: the Rule of Law. The benefits of judicial review inhere not so much in the courts' institutional capacity to prevent tyranny, but in the symbolic importance of the Rule of Law in post-World War II democracies. The purpose of constitutionalism is to express to the citizenry that its rights will not be overlooked, and that the State cannot determine its agenda in disregard of its need for dignity (and autonomy). Despite the fact that the courts are inherently poor forums for determining what the contemporary meaning of fundamental rights and values should be, and despite the fact that their power cannot be easily reconciled with our democratic sensibilities, they are invested with the power to do so because of the *perception* that such an investment guarantees those rights and values more than majoritarian democracies. This perception has a substantive political value independent of the truth of its content; it has functional value as a medium for expressing the fundamental importance of the Rule of Law to the polity at large.

Cappelletti explains this symbolic process:

At its most advanced and sophisticated stage, constitutionalism has demanded a body, or a group, sufficiently independent from the "political" power, both legislative and executive, to protect a higher and relatively permanent rule of law

arguing for a written constitution with human rights protections and judicial review: "Canada's Charter Flight," *supra*, note 3, is the text of a speech given in the U.K. to argue against these voices.

against "the temptations which are inherent in power." This demand has become especially urgent with the human rights provisions of the modern constitutions, where the challenge is to protect the very core of any civil libertarian state — an adequate sphere of individual freedom against government invasions.²⁶⁰

Stated otherwise, the perception that the courts are "above politics," or that the "fundamental rights" they protect can be determined by some different process in a courtroom than in a legislature, responds to a deeply felt need in the modern world.²⁶¹ The need for these perceptions is not diminished as the courts become more activist. Indeed, as we have seen, more States are developing judicial review even as the courts, both domestic and international, are using their powers to impose controversial value judgments upon society. Whatever loss popular sovereignty suffers in the process, popular sovereigns are only too willing to bear it in order to promote the image of the Rule of Law that characterizes modern democracy. Accordingly, while academics agonize over the "mighty problem" that has no solution in its traditional form, governments disregard it.

The response to Mandel, Petter, and Glasbeek is not based on strict legal logic. It is based on a broader standard of constitutional legitimacy that accounts for the political and historical value of governmental institutions. Their scholarship is interesting in that it forces us to question whether the symbolic value of the Rule of Law exceeds its other benefits; however, it is ultimately unpersuasive. The simple fact is that the symbol that it represents is powerful enough to outweigh the negative impact it has on the democratic process.

²⁶⁰Cappelletti, *supra*, note 5 at 169. A secret memorandum prepared by the Canadian federal government during the negotiations leading to the enactment of the *Charter* contained the following position:

The Premiers who are opposed should be put on the defensive very quickly and should be made to appear that they prefer to trust politicians rather than impartial and non-partisan courts in the protection of the basic rights of citizens in a democratic society. It is evident that the Canadian people prefer their rights protected by judges rather than by politicians (David Milne, *The New Canadian Constitution* (Toronto: James Lorimer, 1982) 221-22, as reproduced in *Legalization of Politics*, *supra*, note 2 at 22).

The federal government described the *Charter* to the public in much the same way:

Now, these rights *will* be written into the Constitution so that you will know exactly where you stand... The courts are there as an impartial referee to correct injustices in the event that you find that your constitutional rights are being denied.

²⁶¹It is possible to overstate this need. Prof. Levinson did just that in *Constitutional Faith* (Princeton: Princeton U. Press, 1988), in his contention that adherence to the constitution is a form of "civil religion" (*ibid.* at 10, citing Jefferson), and that citizens subject to a common constitution are a "faith community" (*ibid.* at 193). While the loss of religious faith in the 20th century is very real, it does not seem likely that the post-World War II move to constitutionalism can be explained by popular desire to find new objects of worship. Rather, the importance of the constitutional symbol can be seen in more secular terms: as a response to the felt need to have a counterweight to the "gigantism" (Cappelletti describes: gigantic legislatures and gigantic bureaucracies, *supra*, note 5, at 19). Fascism typifies these phenomena, and its repudiation requires the creation of institutions that both reinforce democracy, such as legislatures, and restate society's opposition to the types of structures Fascism created.

Conclusion

While this paper has criticized both Rationalist and Structural arguments, I would not claim that those schools should be disregarded. Instead, both should be recognized for their contributions to the symbol that the Rule of Law represents in contemporary Western society. The Rationalists provide an image of moral strength that can only motivate the judges and inspire the public. The Structuralist emphasis on democracy, an admittedly vague and malleable concept, reinforces the force of that ideal both within the courts and within society as a whole. While scholars may reveal the weakness of their arguments, nothing in this paper undercuts the importance of their work in strengthening public confidence in Canadian political institutions. Indeed, if the major value of judicial review is the reassurance of the public that their individual rights matter, the works of Sager, Slattery, Cappelletti, Ely, Dworkin, Monahan, Kerans, Weinrib, and the many other articulate exponents of judicial review will do more to encourage that process than the relative skepticism that my paper promotes.

It remains, then, to construe the symbol of the "Rule of Law," to determine the meaning — or the range of meanings — of this concept in contemporary Canadian society. Its potency as a symbol depends at least in part on its combination of determinacy and indeterminacy: its widely accepted core meaning and its more controversial marginal meanings.

Although a powerful motivator, even the idea of the "Rule of Law" has its critics. For example, West says of it that:

What retards the process [of political and social reform] at a deeper level, however, is the understanding of the Constitution as possessing objective value in its own right — of defining, rather than being constituted by, the interests and needs and projects of objective moral worth.²⁶²

In an interesting footnote, she states that:

The "Rule of Law" serves the same function in legal philosophy as the Constitution serves in constitutional theory. The Rule of Law is widely regarded by the vast majority of legal scholars and practitioners as having objective value.²⁶³

To those scholars, the justification of constitutionalism that this paper provides will likely appear as no more than a restatement of a deeper problem, namely the manipulation of political symbols by powerful elites to perpetuate their own authority. This is, of course, true within the electoral, as well as the constitutional sphere; West's thesis will only be politically significant if the process of demystification yields electoral power to non-elites, while the judiciary clings to interpretations of the "Rule of Law" that support entrenched

²⁶²R. West, "Relativism, Objectivity, and Law" (1990) 99 Yale L.J. 1473 at 1482.

²⁶³*Ibid.*, citing, as one example of such a view, A. Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U. Chic. L. Rev. 1175.

classes. That the *Charter* could have that result is conceded.²⁶⁴ To date, it has not, but it would take another essay to fully explore that theme.

²⁶⁴A historical example of the judiciary interpreting the Rule of Law as a means to reinforce entrenched elites can be found in the cases of substantive due process during the *Lochner* era. See note 77.