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JUDICIAL REVIEW AND DEMOCRACY: A THEORY OF JUDICIAL REVIEW

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There are two deep and central puzzles which confront Canadian jurists as they struggle to make sense of the *Charter of Rights and Freedoms*[1] and its meaning for Canadian legal and political culture. The puzzles, although not identical, are closely interrelated. The first is the recurring riddle which has haunted American constitutionalists for the past twenty-five years. It arises from the apparent contradiction between democratic values and the institution of judicial review. Judicial review involves unelected judges overturning the will of a democratically-accountable legislature on the basis of open-ended and abstract constitutional guarantees. The interpretation and application of those guarantees necessarily requires the exercise of wide discretion on the part of the judiciary. A continuing puzzle for American theorists has been how to account for and justify this apparent derogation from democratic principles.

Despite the vast amounts of attention and energy devoted to this enterprise over the past generation, American theorists appear no closer to discovering a solution today than they were when Herbert Wechsler delivered his famous Holmes lecture in 1959.[2] For some, the "historic obsession of normative constitutional law scholarship"

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

[2] "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1.

is now thought to be "essentially incoherent and unresolvable".[3] This has prompted a number of leading writers to declare that it is fruitless and counterproductive to search for "the principle" which legitimizes judicial review. For these theorists, there is no such Archimedean point awaiting discovery. Constitutionalism should descend from the mount of grand theory and focus on more prosaic issues arising from the interpretation and application of particular constitutional provisions.[4]

With the enactment of the *Charter*, Canadian lawyers and judges will now have to grapple with this fundamental issue of legitimacy. There is also a second, related problem arising from the introduction of the *Charter*, one that is particular to Canadian legal culture. One of the central components of Canada's legal creed has been a belief in the continued viability of the distinction between the realms of law and politics.[5] The cornerstone of this creed has been the legislative supremacy of Parliament, subject only to federalism issues dealing with the proper allocation of power. The role of the courts has been regarded as essentially subordinate; the courts do not make political choices themselves, but merely give effect to the political choices made by others. The *Charter* challenges the dominance of this ruling paradigm. The interpretation of the vague language of the *Charter* appears to require the courts to make political choices of their own, rather than simply deferring to the choices of others. The *Charter* suggests the possibility of a new paradigm, one in which the judiciary will assume central and equal responsibility for the development of public policy in Canada. The difficulty for Canada's lawyers and judges is how to reconcile this emerging reality under the *Charter* with their traditional assumptions regarding the proper scope of the judicial role.

This paper is a preliminary attempt to come to terms with these central issues posed by the *Charter*. My argument begins with the proposition that traditional assumptions about the dichotomy between legal and political reasoning cannot be maintained in the context of the *Charter*. My argument does not depend simply on the inexact language employed in the definition of the various sub-

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[3] P. Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship" (1981) 90 Yale L.J. 1063.

[4] For expression of views along these lines, see L. Tribe, *Constitutional Choices* (1985) at 1ff; P. Bobbitt, *Constitutional Fate* (1982) at 237.

[5] See Gold, "The Charter of Rights and the Amending Formula" (1983) [unpublished]; P. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 U. of T.L.J. 47.

stantive rights. More particularly, the political character of *Charter* adjudication is implicit in the very structure of the analysis contemplated under s.1. The "balancing of interests" analysis is just another way of asking the fundamental legislative question: "is this worth what it costs?" In answering this question, the courts will have to develop a substantive theory of the nature of freedom and democracy, in order to determine the limits on rights which "can be demonstrably justified in a free and democratic society". *Charter* analysis is explicitly normative. It requires courts to assess the content of legislation against some background theory of rights, freedom and democracy. There is nothing distinctively "legal" about such an enterprise.

But the political, value-laden character of *Charter* analysis is the starting point rather than the conclusion of my argument. The far more meaningful issue is identifying those substantive values and arguments which should guide judges and lawyers in their application of the *Charter*. The claim which I defend is premised on a distinction between substantive outcomes of the political process and the fairness of that process itself. In my view, the judiciary should not undertake the task of testing the substantive outcomes of the political process against some theory of the right or the good. The resolution of *Charter* issues is not to be found in the philosophies of John Rawls, Robert Nozick or Ronald Dworkin. Rather, the central focus of judicial review should be the integrity of the political process itself. The judiciary should interpret constitutional guarantees in such a way that the opportunities for public debate and collective deliberation are enhanced. To put the matter simply, constitutional adjudication should be in the name of democracy, rather than right answers.

Readers familiar with the American literature will recognize the similarity between this argument and the work of John Hart Ely. In *Democracy and Distrust*,[6] Dean Ely argues that judicial review is designed to ensure that the political process is open to those of all viewpoints on something approaching an equal basis. Ely's work has been the subject of intense and often effective criticism amongst American constitutional theorists.[7] The critics have relentlessly attacked the central distinction between procedure and substance,

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[6] J. Ely, *Democracy and Distrust* (1980).

[7] See, for example: R. Dworkin, "The Forum of Principle", in *A Matter of Principle* (1985) at 33; L. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 Yale L.J. 1063.

which forms the underpinnings of Ely's argument. The main point made by the critics is that Ely's so-called "process-oriented" theory itself requires judges to make substantive value choices. The problem is that Ely regards the making of substantive value choices by judges as illegitimate. Thus his theory seems to require the judiciary to make just the sorts of value choices which he considers off-limits; in short, the theory is hopelessly and inevitably self-contradictory.

It may well be that Dean Ely's theory of judicial review under the American *Constitution* is unpersuasive. But the fundamental shortcomings of the theory are not those identified by Ely's critics. In my view, the fundamental problem with Dean Ely's analysis has very little to do with questions of "internal logic" and everything to do with the basic purposes underlying the American *Constitution*. It is simply implausible to regard the provisions of the American *Constitution* as being directed exclusively towards the enhancement of democratic values. This critique of Ely's theory, since it focuses on the "fit" between the theory and the terms of the American *Constitution*, leaves open the possibility that Ely's basic approach may well be relevant and persuasive in another context. Turning to an analysis of the Canadian *Charter*, I attempt to identify both the similarities and the differences between the *Charter* and the U.S. *Bill of Rights*. What is apparent is that the drafters of the *Charter* either rejected or modified many of the elements found in the American *Bill of Rights*. Significantly, the elements of the American experience which were rejected or modified by Canadian drafters were those constitutional provisions which required judges to vindicate particular substantive values. Those features of the American *Constitution* which required judges to police the integrity of the political process were imported, largely unchanged, into the Canadian *Charter*.

This leads me to conclusions which may appear somewhat counter-intuitive or paradoxical. My claim is that the representation-reinforcing theory of judicial review, although originally formulated in the American context, actually offers a far more convincing account of the purposes underlying the Canadian *Charter*. My claim is that the drafters of the Canadian *Charter* embraced those elements of the American *Constitution* designed to protect the democratic process, while largely excluding provisions aimed at guaranteeing particular substantive goods or values deemed fundamental. In short, judicial review in Canada ought to serve much more limited and circumscribed purposes than judicial review under the American *Bill of Rights*. A shorthand way of describing those purposes would be to say that the *Charter* is mostly concerned with the proper func-

tioning of democratic politics as opposed to the substantive outcomes of the process.

The argument falls into three distinct parts, each comprising a section of the paper. The first section points out the extent to which legal analysis under the *Charter* will be explicitly normative. Reviewing the early Supreme Court opinions under the *Charter*, I argue that the political character of *Charter* choices has thrown the Court into considerable confusion over its role. This confusion has manifested itself in two conflicting tendencies which run through the early cases. On the one hand, the Court has been very anxious to escape the legacy of narrow and technical interpretation which characterized its jurisprudence under the *Canadian Bill of Rights*.[8] It has emphasized that the *Charter* is a fundamental constitutional document as opposed to a mere statute and that it must receive a large and liberal construction by the courts. At the same time, the Court has asserted that the *Charter* does not disturb the traditional barrier between law and politics. A "large and liberal" interpretation of the *Charter* does not require the Court to make political choices because the Court is concerned only with the legality of legislation and not its wisdom. The problem is that the Court has yet to explain how issues of legality under the *Charter* can be resolved without an inquiry into the wisdom of legislative choices. Instead of argument, the Court in these early cases has adopted a strategy of confession and avoidance. The opinions have tended to avoid "balancing of interests" under section 1 while appearing to resolve disputes through resort to categorical, nondiscretionary rules.

The second section of the paper examines two important arguments which might be thought to resolve this fundamental tension regarding the nature of the judicial role. Both arguments are drawn from the American literature on judicial review. The first claims that the judiciary can deal with the indeterminacy of constitutional language through an appeal to the intentions of the drafters. By paying close attention to the purposes and thoughts of those who wrote the *Constitution*, the judiciary can discover rather than create constitutional meaning. This theory of "original intent" has particular importance for Canada, since we have an extensive legislative record of the intentions of the drafters of the Canadian constitution. But after examining the normative implications of the theory, I conclude that the substantive intentions of the drafters can offer only

[8] *Canadian Bill of Rights*, R.S.C. 1970, App. III.

limited guidance in resolving interpretive problems arising under the *Charter*.

This section of the paper goes on to consider another prominent American theory of judicial review. On this view, the judiciary should develop a theory of substantive individual rights based on the idea of what it might mean to recognize in another man or woman the special qualities of moral agency and personality. The judiciary should then test the substantive fairness of the outcomes of the political process against the measuring rod of the idea of personhood. I reject this theory, for two reasons. First, it seeks to arbitrate conflict through appeal to an elite judiciary rather than through collective debate and argument. It proceeds on the mistaken assumption that the point of democracy is to devise correct philosophical answers to moral problems. Second, the theory proceeds on the basis of an individualistic conception of the relationship between individual and community. This individualistic ideology may or may not be appropriate in the American context, but it is incompatible with the rich and heterogeneous traditions of Canadian politics.

The final section of the paper asks whether the proper role of the judiciary under the *Charter* cannot be derived from the idea of democracy itself. I argue that the basic democratic principle, the notion that the exercise of power should be subject to collective debate and deliberation, is an extremely powerful critical tool. I claim that the deep critical power of these ideas should be brought to bear on the political process itself as opposed to the outcomes of that process. The argument does not depend on a false dichotomy between substance and procedure. The approach to judicial review which I defend is every bit as substantive as the arguments of any "fundamental rights" theorist. The difference is that judicial review performed in the name of democracy seeks to enhance the integrity of the political process rather than bypass that process in the name of right answers. It places a premium on the democratic community struggling and searching for its collective identity. Most importantly, it is an analysis which reflects not only the structure of the *Charter* itself but also the larger Canadian political tradition.

There is a preliminary but very fundamental objection which might be raised against the analysis advanced in this paper. This objection is that any discussion of the legitimacy of judicial review is simply misplaced in the Canadian context. According to this objection, the debate over the legitimacy of judicial review is a peculiarly American phenomenon which simply does not arise in relation

to the *Charter*. This attempt to sidestep the legitimacy debate in Canada is exemplified by the judgment of Lamer J. in the *Motor Vehicle Act Reference*.[9]

Mr. Justice Lamer offers a variety of arguments as to why the legitimacy of judicial review is a nonissue for Canadian jurists. First, he points out that the drafters of the *Charter* were well aware of what they were doing when they enacted this document into law in 1982. The very point of enacting the *Charter* was to confer on judges the power to strike down statutes. Thus it would be illogical and ahistorical to claim that when judges interpret and apply the *Charter* they are acting illegitimately; the judiciary is simply discharging the duty which was inherent in the enactment of the *Constitution Act, 1982*.[10] Second, he claims that judicial review acquires legitimacy due to the objectivity and neutrality of the process of *Charter* interpretation. Mr. Justice Lamer emphasizes that the Court's role is simply to interpret and apply the objective and neutral standards contained in the Constitution. The Court need not inquire into the wisdom of legislation, nor do judges substitute their values for those of the legislature in resolving constitutional claims. The question of the constitutional validity of legislation is totally separate and distinct from the question of the wisdom or merits of that legislation.

In my view, this second argument about wisdom is simply wrong. One of the primary claims which I advance in the first section of this article is that judges are inevitably required to assess the policy underlying legislation in order to measure that legislation against the *Charter*. What of the first argument regarding legitimacy — the claim that the whole legitimacy debate is essentially an in-house American dispute which has no relevance for the Canadian *Charter*? This argument is based on the fact that, whereas the American Constitution does not explicitly provide for the power of judicial review, in Canada such power was explicitly contemplated by s. 52 of the *Constitution Act, 1982*. Thus, while there may be some residual doubt over the legitimacy of judicial review in the American context, such questions simply do not arise in Canada.

This defence of the legitimacy of judicial review is misleading and oversimplified. Of course, it is true that the American *Constitution*

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[9] *Reference re. Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288 as am. Motor Vehicle Act S.B.C. 1982* [1985] 2 S.C.R. 486 at 492, 24 D.L.R. (4th) 536 [hereinafter *Motor Vehicle Act Reference*].

[10] Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

does not explicitly provide for judicial review and that the institution owes its existence to Marshall C.J.'s opinion in *Marbury* v. *Madison*.[11] But the debate over the legitimacy of judicial review in America over the past quarter century has certainly not centred over the merits of *Marbury*. There are no prominent contemporary American theorists calling for the abolition of the institution of judicial review. The debate is not over judical review per se, but rather over what type of judicial review can be justified in a democratic polity. In essence, the contemporary debate is between some form of "textualism", which seeks to constrain judges through an objective theory of interpretation, and "noninterpretivism", which suggests that judges may look to values outside the text in order to give meaning to the Constitution.

It is apparent that precisely the same issues inevitably arise in the context of the Canadian *Charter*. The issue of legitimacy does not centre on whether to have judicial review at all; this "big question" was settled in 1982. What the *Charter*'s enactment did not resolve was the subsidiary and more narrow issue of whether there are inherent limits to judicial review in the Canadian context. Once it is acknowledged that such limits exist, then the issue of legitimacy is joined. The very act of defining the limitations of judicial review requires the identification of those forms of judicial review which fall outside of the limits and are therefore inappropriate or illegitimate.

As noted above, the Supreme Court itself has repeated on many occasions that its role under the *Charter* is a limited one. The Court believes that its duty is to objectively apply the text of the Constitution and not assess the wisdom of legislation. Thus, while the Court has sought to deny the relevance of the legitimacy debate, its own analysis makes such a debate unavoidable. By elaborating a particular conception of its role, the Court has begun the task of defining the forms of judicial review which are legitimate and those which are illegitimate. The inevitability of such a debate does not mean that the specific contours of the Canadian debate should simply mimic developments in the United States. Canadians may arrive at quite distinctive and indigenous conclusions over the appropriate function of judicial review. The point is simply that *some* form of legitimacy debate is both necessary and desirable in Canada. This paper attempts to offer a framework for the conduct of that debate.

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[11] (1803) 5 U.S. 537.

II. THE EARLY CHARTER CASES IN THE SUPREME COURT

A. *The Conflicting Tendencies*

With only a handful of *Charter* cases decided by the Supreme Court by early 1986, it is obviously difficult to hazard any generalizations regarding the Court's performance or attitude towards the *Charter*, let alone speculate about future developments. Yet even at this early stage, it is possible to identify at least two important and somewhat conflicting trends in the cases. These tendencies suggest that the Court has a deep ambivalence towards its new responsibities under the *Charter* and that there are strong impulses pulling the Court in opposite directions.

One tendency in these early cases, which is the most obvious and therefore uncontroversial, is that the Court seems intent on adopting a fundamentally different attitude towards *Charter* litigation than it did towards cases arising under the *Canadian Bill of Rights*. The judicial legacy under the *Bill of Rights* was one of endless logical and legal posturing, apparently designed to ensure that the statute's only application would be to laws dealing with the drunkenness of Indians, off of reserves, in the Northwest Territories.[12] Such transparent contortions have apparently become *passé* for purposes of *Charter* litigation. Not only has the Court granted relief in about two-thirds of the *Charter* cases decided thus far,[13] its judgments have been robed in the rhetoric of activist judicial review. We have been

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[12] *R.* v. *Drybones* [1970] S.C.R. 282, 60 W.W.R. 321; *Lavell* v. *Attorney General of Canada* [1974] S.C.R. 1349, 22 D.L.R. (3d) 182; *Bliss* v. *Attorney General of Canada* [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711.

[13] The cases in which the *Charter* challenge succeeded are: *Trask* v. *The Queen* [1985] 1 S.C.R. 655, 19 D.L.R. (4th) 123; *Rahn* v. *The Queen* [1985] 1 S.C.R. 659, 19 D.L.R. (4th) 126; *R.* v. *Therens* [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655; *Singh* v. *Minister of Employment and Immigration* [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422; *Hunter, Director of Investigations and Research, Combines Investigation Branch* v. *Southam Inc.* [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641; *R.* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321; *Attorney General of Quebec* v. *Quebec Assoc. of Protestant School Boards* [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321; *Motor Vehicle Act Reference, supra*, note 9; *R.* v. *Oakes, infra*, note 43; *Dubois* v. *The Queen* [1985] 2 S.C.R. 350, 23 D.L.R. (4th) 503; *R.* v. *Clarkson* [1986] 1 S.C.R. 383, 50 N.B.R. 226. The cases in which the claim failed are: *Operation Dismantle Inc.* v. *The Queen, infra*, note 16; *Law Society of Upper Canada* v. *Skapinker, infra*, note 14; *Spencer* v. *La Reine* [1985] 1 S.C.R. 278, 145 D.L.R. (3d) 344; *R.* v. *Valente* [1985] 2 S.C.R. 673, 145 D.L.R. (3d) 452; *Societé des Acadiens Brunswick* v. *Assoc. of Parents for Fairness in Education* [1986] 1 S.C.R. 549, 50 N.B.R. (2d) 41 [hereinafter *Societé des Acadiens*]; *R.* v. *Krug* [1985] 2 S.C.R. 255, 51 N.R. 320n.

told that the *Charter* is a "living tree" that must not be contaminated by narrow or technical judicial interpretation. The Court in *Charter* cases should not merely engage in ordinary statutory construction, but must perform a "constitutional role".[14] The Court has seen the banner of U.S. Chief Justice Marshall being run up the Canadian legal flagpole and it has saluted: "we must never forget that it is a *constitution* [emphasis added] that we are interpreting."[15]

The second tendency in these early *Charter* cases flows from and, to some extent, qualifies the first. Despite the incessant invocation of activist rhetoric, the Court has stoutly maintained that its role under the *Charter* is legal and not political. The Court's concern is not with the wisdom of legislation, but only with the separate question of whether a right guaranteed by the *Charter* has been violated. Madame Justice Wilson forcefully emphasized this point in her concurring opinion in the *Operation Dismantle* case: "The question before us is not whether the government's defence policy is sound but whether or not it violates the appellant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms. This is a totally different question* [emphasis added]. I do not think there can be any doubt that this is a question for the courts."[16]

Of course, this statement is only meaningful if the issue of legality can be determined without recourse to questions of wisdom. Madame Justice Wilson's confident assertion that the issues are "totally different" seems based on the fact that the Court is being called on to interpret and apply a specific legal standard, in this case s. 7 of the *Charter*. But the mere fact that statutory language is involved does not, in itself, provide a distinction between legal and political questions. The issue is whether it is possible to apply the statutory language without an inquiry into the wisdom of the legislation under review.

Even a cursory analysis of the language and structure of the *Charter* indicates that most *Charter* litigation may well turn on the issue of the wisdom of legislative choices. In part, this is a product of the abstract and generalized nature of the rights protected by the *Charter*. The very process of defining the content of the rights protected by the *Charter* seems inherently political. Many of these rights,

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[14] *Law Society of Upper Canada* v. *Skapinker* [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161 at 168 *per* Estey J.

[15] *M'Culloch* v. *State of Maryland* (1819) 17 U.S. 316, cited by Estey J. in *Skapinker, ibid.* at 170.

[16] *Operation Dismantle Inc.* v. *The Queen* [1985] 1 S.C.R. 441 at 472, 18 D.L.R. (4th) 481.

most notably the right to equality and liberty, contain little or no substantive criteria; they resemble blank slates on which the judiciary can scrawl the imagery of their choice. But there is a second problem. Having given content to these open-ended rights, the judiciary must then balance these rights against considerations of the general welfare under s. 1. This process of interest balancing seems just another way of asking the fundamental legislative question: "is this worth what it costs?" The process of balancing individual against collective interests is a calculation which would have already been made by the legislature when it passed the statute under review. Since the legislature passed the statute, it must have calculated that the interests to be served outweigh those to be sacrificed. Section 1 of the *Charter* appears to invite the Court to assess and second-guess the wisdom of the balance struck by the legislature.

There is no reason to suppose that the Court is better situated than the legislature to make such judgments. Balancing of interests is a quintessentially legislative task.[17] We normally look to the political rather than the legal branches of government for calculations of general welfare. Only the legislature is equipped to deal with the vast array of data that is relevant to such an inquiry. Not only do the courts lack the expertise and the resources to consider these legislative facts, the litigants in a private lawsuit are unlikely to place them on the record. This is why even the most ardent defenders of judicial review concede that interpersonal comparisons of utility are best carried out by the legislature: "[t]he political system of representative democracy may work only indifferently . . . , but it works better than a system that allows nonelected judges, who have no mail bag or lobbyists or pressure groups, to compromise competing interests in their chambers."[18]

The highly politicized nature of the s. 1 inquiry is merely exacerbated by the reference to "reasonable limits" that can be "demonstrably justified in a free and democratic society". In order to give content to this terminology, the courts will have to devise some normative theory about the nature of freedom and of democracy. The trouble with this is twofold. First, there is no fixed or uncontro-

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[17] There was an ongoing American debate in the 1960s over whether "interest balancing" was an appropriate task for the judiciary. The weight of opinion tended to the view that it was inappropriate, since it required the court to perform legislative tasks. For a sampling of the various viewpoints, see L. Frantz, "The First Amendment in the Balance" (1962) 71 Yale L.J. 1424; W. Mendelson, "On the Meaning of the First Amendment: Absolutes in the Balance" (1962) 50 Cal. L. Rev. 821.

[18] R. Dworkin, *Taking Rights Seriously* (1977) at 85.

versial core meaning to these concepts; they are contested concepts, with a rich and sophisticated debate continuing within political theory over their content and application.[19] Second, the judiciary is largely unaware of the nature and subtlety of these theoretical debates; legal training in Canada has always relegated such political questions to the domain of the academy or the legislature rather than the courtroom. The enactment of the *Charter* is like an unscheduled "night drop", in which Canada's judges and lawyers have been parachuted unaware into the battlefields of political theory, without weapons, and with no knowledge of the deployment of the contending armies.

In an attempt to avoid this unpleasant scenario, some of the early *Charter* cases have suggested that the reference to "free and democratic societies" in s. 1 directs judges to engage in a comparative inquiry. According to this view, the court must look to practices in other "free and democratic" societies and determine the limits on rights which are acceptable there. Limitations which are generally accepted in such free and democratic societies are justifiable according to the terms of s. 1.[20] If this analysis were correct, the court would be relieved of the responsibility of determining for itself the nature of freedom or of democracy. The court would be a mere cataloguer rather than a lofty theorist, taking judicial notice of the balance that others have struck between individual rights and collective welfare. The s. 1 analysis would be largely descriptive rather than overtly normative.

The mistake in this analysis is as common as it is fundamental. The reasoning attempts to leap from the fact that a state of affairs exists to the inference that this state is justified. But a moment's reflection will indicate why this leap from the descriptive to the normative cannot succeed. To take a well-known example, blacks in the United States have been subjected to various forms of institutionalized and informal discrimination over the past two hundred years. In particular, the education system prior to the 1950s was segregated along racial lines, in keeping with the "separate but

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[19] For a survey of some of the recent debates over the meaning of democracy, see C. Pateman, *Participation and Democratic Theory* (1970).

[20] For instances of this line of argument see: *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*, (1983) 147 D.L.R. (3d) 58, 41 O.R. (2d) 583 (H.C.); *Federal Republic of Germany* v. *Rauca* (1982) 141 D.L.R. (3d) 412 (Ont. H.C.); The Rt. Honourable D. MacDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources* (1982) at 18.

equal" doctrine sanctioned in *Plessy*.[21] When the Supreme Court of the United States came to reconsider the constitutionality of separate schooling in the famous case of *Brown* v. *Board of Education*[22] the mere fact that such segregation existed could not count as a constitutional justification in its favour. Constitutional argument is normative; it is about what ought to be, not about what is. The opponents of segregation did not question the fact that such segregation had existed; their point was precisely that the very existence of separate facilities perpetuated racial stereotypes and ensured the continued subjugation of American blacks. Historical or comparative arguments pointing to widespread acceptance of such racial segregation were simply irrelevant in this normative equation. If the state was to justify separate facilities, it had to rely on the inherent desirability of the system, not its pervasiveness.

A similar sort of argument applies in the context of s. 1. If, for example, the Court is hearing a s. 15 challenge to restrictions on combat roles for women in the military, the fact that other nations have seen fit to impose similar restrictions cannot count as a significant reason in their favour. This comparative evidence may be relevant as an indication of the extent to which sexual stereotypes are deeply embedded in the consciousness of liberal democracies. But it tells us nothing about whether or not these restrictions on women satisfy some independent norm of equality. To answer that question, the Court will have to devise its own conception of equality and balance it against the interests of the community as a whole.

So we begin with this general premise: the process whereby the Court defines rights and then balances them against considerations of general welfare bears a striking resemblance to legislative judgments about general utility. The question under s. 1 of the *Charter* — whether gains in general welfare justify limits on individual rights — appears no different in principle from the question the legislature asks itself when it enacts legislation. Moreover, the concepts of "freedom" and "democracy" referred to in s. 1 are themselves indeterminate and fundamentally contested. Rather than offer any meaningful weights and measures for use in the balancing process, they merely invite the Court to devise its own theory of freedom and democracy.

This returns me to my original observation regarding the frequent invocation of activist rhetoric by the Supreme Court in its early

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

[22] *Brown* v. *Board of Education* (1954) 347 U.S. 483.

Charter judgments. My claim is that, beneath this bravado, the *Charter* has thrown the Court into a crisis over the legitimacy of the judicial role and the relationship between law and politics. While maintaining that the *Charter* must receive a "large and liberal" interpretation, the Court has insisted that its function under the *Charter* is a peculiarly legal and not a political one. But the story has not convinced anyone. Instead of arguments aimed at differentiating its function from that of the legislature, the Court has offered only bare and hollow assertion.

B. *The Operation Dismantle Case*

The most obvious illustration of the Court's continuing but frustrated attempt to maintain the law/politics distinction is the opinion of Chief Justice Dickson in the *Operation Dismantle* case. Faced with the challenge by Operation Dismantle to the testing of the cruise missile in Canada, it was all well and good for the Court to maintain that its responsibility was to determine a legal question and not to pass judgment on the wisdom of cruise missile testing.[23] But here was the rub. The essence of the legal challenge was that the decision to test the cruise would lead to an increase in the arms race and thereby increase the chances of nuclear war. In other words, the plaintiffs were questioning the wisdom of the government's decision to test the cruise. They were asking a court to hear evidence on the probable effects of the testing program and overturn the judgment of the government of Canada on the question. The so-called legal and political questions were simply different versions of the same question: was it in the Canadian interest to allow the testing of the cruise missile in Canadian airspace?

The majority judgment of Chief Justice Dickson refused to dismiss the plaintiffs' claim on the broad basis that their challenge was political rather than legal. To have relied on such a broad proposition would have undermined the Court's bold rhetoric about the fundamental character of the constitutional document and its status as a "living tree". Indeed, the Chief Justice was particularly careful to reassure his readers on that score: "I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts."[24] Instead, the Chief Justice invoked an argument that has a familiar legal ring to it in order to dismiss this plaintiff's state-

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[23] See the judgment of Wilson J. in *Operation Dismantle, supra,* note 16.

[24] *Ibid.* at 459 *per* Dickson C.J.C.

ment of claim. The claim must be struck out, according to Dickson C.J., on the narrow factual ground of causation. The causal link between the actions of the government and the violation of the plaintiffs' rights was "simply too uncertain, speculative and hypothetical to sustain a cause of action."[25] It would be impossible to offer sufficient legal proof, as a factual matter, of the connection between the government's decision and the increased threat of nuclear war.

Given the highly controversial nature of the contemporary claims and counterclaims regarding the nuclear arms race, there is some initial plausibility to this disposition of the case. But upon dissection it becomes aparent that "causation" is a rather improbable basis for striking out Operation Dismantle's statement of claim. The central thrust of Chief Justice Dickson's argument is that the plaintiffs' claim is premised on assumptions and hypotheses about how independent and sovereign nations will react to the testing of the cruise missile. According to the Chief Justice, such reactions are purely a matter of speculation and cannot be proven one way or the other. For instance, one of the plaintiffs' allegations was that the testing of the cruise missile would result in an increased military presence in Canada, which would make Canada a more likely target of nuclear attack. But, as Chief Justice Dickson points out, this argument assumes certain reactions of hostile foreign powers to an increased military presence and also makes an assumption about the degree to which Canada is already a possible target of nuclear attack. "Given the impossibility of determining how an independent sovereign nation might react, it can only be a matter of hypothesis whether an increased American presence would make Canada more vulnerable to nuclear attack. It would not be possible to prove it one way or the other."[26]

Underlying the argument is an assumption about the nature of the distinction between facts and values, and the relationship between this distinction and legal arguments. The distinction between facts and values is portrayed in terms that are fixed and absolute. Facts exist, independent of human intervention or desire. They can be ascertained and proven through an objectively correct and neutral methodology. Conversely, anything which is not a fact is a mere opinion or conjecture. The world can be categorized and comprehended on the basis of a dichotomy between reason and desire: either something is objectively true and discernible by reason or else

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[25] *Ibid.* at 447 *per* Dickson C.J.C.

[26] *Ibid.* at 453.

it is hopelessly subjective and governed by speculation and appetite. It is pointless to seek to demonstrate the truth or falsity of subjective opinions. Thus, the opponents of the cruise missile testing are "entitled to their opinion and belief" but such opinions lie "in the realm of conjecture rather than fact".[27]

This fact/value dichotomy serves as the toehold securing the legitimacy of judicial review under the *Charter*. On this view, judicial review under the *Charter* can be distinguished from political argument through an appeal to the objective quality of the proof demanded in legal argument. Judicial review is concerned with objective facts rather than subjective opinions. Courts adjudicate claims which are capable of proof in an objective manner, whereas the political branches of government make mere subjective value choices.

An obvious, if disquieting, example of this is the government's decision to permit the testing of the cruise missile. Since it is impossible to prove whether the cruise program will lead to an increased risk of nuclear war, it is appropriate that such a decision be taken by the political and not the legal authorities. In effect, the dichotomy between facts and values itself fortifies the barrier between law and politics. Law is both constituted and legitimated by the objectivity of the factual. Politics is passion and subjectivity, the irrational working out of conflicting desire and opinion.

These premises seem wrong on both counts; the distinction between facts and values is not absolute, while legal proof and argument extend beyond the realm of the factual. As to the first issue, it is a gross oversimplification to suppose that human knowledge comes in only two packages, the one labelled objective, the other subjective. To put this another way, the mere fact that an issue cannot be resolved in some neutral or mechanical fashion does not mean that it must be relegated to the category of mere whim or caprice. It is possible to acknowledge the contingent and value-laden character of an enterprise and yet make rational and meaningful arguments about that enterprise. In fact, an important tradition in contemporary philosophy is premised on the belief that *all* branches of knowledge, including the so-called neutral disciplines of the natural sciences, are shot through with subjective and contingent elements.[28] This contingency does not entail the conclusion that there is nothing

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[27] *Ibid.* at 454.

[28] See R. Rorty, *Philosophy and the Mirror of Nature* (1979); T. S. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (1970).

meaningful to be said about these subjects, or that one opinion is necessarily as persuasive as any other.

Just as it is misleading to posit an absolute dichotomy between facts and values, so too it is false to claim that legal proof is concerned exclusively with facts. In a sense, this is the point made by Madam Justice Wilson in her rebuttal to the argument of the Chief Justice on the causation issue. Madam Justice Wilson claims that legal argument may properly be heard on issues of intangible fact. Intangible facts are "inferences from real facts" and may also be the subject of opinion. Wilson J. illustrates her argument through reference to the case of *McGhee* v. *National Coal Board*.[29] The issue in this case, whether the lack of shower facilities caused the plaintiff's skin disease, was a matter of medical opinion, but it was also "in law a determination which the courts can properly infer from the surrounding facts and expert opinion evidence."[30] According to Madam Justice Wilson, the claim of the plaintiffs, Operation Dismantle, is also premised on such intangible facts. Although she entertained doubts whether the plaintiffs could prove their case at trial, she argued that it was not the function of the court on a preliminary motion to prejudge the issue.

Of course there is a possible point of distinction between the *McGhee* case and *Operation Dismantle*. Although *McGhee* involved the court drawing inferences based on mere medical opinion, these inferences related to events which had already taken place. The plaintiffs had already suffered harm and the only question was whether this harm had been legally caused by the defendants. In *Operation Dismantle*, the court is faced with a situation where the harm has not yet occurred and is by no means certain to occur. In fact, in order to sustain the plaintiffs' claim, the court would have had to have made a prediction about the reactions of independent and sovereign nations to the foreign policy decisions of the Canadian government.

It is not clear why this point of distinction between the cases should be taken to be conclusive. The issue at this stage of the litigation was simply whether the plaintiffs' claim should be permitted to proceed to trial. Accordingly, the question to be decided is whether courts should be barred from hearing evidence and drawing inferences regarding the reactions of independent and sovereign nations.

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[29] *McGhee* v. *National Coal Board* [1972] 3 All E.R. 1008 (H.L.) [hereinafter *McGhee*].

[30] *Operation Dismantle, supra*, note 16 at 478 *per* Wilson J.

Moreover, it should not be sufficient to establish that, in this particular case, the plaintiffs are going to have an extremely difficult time proving their factual allegations. This is simply a corollary of the general rule that, on a motion to strike, the facts pleaded in the statement of claim must be deemed to have been proven.[31]

It need hardly be emphasized that there is no general bar to courts hearing evidence and making assumptions about the future reactions of independent and sovereign actors, whether they be individuals or groups. Consider our most basic assumptions about the behaviour of markets. Whenever we predict how a market will respond to fluctuations in price, supply or other variables, we are making a prediction about the reactions of sovereign and independent actors — in this case, the consumers in a market. Bearing this in mind, recall the judgment of the Supreme Court of Canada in the *Reference Re Anti-Inflation Act*.[32] In this case, the Supreme Court admitted and relied upon a large body of extrinsic evidence in order to determine the constitutional validity of the federal government's anti-inflation program.[33] This material dealt with the state of the Canadian economy in 1975 and the likely success of the anti-inflation program in bringing inflation under control. In short, the evidence tried to establish how millions of individuals, corporations and other economic actors would react to the government's restraint program. The Court examined the material, at least for the limited purpose of determining whether there was a rational basis for the government's decision to enact the legislation.[34]

It is difficult to understand how an a priori distinction can be drawn between the extrinsic material considered in the *Anti-Inflation Reference* and the evidence which Operation Dismantle wished to place before the Court. For example, one of the claims of Operation Dismantle was that the testing would lead to an increased American military presence in Canada, which would make Canada a more likely target of nuclear attack. The objection of the Chief

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[31] *Ibid.* at 475, referring to *Attorney General of Canada* v. *Inuit Tapirisat of Canada* [1980] 2 S.C.R. 735 at 740, 115 D.L.R. (3d) 1, 33 N.R. 304 *per* Estey J.

[32] [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 [hereinafter *Anti-Inflation Reference*].

[33] *Ibid.* These extrinsic materials included a study by economist Richard Lipsey dealing with the state of the Canadian economy in 1975 and the various policy options in dealing with inflation; a transcript of a speech by the Governor of the Bank of Canada, Mr. Gerald Bouey, rebutting the Lipsey study; and a 'comment' by the Ontario Office of Economic Policy on the 1975 economic environment designed to show the need for national action.

[34] *Ibid.* at 391 *per* Laskin C.J.C.

Justice was that this argument made assumptions about the degree to which Canada is already a possible target of nuclear attack, and assumed certain reactions of hostile foreign powers to an increased military presence. According to Chief Justice Dickson, these difficulties meant that it "would not be possible to prove . . . one way or the other" whether an increased American presence would make Canada more vulnerable to nuclear attack.[35]

The obvious response to the argument is that these difficulties might be overcome through the hearing of evidence and expert testimony. The Court could have heard evidence on the extent to which Canada is already a target of nuclear attack as well as the probable effect of an increased American presence. As in the *Anti-Inflation Reference*, the evidence might be admitted merely to establish whether there was a rational basis for the government's decision in this particular case. Thus, the causation argument provides an inadequate justification for the Court's holding in the case. This is not to suggest that the Court's holding could not be justified; the point is simply that the justification would have to be framed in terms of some larger considerations of public policy rather than the narrow grounds of causation.

The majority opinion in the *Operation Dismantle* case illustrates the conflicting tendencies at work in the Court's early *Charter* cases. On the one hand, the Court is clearly motivated by a desire to escape the infamy associated with its *Bill of Rights* jurisprudence and to give a "large and liberal" interpretation to the various *Charter* guarantees. But the overwhelming concern of the Court is to ensure that this civil libertarian stance does not result in the collapse of the distinction between law and politics.

The opinion of the Chief Justice in *Operation Dismantle* highlights the tension between these conflicting tendencies and the failure of the Court in reconciling them. The *Operation Dismantle* litigation was particularly exemplary since it placed the political character of *Charter* litigation in stark relief. The litigation was political not simply in the sense that the testing of the cruise missile was a highly controversial issue in the political arena. More important was the nature of the claim raised by the plaintiffs. The essence of their claim was that the government had been wrong to allow cruise missile testing in Canadian airspace. The plaintiffs wanted the Court to declare that the foreign policy of the government, far from advancing Canadian welfare, was actually increasing the risk of

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[35] *Operation Dismantle, supra,* note 16 at 453 *per* Dickson C.J.C.

nuclear war. Confronted with the prospect of having to substitute its own opinion about the wisdom of cruise missile testing for that of the government, the Court took refuge in an unconvincing argument about causation. It also took the opportunity to reassert and defend the central distinction between the objectivity of legal reasoning and the subjectivity of political argument.

C. *Political Judges and Section 1: The Oakes Case*

If this fundamental issue of legitimacy is kept in mind, certain distinctive tendencies and patterns begin to emerge in the other *Charter* cases decided by the Supreme Court. The most striking is the Court's treatment of s. 1. I argued earlier that the s. 1 balancing of interests appeared to be just another way of asking the basic legislative question: is this worth what it costs? Given the overtly political character of such an analysis, we would expect to observe the Court experiencing particular difficulty in interpreting and applying this section.

The striking feature of the early Supreme Court *Charter* cases was the absence of any meaningful discussion of the principles to govern the application of s. 1. Until the 1986 judgment of the Court in *R.* v. *Oakes*, the Court had managed to sidestep the difficult question of how to balance interests under s. 1 without also questioning the wisdom of legislative enactments.

In a number of the early cases, the avoidance of s. 1 analysis appeared somewhat strained and contrived. In the *Quebec Protestant School Boards* case,[36] the Quebec government had argued that its restrictions on access to English schooling were reasonable within the meaning of s. 1, in view of factors such as demographic patterns, the physical and lingustic mobility of individuals and the regional distribution of interprovincial migrants. In essence, the Government of Quebec was asking the Court to pass judgment on the wisdom of its policy with respect to English schooling. The Court refused to enter into such an inquiry, on the basis of a rather curious argument. The Court held that s. 1 did not have to be considered since "[t]he provisions of s. 73 of Bill 101 collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*."[37] The Court's argument appeared to rely on the

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[36] *Attorney General of Quebec* v. *Quebec Association of Protestant School Bds.* [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321.

[37] *Ibid.* at 88.

alleged distinction between limiting and denying a right: where there is direct conflict between a *Charter* right and government legislation, the legislation can be ruled invalid on a categorical basis, without even considering s. 1.

The argument is only convincing if the distinction between limiting and denying a right is meaningful. The difficulty with the distinction is that it does not appear to offer a determinate basis for deciding cases. A particular state restriction on rights can be made to appear as either a limit or a denial, depending on the level of generality at which the right in question is defined. Suppose a municipality passed a bylaw prohibiting all demonstrations or marches in the city for a period of thirty days.[38] There are equally plausible arguments suggesting that this could be either a limit or a denial of the right to freedom of association. If the thirty day period of the bylaw is taken as the operative time frame, then the residents of the city could be said to have suffered a complete denial of their right to associate during that period. On the other hand, if the right of association is defined in more general and abstract terms, it could plausibly be argued that this general right has not been completely denied, but only limited for the modest period of thirty days. There is nothing in the concepts of limit or denial which instructs the jurist as to which of these two alternative arguments is to be preferred. In effect, the terms limit and denial are not themselves grounds for decision, but mere conclusory labels attached *post hoc* to an analysis determined on other, independent grounds.

Such techniques of confession and avoidance were abandoned in the Court's recent judgment in *Oakes*, where Chief Justice Dickson suggested a general approach for the application of s. 1, as well as a particular framework of analysis to structure its application to particular cases. The opinion of the Chief Justice enjoyed the support of four other members of the Court and thus, for the time being at least, represents the considered opinion of the majority of our highest court on these issues.

The analysis of the Chief Justice appears to constitute a compelling rebuttal to claims that courts are inevitably inquiring into the wisdom of legislation in applying s. 1. The Chief Justice has devised a framework which is designed to put constitutional and legal flesh on the political skeleton of s. 1. Armed with the objective and manageable standards enunciated, lower courts may now

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[38] See *A.G. Canada* v. *Dupond*, [1978] 2 S.C.R. 770.

robustly measure legislation against the dictates of those neutral standards.

This attempt by the Supreme Court to come to terms with the open-ended quality of s. 1 is a welcome development. However, while the analysis purports to offer neutral and objective standards to guide the application of s. 1, this alleged objectivity is wholly illusory. The framework of the Chief Justice necessarily requires the judiciary to question the wisdom of legislation, albeit in a disguised fashion. Thus, far from resolving the lingering doubts about the legitimacy of the judicial role under the *Charter*, the opinion unintentionally lends credence to such claims.

David Edwin Oakes was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*.[39] At his trial, the Crown established that Mr. Oakes had been in possession of eight one-gram vials of *cannabis* resin in the form of hashish oil. The Crown then sought to rely on the reverse onus provision in s. 8 of the *Act*, in order to establish the offence of trafficking.[40] The trial judge found that there was no rational or necessary connection between the fact proved — possession of the drug — and the inference asked to be drawn — possession for the purpose of trafficking. He found that s. 8 of the *Act* violated the right of the accused to be presumed innocent, guaranteed by s. 11(d) of the *Charter*. Section 8 was accordingly rendered

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[39] R.S.C. 1970, c. N-1. The analysis which follows is drawn from P. Monahan and A. Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 Supreme Court L.R. (forthcoming).

[40] S. 8 provides that:

> In any prosecution for a violation of subsection 4(2), if the accused does not plead guilty, the trial shall proceed as if it were a prosecution for an offence under section 3, and after the close of the case for the prosecution and after the accused has had an opportunity to make full answer and defence, the court shall make a finding as to whether or not the accused was in possession of the narcotic contrary to section 3; if the court finds that the accused was not in possession of the narcotic contrary to section 3, he shall be acquitted but if the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking, and thereafter the prosecutor shall be given an opportunity of adducing evidence to establish that the accused was in possession of the narcotic for the purpose of trafficking; if the accused establishes that he was not in possession of the narcotic for the purpose of trafficking he shall be acquitted of the offence as charged but he shall be convicted of an offence under section 3 and sentenced accordingly; and if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged and sentenced accordingly.

inoperative and, in the absence of any further Crown evidence tending to establish an intention to traffic, the accused was acquitted.[41]

This disposition of the case was unanimously upheld by the Ontario Court of Appeal. Mr. Justice Martin, speaking for the Court, concluded that s. 8 of the *Narcotic Control Act* was unconstitutional "because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic)."[42]

The further appeal by the Crown to the Supreme Court of Canada was dismissed unanimously, although two separate opinions were issued. Chief Justice Dickson, writing for himself and four others, began by finding that s. 8 of the *Narcotic Control Act* imposed a legal burden on an accused to prove on a balance of probabilities that he or she was not in possession of a narcotic for the purpose of trafficking. The Chief Justice concluded that he "had no doubt whatsoever" that s. 8 violated the presumption of innocence in s. 11(d) of the *Charter*. This conclusion followed from the fact that the accused was required to establish his innocence on a balance of probabilities; accordingly, it would be possible to convict an accused who had succeeded in raising a reasonable doubt as to his innocence but had failed to satisfy the balance of probabilities standard. Turning to s. 1, the Chief Justice observed that any s. 1 inquiry "must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms which are part of the supreme law of Canada".[43] Further, Dickson C.J.C. held that it is clear "from the text of s. 1" that limits on rights are "exceptions to their general guarantee". The purpose of s. 1 is to allow limits on rights when "their exercise would be inimical to the realization of collective goals of fundamental importance". Accordingly, although the standard of proof under s. 1 is the civil standard of proof by a preponderance of probability, this standard must be applied "rigorously" and "a very high degree of probability will be ... 'commensurate with the occasion'."[44]

The Chief Justice set out two central criteria which must be satisfied by the state before a legal limit on rights can be justified. First, the objective or goal of the law must "at a minimum, ... relate to concerns which are pressing and substantial in a free and democratic

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[41] See *R.* v. *Oakes* (1982) 38 O.R. (2d) 598 (Ont. Prov. Ct.).

[42] *R.* v. *Oakes* (1983) 145 D.L.R. (3d) 123 at 147; 2 C.C.C. (3d) 339 (Ont. C.A.).

[43] *R.* v. *Oakes* [1986] 1 S.C.R. 103 at 135; 50 C.R. (3d) 1.

[44] *Ibid.* at 138.

society . . .".[45] Second, the means chosen must be proportionate to the goal. There are three components of a test of proportionality. The means must be rationally connected to the objective; the means must impair individual rights as little as possible; and there must be a proportionality between the effects of the means and the objective which has been identified as of sufficient importance.[46]

Applying this framework to s. 8 of the *Narcotic Control Act*, the Chief Justice was of the view that Parliament's concern with decreasing drug trafficking could be characterized as "substantial and pressing". Thus the reverse onus provision satisfied the first branch of the s. 1 inquiry. But the provision failed the proportionality test, on the grounds that there was no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. This meant that the presumption required under s. 8 was "overinclusive" and could produce results "in certain cases which would defy both rationality and fairness". The provision could not be justified under s. 1 and was of no force and effect.

The opinion of the Chief Justice suggests that the s. 1 analysis is determinate and objective. The court need not be concerned with the wisdom of legislative policy, but only with the separate question of whether it satisfies the two-pronged test under s. 1. There are a number of features of the analysis which contribute to this sense of objectivity and neutrality. First, the inquiry is framed in terms of the traditional and familiar standard of proof in civil cases, proof on a preponderance of probability. This characterization evokes the imagery of a court deciding a garden-variety dispute between private parties. The court will hear evidence on the s. 1 issue and then determine, as it would in any private litigation, whether the civil standard of proof has been satisfied. Of course, the evidence and arguments in a *Charter* case will often be complex and require the court to exercise considerable discretion. But this is not significantly different from the task of a court in complex civil litigation. Since the court's competence in these complex civil cases is generally accepted, there should be no serious qualms about the judiciary embarking on the task of *Charter* adjudication.

There is a second feature of the judgment which is even more crucial in terms of bolstering the legitimacy of the Court's role. This is the manner in which the Chief Justice actually applies the s. 1 analysis. The Chief Justice accepts the validity of the state's goal in

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[45] *Ibid.* at 138-39.

[46] *Ibid.* at 139.

enacting s. 8 of the *Narcotic Control Act*. He strikes down the provision on the basis that Parliament has pursued its policy in an irrational way. The constitutional objection is not to the state's policy as such but to the manner in which it has attempted to carry out that policy. The Court's ruling appears wholly instrumentalist, designed to measure the fit between the state goal and the means chosen to achieve that goal. Assuming a decidedly deferential posture, the Court is saying to Parliament: *given* that you have decided to pursue this goal, you have done so in a way that is arbitrary or irrational.

This type of analysis appears to resolve any possible tension between judicial review and democratic values. Under a rationality standard, judges are not purporting to substitute their values for those of legislators. The Court is simply ensuring that legislation accurately reflects the chosen values of the legislators themselves. This could be regarded as the perfection of democracy rather than its negation. Judicial review is promoting precision and care in the drafting of legislation and eliminating needless and arbitrary restrictions of individual liberty. There is nothing undemocratic about requiring the legislature to pursue its goals in a precise and careful fashion.

A similar set of assumptions underlies the "least restrictive means" analysis, the second branch of the proportionality test outlined by the Chief Justice. As with the rationality standard, the least restrictive means test does not purport to dictate to the state which value choices it must pursue or avoid. Rather, it is a limited attempt to identify inefficient legislation. The least restrictive means analysis says to the legislature: *given* that you have decided to pursue this goal, you have done so inefficiently. There are other legislative devices available which would allow you to pursue the same goal, but in a manner which would be less restrictive of individual liberty. It seems self-evident that the state should never restrict individual liberty needlessly. Given a choice, the state must select the device that is least intrusive in terms of the fundamental values guaranteed by the *Charter*.

It is hardly a coincidence that the trial court and both appellate courts in *Oakes* resolved the constitutional issue on the basis of the rationality standard. Indeed, it is rather safe to predict that whenever courts in the future decide to invalidate legislation, they will focus on the irrationality of the law or stress the availability of less restrictive means. This is because these techniques allow the court to overturn legislation without appearing to be a "super-legislature".

The crucial question is whether these techniques actually enable the court to avoid having to assess the wisdom of legislative policy, or whether they simply invite the court to make such a political judgment in a more covert fashion.

In my view, courts under the *Charter* can never escape the task of evaluating the policies chosen by the legislature. The rationality standard, although apparently neutral, requires just such a political evaluation on the part of judges.

The political character of the rationality standard becomes apparent from a consideration of those instances in which it has been applied in the American context. Consider the following example, developed by Professor Ely from the facts of *Smith* v. *Cahoon*.[47] Professor Ely asks his readers to suppose that a new and unusually effective truck brake was developed.[48] The legislature would undoubtedly be given a wide degree of latitude in deciding whether to require installation of the new brake. Given the cost of the new brake, it might be open to the legislature to require some, but not all, truck owners to install it. For example, a law which required installation of the brake on all trucks whose weight exceeded five tons might well be valid. The burden on the legislature would be to demonstrate that the distinction drawn by the law was rationally relatable to the goal of promoting traffic safety. It could discharge this burden in a variety of ways; for instance, if it could be shown that the heavier a truck is, the harder it is to stop, then requiring the brakes on heavy trucks promotes safety to a greater extent than requiring them on light trucks.

But not all distinctions could be shown to be rationally relatable to the goal of traffic safety. Professor Ely offers the example of a law which requires the brake to be installed on all trucks except those carrying seafood.[49] According to Ely, this is an irrational law. From the point of view of safety, the distinction between trucks carrying seafood and those carrying other goods is irrelevant; trucks carrying seafood are just as likely to benefit from the installation of the new brake as are any others. Similarly, there is no indication that the installation of the brake on trucks carrying seafood is exceptionally

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[47] (1981) 283 U.S. 553. In this case, the Court struck down an exemption for carriers of farm products and certain seafoods from a Florida law requiring commercial carriers to post security against liability for injuries caused by their negligence.

[48] J. Ely, "Legislative and Administrative Motivation in Constitutional Law" (1970) 79 Yale L.J. 1205 at 1237-39.

[49] This was the distinction employed in *Smith* v. *Cahoon*, *supra*, note 47.

expensive or difficult. Thus the distinction is not rationally relatable to the goals of either traffic safety or driver economy.

Yet the characterization of the law as irrational is surely misplaced. It is true that a distinction based on whether a truck happens to be carrying seafood does not further the goals of traffic safety or driver economy. But there is nothing mysterious about the inclusion of such a distinction in a statute. The purpose of the distinction is obviously to give a preference to the owners of trucks in the seafood business. The exemption will save these truckers the costs of installing the new brake and, presumably, grant them an advantage over their competitors. It is apparent that the law had two purposes, rather than one. The first purpose was to increase traffic safety by requiring most trucks to install new brakes. The second purpose was to ensure that these gains in traffic safety did not come at the expense of increasing the costs of truckers transporting seafood.

Perhaps it might be argued that there is something inherently irrational about conferring special benefits or exemptions on one industry as opposed to another. But this argument would be mistaken. It is an uncontroversial feature of our tax laws, for example, that certain industries or individuals may be granted more favourable tax treatment than others. The state might decide to grant special tax exemptions to the oil industry, but not to artists. Thus, in the context of our trucking example, there is very little doubt that the legislature could have granted a special tax concession to truckers transporting seafood but have denied the concession to others. It would be absurd to claim that such a law was irrational, in the sense that it failed to further its goal. A tax exemption for trucks carrying seafood fits perfectly its goal, which is to confer a competitive advantage on such truckers.

Thus the hypothetical law exempting trucks carrying seafood from installing new brakes is not irrational. The law advances the goal of promoting safety, but not at the expense of truckers carrying seafood. The claim of irrationality is really little more than a judgment that one of these purposes, the goal of preferring seafood truckers, is unacceptable. The court simply ignores the impugned purpose, and then concludes that the legislature does not further the goals which remain.[50]

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[50] This was essentially the technique employed in *Smith* v. *Cahoon, supra,* note 47, in which the Court considered only the goal of traffic safety and ignored other possible purposes of the law.

This analysis is not exceptional or aberrant. Laws are never passed without reasons. Those reasons may be complex and involve a trade-off between a number of competing goals, but the reasons always exist. The issue is never whether a law is rational or not but, rather, whether it has been passed for good reasons or for bad reasons. Accordingly, the conclusion that a law is irrational is not achieved by measuring the fit between a law and its real purposes; it is a product of evaluating the fit between the law and some contrived and restrictive set of judicial purposes.[51]

So the rationality standard is not simply a neutral process of measuring the fit between the goals of legislation and the means chosen to achieve those goals. Instead, it requires judges to make an evaluation of the adequacy of the goals themselves. In short, the judgment of Chief Justice Dickson in the *Oakes* case, while purporting to downplay the political character of the s. 1 inquiry, merely confirms the necessity of political judgments in *Charter* adjudication.[52]

So the first story that can be told about the early *Charter* cases in the Supreme Court is rather simple and straightforward. It has been particularly important to the Court to give at least the appearance of breaking with the discredited tradition of the *Bill of Rights* cases. But the Court wants to accomplish this first objective without calling into question the basic legitimacy of the judicial role, in particular, the distinction between legal and political reasoning. The sticking point is that the Court has not yet hit on a method for accomplishing both of these goals simultaneously. Indeed, a careful analysis of the early *Charter* opinions of the Court illustrates the inherently political character of the Court's reasoning. I chose to make this point by focusing on the Court's opinions in *Operation Dismantle* and *Oakes*, but a similar critique could have been offered of any of the other *Charter* judgments of the Court. The value-laden character of the Court's analysis illustrates the hollowness of the claim that the legitimacy of judicial review is a nonissue in the Canadian context. If judicial review under the *Charter* is to be justified, it cannot be on the spurious basis that the adjudication process is neutral or objective. Any convincing justification must take into account the value-laden nature of judicial review and attempt to reconcile this

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51 For the elaboration and application of this critique to a wide number of contexts, see Note, "Legislative Purpose, Rationality, and Equal Protection" (1972) 82 Yale L.J. 123.

52 Due to space limitations, I have not considered Dickson C.J.C.'s particular analysis of s. 8 of the *Narcotic Control Act*. For a discussion of this part of the Chief Justice's opinion, see P. Monahan and A. Petter, *supra*, note 39.

political role for judges with traditional democratic values. The next section considers two such justifications, both of which are prominent in contemporary American discussions of judicial review.

III. THE AMERICAN ESCAPE ROUTES CONSIDERED: ORIGINALISM AND "FUNDAMENTAL RIGHTS"

A. *The First Escape: Originalism*

A theory which has enjoyed substantial popularity and influence amongst American commentators seeks to resolve textual indeterminacy through an appeal to the original intentions of the framers. According to this theory, the courts should give meaning to the open-ended clauses of the constitution by interpreting them in accordance with the views of the individuals who drafted them.[53] By observing this canon of construction, judges can avoid the charge that they are usurping legislative power. Far from imposing their own values, the courts are merely giving effect to the enduring, fundamental values of the polity as embodied in the constitutional text. To the extent that those fundamental values now appear outdated, the appropriate remedy is a formal constitutional amendment rather than creative judicial interpretation.

It is important to appreciate the distinctiveness of the originalist argument. Originalism does not merely claim that the intentions of the framers deserve to be considered or even to be accorded presumptive weight in the interpretive process. The identifying feature of the originalist argument is the claim that the intentions of the framers should be *conclusive* in resolving textual ambiguity. If it is possible to ascertain how the framers would have applied a particular constitutional provision, then that interpretation must govern, regardless of any arguments or considerations to the contrary.

A virtual cottage industry has sprung up in the past decade aimed at discrediting the claims of originalism.[54] The criticisms fall into two camps. The first group of critics raise essentially pragmatic

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[53] See, for example, R. Berger, *Government by Judiciary* (1977); R. Bork, "Neutral Principles and Some First Amendment Problems" (1971) Indiana L.J.; H. Monaghan, "Our Perfect Constitution" (1981) 56 N.Y.U.L. Rev. 353.

[54] It would be impossible to refer to even a small portion of this literature here. Perhaps the most compelling case against originalism is to be found in P. Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 Bos. U.L. Rev. 204; see also R. Dworkin, "The Forum of Principle", in *A Matter of Principle* (1985).

objections to the originalist argument. These objections are designed to demonstrate the inherent impossibility of ascertaining the collective intention of a group of men who have been dead for nearly two hundred years. The critics focus on the illusory nature of group intent, point out that the framers' intention on many questions was indeterminate, and argue that it is impossible for any contemporary observer to truly understand the intent of individuals who lived in eighteenth century America. This last argument is premised on the assumption that the world-view of the framers is so fundamentally foreign to our own that it would be mistaken and presumptuous to suppose that we could ever really appreciate their intent.

What force do these pragmatic objections hold in the context of the Canadian *Charter*? In general, the objections seem much less persuasive. This does not mean that it is ever going to be a straightforward or mechanical matter to determine the views of the drafters with respect to substantive provisions of the *Charter*. The first and most obvious difficulty will be who is to count as the drafters. According to the Supreme Court's judgment in the *Patriation Reference*,[55] constitutional convention at the time of the enactment of the *Charter* required that the substantial consent of the provinces be obtained before the joint resolution could be forwarded to Great Britain. This suggests that it would be necessary to canvass the views of provincial as well as federal officials in determining drafters' intention. Yet we have virtually no record of provincial views on the meaning or application of specific substantive provisions of the *Charter*.

A second problem is that very few members of the federal Senate and House of Commons appear to have formed any independent views as to the meaning of the various *Charter* provisions. Instead, they simply relied on officials in the Department of Justice to provide them with expert opinion about the meaning of *Charter* phraseology. The deference of elected representatives towards departmental officials was made crystal clear in the committee hearings on the proposed resolution.[56] Thus the relevant intention appears to be that of officials in the federal Department of Justice, rather than that of elected representatives in either the provinces or Parliament.

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[55] *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1.

[56] See Special Joint Committee on the Constitution of Canada, *Proceedings*, 32nd Parl., Sess. 1 (1980-81), No. 46 [hereinafter *Proceedings*].

The irony is that, in purely pragmatic terms, the domination of the process by unelected federal officials may be more a virtue than a vice. There is no surer way to foreclose problems of indeterminacy in constitutional provisions than through appeal to a bureaucratic hierarchy. The dominant role played by the federal bureaucracy makes the instrumental task of determining drafters' intent much easier than if one had to consult the conflicting and often self-serving opinions of a group of elected Parliamentarians. Rather than being confronted with a cacophony of conflicting opinion, one is presented with a single, distilled interpretation of the meaning of various *Charter* provisions. To consider but one example, there can be little doubt as to the views of officials in the Department of Justice on the issue of whether s. 7 of the *Charter* was to receive a procedural as opposed to a substantive interpretation. In testimony before the Special Joint Committee on the Constitution, the Department made it clear that it regarded s. 7 of the *Charter* as providing purely procedural as opposed to substantive protection for "life, liberty and security of the person".[57] The Department hoped to avoid the line of American cases based on "substantive due process" and chose the words "fundamental justice" rather than "due process" in an attempt to achieve this result. In sum, if the views of the drafters are dispositive, there can be little doubt as to how the ambiguity in s. 7 ought to be resolved.

While the existence of this expert opinion may be helpful in overcoming purely pragmatic difficulties in determining drafters' intention, it resolves none of the principled, normative objections to originalism. The mere fact that we might be capable of ascertaining the intent of the drafters does not mean that their intention should necessarily govern. Constitutional theories based on original intent must be normative as well as descriptive; the theory must provide a reason why the views of the drafters ought to count in the interpretive process.[58]

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[57] See the comments of Mr. B. L. Strayer, then Assistant Deputy Minister, Public Law, Department of Justice, speaking before the Special Joint Committee of the Senate and House of Commons on 27 January 1981:

> Mr. Chairman, it was our belief that the words 'fundamental justice' would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to policy of the law in question.

Proceedings, supra, note 57 at 32.

[58] Dworkin, *supra,* note 54.

In a sense, it is rather easy to defend the claim that some minimal weight ought to attach to the views of the drafters of a constitution. The argument flows from the basic observation that the process of interpretation is necessarily contextual. Words do not speak for themselves. Language has meaning only within a particular context. To attempt to interpret language apart from the context in which it is used is a recipe for unresolvable indeterminacy. A central feature of linguistic context is the purposes and understandings of the individuals using the language. Thus, on this view, it is self-evident that some attention must be paid to the intentions of the drafters of the *Charter* if we are to make any sense at all of the document.

But this argument does not inform us of the extent to which the drafters' views ought to figure in the interpretive process. The first issue is whether their views should be accorded conclusive weight in the interpretive process. The best way to resolve this issue is to analyse what might be termed the interpretive intent of the drafters of the *Charter*. American writers on judicial review have made an important distinction between two very different senses in which we might use the term "drafters' intent".[59] The drafters' substantive intent refers to their views as to the actual meaning of the various constitutional provisions they have enacted. The drafters' interpretive intent refers to their understanding of how those substantive provisions are to be interpreted and applied by the courts. The distinction is important because there is no necessary connection between substantive and interpretive intent. The drafters may hold very fixed substantive views as to the meaning of certain constitutional provisions, but may also regard their personal beliefs as irrelevant in terms of the legal interpretation of the provisions; their views on interpretation might be based, for example, on a plain meaning rule, which would make judicial recourse to legislative history inappropriate.[60]

Defenders of originalism suppose that only the drafters' substantive intent is relevant. But this is obviously mistaken. If one were really serious about fidelity to the intention of the drafters, one would have to at least begin with their views as to the nature of the interpretive process. It would be ironic and bizarre to rely on the drafters' substantive views without first determining whether they themselves regarded those substantive views as conclusive.

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[59] This distinction has been highlighted by American critics of originalism. See, in particular, the helpful article by Brest, *supra*, note 54 at 205-16.

[60] See *ibid.* at 215-16. See also H. Powell, "The Original Understanding of Original Intent" (1985) 98 Harv. L.R. 885.

These distinctions are particularly relevant in the Canadian context, since we have a full legislative record outlining the interpretive views of the Canadian drafters. This legislative record makes it clear that the Canadian drafters did not envisage their substantive views on the meaning of various *Charter* provisions as being conclusive of constitutional meaning. Rather, their view of constitutional interpretation might be described as one of modified judicial realism. This modified realism was a product of our drafters' analysis of the nature and development of constitutional interpretation in the United States. Notwithstanding the recent protests of legal academics, the American constitutional tradition has never been premised on the belief that the original intention of the drafters should be conclusive on issues of textual indeterminacy. The American courts may have considered the intentions of the framers on occasion, but they have certainly not hesitated to ignore those views when they found other values or interpretations more compelling. As Paul Brest has pointed out, a substantial portion of contemporary American constitutional doctrine has evolved in this way:

> [I]f you consider the evolution of doctrines in just about any extensively adjudicated area of constitutional law — whether 'under' the commerce, free speech, due process, or equal protection clauses — explicit reliance on originalist sources has played a very small role compared to the elaboration of the Court's own precedents. It is rather like having a remote ancestor who came over on the Mayflower.[61]

The drafters of the *Charter* expected that the Canadian constitutional tradition would develop in a broadly similar fashion. Canada's judges were not expected to consult the substantive opinions of the drafters each time they were faced with ambiguous *Charter* language. It was thought that the courts would rely on a variety of nonoriginalist sources, including judge-made rules of statutory construction and previous judicial decisions on similar language. Reliance on these sources meant that judicial interpretations of *Charter* provisions might well diverge from the drafters' substantive intentions regarding those provisions. But the drafters regarded this judicial originality as an inherent feature of constitutional interpretation under the *Charter*. They had a relatively sophisticated and realistic view of the nature of the adjudication process. For them, constitutional adjudication was far from mechanical or formalistic. They were aware of the significant degree of discretion available to courts

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[61] Brest, *supra*, note 54 at 234.

interpreting constitutional texts. Because some degree of judicial originality was inevitable, the drafters saw their task as making educated guesses as to how the courts might interpret particular constitutional language, and choosing the language which was most likely to secure them the results they desired.

The best way to illustrate this modified judicial realism is to consider the discussion surrounding a particular substantive *Charter* provision. The debate over the nature of s. 7 is particularly illuminating. In drafting s. 7 of the *Charter*, the Department had hoped to provide procedural but not substantive protection for "life, liberty and security of the person". Yet there was considerable confusion during the Parliamentary hearings as to why the Department had inserted the words "principles of fundamental justice" rather than "procedural due process" in s. 7; to the lay members of the Parliamentary Committee, the words "due process" seemed to capture the Department's intent much more accurately than the novel and baffling "principles of fundamental justice".[62] The response of the Department is instructive. Justice officials did not claim that the phrase "principles of fundamental justice" was a clearer or more accurate way to capture their intent. Indeed, when pressed on the matter, they had to admit that the words "principles of fundamental justice" were almost totally novel in Canadian jurisprudence.[63] Rather, they noted that the American courts had interpreted the phrase "due process" as guaranteeing substantive protection for property or privacy and they wanted to avoid the courts reading this interpretation into s. 7 of the *Charter*. Barry Strayer, then the Assistant Deputy Minister of Justice, explained the matter in these terms:

> [t]hese words [principles of fundamental justice] have not appeared in a constitution or in any type of statute before, but I am bound to add, Mr. Chairman, that there is a good deal of jurisprudence on the term "due process", both in Canada and the United States, and some of that jurisprudence in the United States gave rise to the

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[62] See, in particular, the exchange between the Hon. David Crombie and Mr. Barry Strayer, Assistant Deputy Minister of Justice, on this issue: *Proceedings, supra,* note 56 at 38-43.

[63] The only instance in which the words had been used previously was in s. 2(e) of the *Canadian Bill of Rights,* in connection with the right to a fair hearing. This had been interpreted in *Duke* v. *The Queen* [1972] S.C.R. 917 at 923 28 D.L.R. (3d) 129 *per* Fauteux C.J.C., as follows:

> Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give him an opportunity to state his case.

problem that we were trying to avoid with the term 'fundamental justice'.[64]

But the matter did not rest there. When the resolution reached the House of Commons, there was a good deal of concern expressed over the possibility that s. 7 would limit Parliament's ability to legislate with respect to abortion. Since "conflicting legal difficulties throw that matter into doubt",[65] the Hon. David Crombie proposed that the *Charter* be amended to include the words "nothing in this charter affects the authority of Parliament to legislate in respect of abortion."[66] In speaking against the proposed amendment, the Prime Minister noted that the government's view was that the *Charter* was neutral on the issue of abortion. He continued:

> However, as I said yesterday to the member for Etobicoke-Lakeshore, should a judge conclude that on the contrary, the *Charter* does, to a certain extent, affect certain provisions of the Criminal Code, under the override clause we reserve the right to say: Notwithstanding this decision, notwithstanding the charter of rights as interpreted by this judge, the House legislates in such and such a manner on the abortion issue.[67]

It is important to retrace the steps in the government's argument closely. The government believed that the *Charter* was neutral on the abortion issue. But there were no guarantees that the courts would necessarily see it that way. After all, the American courts had taken the words "due process" and read into them a whole series of substantive protections for rights of property and privacy. Moreover, the American courts had done so without relying on the intentions of the framers; the substantive due process jurisprudence was a product of the court's own views as to the meaning of the fifth and fourteenth amendments. This is simply a reiteration of Brest's basic point that "the practice of supplementing and derogating from the text and original understanding is itself part of our constitutional tradition."[68]

The drafters of the Canadian *Charter* recognized this reality and sought to take account of it in their choice of constitutional language.

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[64] *Proceedings, supra,* note 56 at 33.

[65] Speech of the Hon. David Crombie, House of Commons Debates, 27 November 1981.

[66] *Ibid.*

[67] Speech of the Right Hon. Pierre E. Trudeau, Prime Minister, House of Commons Debates, 27 November 1981.

[68] Brest, *supra,* note 54 at 225.

Thus, while the words "procedural due process" might have been an accurate reflection of their intentions with respect to s. 7, they rejected them on account of the American substantive due process jurisprudence. There was no magic in the words "fundamental justice", even though there was an earlier court decision under the Canadian *Bill of Rights* which had suggested that they provided procedural protection only.[69] Thus, if the courts interpreted the words "fundamental justice" as importing substantive protection for rights, Parliament could always resort to the override provision in s. 33 of the *Charter*. In fact, the inclusion of the override provision is itself a recognition of the possibility of creative judicial interpretation under the *Charter*. Because the *Charter* would come to be interpreted and applied in ways that were unforeseen by its drafters, it was prudent to provide a mechanism which would enable Parliament to limit its scope.

This conception of constitutional adjudication is a continuation rather than a contrast with our previous constitutional tradition. Prior to 1982, constitutional interpretation had been concerned primarily with the terms of the *Constitution Act, 1867*.[70] This document has been construed with little or no reference to the actual intentions of the Fathers of Confederation. Nor do the bare words of the statute constitute an accurate guide to its meaning; the classes of subjects in ss. 91 and 92 are so abstract that a whole range of alternative interpretations of their meaning is possible. Instead, constitutional law is composed almost exclusively of previous court decisions which have determined the content of various constitutional provisions. These judicial elaborations are the flesh on the constitutional skeleton.

For many years, academic lawyers complained that these judicial interpretations of the *Constitution Act, 1867* did not conform to the expectations of the drafters of the document. The drafters had contemplated a highly centralized federalism for Canada. In place of this quasi-unitary state, the Privy Council had substituted its own idiosyncratic and romantic brand of classical, decentralized federalism.[71] But in recent decades, it has come to be recognized that the

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[69] See *Duke* v. *The Queen*, *supra*, note 63, interpreting the phrase "a fair hearing in accordance with the principles of fundamental justice" in s. 2(e) of the *Bill of Rights*.

[70] (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act*, 1867) [hereinafter *Constitution Act, 1867*].

[71] See, for example, V. MacDonald, "Judicial Interpretations of the Canadian Constitution" (1935-36) 1 U. of T. L.J. 1.

supposed mutilation of the *Constitution Act, 1867* by the Privy Council actually was more in keeping with the underlying Canadian political reality.[72] According to the contemporary view, the country has always been too large and diverse to tolerate the degree of centralism envisaged by the Fathers of Confederation. The provincialist bias of the Privy Council is to be commended rather than condemned; it helped to ensure the continued relevance and vibrancy of federal institutions in Canada. The underlying assumption is that constitutional adjudication should be less concerned with ascertaining the views of the drafters than with ensuring that the constitution is applied in conformity with the changing values and needs of the polity.

The recognition of constitutional adjudication as being in keeping with the Canadian political reality suggests that the drafters' intentions should not be conclusive in constitutional interpretation. However, this does not necessarily imply that their intentions should be simply ignored. Indeed, it would seem impossible or absurd to attempt to construe the *Charter* without taking the intentions of the drafters into account in some fashion. The Court has declared its support for a "purposive" interpretation of the *Charter*, which surely makes the purposes of the drafters of the document relevant and significant.[73] Moreover, the Court's recent jurisprudence surrounding the *Constitution Act, 1867* has made increasing reference to legislative history.[74] Thus the real issue is not whether the drafters' intentions are relevant but rather what weight ought to be attached to this material.

Professor Dworkin has attempted to answer this question through reference to a distinction between "concepts" and "conceptions".[75] A "conception" is a specific account or understanding; a "concept" is used to convey some general idea. Dworkin's view is that only the concepts used by the drafters of the Constitution are binding on latter interpreters. Although the drafters may well have had conceptions of their own as to the meaning of constitutional language, these conceptions need not be used in deciding cases. According to

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[72] See A. Cairns, "The Judicial Committee and Its Critics" (1971) 4 C.J.P.S. 301.

[73] *Hunter* v. *Southam*, *supra*, note 13; *R.* v. *Oakes*, *supra*, note 43.

[74] For a helpful discussion of this jurisprudence, see P. Hogg, "Legislative History in Constitutional Cases", in B. Sharpe, ed., *Charter Litigation Symposium* (forthcoming).

[75] Dworkin, *supra*, note 18.

Dworkin, the drafters themselves did not intend to give their own conceptions any special weight.[76]

Dworkin's distinction between concepts and conceptions, while extremely attractive, has been subjected to widespread criticism in the American constitutional literature.[77] Despite the difficulties with Dworkin's approach, it captures one important truth about the significance of authorial intent in constitutional interpretation: judges deciding cases ought to take serious account of generalized purposes or intentions of the drafters, while at the same time according less weight to the drafters' views as to the precise meaning of particular words or phrases. This conclusion is consistent with the process of drafting a constitution. A constitution is designed to state the general and enduring principles which are to govern the life of the polity. The role of the drafters is simply to define those general purposes rather than to decide individual cases. The task of applying the language of the document to particular circumstances is the responsibility of judges rather than the authors. It follows that judges should pay particular attention to the general purposes and policies of the drafters, but accord little or no weight to their opinions on the outcome of particular cases. This analysis does not depend on Dworkin's distinction between concepts and conceptions which, in any case, probably never occurred to the drafters. The analysis is much more straightforward.

My suggestion is that the use of legislative history can be structured along a continuum ranging from the more abstract and generalized purposes of the drafters, which should be accorded significant weight, to their views on the application of specific provisions, which are entitled to minimal or no weight. The argument can be illustrated by referring once again to the *Charter*. As we have seen, the drafters expressed a number of opinions as to the effect of s. 7 on particular legislative provisions. For instance, it was claimed that s. 7 would not have any impact on the *Criminal Code* provisions regarding abortion and that Parliament's power to regulate this matter would be unimpaired by the *Charter*. According to the framework offered here, these opinions on the particular application of s. 7 should be granted little or no weight by a court called upon to determine the constitutionality of Canada's abortion laws. At the

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[76] *Ibid.* at 136.

[77] See, for example, M. Perry, *The Constitution, the Courts and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (1982).

same time, the drafters offered their views on the general purposes underlying s. 7, emphasizing that the provision was intended to protect procedural rather than substantive rights. These more generalized views are entitled to more serious consideration by a court interpreting s. 7. They relate, not to the application of the provision to particular cases, but to the very point of including the provision in the *Constitution* in the first place. A court interested in a purposive interpretation of s. 7 would surely accord these views very serious consideration.

This analysis of general versus specific purposes in drafting suggests that the Supreme Court's treatment of legislative history in the *Motor Vehicle Act Reference* was seriously inadequate. Lamer J. acknowledged that the senior civil servants and politicians who appeared before the Special Joint Committee were united in their view that s. 7 was confined to questions of procedural justice. But Mr. Justice Lamer concluded that this evidence, although admissible, was entitled to minimal weight. He justifies his conclusion on two grounds. First, he states that a few federal civil servants should not be regarded as representative of the "multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the *Charter*".[78] Second, he argues that adopting the views of the drafters would mean that *Charter* rights would become "frozen in time ... with little or no possibility of growth, development and adjustment to changing societal needs."[79]

Neither of Lamer J.'s arguments is particularly persuasive. The first argument fails to take account of the fact that it was not just a few federal civil servants who advanced a procedural interpretation of s. 7. The proceedings of the Joint Committee indicate that all the members of the Committee were of the view that s. 7 ought not to receive a substantive interpretation. As for the second argument, the objection would be convincing if the Court had been considering the drafters' views on the particular application of s. 7. What was at issue, however, was the drafters' views on the very purpose of the provision. For the Court to have given greater weight to this evidence would hardly have frozen the meaning of the section, since the evidence merely went to general principles and did not deal with specific applications of those principles. There would have been adequate scope for the courts to have developed a progressive inter-

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[78] *Supra*, note 9 at 508.

[79] *Ibid.*

pretation of s. 7 while remaining faithful to the fundamental purposes and policies it was designed to serve.

I conclude that the intentions of the drafters do have a significant role to play in constitutional interpretation. Their views should never be taken to be conclusive on issues of doctrinal ambiguity. But the dratfers' opinions as to the general purposes underlying particular provisions should be given serious consideration by courts. These authorial intentions are unlikely to compel or dictate specific results in concrete cases, given their inherent generality. Thus, use of legislative history will not relieve the judiciary of the difficult task of applying general constitutional language to individual cases. It is only by consulting history in appropriate cases that the judiciary can hope to engage in a purposive analysis of the *Charter* that is realistic and defensible.

B. *Fundamental Rights Theories of Judicial Review*

Another attempt to reconcile the institution of judicial review with democracy has adopted a much more sophisticated strategy. According to this second view, it is futile to suppose that constitutional adjudication is concerned only with the plain meaning of the text or with the views of the framers. The strategy of this view is to concede a wide scope for judicial originality. This originality is argued to be justified because of a particular expertise claimed by judges. The justification for judicial review is the judicial concern with fundamental rights.[80] Rights should not be taken to be synonymous with interests or preferences. Rather, rights are a certain body of preferences which are singled out and accorded special weight. In this sense, certain rights-theorists have described rights as "trumps"; the special weight accorded to certain preferences means that they can overcome arguments based solely on considerations of general welfare.

An approach to judicial review based on rights attempts to construct boundaries around democratic politics. A political debate appropriately involves the calculation of community welfare. Although the political process is the most appropriate institution to make compromises based on straightforward utilitarian principles, questions of rights are thought to be within the competence of judges rather than politicians. Rights claims implicate problems germane to moral philosophy rather than to politics. For instance, a theory of rights can

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[80] See generally Dworkin, *A Matter of Principle* (1985).

be tested by imagining circumstances in which the theory would produce unacceptable results and then revising the theory accordingly.[81] This type of analysis is likely to be performed in a far more accurate manner by judges than by legislators or individual citizens. Judges are free from political pressure, deciding cases on the basis of reason and principle rather than expedient log-rolling.

This argument based on institutional expertise is not the only justification offered for judicial review on the basis of rights. Other arguments have suggested that judicial review has an important role to play in heightening the awareness of rights issues amongst citizens generally. The claim is that "rights talk" is a means of uplifting and revitalizing political and moral discourse in our society generally. By forcing the political process to confront the question of individual rights, public morality will become more reflective and self-critical.[82] The most commonly cited American example of this phenomenon is the American Supreme Court's decision in *Brown* v. *Board of Education*[83] in 1954, a decision which made the issue of desegregation in public schools a major focus of public controversy. Cast as the high priests of moral discourse, the judiciary encourages and orchestrates meaningful public debate on moral issues.

These arguments based on fundamental rights have, however, been the subject of extensive debate and critique in the American literature. The critiques have focused on the spurious claims of objectivity and elitism which underlie the fundamental rights position. Perhaps the most compelling critique has been that advanced by John Hart Ely.[84] Ely points out that there is no such thing as one method of moral philosophy. For instance, the two most renowned contemporary theorists of moral and political philosophy, John Rawls[85] and Robert Nozick,[86] reach radically different conclusions on the requirements of the just state. Given this indeterminacy in moral theory, the invitation to judges to act as moral philosophers is a covert invitation for them to impose their own values on the democracy. The values that will be deemed to be fundamental will be the ones which seem most important to the

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[81] Dworkin, "Political Judges and the Rule of Law", in *A Matter of Principle* (1985) at 24.

[82] For arguments to this effect, see M. Perry, *supra*, note 77; B. Ackerman, *Reconstructing American Law* (1984).

[83] *Supra*, note 22.

[84] See J. Ely, *supra*, note 6 at 56-60.

[85] *A Theory of Justice* (1971).

[86] *Anarchy, State and Utopia* (1974).

upper middle, professional class from which most lawyers and judges are drawn. Ely condemns such a practice as flagrantly elitist and undemocratic:

> Thus the values judges are likely to single out as fundamental, to the extent that the selections do not simply reflect the political and ethical predispositions of the individuals concerned, are likely to have the smell of the lamp about them. They will be — and it would be unreasonable to expect otherwise if the task is so defined — the values of what Henry Hart without irony used to call "first-rate lawyers". . . . Our society did not make the constitutional decision to move to near-universal suffrage only to turn around and have superimposed on popular decisions the values of first rate lawyers.[87]

Even if the decisions of judges did not systematically reflect this narrow range of values, it would still be difficult to sustain the case for the legitimacy of activist judicial review. The proponents of activist judicial review are motivated by a profound distrust of the political process on rights issues. They regard the messy compromises of politics as simply inappropriate for determining individual rights; rights are matters of individual entitlement, derived from a process of reason and argument, and should not depend for their recognition upon whether "the people" happen to recognize them or not. The fallacy in the argument is the assumption that the justification for democracy is that it is likely to produce objectively "right" answers. Democratic politics is not guaranteed to produce right answers. No matter how much debate and discussion is encouraged, there is still the possibility that the community will make a choice that is mean-spirited or unenlightened. This possibility seems implicit in the democratic bargain. A choice for democracy means that the community has a right to be wrong. As Michael Walzer has observed, "[t]he people's claim to rule does not rest upon their knowledge of truth . . . but in terms of who they are. They are the subjects of the law, and if the law is to bind them as free men and women, they must also be its makers."[88] The distinction that Walzer is drawing is between having a right to decide and having the right answer. Democracy assumes that the people have the former but not necessarily the latter.

There is a final, highly ironic objection to the fundamental rights approach to judicial review. The irony lies in the fact that, while these theorists claim to be the champions of principle, their own

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[87] *Ibid.* at 59.

[88] M. Walzer, "Philosophy and Democracy" (1981) 9 Political Theory 379 at 384.

theories are remarkably unprincipled and ad hoc. The problem arises in the following way. If judicial review was actually designed to protect fundamental interests, the range of issues subject to judicial scrutiny would have to be radically expanded. Judicial review would have to assume a leading role in defining individual entitlement to employment, housing or education, since all of these matters are arguably fundamental to human development. Yet the judiciary does not now purport to deal with these issues in any serious or systematic fashion. This leaves the fundamental rights theorists with a major problem: how can a fundamental rights analysis of judicial review be justified when the range of interests which are deemed fundamental is so obviously underinclusive? There are two possible ways to deal with this problem of underinclusiveness, neither of which is particularly satisfactory. On the one hand, the theorist can arbitrarily narrow the class of interests which are deemed to be fundamental, so that the protected class exactly appropriates the current, restricted doctrinal categories. Alternatively, the theorist can claim that large portions of current doctrine are mistaken and that the range of constitutionally protected interests should be radically expanded. The difficulty with this latter strategy is that the category of mistakes must remain limited and exceptional; otherwise, the theory is no longer an account of current doctrine but rather a prescription for a whole new set of doctrinal understandings. A serious attempt to apply a fundamental rights analysis and critique to current American constitutional doctrine, for example, would undoubtedly produce an unworkable and overwhelming category of "mistakes".

These democratic objections to the judiciary enforcing a set of fundamental values are as persuasive in the Canadian as in the American context. But there are a series of additional, equally compelling difficulties with any attempt to import this form of judicial review into the Canadian setting. These difficulties arise from a tension between the fundamental values assumptions and the distinctive quality of the Canadian political tradition.

The assumptions underlying the fundamental values version of judicial review are profoundly individualistic. The language of "trump rights" encourages the belief that communities are nothing more than aggregations of private interests. The rightholder is defined by his separation from and opposition to the community as opposed to his membership in it. This is exemplified by the assertion that rights are designed to ensure that the state remains neutral on

questions of the good life or of what gives value to life.[89] Since the citizens of the society hold radically different conceptions of what gives value to life, the government must never take a stand on the issue. It cannot justify a decision on the basis that some ways of leading one's life are more worthy than others, "that it is more worthwhile to look at Titian on the wall than watch a football game on television. Perhaps it is more worthwhile to look at Titian, but that is not the point".[90]

This rights-based ethic has an impoverished conception of communal politics. Attempts on the part of the community to define its collective identity are automatically suspect. For the rights theorist, wherever communities gather together to express their moral beliefs in law, there lurks the stale but unmistakable odour of totalitarianism. Questions of morality and values are inescapably relative. Such matters of taste must be left in the hands of the individual, freed from the tyranny of the opinions of others regarding his lifestyle.

The constitutional analysis of Ronald Dworkin exemplifies this impoverished conception of community with its corresponding emphasis on the privatization of morality. Dworkin's analysis is premised on the notion that everyone has the right to be treated with equal concern and respect. This concern for equality is violated when the community allows a "corrupting" element to contaminate its calculation of general welfare. Dworkin identifies the corrupting element as a reliance on external preferences, preferences people have about what others shall do or have. External preferences are vulgar and corrupt because they suppose that a particular form of life or community is more valuable than any other. Dworkin concludes that judicial protection for fundamental rights is an attempt to identify those political decisions that are likely to reflect strong external preferences and remove them from majoritarian political institutions.

The implication of Dworkin's argument is that political debate is purified when individuals frame arguments solely in terms of their personal interests. Far from purifying utilitarian discourse, Dworkin's proposal debases it. In the guise of offering a political discourse that is neutral or egalitarian, Dworkin has simply ordained that only certain values or ideals may be tolerated in political debate and argument. The accepted dialect is that employed by individuals bargaining in their own self interest. Any appeal to the values or

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[89] See Dworkin, "Liberalism" in *A Matter of Principle* (1985) 181 at 191.

[90] Dworkin, "Can a Liberal State Support Art?", in *A Matter of Principle* (1985) 221 at 222.

interests of the community as a whole is morally malformed. Apparently, to invoke public as opposed to purely private considerations is to violate the norm of equal concern and respect.

The result is an aggregate of individuals secure in their abstract rights and liberties but divorced from each other. This, of course, is entirely predictable given the background theory of personality which underlies contemporary liberal accounts of politics.[91] The common starting point of these accounts is an abstract and fictitious choosing self which is stripped of all particularity. This abstract self belongs to no particular family or community, has no set of allegiances or commitments and possesses no life plans. The quality of this person's liberation is aptly captured by Michael Walzer: "I imagine a human being thoroughly divorced, freed of parents, spouse and children, watching pornographic performances in some dark theater, joining (it may be his only membership) this or that odd cult, which he will probably leave in a month or two for another still odder."[92]

In a recent essay, Dworkin has attempted to qualify the prohibition he would place on the use of external preferences in political debate and argument.[93] The revised thesis would prohibit use of external preferences only in the sense that the mere existence or popularity of those preferences cannot be counted as a reason in their favour. On this basis, Dworkin explains that it was proper to count the disinterested political preferences of liberals that tipped the balance in favour of repealing laws against homosexual relationships in England in 1967. Although these preferences might have been external, the liberals "expressed their own political preferences in their votes and arguments, but they did not appeal to the popularity of these preferences as providing an argument in itself for what they wanted."[94] The point seems to be that the case for reform would have been just as strong had there been very few heterosexuals in favour of reform even though, as a practical matter, reform might have been impossible.

This qualification seems to collapse the argument into a crude assertion along the following lines: one should only count those

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[91] See M. Sandel, *Liberalism and the Limits of Justice* (1982), discussing Rawls, *supra*, note 85.

[92] M. Walzer, *Radical Principles* (1980) at 6.

[93] See Dworkin, "Do We Have A Right to Pornography?", in *A Matter of Principle* (1985) 335 at 365-72.

[94] *Ibid.* at 368.

views which are liberal, and therefore correct, while discounting any contrary views. This argument claims that conservative arguments depend on the popularity of the views in question, as opposed to the inherent correctness of those views. Conservative opponents of reform however, would have appealed to the same class of arguments as did liberals; their argument would have been one of principle, based on the assertion that homosexual relationships were morally wrong. Like liberals, conservatives would have regarded the case for continued criminalization of homosexuality to be just as compelling, regardless of the relative popularity of their views. Thus the suggestion that one can distinguish conservative views from liberal ones based on the fact that the former appeals to the popularity of the views while the latter does not is unfounded.

It would be possible to argue that this individualistic political philosophy is undesirable on its own terms. The basic objection would be that it stunts the possibility of developing a set of shared ends and values, a precondition to the emergence of a genuine populist democratic practice. But the objection which I want to emphasize is a much more limited and modest one. My claim is that there is a tension between this individualist ideology and the Canadian political tradition and, for that reason alone, this ideology ought not to form the basis of judicial review under the *Charter*.

C. *The Canadian Tory Touch: The Canadian Political Tradition*

Despite the ongoing Canadian identity crisis, social and political theorists claim to have discovered important and enduring differences between Canadian and American political culture. The differences are said to flow from a distinction between "individualist" and "collectivist" visions of the relationship between individual and society.[95] For an individualist, life is the individual pursuit of happiness rather than membership in a body politic. All roads converge on the atomic, prepolitical individual maximizing his or her self-interest. Thus social contract theorists like Hobbes and Locke justified the creation of the state by analogy to a self-interested bargain between autonomous individuals in a state of nature. There was little emphasis on the possibility of the state helping to forge communal values or common ends. The state was necessary merely as a means of establishing order in a universe in which the interests of

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[95] See generally, G. Horowitz, "Conservatism, Liberalism and Socialism in Canada: An Interpretation" (1966) 32 Can. J. of Econ. & Pol. Sci. 143.

rational maximizers inevitably collided with each other.[96] Restraint was contractual rather than natural.

Within collectivism, individuals are defined by their membership in an organic community. Society is primarily a community of hierarchically organized classes or groups, rather than an association of a priori free individuals. The good of the individual is not conceivable apart from some regard for the good of the whole. Thus, restraints on individuals are natural rather than contractual, flowing from the very duties and rights which are implicit in membership in a larger community.

In general terms, the dominant ideology in both Canada and the United States can be described as essentially liberal or "individualist". But the broad similarities between the two societies should not lead one to minimize the important differences between them. Although Canada is broadly liberal, there are important features of the Canadian political tradition which cannot be placed within a purely individualist framework. The most prominent of these features is the fact that socialism in Canada is a national political force, whereas in the United States, organized socialism is dead.[97] The significance of socialist ideas is particularly pronounced in provincial politics, where the CCF-NDP parties have formed governments in three provinces; in the national arena, the NDP has never been able to achieve the status of a major urban party, but it has succeeded in becoming a significant minor party. The presence of these socialist ideas is an indication of the ideological diversity in the Canadian political tradition, particularly the legitimacy accorded collectivist or organic conceptions of society. Socialism is an ideology which combines collectivist ideas with rationalist and egalitarian ones; "[i]t is *because* socialists have a conception of society as more than an agglomeration of competing individuals — a conception close to the tory view of society as an organic community — that they find the liberal idea of equality (equality of opportunity) inadequate."[98] Socialists see classes and communities in addition to isolated individuals maximizing opportunities for personal growth. They reject the liberal vision of abstract, bloodless individuals, situated in some situation of hypothetical choice, detached from the actual communities in which they live and work.

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[96] See generally, C. MacPherson, *The Life and Times of Liberal Democracy* (1977); C. MacPherson, *Democratic Theory: Essays in Retrieval* (1973).

[97] See generally, Horowitz, *supra*, note 95.

[98] *Ibid.* at 144.

The presence of socialism is not the only feature of the Canadian political tradition which belies the exclusivity of liberal individualism. "Tory" values of "ascription" and "elitism" played a much more significant role in Canada's development than in America's.[99] Unlike America, Canada never had a lawless and egalitarian frontier. There has been a weaker Canadian emphasis on social equality and a greater acceptance by individuals of the facts of economic inequality and social hierarchy. Thus, in Canada, the Family Compacts were able to maintain their grip on political life long after the easy victory of Jeffersonian and Jacksonian democracy in the United States. Even after the achievement of responsible government, "there was no complete repudiation of the Compacts and what they stood for."[100] There continued to be a greater acceptance of limitations and of heirarchical patterns, as well as a distrust of American republicanism and democracy. Moreover, Canadian political elites have been far more willing than their American counterparts to use the state for controlling and directing economic development. Perhaps the most articulate and passionate celebration of these Canadian conservative values is George Grant's famous essay *Lament for a Nation*. For Grant, the United States was a society which was devoted to the rights of the individual above the common good and espoused freedom above order and authority. Canada, on the other hand, stood "in firm opposition to the Jeffersonian liberalism so dominant in the United States".[101] Canadians were less enamoured of change, technology and materialism than their American counterparts. In Canada, tradition, order and stability were important virtues of political life. Other commentators do not share Grant's profound commitment to conservative values, but nevertheless conclude that Canada is a society tinged with a "tory touch":[102] "In English Canada ideological diversity has not been buried beneath an absolutist liberal nationalism. Here Locke is not the one true god; he must tolerate lesser tory and socialist deities at his side."[103]

There is no universal agreement as to what accounts for the "tory", or more recently the socialist, touch in Canadian politics.

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[99] See S. Lipset, *The First New Nation* (1963).

[100] K. McRae, "The Structure of Canadian History" in L. Hartz, *The Founding of New Societies* (1964) at 239.

[101] G. Grant, *Lament for at Nation* (1965) at 33.

[102] *Ibid.*; see also R. Whitaker, "Images of the State in Canada" in L. Panitch, ed., *The Canadian State; Political Economy and Political Power* (1977) at 28; G. Horowitz, *Canadian Labour in Politics* (1968).

[103] *Supra*, note 95 at 155.

Perhaps the most influential explanation has been that offered by Gad Horowitz, who has argued that Canadian liberalism and conservatism interacted in a dialectical fashion to produce socialism.[104] This dialectical hypothesis depicts Canada as a fragment society with predominantly bourgeois roots,[105] but with non-liberal imperfections which eventually produced socialism. Other writers have attempted to offer an economic or materialist explanation for the development of Canadian political culture. Thus, Tom Naylor suggests that toryism in Canada is a product of the underdevelopment of Canada as an industrialist capitalist political economy.[106] According to Naylor's thesis, the Canadian bourgeoisie has always been dominated by mercantile and financial elements, which are less entrepreneurial and are more willing to work through the state to enforce their position: "[T]he willingness of Canadian elites to use the state ... to control and develop the economy is not the consequence of [tory ideology], but its cause."[107] Finally, other observers have advanced the more prosaic explanation that the strength of Canadian socialism is due primarily to our close relationship with Great Britain which made it easy for British ideas to be imported and accepted.[108]

Whatever the explanation, the important point for present purposes is that Canadian political culture cannot be portrayed as uniformly individualist. The Canadian polity has a rich and continuing commitment to collectivist, organic values in addition to individualist ones. This heterogeneity has important implications for the nature of judicial review under the *Charter*. With the enactment of the

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[104] *Ibid.* See also "Notes on 'Conservatism, Liberalism and Socialism in Canada'" (1978) 11 Can. J. Pol. Sci. 383. For a critique of the Horowitz thesis, see R. Preece, "The Anglo-Saxon Conservative Tradition" (1980) 13 Can. J. Pol. Sci. (1980).

[105] The notion of a 'fragment society' was originally developed by Louis Hartz. See *The Liberal Tradition in America* (1955) and *The Founding of New Societies* (1964). According to this thesis, the new societies founded by Europeans were fragments thrown off from Europe. They were fragment societies because the ideologies borne by the founders of the new society were not representative of the ideological spectrum of the mother country. The United States was a bourgeois fragment, its settlers being dominated by an individualist ethic to the exclusion of other ideas on the ideological spectrum.

[106] R. Naylor, "The Rise and Fall of the Third Commercial Empire of the St. Lawrence" in G. Teeple, ed., *Capitalism and the National Question in Canada* (1972).

[107] *Ibid.* at 39.

[108] T. Truman, "A Critique of Seymour Martin Lipset's Article, 'Value Differences, Absolute or Relative: The English Speaking Democracies'" (1971) 4 Can. J. Pol. Sci. 518.

Charter, there is a danger that Canadian jurists and lawyers will uncritically embrace American assumptions about the nature and function of judicial review. But this would be a mistake. American approaches to fundamental rights have been developed in a political culture that is quite different from our own. To rely, in some wholesale and uncritical fashion, on the answers that American courts and commentators have given to problems of individual rights would be to deny the distinctiveness of the Canadian tradition. Importation of the American model of judicial review without significant design modifications would be to marginalize the enterprise. General Motors may be able to ignore the Canadian-American border, but Ronald Dworkin cannot; approaches to judicial review in Canada must necessarily differ from those in the United States.

This result flows from the very nature of constitutions and of constitutional adjudication. The enactment of a constitution is a momentous instant in the life of a polity. It is a moment in which the community attempts to articulate those values which are most fundamental and which constitute its identity as a community. Judicial review is the process which seeks to mediate and interpret the values identified at that constitutional moment for future generations. Thus, the whole premise and justification of constitutional adjudication under the *Charter* is that it gives expression to fundamental Canadian values as opposed to fundamental American, British or European ones. This does not mean that this expression and interpretation of values need be static or backward looking. As Alasdair MacIntyre has emphasized, a tradition is a "living tradition" to the extent that the heritage of the past is modified and reconstituted in the present:

> [A]ll reasoning takes place within the context of some traditional mode of thought, transcending through criticism and invention the limitations of what had hitherto been reasoned in that tradition; this is as true of modern physics as of medieval logic. Moreover when a tradition is in good order, it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose ... [A]n adequate sense of tradition manifests itself in a grasp of those future possibilities which the past has made available to the present. Living traditions, just because they constitute a not-yet-completed narrative, confront a future whose determinate and determinable character, so far as it possesses any, derives from the past.[109]

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[109] A. MacIntyre, *After Virtue* (1981) at 206-07.

This suggests that the profoundly individualistic philosophies of Ronald Dworkin and other American fundamental rights theorists are an inapt and foreign foundation for judical review under the Canadian *Charter*. Constitutional adjudication in Canada must accommodate the communitarian and collectivist aspects of our cultural tradition as well as the individualist ones. It must regard attempts by the community to embody its fundamental beliefs in law as something more than the imposition of one person's external preferences on another. Judicial review in Canada must be more than another branch-plant operation of an American head office.

IV. JUDICIAL REVIEW AND DEMOCRACY

We return, once again, to our point of departure; given the political character of constitutional adjudication under the *Charter*, what are the values which should guide Canadian judges as they give meaning to its open-ended provisions? The proposal which I want to advance and defend is neither complex nor novel. Its virtue lies in the fact that it offers a response and a resolution to many of the objections to judical review outlined in the previous section. In particular, it is a conception of judical review which places a premium on values of community, values which are central to the Canadian political tradition. At its most abstract level, the proposal is that Canadian judges should interpret the *Charter* to reinforce and protect values associated with democracy. The concern of judges should be with the way in which decisions have been reached rather than with the substantive fairness of the decisions themselves. Constitutional adjudication should be performed in the name of democracy rather than in the name of right answers.

At first blush, this proposal appears to present more difficulties than solutions. An instruction to protect democratic values seems hopelessly vague, almost meaningless. Democracy is far from a precise concept and there is much disagreement over what procedures qualify as democratic.[110] Moreover, a recent American attempt to defend a similar theory of judicial review has been met with widespread and effective criticism.[111] It would seem that any attempt to construct a theory of judicial review under the *Charter* on a similar

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[110] See Dworkin, "The Forum of Principle" in *A Matter of Principle* (1985) 33 at 59.

[111] Of course, I refer to the work of J. Ely, *supra*, note 6. For some of the more punishing critiques of Ely, see Dworkin and Tribe, both *supra*, note 7.

basis would be to rework soil that has been well-tilled and already found to be barren.

Despite these important initial reservations, a theory of judicial review based on democratic values continues to hold certain attractions. The most important of these is that such a theory seems to resolve the classic and continuing tension between judicial review and democracy, the single issue which has dominated American constitutional thinking for the past twenty-five years. Far from derogating from democracy, judicial review under such a conception would be in aid of it. With such potential, a theory of judicial review based on the idea of democracy itself merits close attention.

A. *Process versus Substance*

In the recent American constitutional literature, John Hart Ely's work stands out; he alone has fashioned a defence of judicial review based on democratic values.[112] His theory builds on the distinction between substance and procedure. For Ely, democracy means that the choice of substantive political values must be made by representatives of the people rather than by unelected judges. The role of the judiciary should be to police the process of democracy rather than its substance. The court should intervene, not to vindicate particular substantive values it has determined are important or fundamental, but rather "to ensure that the political process — which is where such values *are* properly identified, weighed, and accommodated — is open to those of all viewpoints on something approaching an equal basis."[113] This means making sure that the avenues of participation remain open and that legislation which discriminates against discrete and insular minorities not be permitted.

This distinction between substance and procedure has proven to be the weak link in Ely's argument and the focus for the attacks of his critics. In one of the most punishing critiques, Lawrence Tribe has argued that if process values are seen as primary, this can only be because they are themselves substantive.[114] We value process, according to Tribe, for its intrinsic characteristics; it gives expression to "a right to individual dignity, or some similarly substantive norm".[115] Moreover, not only are process values substantive, in

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[112] Ely, *supra*, note 6.

[113] *Ibid.* at 74.

[114] Tribe, *supra*, note 7 at 1066-67.

[115] *Ibid.* at 1072.

applying process values courts must necessarily make substantive value choices. For instance, in applying the equal protection clause, "[a]ny constitutional distinction between laws burdening homosexuals and laws burdening exhibitionists ... must depend on a substantive theory of which [group is] exercising fundamental rights and which [is] not."[116] Finally, Tribe argues that considerations of substance are more fundamental than those of process. A narrow concentration on process may lead us to accept decisions whose effects strike us as substantively obnoxious. Tribe also believes that there are certain constitutional provisions, particularly the equal protection clause, which ought to be fully explored rather than artificially made to fit the mold of process values. This critique of the distinction between procedural and substantive values pulled the carpet out from under Ely's feet. He could no longer claim that his theory reserved questions of substantive values to the democratic legislature, while asking the judiciary to deal only with questions of process. The critics had demonstrated that, on Ely's own premises, courts would still be forced to make substantive determinations on issues of political morality. By Ely's own admission, the courts had no business making such substantive choices. He had been hoist on his own petard.

Yet it is possible to begin the analysis from the opposite direction. This alternative starting point assumes that judges interpreting a fundamental constitutional document must inevitably make substantive political choices. This starting point is by no means incompatible with drawing the following fundamental distinction between two very different types of instructions which might be issued to judges interpreting a constitution. The first instruction would direct the court to attend to the outcomes of the political decisions which came before it. The issue in any constitutional case would be whether the court regarded those outcomes as substantively just or right. The second instruction would direct the court to focus its attention on the way in which the outcomes had been produced as opposed to whether the outcomes were substantively just. On this second view, the issue for the court would be whether the process which had produced the decision in question had conformed to democratic values.

In either alternative, the court would be drawn into making determinations of substantive political morality. But this does not count as an argument in favour of giving the first instruction to

[116] *Ibid.* at 1076.

judges as opposed to the second. The mere fact that judges must make substantive choices is completely neutral in terms of whether judges ought to heed political outcomes as opposed to the way in which those outcomes are produced. In order to choose between these alternative conceptions of judicial review, it is necessary to construct an independent normative argument that does not depend on the mere fact that constitutional adjudication is substantive.

There are two such normative arguments available, both of which argue in favour of a theory of judicial review based on process. The first argument stems from the value of democracy itself. Democracy regards consent as the only legitimate basis for the exercise of state power. Either the people themselves or their accountable representatives should have responsibility for making political choices. This procedural theory regards judicial review as a mechanism to protect existing opportunities for democratic debate and to open new avenues for such debate.

A theory of judicial review based on outcomes, on the other hand, is designed to circumscribe and to bypass the political process. By inviting judges to test the substantive fairness of political outcomes against some independent normative standard, the opportunities for popular participation and control are limited. Rather than encouraging individuals to debate and define the conditions of their communal life, conflict is arbitrated by deferring to an elite judiciary. In attempting to avoid the tyranny of the majority, it mistakenly embraces a doctrine of expertise and dependency which carries with it a subtle yet despotic dominion of its own.

A second argument in favour of the procedural conception of judicial review is based on the related value of community. On the procedural theory, communities are not mere aggregations of private interests. The rightholder is identified, in an important if not exclusive sense, by his membership in a community. Democratic debate and dialogue is valued not because it will necessarily yield right answers to issues of political morality, but at least partly because it is a necessary feature of a community developing its own identity. This perspective values the process whereby citizens define their own traditions, conventions and expectations as opposed to seeking to emulate the choices of the inhabitants of some ideal or hypothetical commonwealth. It is a choice, as Michael Walzer has asserted, for politics and pluralism over universal truth; a community's particular experiences "are valued by the people over the philosopher's gifts because they belong to the people and the gifts do not — much as I might value some familiar and much-used possession and feel

uneasy with a new, more perfect model."[117] Of course, it is this emphasis on values of community which has been an important distinguishing feature of the Canadian political tradition.

There is an important theoretical objection which might be raised against the democratic conception of judicial review. This objection is that the idea of democracy is itself so vague and indeterminate that it could hardly serve as the basis for a rich and developed theory of judicial review. In effect, the objection is that the democratic conception of judicial review is internally incoherent and logically unattainable. In the next section, I explain why I find this objection unconvincing; theoretically at least, the democratic conception is coherent and possible. I then turn to an examination of the *Charter*, in order to determine whether this model of judicial review offers a convincing account of the principles which underlie the document.

B. *The Democratic Ideal*

Few concepts in political theory are more contested than that of democracy. Much current controversy centres over the extent to which democracy requires citizen participation in making decisions which affect their lives. The current practice of democracy certainly gives rather limited expression to this participatory ideal. Rather than make decisions themselves, citizens in modern democracies simply choose the experts or representatives who will make such decisions on their behalf. The great challenge for modern democratic theory has been to justify the highly elitist character of contemporary democratic practice.

A variety of justifications have been offered, most of them centering on the "realism" of representative forms of democracy.[118] The starting point of such arguments is Robert Dahl's observation that "*Homo Civicus* is not by nature a political animal".[119] The vast majority of citizens are largely apathetic about public affairs.[120] Those individuals who do engage in the minimal political act of voting do not engage in a rational, informed analysis of the issues;

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[117] Walzer, *supra*, note 88 at 395.

[118] The classic defence of representative democracy remains the work of Joseph Schumpeter. See J. Schumpeter, *Capitalism, Socialism and Democracy* (1943). For other writing in this tradition, see R. Dahl, *Voting* (1954); R. Dahl, *A Preface to Democratic Theory* (1956).

[119] R. Dahl, *Who Governs?* (1961) at 225.

[120] See, for example, S. Verba & N. Nie, *Participation in America* (1972); W. Mishler, *Political Participation in Canada* (1979).

rather, voting studies have consistently confirmed that questions of party loyalty, candidates' personalities, prejudice and custom are the chief determinants of voter choice. Moreover, elite theorists regard the low levels of citizen participation and interest as desirable. There is strong evidence to suggest that mass publics are less sympathetic to democratic norms and individual rights than are political elites.[121] If participation were increased, it is argued that the result would be to exacerbate political tensions and jeopardize political stability. Elite theorists claim that it is far better to leave important political decisions to an informed and tolerant elite which is somewhat insulated from the vulgar and authoritarian attitudes of individual citizens. Such analyses have been particularly influential in Canadian political theory; it has been argued that the leaders of Canada's various ethnic groups have sought bargains at the elite level in an effort to avoid conflicts among the masses of the various subcultures.[122]

Critics of representative democracy have charged that this limited public participation is neither necessary nor desirable.[123] They have lamented the disappearance of the classical Greek notion of public freedom—the belief that individuals should take responsibility for creating and changing the terms on which they lead their lives.[124] The source of the trouble is said to be the proliferation of private and introspective conceptions of freedom. Freedom is commonly conceived of as nothing more than the absence of restraint, as "an inner realm into which men might escape at will from the pressures of the world."[125] This purely negative conception of freedom has cheapened and trivialized its meaning. Instead of continuing to view freedom as protection for our private lives, Arendt and others urge us to recapture a forgotten, alternative vision of the idea; freedom as active participation in public decision making. The truncated character of the contemporary vision of freedom has made the task of creating shared, reflective public values an impossibility. In short, it has undermined values of community in favour of an empty cult of privatism.

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121 See H. McClosky, "Consensus and Ideology in American Politics" (1964) 58 Am. Pol. Sci. Rev. 361 at 375.

122 See R. Presthus, *Elite Accommodation in Canadian Politics* (1973).

123 See, for example, H. Arendt, *On Revolution* (1963); C. Pateman, *Participation and Democratic Theory* (1970).

124 See G. Frug, "The City as a Legal Concept" (1980) 93 Harv. L. Rev. 1057 at 1068.

125 Arendt, *supra*, note 123 at 120-21.

Given these radically different visions of democracy, it may be surprising to discover that many of the differences between these competing positions are empirical in nature. A central issue in dispute is the causes and consequences of citizen participation in contemporary democracy. The basic contention of elite theorists is that apathy and authoritarianism are natural and inevitable; increased participation is both impractical and dangerous. Participatory democrats, in contrast, maintain that apathy is learned rather than natural and that increased citizen participation would contribute to individual empowerment without endangering social stability. Such empirical assertions may be tested. Indeed, there is an extensive body of social science evidence which confirms the observations of elite theorists with respect to the behaviour of an average citizen.

Historically, citizen participation in Canada has been limited primarily to voting, with less than one quarter of the eligible population participating in more intensive forms of political activity.[126] Concentration on average levels of participation, however, obscures the fact that there are significant differences in the levels of participation of various identifiable groups in Canadian society. Social standing, ethnicity, religion, sex and age are all effective predictors of one's level of political participation.[127] The higher an individual's occupation, income and education, the more likely it is that he or she will participate in politics. Citizens of Anglo-Celtic descent participate more extensively in most areas of political life. Women participate less than men in virtually every form of political activity. In terms of age, those from 35 to 65 participate more extensively than do older citizens or those aged 21 to 35.

What this suggests is the levels of political participation are learned rather than given. There is nothing inherent in human nature which tends towards apathy and public disinterest. Levels of political participation are the products of human experience and motivation rather than biological necessity. Moreover, there appears to be a strong relationship between the quantity of citizen participation and its quality. Those citizens who participate the most exhibit the highest levels of political tolerance and tend to be better informed about issues of public policy. Conversely, prejudice and dogmatism have been found to be most prevalent amongst those

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[126] The leading study on the issue of participation in Canada is Mishler, *supra*, note 120.

[127] See generally, Mishler, *supra*, note 120 at 88-113.

least active in politics.[128] The relationship between political efficacy and participation has been confirmed by studies of democracy in "non-political" settings, such as the family, the school and the workplace. Citizens who are given the opportunity to participate in decisionmaking in these settings are likely to carry a generalized sense of personal competence into the political sphere.[129] Thus, participation by untrained and inexpert citizens does not breed mob rule. Rather, it increases the individual's self esteem while prompting tolerance and respect for the interests of the community as a whole.

This empirical evidence suggests the possibility of discovering some common ground between the defenders and the critics of current forms of representative government. The starting point of the analysis would be the current practice and understanding of democracy rather than some utopian, classical democratic community. Thus the analysis would accept the proposition that professional politicians and bureaucrats will continue to be responsible for the day-to-day management of public policy. But the widespread citizen apathy and ignorance which characterizes contemporary liberal democracies would still be lamented rather than praised. The common ground between the competing theories of democracy would be a recognition of the positive value of citizen participation for the polity. Citizen participation would be valued for its role in producing better informed and tolerant citizens. It would also be seen as a means of ensuring greater responsiveness on the part of state officials to the needs and desires of the public as a whole. In essence, this approach would accept the proposition that issues of public policy may be properly delegated to professional politicians and officials, but it would seek to enhance the opportunities for popular debate, argument and accountability. Citizen involvement would be encouraged in political activities which were more intensive than voting. It would also support participation in such non-political settings as the family, school and workplace as a means of encouraging political efficacy and education.

Although this hybrid conception of democratic politics may be less radical than other proposals, it nevertheless possesses very deep

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[128] Although there is little Canadian evidence on this issue, numerous American studies have found a correlation between levels of political activity and a greater degree of tolerance as well as a higher sense of political efficacy. See H. McClosky et al., "Issue Conflict and Consensus Among Party Leaders and Followers" (1960) 54 Am. Pol. Sci. Rev. 406; McClosky, *supra*, note 121.

[129] Mishler, *supra*, note 120 at 108-110 (summarizing literature on this issue).

critical power. The power of the theory flows from the fact that the average Canadian citizen has relatively little awareness or understanding of issues of public policy. This lack of accountability and democratic responsiveness is exacerbated by the significant differences in the levels of participation of various groups and interests.

What are the implications of this hybrid theory based on current democratic practices for the practice of judicial review? On one view, the logical implication would be for the judiciary to assume the task of wholly reconstituting the nature and practice of democracy. For instance, given the widespread evidence that levels of political participation decline with social and economic status,[130] it will be necessary for the judiciary to provide citizens with the material and intellectual resources to enable them to participate fully in the democratic process. One implication is that the judiciary should read into the constitution a set of welfare rights which guarantee minimum levels of income, housing and education. A number of American writers have argued in favour of such welfare rights on the basis that without a minimum level of material resources, problems of unequal access will never be overcome.

Yet this welfare rights approach of judicial review is neither logical nor desirable in principle. The difficulty is that constitutionalizing such rights would vastly limit the scope for democratic debate and dialogue rather than expand it. The judiciary, rather than the legislature, would have to assume responsibility for defining the scope and character of the welfare system. It would have to determine how much money to allocate to social programs and the tradeoffs between such programs and other measures in the government's budget. Once the judiciary embarked on such a project there would be no turning back. Ultimately, budgets and tax measures would have to be drafted by judges and lawyers rather than the legislature. It is precisely this result that the procedural approach to judicial review was designed to avoid in the first place. Moreover, the welfare rights approach ignores the historical fact that it has always been legislatures rather than courts which have taken the initiative in improving equal political access. Elected representatives, acting through the democratic process, have been responsible for putting in place the basic elements of the modern welfare state. The judiciary, far from promoting such redistributive or social welfare measures, has often been keen to block them. Thus the basic responsibility for improving equal access and participation should

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[130] See R. Dahl, *Democracy in the United States*, 3d ed. (1976) at 450.

remain with the legislature rather than the courts, in keeping with the historical record.

Judicial review, especially under the *Charter*, should be structured around two general principles. These two principles are analogous to those underlying John Ely's analysis, but they differ from his approach in certain important respects. The first principle is a right of equal access and participation in the political system. In one sense, this first principle parallels Dean Ely's concern that those in power must not be permitted to impair the formal access of citizens to the political process. The court must protect the basic infrastructure of liberal democracy — rights of assembly, debate, free elections; no citizen may be excluded from participation in the process of collective debate and argument except on compelling grounds. But this first principle must not be interpreted in purely formal and negative terms. The court's analysis must take account of the fact that formal access does not guarantee equal access; moreover, it must appreciate the particular concern of legislatures in the past to bridge the gap between formal and effective rights of access. The state does not act merely to impair freedom, but also to ameliorate it. Freedom is not just absence of restraint, but the ability to effectively participate in collective decision making. This suggests that where the state acts in such a way as to improve equal access, there should be a strong presumption in favour of the constitutional validity of such a measure.

The second principle is one of equality. The concern is not with the substantive equality of the outcomes of the policy process but with the manner in which the decisions or outcomes were produced. But in what way could the process of decisionmaking, as opposed to the outcomes themselves, be said to violate a norm of equality? Dean Ely, in struggling with this difficult issue, formulated an answer based on the concept of prejudice. While acknowledging that "prejudice" was a "mushword", he suggested that the core notion of prejuidce was a "lens that distorts reality".[131] We act out of prejudice when we inflict inequality for its own sake, "to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members".[132] Ely argues that we are likely to develop such prejudice against a minority which is "discrete and insular". Where there is little social contact

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131 Ely, *supra*, note 6 at 153.

132 *Ibid.*

between the minority and society as a whole, it is likely that unjustified stereotypical generalizations about their characteristics will arise.

Yet the concept of prejudice seems a rather implausible basis for argument under an equal protection guarantee. It requires a court to inquire into the motives behind legislation and make extremely fine distinctions. How, for example, is the court to distinguish between prejudice on the one hand and a simple preference for one's own interests over those of the minority on the other? There seem to be relatively few public policy choices which inflict harm for its own sake; most choices prefer the interests of certain groups at the expense of those of others. Nor can it be said that, in instances where the inequality between two groups is very great, the advantaged group is imposing burdens on the basis of prejudice. In principle, there is no constraint on the social cost which a special interest group will find it expedient to impose on other groups in society in the course of obtaining a larger share of output for itself.[133] A finding of prejudice seems little more than a rhetorical, perjorative construct which legitimizes overturning legislative choices with which judges happen to disagree.

The empty character of the prejudice criterion is exemplified by the fact that Ely himself appears to abandon it in his discussion of whether particular groups qualify as discrete and insular minorities. For instance, in the case of women, Ely does not claim that they have been the victims of harm inflicted for its own sake. Rather, he suggests that the trouble is that women have been operating at an unfair disadvantage in the political process. They have largely been excluded from the political process, which has been pervasively dominated by men.[134] He concludes, however, that this exclusion has largely been a historical phenomenon and that any lack of participation by women in the 1980s must be due to their own conscious choice:

> On this score it seems important that today discussion about the appropriate 'place' of women is common among both women and men, and between the sexes as well. The very stereotypes that gave rise to laws 'protecting' women by barring them from various activities are under daily and publicized attack and are the subject of equally spirited defense . . . Given such open discussion of the traditional stereotypes, the claim that the numerical majority is being 'dominated', that women are in effect 'slaves' who have no realistic

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133 See M. Olson, *The Rise and Decline of Nations* (1982) at 44.

134 Ely, *supra*, note 6 at 164-66.

choice but to assimilate the stereotypes, is one it has become impossible to maintain except at the most inflated rhetorical level.[135]

It is no doubt true that many of the existing stereotypes about women are under attack in both popular and elite circles. Nevertheless, social and economic inequality between the sexes remains a pervasive fact of North American society in the 1980s. The underlying social and economic position of women may have improved over the past twenty-five years, but it remains vastly inferior to that of men according to virtually all measures. The continuing unequal status of women may have relatively little to do with motives such as prejudice and much more to do with more observable factors such as access and participation in the political process.

As was indicated above, women continue to participate less extensively in the political process than do men, although the gap between the sexes is generally narrowing. The gap in participation rates remains particularly stark in terms of the number of women seeking and securing public office. Women remain the most underrepresented group in elected assemblies today.[136] Elected women become rarer as one moves from the level of municipal politics to the federal level. On the federal level, although the number of women running for office doubled from 1972 to 1979, less than fourteen percent of the candidates in the 1979 general election were women. Less than one in ten women running for federal office in the 1970s was elected, as opposed to a success rate of one in five for male candidates. This unequal success rate was not a product of "false consciousness" on the part of women who, after all, comprise approximately half the electorate. An analysis of the 1979 election traced the failure of women to get elected to two factors.[137] First, the pattern of recruitment by the major parties was such that women tended to be nominated in so-called lost cause ridings, where the party had little prospects for success. Second, there was a substantial increase in the number of women contesting election as independents with little realistic chance of winning. The situation of women is merely a special case of the more general phenomenon outlined earlier in this section; rates of political participation vary considerably based on

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135 *Ibid.* at 166.

136 M. Brodie, "The Recruitment of Canadian Women Provincial Legislators, 1950-75" (1977) 2 Atlantis 6; M. Brodie & J. Vickers, "The More Things Change... Women in the 1979 Federal Campaign" in H. Penniman, ed., *Canada at the Polls 1979 and 1980: A Study of the General Elections* (1981) at 322.

137 Brodie & Vickers, *supra*, note 136 at 326-27.

factors such as ethnicity, social status, age and gender. This suggests an alternative conception of the equality norm in a procedural theory of judicial review.

In this alternative view the norm of equality is designed to take account of the fact that certain groups and individuals possess unequal access to the political system. Despite guarantees of formal access, certain factions may nevertheless come to enjoy a de facto monopoly over state power, excluding certain minorities from effective participation in the system. The equality norm is an attempt to counter the presence of these systemic but subtle defects in the process; it claims that it is appropriate for the judiciary to subject decisions reached through such a tainted process to a heightened standard of review.

For this theory of a new equality norm to be plausible, it is necessary to make an important assumption about the relationship between political participation and the outcomes of the policy process. Simply put, the assumption is that participation makes a difference. The argument is that the political process will tend to ignore or to discount the interests of those who are unequally represented. Similarly, the process will tend to favour the interests of those groups who are most vocal and politically active. The argument is captured by John Stuart Mill, who observed that "in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the person whom it directly concerns."[138]

There is relatively little empirical evidence regarding the consequences of participation for public policy, but there are strong theoretical reasons for assuming that varying rates of political participation and awareness will have an impact on the policy process. Recent studies of the policy process have advanced a model of political rationality to explain public choices.[139] According to this model, impersonal considerations such as technical efficiency offer relatively weak predictors of public policy. The model of political rationality predicts that politicians will seek outcomes which will maximize their own interests, namely, the likelihood of their securing re-election. This model would suggest that even relatively modest

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[138] J. S. Mill, "Considerations on Representative Government" Bk. III of *Utilitarianism, Liberty and Representative Government*, cited in Mishler, *supra*, note 120 at 133.

[139] Economic Council of Canada, "The Choice of Governing Instrument" (M. Trebilcock) (1981).

changes in the composition of the politically active segments in society would stimulate significant changes in government priorities.

The evidence which is available suggests that participation does matter and that government is most responsive to the interests of those who participate the most extensively and in the most demanding political activities.[140] For example, the gradual expansion of opportunities for working-class participation in political life has induced greater attention to the interests of the disadvantaged, particularly in provinces where the CCF-NDP has constituted a major party. My claim is not that the state will always and everywhere favour the interests of the politically powerful while ignoring those of the politically inactive or uninformed. There is no crude, determinist conspiracy at work here. The point is simply that differential rates of participation constitute a crucial and systemic factor in the political process.

The principle of equality of access offers a far more convincing explanation of American equal protection doctrine than does a theory based on the indeterminate notion of prejudice. Consider the issue of racial equality, the central and continuing focus of equal protection doctrine. According to Ely's analysis, the court can identify legislation which violates the norm of racial equality by examining the motivation underlying racially discriminatory legislation. Legislation which is enacted in order to inflict harm for its own sake violates the norm of equality, while legislation which simply prefers the interests of certain racial groups at the expense of others is the normal and legitimate product of the political system. The first difficulty with this claim has already been pointed out in our discussion of gender; because all legislation prefers the interests of certain groups over those of others, it is impossible to identify legislation which inflicts harm solely for its own sake. Yet even if the distinction were meaningful, why should the issue of motivation prove conclusive? Surely all laws which single out certain racial minorities for discriminatory treatment are suspect, not simply a narrow class of laws which inflict harm for its own sake. The reason why all such discriminatory laws are suspect is that certain racial minorities have historically been denied equal access to the political system. The absence of equal access has this important implication: it does not matter whether the discriminatory legislation was enacted out

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[140] See W. Mishler, "Political Participation and Democracy", in M. Whittington & G. Williams, eds., *Canadian Politics in the 1980s* (1981) 126 at 138-39.

of a simple preference for the interests of the majority over those of the minority, or whether it was motivated by prejudice. In either event, the legislation is the tainted fruit of a tainted process. The disadvantaged minority did not have an equal voice in the process and for this reason it is illegitimate for the majority to have disregarded the minority's interests.

The notion that equal protection analysis should be triggered by unequal access to the political process is by no means a simple or mechanical concept. It still requires the judiciary to make substantive judgments of political morality, but it avoids a pointless and elusive inquiry into the motivation behind racially discriminatory legislation. Moreover, it illuminates more recent developments in American equal protection analysis. The extension of heightened judicial scrutiny to classifications based on gender seems a response to the fact that women, like blacks and other racial minorities, have lacked an equal voice in the political process. Moreover, the criteria of political access offers a principled basis for holding that affirmative action programs do not violate the constitutional norm of equality. It is true that such programs discriminate against certain groups or individuals on the basis of racial criteria. But the difference is that the groups or individuals who stand to lose through affirmative action programs have never been denied access to the political system. Rather, they are individuals like Allan Bakke, a white male whose interests have historically been vastly overrepresented in the political process. If the legislature determines that the interests of someone in Allan Bakke's position must give way in the face of the claims of certain racial minorities, Mr. Bakke has no basis for a constitutional complaint.

Of course, the question of affirmative action was dealt with explicitly in the Canadian *Charter*. Section 15(2) provides that the guarantee of equality rights in s. 15(1) does not preclude programs designed to ameliorate the conditions of disadvantaged individuals or groups. It is comforting to discover that s. 15(2) can be explained and justified on principled rather than expedient grounds. In addition, the analysis advanced here offers some basis for distinguishing those groups which should be deemed to be disadvantaged for purposes of s. 15(2). In short, the principle of equal access to the political system constitutes the background purpose of both ss. 15(1) and 15(2) of the *Charter*. Reliance on this principle will not eliminate doctrinal ambiguity. But it will enable the courts to coherently sort through the mass of conflicting claims that are certain to arise under the equality clause.

C. *Understanding the Charter*

The argument to this point has been theoretical rather than applied; my goal has been to establish only that a democratic conception of judicial review is a coherent and possible basis for judicial review. But this leaves unanswered a much more fundamental issue for Canadian constitutional scholars and jurists. Simply put, does the democratic conception accurately reflect the essential principles and policies underlying the *Charter*? This question is descriptive and empirical as well as normative. It seeks to determine the background principles and themes of the *Charter* as a whole.

It would be foolish to claim that there was a single monolithic purpose underlying all aspects of the *Charter*. There is no question that the document embodies a range of competing and disparate values, as opposed to a unitary or unique set of goals. Notwithstanding this heterogeneity, it seems to be possible and desirable to step back from the document and to attempt to identify its overriding themes and ambitions. A key method for identifying those themes is to compare the *Charter* with the American *Bill of Rights*. The Canadian drafters constantly had the American experience before them in developing the *Charter*. It is thus particularly instructive to note those elements of the American constitutional experience which were incorporated into the *Charter* as well as those elements which were excluded or modified.

What is the relationship between the American *Constitution* and democratic values? Democratic institutions are certainly one important focus of the American *Constitution*, but it is difficult to regard them as the exclusive or even the overriding theme of the document. There are a variety of clauses which are directed towards the preservation of certain fundamental values which have little or nothing to do with furthering democracy. In fact, far from promoting democracy, the document seems preoccupied with drawing boundaries around the political process and preventing unruly majorities from interfering with established rights, particularly property rights. In the 1780s, state legislatures had passed a variety of debtor relief laws which were widely viewed as violations of property rights. A particular concern for federalist thought at the time was to protect property against tyranny by the majority; the ambition was to minimize the threat implicit in popular political power rather than to facilitate political participation or democratic empowerment.

A central purpose of the U.S. *Constitution* was to confine political life to the public realm, while ensuring that the state did not inter-

fere with private rights of property or contract. This dichotomy between public and private realms was premised on the belief that individuals possessed a prepolitical zone of pure autonomy or freedom. The zone of pure autonomy was prepolitical in the sense that it did not depend upon the state for its existence or legitimacy. The boundaries of individual autonomy were defined primarily by the institution of property, contract and the market. Within this 18th century world view market ordering was not a form of coercion or a system of state regulation; markets reflected the absence of regulation, a sphere in which voluntarism and freedom might flourish. State regulation was thus characterized as the coercive control of individuals by the collectivity. Constitutional guarantees such as the "Contracts Clause" or the "Takings Clause" were designed to check the potential excesses of popular rule.[141] Armed with such constitutional guarantees, the judiciary would police the boundary between the zone of autonomy and the realm of legitimate democratic debate. Judicial review would be one means of ensuring that the people did not encroach on the private sphere reserved for individuals.

The drafters of the American *Constitution* did not rely exclusively on formal limits in order to protect the propertied minority; they also devised a complex system of checks and balances which would enable minorities to block popular majorities intent on violating rights. The ultimate goal was limited government, not majority rule. Jennifer Nedelsky summarizes the mood and thrust of Federalist thought in the following terms:

> The Federalists came to emphasize protection from republican government, rather than exploring or optimizing republican principles. They accepted the widely held view that government by consent was necessary to prevent tyranny, and was required by the imperative of natural rights and the equality of man. Moreover, they recognized that political exigencies required that any viable political proposal appear to comport with the popular attachment to republican principles. They thus took the principle of consent as a given, and turned their attention to the dangers inherent in governments based on such principles. The result was a subtle but important shift in focus from the promise of republican government to the containment of its threats.[142]

John Hart Ely, who claims that the American *Constitution* is primarily directed towards protecting democracy rather than sub-

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[141] Contracts Clause and Takings Clause of U.S. Constitution.

[142] Nedelsky, "Private Property and the Formation of the American Constitution", (Public Law Workshop, Osgoode Hall Law School, October 1985) at 15.

stantive values, has some difficulty in accounting for the emphasis on property and contract in the document. He acknowledges that there are a number of provisions which are "value oriented", but argues that the provisions which do not fit within his framework are "few and far between". He believes that in order to characterize the "value oriented" provisions as the dominant theme of the constitutional document, "one would have to concentrate quite single-mindedly on hopping from stone to stone and averting one's eyes from the mainstream".[143] Thus Ely argues that the "contracts clause", although protecting the substantive value of contractual rights, has not played a significant role during most of the twentieth century. As for the Fifth Amendment's requirement that private property not be taken for public use without just compensation, Ely interprets this as promoting democracy rather than the value of property as such: its point is to "spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment of it".[144]

It is quite unnecessary to determine whether Ely's attempt to marginalize the contracts clause or the takings clause are convincing in historical terms. My point is much simpler. Whatever the precise meaning of the various clauses in the U.S. *Constitution*, it is clear that eighteenth-century political assumptions about "limited government" are today totally discredited. It has been axiomatic, at least since the legal realists in the 1920s and 1930s, that the traditional dichotomy between public and private realms is largely illusory. There is no such thing as a zone of pure autonomy, free of state regulation. Property, for example, is itself the creature of the state, rather than its antithesis. The state defines those interests which qualify as property and then intervenes to ensure that they are protected. The same can be said of contractual rights or of markets generally. In effect, it is simply fallacious to attempt to "eliminate" state intervention in markets; the state is already there, defining the entitlements and intervening to protect them. The whole conceptual underpinnings of the eighteenth century preoccupation with limited government have been demonstrated to be false.

Thus the Canadian *Charter* was drafted in an era in which the notion of "private ordering", the very basis of the American *Constitution*, had lost much of its meaning. One would accordingly expect

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[143] Ely, *supra*, note 6 at 101.

[144] *Ibid.* at 97, citing J. Sax, "Takings and the Police Power", (1964-65) 74 Yale L.J. 36 at 75-76.

to observe quite significant differences between the *Charter* and the American *Bill of Rights*. In fact, this is precisely what one does observe. The agenda of Canadian constitutionalists in 1982 was a far cry from that of American Federalists 200 years earlier. The preoccupation with limited government had largely disappeared, replaced by a concern to ensure that the *Charter* did not frustrate state efforts to expand freedom and pursue the cause of social justice. There was a recognition, in other words, of the fact that there is no necessary tension between the state and freedom; the state can create or enhance freedom as well as limit it. The overriding goal of the *Charter* was to regulate and structure the way in which state power could be used, rather than to define the boundary between public and private.

This agenda is reflected first of all in what the drafters of the *Charter* sought to exclude from the document. The *Charter* includes no contracts clause and no takings clause. In fact, the drafters took the view that the *Charter* did not provide any protection for "economic" as opposed to "political" rights. Section 7, the Canadian equivalent to the American due process clause, was supposed to protect only the right to a fair procedure as opposed to an entitlement to a substantively just outcome. The drafters were emphatic in their view that s. 7 would not entitle judges to inquire into whether or not the outcomes of the political process were "fair". Thus the point of s. 7 was to structure and mediate the exercise of state power, rather than to draw artificial boundaries between "public and "private" realms. The drafters believed that it was inappropriate for judges to define state policy on issues of public concern; the task of the judges was simply to ensure that the policy chosen by Parliament was applied in a fair and even-handed fashion.

The debates over the purpose of s. 7 reflect and illuminate the larger conception of judicial review which underlies the *Charter* as a whole. This conception of judicial review is premised on a particular view of the nature of state power. For the drafters of the *Charter*, state "intervention" in the supposedly private realm of property and markets was a given. The issue was not whether the state would intervene, but how. The corollary was that state intervention was not necessarily "bad"; the state could enhance freedom as well as limit it. This meant that it would be counterproductive and wrongheaded to impose a series of rigid constitutional constraints on the policies which the state might pursue. Such constitutional constraints would be wrongheaded, since they would not necessarily serve the cause of individual freedom. They would simply prevent

the state from intervening in certain ways or in aid of certain substantive goals. Thus the drafters of the *Charter* were acutely conscious of the possible dangers inherent in constitutionalizing rights. The prime fear was that the *Charter* would mean that public policy would be defined by a set of unelected and unaccountable judges, rather than by Parliament. The drafters sought to guard against this danger. They believed that Parliament would still be free to define the agenda and the goals of public policy, even under the *Charter*. The role of the courts was not to choose substantive policy, but simply to mediate and structure the way in which state power was applied to individual citizens.

This preoccupation with the dangers of judicial review and with protecting the political process is not simply reflected in the discussions surrounding s. 7. There is a whole series of rather remarkable clauses explicitly designed to limit the scope of judicial review. The most obvious of these is s. 1, the "reasonable limits" clause. In theory at least, it was not strictly necessary to draft a separate "limitations clause" indicating that the rights guaranteed by the *Charter* were not absolute. Common sense alone indicates that since rights and freedoms inevitably collide, the rights of any one individual or group cannot be absolutely protected. Yet the drafters of the *Charter* were apparently uncomfortable with simply assuming that the courts would necessarily read in limits to substantive rights. The separate limitations clause reinforces the fact that the substantive rights should not be read in an absolutist fashion and that collective as well as individual interests must be taken into account by the judiciary. The other message implicit in s. 1 is that defining the scope of rights is not simply a matter reserved exclusively for courts and judges. The legislature also has a legitimate role to play in defining the appropriate balance between individual and collective interests. Unlike Professor Dworkin's imagery of courts as the elite "forum of principle", under the *Charter* matters of principle fall within the domain of legislatures as well as courts.

Sections 6(4) and 15(2) of the *Charter* reflect the notion that state intervention can enhance freedom and that judicial review should not be allowed to frustrate such state efforts. Section 6(4) provides that mobility rights shall not preclude a law designed to ameliorate conditions of socially or economically disadvantaged individuals in a province "if the rate of employment in that province is below the rate of employment in Canada". Section 15(2) provides that equality rights shall not preclude any "law, program or activity that has as its object the amelioration of conditions of disadvantaged

individuals or groups." These sections are merely particular illustrations of the more general point made earlier: constitutional limits on the state do not necessarily enhance freedom. If the *Charter* were interpreted so as to preclude so-called "affirmative action" programs, the effect would be to deprive disadvantaged groups of the benefit of those programs. In short, constitutional limits on state power operate in a zero-sum fashion, expanding the freedom of some individuals while at the same time limiting the freedom of others. Sections 6(4) and 15(2) are designed to limit the scope of judicial review and preserve the ability of the state to act in the interests of socially and economically disadvantaged Canadians.

These same sentiments underlie s. 33, the override provision, which gives the legislature the final say on most rights issues. The existence of s. 33 is not an indication that the rights guaranteed by the *Charter* are somehow unimportant or trivial. Rather, s. 33 reflects a fear that judicial review can be used to frustrate or unduly constrict state policy. By giving the final say on most *Charter* issues to the legislature, s. 33 is an attempt to prevent the courts from unnecessarily restricting the ability of the legislature to enhance freedom. It is a recognition of the fact that rights issues are not matters reserved exclusively for the courts, but are appropriate subjects for collective deliberation and debate. It is also a signal to the courts that if they fail to heed the caution signs displayed prominently elsewhere in the *Charter*, the legislature will step in to overturn their decisions.

What all of this suggests is that the vision of judicial review embodied in the *Charter* is radically different from that contained in the U.S. *Constitution*. Unlike the American *Constitution*, the *Charter* is not designed to insulate zones of "privacy" or "autonomy" from the intervention of the political process. By the 1980s it has become self evident that the classic dichotomy between public and private is largely illusory and that there is no such thing as a zone of "pure autonomy". Thus property rights and contract rights, which were the cornerstone of private ordering in eighteenth-century Federalist thinking, play no role in the *Charter*. Further, the drafters refused to constitutionalize a right to "privacy", which has supplanted property as a conceptual basis for private ordering in contemporary American doctrine. The *Charter* is designed to mediate the exercise of state power, not to draw boundaries around it. The attempt to mediate state power takes a number of specific forms. First, there is the concern with preserving the basic infrastructure of democracy — elections, free speech and rights of asso-

ciation. Second, there is a concern that laws not be applied in a discriminatory fashion. The legislature is not under an obligaton to provide any particular service or program, but if it elects to provide the service or program for some citizens but not ohers, it must offer some justification for the choice it made. Third, when the state interferes directly with the liberty of an individual, it must act in accordance with a detailed set of procedural norms. These procedural protections reflect the fact that the state possesses an overwhelming advantage over individuals in terms of resources and expertise. The various guarantees in ss. 7-14 of the *Charter* are an attempt to moderate and equalize the power relationship between state and individual.

This emphasis on mediating state power is by no means the only purpose embodied in the *Charter*. The major exception to my analysis of the document is ss. 16-23, the language rights sections. These guarantees stand apart from the rest of the *Charter*. They are an explicit attempt to constitutionalize a particular social value, rather than simply structure and mediate the exercise of state power. Thus, it would be quite misleading to characterize the language rights as a mere elaboration of the idea of democracy. At the same time, the presence of this distinctive set of constitutional entitlements tends to confirm rather than contradict my readings of the *Charter* as a whole. The language rights are clearly special and stand apart from the remainder of the *Charter*. For one thing, these rights are not subject to the legislative override in s. 33. Further, they deal with the rights of groups rather than individuals and are only triggered in certain defined circumstances [*i.e.*, the "where numbers warrant" criteria in s. 23]. The Supreme Court, in its first extended discussion of the nature of language rights, has emphasized their distinctive character. In *La Societé Des Acadiens Du Nouveau-Brunswick Inc.* v. *Association of Parents for Fairness in Education*,[145] Mr. Justice Beetz argued that language rights are a product of "political compromise" rather than "principle" and that they lack the universality and generality of other rights in the *Charter*. I prefer to describe the difference between the language rights and the remainder of the *Charter* in slightly different terms; in my opinion, the distinguishing feature of the language rights is their attempt to constitutionalize a particular set of political outcomes. For purposes of the present discussion, however, the crucial point is that the language rights tend to illuminate and sharpen the shape of the remain-

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[145] *Societé des Acadiens, supra,* note 13.

der of the *Charter*. Because the language rights are intuitively different from the *Charter* as a whole, they help to bring the background purposes and principles of the document into bolder relief.

Ultimately, then, my claim is not that there is a single purpose underlying the *Charter*. I do believe, however, that there are certain broad themes and assumptions which underlie the document as a whole. These background principles are sufficiently abstract that they do not constitute a recipe book in which one can "look up" the correct answers to particular *Charter* cases. But they do exert what Dworkin has termed a "gravitational pull", cutting in favour of certain arguments and cutting against others. In the next section, I offer particular illustrations of the practical bite of this way of understanding the *Charter*.

D. *Applications*

The practical utility, as well as the limitations, of the argument are best illustrated by consideration of a number of concrete examples. Take first the vexing question of government attempts to regulate the amount of money that can be spent by candidates or individuals in election campaigns. In both Canada and the United States, the state has taken steps to insulate the electoral process from the effects of money. In both jurisdictions, the courts have interpreted constitutional guarantees of free speech so as to prohibit or to limit the regulation of campaign finance. In the United States, the Supreme Court struck down attempts by Congress to limit the amount of money which could be spent by a candidate or by an individual on the candidate's behalf.[146] In Canada, a provision in the *Canada Elections Act*,[147] which prohibited "third party" advertising during an election campaign was ruled invalid due to the guarantee of freedom of expression in s. 2 of the *Charter*.[148]

The reasoning of the American Court was that campaign expenditures constituted speech "at the core of the first Amendment". The only "compelling" reason justifying government restriction of such speech was to prevent corruption or the appearance of corruption in the political process. Since the expenditure of money merely expressed an opinion and did not raise the spectre of corruption, attempts to regulate such expenditures were unconstitutional.

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[146] *Buckley* v. *Valeo* (1976) 424 U.S. 1.

[147] R.S.C. 1970, c. 14 (1st supp.).

[148] See *National Citizens Coalition Inc.* v. *Attorney General of Canada* [1984] 5 W.W.R. 436 (Alta. Q.B.).

The approach of the Canadian Court in the *National Citizens Coalition* case was far less categorical. The government apparently made no attempt to justify the limits on third party spending on the basis of a fear of corruption. The government's primary justification for the legislation was the need to ensure a level of equality amongst all participants in federal elections. It was argued that since parties and candidates are subject to spending limits, the absence of spending limits on third parties would give an unfair advantage to wealthy interest groups. Mr. Justice Medhurst did not indicate whether this principle of equality was a legitimate government objective. His Lordship added that the Court could not consider whether there may have been other, less restrictive means available to achieve the objective. This would be rewriting the legislation, which was a political as opposed to a legal task. Medhurst J. based his finding of invalidity on the simple fact that there should be "actual demonstration of harm or a real likelihood of harm to a society value before a limitation can be said to be justified". In this instance, the government had advanced nothing more than "fears or concerns of mischief that may occur", and this evidence was insufficient to justify the limitation on rights of expression.[149] This analysis, although dealing only with the narrow question of third party spending, is an implied attack on the regulation of expenditures by candidates as well. It is hard to see how the government could demonstrate that there was any more "actual harm" from candidates' expenditures as opposed to expenditures by third parties.

How might a "process-based" theory along the lines I propose deal with the issue of election campaign finance? The first point to note is that the theory does not necessarily "demand" or "require" a particular result. But in general terms, I would be far more sympathetic to campaign finance regulation than either the Canadian or the American courts have been. If we begin with the proposition that freedom is not simply the absence of restraint, it becomes possible to conceive of the regulation of campaign finance as enhancing freedom rather than limiting it. The point of the legislation is to restrict the ability of certain wealthy groups or interests to dominate election campaigns through the expenditure of money. The legislation is designed to ensure that no one political perspective is permitted to drown out the competing messages in the electoral marketplace. This justification becomes convincing once you push beyond

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[149] *Ibid.* at 448 and 453.

questions of formal access and negative freedom and focus instead on issues of equality of access and positive freedom.

Basic democratic values suggest that government attempts to improve equal access is an objective that is weighty or "compelling". Far from mandating that certain factions or interests be permitted to dominate the political process, democracy implies that such radical inequality subverts the proper working of the process. If this assumption is accepted, the question then becomes an instrumental one of matching means to ends; has the government pursued its objective in a way that does not unnecessarily compromise other important societal values? One need not use a sledgehammer to kill a fly. This is one way of construing Mr. Justice Medhurst's statement that the government could not justify its legislation on the basis of "concerns of mischief which may occur". The implication seems to be that, given the limited amount of third party spending in the past, there was no need for the government to impose an absolute prohibition on all spending. The government could have achieved its objective through a more finely tuned regulation, such as the previous legislation which had permitted a "good faith" defence.[150]

Mr. Justice Medhurst claims that he is not engaging in any such instrumental analysis of matching means to ends. But once the basic governmental objective of equality in the electoral marketplace is accepted as legitimate, the only remaining issue is whether the government could have achieved this objective using a less restrictive means. This is indeed a "political" or normative analysis, as Medhurst J. recognizes. But it has long been a commonplace feature of constitutional adjudication in the United States and the same will necessarily be so in Canada.

The analysis advanced here does not yield a "right" answer to the constitutional issue. But it does suggest that the American approach, with its narrow focus on "corruption" as a justification for campaign finance regulation, ought not be followed. The analysis of the American courts is predicated on a wholly negative view of freedom, with no recognition of the fact that the legislation is de-

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[150] The specific restriction considered in the case had been an amendment to the Act, enacted in 1983. It had abolished a 'good faith' exception which had existed in the legislation. The exception provided that a defence could be claimed by third parties if they could establish that their expenditures were incurred with respect to an issue of public policy, and had not been incurred in collusion with a party or candidate for the purpose of defeating provisions on spending restrictions. For a short history of the legislation, see the judgment of Medhurst J. *ibid.* at 442-46.

signed to enhance positive freedom and effective access to the political arena. Constitutional argument should be limited to the narrow issue of whether the means chosen by the government to achieve this important objective is unduly restrictive of other social values.

Let me offer a second, related illustration of the application of this general approach to judicial review. In the *Oakes* case, the Supreme Court of Canada set out a framework of analysis for the application of s. 1 of the *Charter*. In an earlier part of this paper, I pointed out that the second branch of the test proposed by Chief Justice Dickson — the "proportionality test" — required courts to make substantive value choices. The point of that critique was to emphasize that *Charter* analysis is not neutral or apolitical and that courts will inevitably have to make some assessment of the "wisdom" of legislative choices.

The fact that the proportionality test requires political choices by courts does not necessarily mean it ought to be abandoned. The inescapable reality of the *Charter* era is that courts will inevitably be forced into making choices that are overly political. Even the decision not to hear a case is itself a political choice as I pointed out in my discussion of the *Operation Dismantle* case. The question is not whether or not political choices will be made by courts but the manner in which those choices are to be made.

Viewed against this backdrop, there are certain obvious attractions to the proportionality test proposed by Chief Justice Dickson in the *Oakes* case. The test does require an assessment of the goals underlying legislation, but this assessment is more constrained and focused than it would be under the first branch of the test in *Oakes*. The first branch of *Oakes* simply asks courts to assess the "importance" of the government's policy goal. In contrast, the proportionality test measures means and ends at the margin. The starting point of the analysis is the particular regulatory framework chosen by the legislature. The analysis then attempts to assess the costs and benefits of alternative regulatory instruments which could have been employed to achieve the state's goal. The analysis is necessarily empirical and pragmatic, measuring the effects and the costs of the various alternatives against their stated goals.

The obvious objection to this type of empirical, means-ends analysis is that courts are ill-equipped to make such complex factual and normative judgments. But the answer to the objection is quite simple. Courts under the *Charter* cannot avoid making complex factual and normative judgments about legislation. The real question is not whether they will make such judgments at all, but

rather whether they will do so in an empirical vacuum. Notwithstanding the well-known institutional limitations of courts, they are better off attempting to assess the relationship between the means and the ends of laws on the basis of evidence and argument as opposed to mere intuition.

The general theory of judicial review proposed in this paper suggests that the second branch of the *Oakes* test should be emphasized while the first branch of the test should be downplayed. The process of forcing legislatures to justify the fit between means and ends is not necessarily incompatible with democracy. The virtue of the exercise is that it forces the legislature to re-examine its legislation in order to ensure that these laws really achieve their intended purposes. One of the initial and continuing benefits of the *Charter* is that it forces all levels of government in Canada to undertake a comprehensive review of existing regulation in order to ensure compliance with the *Charter*. Far from subverting democracy this process has the potential to enhance it. It forces the political branches to re-evaluate the tradeoffs involved in regulation and to ask whether the benefits of a law truly outweigh its costs.

V. CONCLUSION: COMING TO TERMS WITH THE *CHARTER*

In closing, I want to briefly consider two objections which might be raised against the general theory of judicial review proposed in this paper. The first objection is a wholesale rejection of the utility or necessity of the enterprise of "high theory" itself. According to this objection, general theories of judicial review are of relatively little practical relevance. They do not determine results in particular cases. As such, they are purely academic exercises with marginal significance for the "real world" of constitutional litigation.

The observation that general theories of judicial review do not "demand" a unique set of results is unassailable. But this does not mean that high theory is irrelevant to the litigation process. All constitutional decisions depend upon a set of controversial assumptions about the nature of rights and of democracy. The distinction is not between decisions which depend on a general theory and those which do not, but between those cases in which the theory is made explicit and those in which it remains implicit. This has been clearly illustrated by the early Supreme Court cases under the *Charter*. Although the Court did not purport to elaborate a general theory of individual rights, decisions such as *Operation Dismantle*

were shown to rest on a controversial set of assumptions about the nature of freedom. Unless these assumptions are made explicit, their highly contestable nature remains latent. Decisions which are the product of a whole series of debatable value choices take on an appearance of neutrality and inevitability. By engaging in an explicit discussion of high theory, this appearance of inevitability can be exploded. It becomes possible to criticize the actual judicial choices that are being made and to imagine a set of alternative constitutional outcomes.

There is a second, more modest objection to the enterprise of constructing a general theory of judicial review. This objection flows from the presence of the "legislative override" in s. 33 of the *Charter*. On this view, it is unnecessary to offer a general theory to justify or explain judicial review because the judiciary does not have the last word on rights issues. If the legislature disagrees with the choices made by the judiciary, it can simply pass legislation which will operate notwithstanding the *Charter*.

There are problems with this view. First, we do not yet know the extent to which it will be politically feasible for legislatures to make use of the override provision. Second, the use of the override is itself subject to the possibility of judicial review. Significantly, on the one occasion in which a legislature has made use of the override, a court has ruled the measure to be contrary to the terms of s. 33.[151] Finally, as I argued earlier, the presence of the override is itself consistent with the theory of judicial review I put forward in this paper.

The purpose of the theory is less to legitimate judicial review than to come to terms with it. Many Canadian lawyers continue to have serious doubts about the inherent desirability of constitutionalizing a set of fundamental rights. There can be no doubt that these principled concerns are weighty and fundamental. But the *Charter* is now the pervasive phenomenon of legal life in this country, in both elite and popular circles. The time for lamenting the enactment of the *Charter* is past. The issue now is the path which judicial review will pursue and the interests it will serve. This essay is premised on the belief that the choices that our legal culture will make and the interests it will favour are not preordained by fate or the "objective conditions" of history. We can experience this sense of possibility and empowerment only when we take seriously the *Charter* and the choices it offers for Canadian law.

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[151] *Alliance des Professeurs de Montreal* v. *Attorney General of Quebec* (1985) 21 D.L.R. (4th) 354 (Que. C.A.).