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[*Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*. By Patrick Monahan. Toronto: Carswell, 1987.]

ARE CONSTITUTIONAL CASES POLITICAL?

Brian Slattery*

"The judge's task is to remain as far as humanly possible impartial, free of his own biases or prejudices. Unwittingly, no doubt, everyone's thinking is to some extent a product of his or her upbringing and education. But the constant struggle is to decide, free of preconceived notions, to the end that the decision is in the best interests of the parties and the country."¹ Justice John Sopinka, in a speech delivered at his inauguration as a Justice of the Supreme Court of Canada.

Most judges think that, when asked to decide constitutional issues, they should detach themselves from any related political controversies and their personal views on these matters, and decide the issues in accordance with the Constitution, and "in the best interests of the parties and the country." But is there a rational way to resolve constitutional issues that does not in the end draw heavily on political considerations? When judges try to determine what the best interests of the parties and the country require, are they doing anything essentially different from politicians? Is deciding a constitutional case really an exercise in politics, if perhaps in a disguised or covert form?

The view that politics lies at the core of constitutional decision-making is not a new one, but it has won new adherents in recent years, and in Canada has gained added plausibility with the enactment of the *Canadian Charter of Rights and Freedoms*.² It is presented with flair and passion in a recent book by Patrick Monahan, a Professor at Osgoode Hall Law School. The book, entitled *Politics and the Constitution: The*

* Professor of Law, Osgoode Hall Law School, York University. I am indebted to John Evans, Eric Gertner, Joel Bakan and Peter Hogg for their helpful comments on an earlier version of this essay.

¹ As reported in *The Globe and Mail*, Toronto, June 24, 1988.

² Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 (hereafter referred to as the Charter).

Charter, Federalism and the Supreme Court of Canada,³ is lively and provocative, and its central claims deserve close consideration.

Monahan's first major theme is announced in his opening passage:

As I argue in this book, the constitutional issues that reach the Supreme Court are fundamentally and inescapably political. Constitutional argument asks the Court to help define who we are as individuals and as a people. Such questions cannot be answered through the application of some specialized or technical brand of expertise. What is demanded are political choices and acts of political will.⁴

Two interwoven strands of argument run through this passage. The main point, of course, is that constitutional issues are essentially political in nature. Monahan does not clearly indicate here what he means by "political" — a point that will occupy us later. But he implies that politics is somehow wrapped up with questions as to our individual and collective "identity," and in later passages he suggests more broadly that all questions of value are political. It should be noted that the claim is not simply that constitutional cases incidentally raise political considerations, or that judges may find it difficult to detach themselves utterly from politics, for these obvious points would hardly be worth making. Monahan is concerned to establish that constitutional issues are political *at their core*, that the search for a distinct "constitutional" basis for resolving them is misguided.

The second strand of argument, although presented by Monahan as closely related to the first, is actually quite distinct. It suggests that constitutional issues can only be answered by "political choices and acts of political will" or, as Monahan later remarks, by a process that is "political and discretionary" in nature.⁵ Now, the point that constitutional cases require "choices," "acts of will" or the exercise of "discretion" in no way follows inevitably from the argument that these cases are political in nature. Just because an issue is political does not mean that it can only be decided by an "act of will," with all the suggestion of arbitrariness and subjectivity that this expression carries, rather than, for example, by a process of rational deliberation, involving reference to first principles or, alternatively, by an exercise of practical judgment informed by experience and reflection or, indeed, by intuition. Monahan's choice of terms implies that politics is an arena of contending passions and preferences, where conflicts are resolved by acts of power expressing the ruler's will. This viewpoint, which needless to say has a

³ 1987.

⁴ *Id.*, at iii.

⁵ *Id.*

remarkably old-fashioned and positivist air, will receive extended consideration later.

Monahan identifies a further aspect of his first major theme. He argues that, while most legal scholarship "regards constitutional analysis as a specialized and technical form of reasoning," in fact constitutional questions cannot be answered through the application of some special brand of expertise.⁶ The point is said to carry an important consequence: "Under this new perception, constitutional analysis and argument would become a legitimate matter of concern to all Canadians, rather than the preserve of an elite group of specialists or experts."⁷

Once again, it is unclear how far this further argument flows from the book's first main theme. For even if Monahan is right in maintaining that constitutional issues are political, it by no means follows that specialized abilities are unimportant or dispensable. As is well known, political questions are often subtle and multi-faceted, with complex social, economic and historical dimensions. Consider, for example, the intricacies of the recent debate over free trade with the United States, and the convoluted political and historical arguments for and against Quebec separatism. It is not implausible to think that some form of expertise might help us to grapple with these issues. Having got this far, we may also wonder if some special qualifications may not be necessary for deciding constitutional cases. Monahan seems to want us to suppress these thoughts as undemocratic: specialized or technical qualifications, he argues, are unimportant in resolving political and constitutional questions alike.

Now, it should be said that the Canadian legal profession, whatever its faults, has not in recent times (if ever) celebrated judges *simply* for their skill at applying "a specialized and technical form of reasoning" in constitutional matters. True, judges can be found who evidently regard the interpretation of the Constitution as akin to the elaboration of the theorems of some arcane system of legal geometry. But such judges are generally regarded as *poor judges*, and rightly so. For while judges must, on the ordinary view, be people with specialized skills, they must also be people of wisdom and good practical sense, grounded in broad experience. But Monahan must mean more than this. He must be suggesting not just that specialized expertise is inadequate in itself to decide constitutional issues (for here he is only stating the obvious), but that it is relatively unimportant or even unnecessary. Judges, it would seem, are little more competent to resolve such issues than ordinary people.

Monahan articulates a second major theme in his work. We are told

⁶ *Id.*

⁷ *Id.*, at iii-iv.

that "constitutional scholarship must be conceived and practiced within an expanded universe, one which includes and is sensitive to the whole of political and social theory."⁸ This theme, then, emphasizes the importance of *theory* in the resolution of constitutional cases. As Monahan goes on to explain:

For lawyers, whose training has been focused almost exclusively on the details and distinctions contained in particular cases, this is a daunting prospect indeed. What is demanded is nothing less than a fundamental reorientation of one's way of thinking and approaching problems. In concrete terms, it means paying less attention to the details of particular cases and examining the interconnections and themes underlying whole areas of doctrine. It means, further, attempting to identify the assumptions, both explicit and implicit, which underlie and inform the doctrine. It means attempting to understand the provisional and partial nature of those assumptions and imagining an alternative way of approaching the problems presented.⁹

This is a slightly puzzling passage. On the one hand, it announces what the author evidently takes to be a revolutionary doctrine; and yet, on the other hand, the specifics of the doctrine might seem to require us to do only what many Canadian lawyers and judges have long thought it their job to do, namely, to approach cases with an eye not only to their specific facts but also to their basic underlying issues. In the common law world, it is generally supposed that a court should decide a case according to the governing precedents, a process that often requires the judge to identify the general principles and values informing previous decisions.

This fact is reflected in a standard modern introduction to Canadian law designed for beginning law students. The author, Stephen Waddams, observes that, just as the legal theorist should test his or her ideas against concrete cases, the legal practitioner should be attuned to the theoretical implications of particular issues. He goes on to explain:

It would, of course, be impossible to learn every single judicial decision as a separate "rule" of law. It would also be fruitless. It is useless to know that on a particular set of facts the law requires a particular result, if the reason for the result is not also appreciated. Without an appreciation of the principle that governs the decision one cannot even begin to pick out from the mass of facts that constitute each case those that are relevant. The good lawyer, and by this I mean the good practising lawyer, as well as the good academic, must appreciate the strengths and weaknesses of the arguments that support each legal "rule". If the arguments are open to challenge, they will be challenged, if not in the County Court tomorrow, at least in the Supreme Court of Canada in ten years' time.¹⁰

⁸ *Id.*, at iv.

⁹ *Id.*

¹⁰ Waddams, *Introduction to the Study of Law* (1979), at 25-26.

Yet again, it seems that Monahan must mean more than this: for whatever he has in mind requires "a fundamental reorientation of one's way of thinking and approaching problems." What then does the revolutionary program demand? The answer appears to be that judges should go beyond the low and middle level generalizations that are the usual stuff of decisions and engage in the kind of highly abstract and far-reaching theorizing favoured by some legal, social and political philosophers. To the extent, then, that Canadian judges have hitherto preferred a contextual, "case by case" approach over one that employs quasi-deductive inferences from abstract first principles, Monahan seems to think they have got it wrong. That is, he thinks that current methods of deciding constitutional cases make insufficient use of high-flown social and political theory.

Monahan, then, is making several rather different points: first, constitutional cases turn on issues that are basically political in nature; second, issues of this kind can be resolved only by subjective "acts of will" rather than more objective modes of rational deliberation; third, good constitutional judging does not require much specialized or technical expertise; and finally, courts are insufficiently theoretical in their approach to constitutional issues, too tied up in the facts of particular cases.

I think that all four points are misleading in their dogmatic simplicity, and that the final point — that courts are insufficiently theoretical — is incompatible with the third point, and probably also the second. To see why, one must look more closely at the way in which Monahan elaborates his major themes. These themes demand, of course, more extensive treatment than they can receive in a short essay such as this. My concern throughout is simply to point out that the issues are more complex than Monahan's arguments acknowledge, and that the solutions to them may well lie in directions different from those he indicates.

I. THE NATURE OF THE BASIC CLAIM

At the start, an important point needs clarification. When Monahan argues that constitutional cases are in some essential way "political," is he making a descriptive *cum* conceptual claim, or is the claim ultimately a normative one? On the first view, Monahan is advancing a descriptive thesis which holds that, despite appearances, judges deciding constitutional cases are actually motivated by "political" factors rather than the "legal" arguments deployed in the judgments. This thesis is allied with a conceptual argument to the effect that, on a correct understanding of the true natures of law and politics, it can be seen that constitutional issues fall into the latter category. Overall, the argument takes the form of an

"unmasking," where an impressive false facade is torn away to reveal the humble reality within.

However, Monahan's argument can also be understood as normative in nature. On this view, he is ultimately making claims about the way in which judges and lawyers *ought rationally to proceed* in arguing and deciding constitutional cases — that is, by explicitly taking into account political factors, or perhaps by employing a political mode of decision-making. In other words, he is concerned with identifying the correct way to go about deciding constitutional cases, while at the same time deploring prevailing methods. Now, it is possible, of course, that this argument is wedded to a conceptual thesis and perhaps also a descriptive one. Thus, Monahan could conceivably be arguing that, since constitutional cases are *in essence* political, they *ought* to be decided in a political manner, and to some extent judges *already do this*, even if they are unwilling to acknowledge this fact openly.

What sort of claim, then, is Monahan making? The answer is not completely clear. At times, he seems to be advancing basically normative arguments, that is, arguments about how judges ought rationally to go about deciding constitutional cases. In short, he is attempting to define the proper role of the judiciary in the constitutional sphere. Thus, when Monahan maintains, in the passage quoted earlier, that the constitutional issues reaching the Supreme Court are "inescapably political," he clearly does not mean that judges are factually compelled to deal with them in a political manner, for they could always decide them in other ways — by the toss of a coin or by consulting astrologists or the spirits of the departed. Neither does he seem to mean that at present judges actually deal with these issues politically, at least in the normal case. Rather, he apparently means that, on a correct appreciation of the issues at stake, judges *ought* to decide them by taking political factors into consideration or by adopting a political mode of reasoning. Likewise, when he says that constitutional argument "asks the Court to help define who we are as individuals and as a people," he is talking about the way in which constitutional argument should ideally be conducted or understood, rather than what is actually said by lawyers appearing before the Supreme Court.

In so far, then, as Monahan is arguing that constitutional cases ought to be decided in a political manner, he owes his readers an explanation of what he understands by "politics." He does not seem to have in mind the way in which Canadian politicians actually behave. Otherwise, he could be understood as suggesting that cases should be resolved on the basis of public opinion polls, regional interests, party-political loyalties, or even the contending parties' respective contributions to party coffers. It is not enough for Monahan to suggest that judges ought to act politically,

without going on to indicate what the true goals of politics are, what standards ought to govern its practitioners and how political decisions should be made. That is, his normative theory of constitutional adjudication requires a normative theory of politics.

At other times, however, Monahan seems to be advancing a basically descriptive *cum* conceptual thesis that seeks to expose constitutional adjudication for what it really is. Moreover, as we will see shortly, this descriptive thesis is penetrated with such a high degree of skepticism that it seems to rule out the very possibility that a sound normative basis for political or constitutional decision-making can ever be found. In short, the critical edge that characterizes this aspect of Monahan's work seems to cut against his own normative arguments, presented in other parts of the book.

At any rate, it is clear that the force of any argument that assimilates constitutional decision-making to politics depends largely on how politics is characterized. What then does Monahan mean by politics, and how does he think it should be practised? In the next two sections, I will attempt to find an answer.

II. POLITICS AND GENERAL CONSTITUTIONAL NORMS

For a work entitled "Politics and the Constitution," the space devoted to the nature and ends of politics is remarkably meagre. The author's views on the matter are presented in a piecemeal and indirect manner, mainly in passages discussing the "political" character of constitutional cases.¹¹ I will consider several of these passages, in the hope of building up a rounded picture of the author's ideas.

A good starting-point is a passage in which Monahan considers the judicial application of the Charter:

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 — 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.¹²

This passage, then, tacitly suggests that politics involves a process whereby those possessing power impose their will on others, projecting

¹¹ See, for example, the passages in Monahan, *supra*, note 3, at 7-8, 53-56, 58-59, 71-72, 135, and 158-59.

¹² *Id.*, at 53.

imagery of their own choosing on the blank screens furnished by such vague ideals as "equality" and "liberty." Politics is not governed by any substantive standards worth taking seriously. Since the Charter forces judges to make the same kind of unconstrained personal choices, it mandates an essentially political process.

The argument gives rise to several intriguing points. We note first the wavering between a descriptive and a normative approach. When Monahan implicitly characterizes politics as the exercise of unconstrained power, does he mean to suggest only that this is how politics is *actually* carried on or, rather, that, for various reasons, politics *cannot* (or *should not*) be conducted in any other manner? The answer, it must be said, is not very obvious. Either way, the author seems to hold a low opinion of politics; he implies that political debates about the nature of equality and liberty are nothing (and can be nothing) but the venting of highly subjective opinions and preferences.

On this view, the political question that confronted the Canadian government after the bombing of Pearl Harbour — whether it should detain Canadians of Japanese ancestry and confiscate their properties — comes down to a question of subjective preference and will. Should the government follow the preferences of many British Columbians, steeped in racial animosity and fear, or should it favour the preference of Japanese-Canadians to continue their lives in liberty? Whose views should the government prefer? There is no point, according to Monahan, in trying to pretend that "equality" or "freedom" are at stake here, for these are empty ideals, containing little or no substantive criteria. The government may do as it will.

But does the fact that a decision-making process (whether political or constitutional) is governed by general norms necessarily mean that the process is an arbitrary one, requiring resort to personal values and preferences? The answer depends on what role we think general norms should play in the making of particular decisions. If one thinks that general norms should be capable of supporting the deduction of specific propositions about concrete cases with a high degree of certainty, on a quasi-geometrical model, then, like Monahan, one will be disturbed by the fact that general constitutional standards, such as those found in the Charter, cannot readily be used in this manner; and one will be tempted to conclude that the process of applying them is essentially unconstrained and arbitrary. However, if one views the task of making concrete decisions in the light of general standards as a practical art rather than an exercise in deductive logic, the matter appears in an altogether different light.

It is common experience that the practical principles or "maxims" governing an art are often so abstract as to appear almost meaningless,

particularly to the novice or outsider. And we all know that to pursue an art successfully it is not enough to memorize these maxims and deduce from them the right way to proceed. The maxims reveal their sense only to someone who already has a good practical understanding of the art, consisting of a tacit and largely inarticulable body of knowledge gained through observation and direct experience. As one gains a better practical command of the art, one's understanding of its maxims deepens. That understanding can never be fully articulated or explained, but ultimately can only be "shown" by action. Nonetheless, some people are far better at the art than others. And it is the practice of the acknowledged master that ultimately exemplifies the meaning of the art's basic maxims.¹³

For example, the meaning of the martial arts maxim, that one should be "centred" in engaging an opponent, can be understood only by observing masters and attempting to imitate the ineffable stillness informing their movements. Similarly, the maxim that parents should be "firm" with young children but not "too strict" obviously does not direct any determinate course of action and may appear vacuous on that account. Yet, as an experienced parent knows, the maxim is far from meaningless. Its meaning, however, cannot be determined simply by analysis of the expressions "firm" and "too strict," or by consulting dictionaries. It is embedded in a body of practical knowledge that cannot be readily summed up or communicated in words alone.

So it can be argued that deciding constitutional cases is a practical art, just like playing baseball, raising children, writing short stories, cooking a good meal, diagnosing an illness or governing a country. Good constitutional decisions are made, not by logical deductions from explicit constitutional standards, but by tapping one's tacit knowledge of the practical workings of the constitutional system and its implicit values and principles, which the explicit standards only partially and palely reflect. To attempt to use these standards as the sole basis of decision would be like trying to learn driving from the provisions of the *Highway Traffic Act*. The fact that the standards are in themselves indeterminate does not mean that the decision-making process that they govern is arbitrary or unconstrained. It only means that the practical knowledge that guides and constrains the decision-making process cannot adequately be stated in words. The subtlety of that practical knowledge and the large number of variables that it embraces mean that verbal formulations of the basic precepts of good constitutional practice will tend to be abstract and indeterminate. Thus, the indeterminacy of general constitutional standards is a reflection of the fact that constitutional decision-making is a

¹³ For a brilliant exposition of the theme, see Polanyi, *Personal Knowledge* (1958; corrected edition, 1962).

highly concrete and contextual art that requires experience and skill and more than a little wisdom.

III. VALUES AND OBJECTIVITY

Let us turn now to another feature identified by Monahan as demonstrating the political nature of constitutional adjudication: its "value-laden" character. He writes:

[A] careful analysis of the early *Charter* opinions of the Court illustrates the inherently "political" character of the Court's reasoning. . . . The value-laden character of the Court's analysis illustrates the hollowness of the claim that the legitimacy of judicial review is a non-issue in the Canadian context. If judicial review under the *Charter* is to be justified, it cannot be on the spurious basis that the adjudicative process is neutral or objective. Any convincing justification must take into account the value-laden nature of judicial review and attempt to reconcile this political role for judges with traditional democratic values.¹⁴

The most striking feature of this passage is its tacit assumption that a "value-laden" process cannot be neutral or objective, that it cannot, in effect, be other than partisan and subjective in character, that is, "political." On this view, neutrality and objectivity in decision-making are possible only when the decision can rationally be made without any reference to values or value-laden principles. This view is a common and plausible one, but nonetheless it is quite wrong.

First let us be clear about what is at stake. The issue is not whether it is possible for a decision-maker to achieve total objectivity or neutrality in making evaluative decisions, for it may readily be conceded that total objectivity is not within one's grasp. The issue, rather, is whether it is possible to achieve *any degree of objectivity at all* in such matters. That is, does it make sense to say that one judge is "more objective" than another in making evaluative decisions, or is this like saying that one watermelon is more objective than another? More importantly, is there any point in judges attempting to be as objective as possible, or is this an inherently unavailing task?

If, as Monahan argues, the need to refer to values in reaching decisions precludes objectivity or neutrality, it follows that one value-laden decision cannot be any more or less objective than any other. For a judge to try to achieve any degree of objectivity is to fall prey to a delusion. Objectivity is a false and inappropriate ideal, at least for decisions that are grounded in human values. Judges, on this view, should frankly

¹⁴ *Supra*, note 3, at 71-72.

recognize this fact and drop the pretence that any measure of neutrality is possible.

Stated this way, the argument has far less intuitive appeal. It is one thing to say that it is virtually impossible to have perfect vision, but it is another to say that nobody's vision is better than any other's, and that there is no point in opening your eyes. It seems a basic lesson of experience that some decision-makers are more partisan and subjective than others. We all remember the teacher who treated his "favourites" more leniently than other students, and we criticize the judge who lets her previous political affiliations influence her disposition of constitutional cases. And when we have to make evaluative decisions, we are aware of a difference between yielding to our immediate subjective reactions and trying to be more neutral and balanced. Should we, as teachers, give a low mark to the student who dismisses our pet theory as worthless, or should we attempt to achieve a more detached assessment of his abilities? Should we, as judges, dismiss out of hand the arguments advanced by the irritating or arrogant counsel, or should we endeavour to appraise them on their merits?

In short, it is plainly wrong to suggest that trying to be objective in making evaluative decisions is a misguided endeavour, like trying to cook a more melodious steak or to achieve a spicier golf-swing. Objectivity is a quality that *characterizes* good evaluative decisions, just as dynamism and fluidity are the marks of a good gymnast. If we have come to doubt this, it is due to the influence of simplistic models often held out for the conduct of scientific inquiry, according to which a scientist has to detach herself from all values in order to attain objectivity. These models are simply inappropriate for any process of evaluative decision-making. But even in the purely scientific realm it is difficult to see how the scientist can conform to such models without losing respect for the value of *truth*. In reality, scientific inquiry, far from being value-free, is driven and sustained by a strong commitment to truth, and the scientist who loses sight of this ideal and cooks her results is universally condemned.

More generally, then, objectivity in decision-making is not to be attained by squeezing oneself dry of values. To the contrary, an objective decision is one that is animated by the right sort of values and normative principles, while bearing no trace of values and principles (to say nothing of passions) that are inappropriate in the context. To revert to an earlier example, an objective approach to the question of whether it would be right to detain Japanese-Canadians after Pearl Harbour would take account of such basic norms as the equal respect owed to all persons, regardless of race, the right to be presumed innocent before being proven guilty, and the right to a fair trial. These norms, which are obviously drenched in values, are essential preconditions of any objective assessment of the matter.

Of course, someone who maintains that all values are nothing but a projection of personal preferences cannot accept this viewpoint. On this view, there is no objective basis for saying that some values are more relevant to an inquiry than others. But it should be noted that radical subjectivism leads to conclusions that are rarely accepted in practice. It entails holding that whether one approves or disapproves of the bombing of Hiroshima, the discrimination against non-whites in South Africa or the wholesale killing of innocents in Pol Pot's Cambodia is ultimately a matter of personal preference, like choosing between chocolate-ripple and maple-fudge ice cream. Yet only on the assumption that radical subjectivism is correct does the presence of values in constitutional decision-making rule out the possibility of objectivity.

Not surprisingly, Monahan ultimately shrinks from endorsing the subjectivism implicit in his line of argument. He later remarks, for example: "The inescapable reality of the *Charter* era is that the judiciary will inevitably be drawn into making fundamental value choices. The issue is not whether or not political choices will be made by courts. *The issue is whether those choices will be made well or badly.*"¹⁵ Precisely. But how can one value choice be adjudged better than any other value choice, unless there is some objective basis for making this assessment, a basis that transcends mere preference?

Monahan's attempt to work out an answer is interesting because it reveals so clearly the difficulties afflicting those who want to reap the benefits of objectivism while retaining moral skepticism as a critical tool. Monahan's approach emerges in a passage where he takes issue with the view, which he attributes to Chief Justice Dickson's judgment in the *Operation Dismantle* case,¹⁶ that: "Politics is passion and subjectivity, the irrational working out of conflicting desire and opinion."¹⁷ Now, as we have seen, this appears to be the very position that Monahan himself espouses elsewhere in his work. But Monahan is here at pains to disassociate himself from this view:

[I]t 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,

¹⁵ *Id.*, at 135 (emphasis added).

¹⁶ *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, 59 N.R. 1, 12 Admin. L.R. 16, 13 C.R.R. 287.

¹⁷ *Supra*, note 3, at 58.

are shot through with subjective and contingent elements. This contingency does not entail the conclusion that there is nothing meaningful to be said about these subjects, or that one opinion is necessarily as persuasive as any other.¹⁸

These remarks are clearly intended to ward off the imputation of subjectivism. Yet it is not clear how Monahan can accomplish this without also repudiating much of what he has already said about the nature of politics and constitutional cases. He suggests that while all branches of knowledge may be "shot through with subjective and contingent elements," it is still possible to make "rational and meaningful" arguments, some of which may be more persuasive than others. The question, of course, is what firm basis can be found for judging the rationality of an argument or assessing its persuasiveness. Unless this basis transcends mere personal preference or its social analogues, convention and tradition, it is evident that one has not escaped from subjectivity, protestations notwithstanding.

Monahan attempts to deal with these problems in a later passage:

The more general point that emerges is that the very dichotomy between objectivity and subjectivity which has fueled debates over judicial review is itself suspect. Building on the "hermeneutical insight" — the view that "a sharp distinction cannot be drawn between understanding the text in its own terms and reading the interpreter's concerns into it" — it becomes unnecessary to discover some independent, apolitical ground for legal reasoning. In this view, the only meaningful use of the term "objectivity" is "the view which would be agreed upon as a result of argument undeflected by irrelevant considerations." Legal reasoning, along with other forms of political argument, is accordingly best understood as contingent yet constrained. It is constrained in the sense that legal argument must interpret and advance the aspirations and ideals which exemplify the political tradition. Yet it is contingent in the sense that the very act of interpreting those ideals changes them; the past is redescribed in order to accommodate the issues raised by the present.¹⁹

It seems clear, however, that Monahan has only replaced personal subjectivism with its communal equivalent, convention. He says, for example, that "the only meaningful use of the term 'objectivity' is 'the view *which would be agreed upon* as a result of argument undeflected by irrelevant considerations'."²⁰ But, it may be inquired, how does communal agreement represent an advance over individual preference, if it merely represents the preference of a group? Until comparatively re-

¹⁸ *Id.*, at 59.

¹⁹ *Id.*, at 158-59 (notes omitted).

²⁰ *Id.* (emphasis added).

cently in human history, most societies accepted some form of slavery as justified. Does this mean that we have no basis today, beyond mere convention and agreement, for thinking that slavery is objectionable?

Monahan places great store in the virtues of "argument undeflected by irrelevant considerations." But how does one go about constructing the right sort of arguments? Are some arguments objectively better than others? Or is the better argument simply the one that happens to "persuade" best? In any case, why should arguments of any sort be preferred over that best of all persuasive devices, the loaded gun? Moreover, in making and assessing arguments, how are we to know which considerations are "irrelevant?" Is it relevant, in determining whether people should be accorded basic civic rights, that they are Jews or Catholics or Protestants or Muslims or heretics or infidels or atheists? Many European, African and Middle Eastern societies have at various historical periods thought that such factors were highly relevant, and some societies still take this view. What should we think about such matters, and how are we to go about deciding?

The problem is strikingly illustrated by Monahan's suggestion that legal argument is not wholly unconstrained, even if it is contingent. "It is constrained," he says, "in the sense that legal argument must interpret and advance the aspirations and ideals which exemplify the political tradition."²¹ But where does the force of that interesting word "must" come from? And why should arguments that "advance" the ideals of the political tradition be preferred to those that seek to overturn or reform those ideals? If the political tradition in which I am raised is imbued with the notion of a master race, "must" my legal arguments be directed toward advancing that ideal?

In sum, then, Monahan denies that constitutional or political decision-making can or should aspire to objectivity. And yet he also wants to say that it is not (and should not be) merely a matter of arbitrary choice. However, beyond asserting that it is somehow possible to escape from the realm of subjective preference to that of rational deliberation, he has not shown us how we may do this, or even why we should want to.

IV. THE DIFFERENCE BETWEEN CONSTITUTIONAL AND POLITICAL DECISIONS

Monahan's main point is, of course, to argue that the "value-laden" character of constitutional decision-making shows that it is political. But to assume that because a decision is evaluative it is necessarily "political" rather than "legal" is, on the one hand, to fall victim to a

²¹ *Id.*, at 159.

narrow, positivist conception of law and, on the other, to adopt an all-embracing view of politics, which thins out the meaning of the term while ignoring important differences between various sorts of evaluative decisions. When I decide to go to a hockey game rather than the opera, the decision is undoubtedly "value-laden," but it seems silly and unhelpful to insist that the decision is therefore "political." Again, when I opt for scrambled eggs rather than waffles, the choice involves an evaluation, yet are we bound to conclude that ordering a meal is a political act? In brief, there are substantial differences between various sorts of evaluative decisions that a reductionist "political" analysis ignores.

More precisely, Monahan commits the error of assuming that, when two activities share something in common, one activity can always be subsumed under the other. Just because swimming and pole-vaulting are both energy-consuming activities, it does not follow that swimming is an aquatic form of pole-vaulting. And even if we think that both writing poetry and hairdressing are devoted to the pursuit of beauty, we need not infer that poets are really closet hairdressers. Similarly, from the premise that both constitutional and political decisions are "value-laden," it does not necessarily follow that constitutional decision-making is a form of politics or, for that matter, that politics is a form of constitutional decision-making. It only means that both are in some way concerned with values. Whether they are concerned with the same range of values, or are concerned with them in the same way, is another matter.

Now, it seems intuitively clear that one of the main purposes of adopting a written constitution is to decide for the future certain basic normative questions and, accordingly, to structure future normative debate within a certain framework. Thus, the adoption of the *Constitution Act, 1867*²² determined that certain formerly distinct British colonies in North America would be united in a single country under a federal system allocating power between national and provincial governments. The Act resolved certain important political issues, notably whether such a federation was desirable and what general shape it should take. But this latter point must be carefully appreciated. The questions were decided, but not in the sense that they were now closed to political discussion, for political debate over the merits of Confederation has never really ended. Rather, the adoption of the 1867 Act meant that a working system of governmental bodies was actually put into place along the lines envisaged in the Act, with courts regulating governmental observance of the Act. This working system remains in place until amended or overthrown, and provides a stable point of reference for practical deliberation and action.

²² 30 & 31 Vict., c. 3 (U.K.).

Thus, prior to 1867, when the government of Nova Scotia contemplated passing a bill, the major question was simply whether the Bill was politically desirable, that is, whether it was for the common good of the community and the benefit of individual citizens; but, after 1867, the government had an additional question to consider, namely, whether or not the Bill fell within the powers granted to provincial governments by the *Constitution Act, 1867*. It would be for the Nova Scotia government in the first instance to consider and answer this question, although the courts might later be involved in a constitutional challenge to the legislation. Under the Constitution the Nova Scotia government has the initial responsibility to ensure that its legislation comes within the allotted provincial sphere.

However, it should be noted that the question of the constitutionality of the Bill, as considered by the Nova Scotia government, is different from the question of the Bill's overall political merits. This is true even though no court is as yet involved in the question. The government of Nova Scotia has to determine whether or not its proposed action is constitutional, which is not the same as deciding whether the proposed action is politically meritorious. Now, one can argue that both questions are in some sense value-laden, and perhaps they are. But that does not detract from the fact that they are different questions, and sufficiently different to merit different appellations. Thus, it is customary to say that the question of the merits of the Bill is "political," while the question of whether the Bill is within the governmental powers of Nova Scotia is "constitutional." The difference is more than a matter of mere words or classification, for the government might well reach the conclusion that the Bill is politically sound but constitutionally illegitimate.

It also seems true that, although both sorts of decisions may be value-laden, the evaluative considerations that figure in resolving the constitutional question are likely to differ somewhat from those pertaining to the Bill's political merits. Suppose the Nova Scotia government is considering passing legislation to help stamp out the growing traffic in narcotics in the province. In any debate over the political merits of the proposed legislation the question of whether the Bill would relate to criminal law as distinct from, for example, property and civil rights would be largely irrelevant. But such questions would be central to any debate over the Bill's constitutionality, simply because of the provisions of the *Constitution Act, 1867* and the normative decisions reflected there.

Thus the degree to which a constitutional question is, in this sense, political depends upon the extent to which the constitutional norms that figure in the constitutional debate coincide or overlap with those applicable in the political debate. As can readily be appreciated, this sort of overlap is likely to be greater in questions arising under the Charter than

under the division of powers in the 1867 Act. But even under the Charter the constitutional debate is likely to proceed along lines somewhat different than would a purely political debate, where the only question is the overall desirability of the legislation in question.

Oddly, at certain junctures Monahan seems to recognize this basic point. In commenting, for example, on the Supreme Court's judgment in the *Constitutional Reference*,²³ he states: "The decision may well have reflected shrewd political judgment on the part of the Court; as is well known, the effect of the judgment was to force the parties back to the bargaining table for one final effort to reach a compromise solution. Yet, *whatever its political merits*, the Court's *legal analysis* was confusing, internally inconsistent and a total contradiction of its opinion in the Senate Reference just two years earlier."²⁴ One would have thought that, on Monahan's premises, once the political merits of a constitutional decision had been assessed, there would be nothing left to say about its "constitutional" or "legal" merits. The implication seems to be that constitutional law is, after all, a discipline governed by standards that are not necessarily identical to those of politics.

V. THE ROLE OF ELITES

One of Monahan's important themes is that constitutional analysis does not require a specialized or technical brand of expertise, so that such analysis is a legitimate matter of concern to all Canadians, rather than "the preserve of an elite group of specialists or experts."²⁵ Now, it would be hard to deny the desirability of engaging a broad spectrum of the interested public in constitutional debates; although this theme is a familiar one, it certainly bears repetition. A curious feature of Monahan's book, however, is that some of his basic arguments in fact point in a different direction.

Thus, Monahan argues that judicial interpretation of the Constitution, properly understood, is "an exercise in political theory,"²⁶ and he calls for constitutional scholarship to be practised "within an expanded universe, one which includes and is sensitive to the whole of political and social theory."²⁷ He also emphasizes that political theory involves "rich and sophisticated debates" about the true character and implications of "contested concepts,"²⁸ and that the standard training of lawyers and

²³ *Reference re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753, 11 Man. R. (2d) 1, 34 Nfld. P.E.I.R. 1, [1981] 6 W.W.R. 1, 125 D.L.R. (3d) 1, 39 N.R. 1.

²⁴ *Supra*, note 3, at 192 (emphasis added).

²⁵ *Id.*, at iv.

²⁶ *Id.*, at 12.

²⁷ *Id.*, at iv.

²⁸ *Id.*, at 54.

judges does not properly equip them to engage in these debates.²⁹ In a colourful passage he remarks: "The enactment of the *Charter* is like an unscheduled 'night drop', in which Canada's judges and lawyers have been parachuted unawares into the battlefields of political theory, without weapons, and with no knowledge of the deployment of the contending armies."³⁰

By Monahan's account, then, these sophisticated debates cannot be understood or conducted by just anyone. They require people with a specialized grounding in political theory: "experts," one might say. These people alone are in a position to appreciate the "nature and subtlety of these theoretical debates."³¹ Such important matters cannot, it would appear, be left in the hands of ordinary souls, any more than the command of armies can be turned over to raw recruits.

Who then is best qualified to illuminate ordinary lawyers and judges on these matters? The answer seems to be: *academics*. Monahan's heavy reliance on the writings of such theorists as Ely, Dworkin, Unger, Kennedy and Walzer testifies to his tacit belief that the inert dough of the Canadian judiciary needs animation by heavy doses of academic yeast. It may be noted that Monahan's preferred yeast comes in bright packages from the Great Emporium to the south.

Now, all this seems very much an elite enterprise. For, if Roberto Unger's works are not on the bedside tables of many lawyers and judges, they are hardly the preferred reading of most ordinary Canadians and the politicians they elect. The theoretical debates to which Monahan refers will probably seem pointless if not largely incomprehensible to many honest citizens, who will judge them (perhaps not without reason) to be divorced from the practical concerns of everyday life. What Monahan proposes, then, is to deliver the Constitution into the embrace of a small coterie of academic theorists. Whether this is a desirable course of action can be debated; my point is simply that Monahan's program leads us down paths different than his democratic verbal flourishes would suggest.

The same tendency is visible at other points in his analysis. Thus, Monahan argues that the Charter requires judges to engage in a balancing of interests, and that this entails a form of cost-benefit analysis, involving "complex factual and normative issues."³² But he maintains that interest-balancing is a "quintessentially legislative task," for only the legislature is equipped "to deal with the vast array of data" germane to such an inquiry.³³ It must be doubted, however, whether Monahan

²⁹ *Id.*, at iv and 54.

³⁰ *Id.*, at 54.

³¹ *Id.*

³² *Id.*, at 135-36.

³³ *Id.*, at 53.

really thinks that the average member of Parliament is better positioned than the average judge to cope with this "vast array of data" in a detailed and understanding way. As is well known, much detailed governmental policy is formulated and legislation drafted, not by Members of Parliament, or even by Ministers, but by a bureaucratic elite with highly specialized skills and experience.³⁴

To the extent that Monahan emphasizes the complexity of the issues involved in making basic political and legal decisions, I suggest that he is also implicitly committed to the view that such decisions require the assistance of people with relatively uncommon and specialized skills — if not the average judge on the bench, neither the average person in the corner doughnut store. Once again, then, his analysis implicitly draws us in the direction of an elite, although in this case the elite appears to be the governmental technocracy that lies beyond the velvet curtains of the modern Canadian legislature rather than the academic elite. But the links between the academic and bureaucratic elites in Canada should not be underestimated.

So, Monahan's early insistence that constitutional adjudication does not involve a specialized brand of expertise, which is said to open constitutional debates to ordinary Canadians, eventually drifts into the view that a different brand of expertise is required — namely, a grasp of a sophisticated body of political theory coupled with the ability to cope with large bodies of complicated data. Judges, it is said, lack these qualifications due to deficiencies in their education and training. But ordinary people are similarly lacking, and so, for the most part, are parliamentarians. Thus, despite the populist language and the appeal to the ideals of democracy and community, Monahan arguably espouses views with strong elitist undertones. But, while he distrusts the judicial elite and has ambiguous feelings about members of legislatures, he seems to have a strong underlying faith in academia and the governmental bureaucracy. Not everyone who has experienced academic life or dealt with bureaucrats would share this faith.

³⁴ Thus, *The Globe and Mail*, Toronto reports on June 28, 1988: "The federal Government's chief salesman for the free-trade accord with the United States says he hasn't read the entire agreement and doesn't intend to. 'I haven't read the whole of the free-trade agreement,' International Trade minister John Crosbie told reporters. 'I've read all of the free-trade agreement that I feel is necessary for me to read and then I have a whole department of people to interpret it. I'm not going to sit down and read every word of the free-trade agreement.' He said he has read the parts he considers important 'for a generalist to know' but could not specify what they are."

CONCLUSION

Standing back, now, from a detailed appraisal of Monahan's work, a number of general points deserve mention. I suggest that anyone who wants to understand constitutional decision-making and to explore its connections with politics is unwise to focus mainly on judges as constitutional decision-makers. The mistake is one into which lawyers, such as Monahan, are particularly prone to fall. Even while criticizing the performance of the courts or arguing that the judicial role is over-blown, many lawyers still tacitly take courts to be at the centre of the constitutional universe. The better view, I suggest, is that the Constitution binds not only the courts but also members of the legislature and the executive; all three branches of government are required to follow constitutional standards in making decisions within their separate spheres. Consequently, the decisions of the legislative and executive branches on these matters are in many respects as important as those of the courts in moulding the constitutional culture that sustains the Constitution and gives it meaning.³⁵ The failure to consider the roles of politicians and public servants in implementing the Constitution not only makes Monahan's analysis incomplete, it distorts his understanding of the judicial role and the relation that it bears to decision-making in the other branches of government.

A second failing in Monahan's approach may be noted. It is unhelpful to characterize constitutional adjudication as "political" without going on to specify what the pursuit of politics entails, the goals it aims to attain, and the basic principles informing its practice. The word "political" has no clearly defined meaning in modern usage. Rather, as Monahan's own work illustrates, it has the chameleon-like capacity to change colours to blend with a variety of different conceptual backgrounds. Of course, if we adopt an Aristotelian notion of politics as the pursuit of the common good of a community and the individual goods of its members, we can agree that constitutional adjudication should in some manner be informed by this pursuit. But to say that judges, like other governmental figures, should act for the good of the community and its members does not carry us very far in understanding what that good entails and how it can be achieved, or in determining the relative roles of Canadian judges, legislators and administrators in the process.

I have argued here that good constitutional decision-making entails a variety of particular arts or skills that are best learned by experience and practice within the tradition. These skills, in some degree, are possessed

³⁵ The point is developed at greater length in my paper "A Theory of the Charter" (1987), 25 *Osgoode Hall L.J.* 701.

by able politicians, administrators and judges alike — but each role has its distinctive traditions, which emphasize different skills and abilities. The qualities of a good judge are not identical to those of a good politician. Moreover, judges, politicians and administrators alike need a variety of specialized skills, not possessed by the average person, in order to carry out their mandates successfully.

What role, then, should theorizing play in reaching constitutional decisions? I suggest that, contrary to what Monahan maintains, a judge or other decision-maker should be guided primarily by a sense of what is right in the concrete circumstances of a particular case. A judge's sense of rightness should, let it be said, be informed by broad constitutional experience, a detailed grasp of the precedents and reflection on the case's broader implications. In the end, however, it is the concrete intuition of where the true path lies that should predominate. Although formal reasoning and explicit justification are usually desirable features of judicial decision-making, they should not be allowed to usurp the position of good sense as the nerve of the process. If logic is not the life of the law, neither is theory its vital juice. What constitutional adjudication involves, then, is contextual decision-making within a particular tradition by reference to values and principles that represent aspects of the tradition without exhausting it.

But tradition alone is an inadequate basis for making constitutional decisions. Why should we bind ourselves to the ossified preferences of our society? Yet the alternative of casting ourselves adrift on a sea of individual preferences is little more attractive. Only on the assumption that a transcendent basis for moral and political judgment exists can debates within a society over the justice and morality of existing arrangements be anything more than a senseless battle of wind and tide. The idea of equality, for example, has no power against conventional differentiations made between the sexes — no power, that is, beyond that of one arbitrary notion against another arbitrary notion — unless it is anchored in a belief in the equal worth of the individual human being, a worth that has a transcendent and not merely conventional status. Whether there is in fact some way in which, through the distorting lens of culture and tradition, we may glimpse aspects of transcendent goods and principles of justice is another question. But it is no solution to shut our eyes and whistle loudly.