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Cross Cultural Reflections: Teaching the Charter to Americans

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Abstract

In this article, the author discusses a course in Comparative Constitutional Jurisprudence that she taught at Cornell Law School in the winter semester of 1989. She is particularly interested in the way this class of American students responded to the Supreme Court of Canada's interpretation of the Charter. She presents her reflections on differences between Canadian and American constitutional culture through a discussion of the decisions in The Motor Vehicle Reference, R. v. Morgentaler, and The French Language Case.

Keywords

Canada. Canadian Charter of Rights and Freedoms; Constitutional law--Study and teaching; United States; Canada

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CROSS CULTURAL REFLECTIONS: TEACHING THE CHARTER TO AMERICANS©

BY JAMIE CAMERON*

In this article, the author discusses a course in Comparative Constitutional Jurisprudence that she taught at Cornell Law School in the winter semester of 1989. She is particularly interested in the way this class of American students responded to the Supreme Court of Canada's interpretation of the *Charter*. She presents her reflections on differences between Canadian and American constitutional culture through a discussion of the decisions in *The Motor Vehicle Reference*, *R.* v. *Morgentaler*, and *The French Language Case*.

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I. ODE TO THE ROAD

My life as an academic began at Cornell Law School in 1982-83, and it seemed appropriate, during my first sabbatical, to return to those roots. In my eagerness to resume old friendships and make some new, I overlooked one detail: assuming fair weather, sparse traffic at the border, and moderately aggressive driving, it takes a little more than four hours to get from Toronto to the parking lot at Cornell. After thirteen weeks of numbing driving, across a dark, lonely, and often dangerous stretch of snow belt highway, the result is an account of my seminar on Comparative Constitutional Jurisprudence.

After the last class, I literally drove off into the sunset. By then I was aware that almost none of my reflective thinking about the course occurred at Cornell, "far above Cayuga's waters," in an office overlooking a spectacular gorge.[1] Instead, it took place along the New York Thruway, as I pondered what Americans said about the *Charter*.[2] On my final journey, a remarkable sunset, in combination with a sense of conclusion and relief, produced an interlude in which a series of disparate reflections about the nature of constitutional culture fell into place.

On the first day of class, I told the students that it was not my job to proselytize about Canada's *Charter of Rights and Freedoms*; that instead, this would be a course about culture and ideology. Using the *Charter* as my vehicle, so to speak, I would try to disarm a sense of cultural complacency that the outside world often perceives as being typically American.[3] An iconoclastic approach which challenged their basic assumptions about democratic values and individual rights, I hoped, would force these students to assess the ideological values they too readily take for granted.

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[1] "Far Above Cayuga's Waters" is Cornell's Alma Mater and is sung to the hymnal tune "Glory to His Name."

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

[3] A. de Tocqueville, *Democracy in America*, ed. by J.P. Mayer (Garden City, N.Y.: Doubleday/Anchor Books, 1969) at 237.

In addition, I told them I was keenly interested in their impressions of the *Charter*. Although American students are more curious about Canada than we think, they still know little about us. Most of the time, this group contributed responses which were thoughtful, open-minded, and flexible. Even so, I had little idea in advance just how baffled they would be by certain aspects of the *Charter*. Sometimes they reacted to Canadian decisions in ways that were predictable, but other times they caught me completely off guard. Even when I could anticipate the conclusion they reached, they would support it with arguments that were distinctly un-Canadian. Curiosity forced me to try and explain these results.

What follows are my reflections on teaching the *Charter* to Americans. They are based on comments Cornell students made in class, in conversation with me outside of class, and in their papers. Whether any other group of American students would respond in a similar way, I cannot guess. And then there is my own subjectivity. Often I thought the hardest about points that may seem obvious or unimportant. Here I have caricatured and enhanced simple insights to bring the cultural perspective into sharper focus. These factors make this an interpretation that is somewhat anecdotal.[4] Such limitations of necessity make these impressions preliminary. Even so, this group of students advanced my understanding of constitutional culture in ways I never expected.

This paper provides a cultural re-interpretation of three Supreme Court of Canada decisions. It singles out *The Motor Vehicle Reference*,[5] *R.* v. *Morgentaler*,[6] and *The French Language Case*[7] because American students responded to these decisions in ways that interested me. Although some observations may seem obvious, and this an exercise in truism, our understanding of the *Charter* can only benefit from an awareness of basic cultural

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[4] I have not provided the usual footnote documentation of statements I make in the text. Although it is readily available, I decided that including it would compromise the spontaneity of this piece.

[5] *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 [hereinafter *The Motor Vehicle Reference*].

[6] [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*].

[7] *Ford* v. *A.G. Quebec*, [1988] 2 S.C.R. 712 [hereinafter *The French Language Case*].

assumptions about the nature of a constitution, and of judicial review. These assumptions are pervasive, and a more powerful influence in our respective constitutional traditions than we realize. As a result of this course, I am more acutely aware of the degree to which these perceptions influence the way Canadians and Americans think about their Constitutions.

II. AMERICAN PERSPECTIVES ON *CHARTER* DECISIONS

A. *Introduction*

The course followed a simple outline. After commencing with an introduction to Canada's pre-*Charter* tradition, we compared the texts of the U.S. Bill of Rights and of the *Canadian Charter of Rights and Freedoms.* From there, given time and subject matter constraints, we focussed on sections 7, 2, and 15 of the *Charter*, and their American equivalents. In discussing specific guarantees, we analyzed the relationship between the substantive provision and section 1 before debating particular issues like hate literature, abortion, Sunday closing, and affirmative action. The schedule was adjusted to accommodate a guest speaker, newly released decisions, and the American students' interest in religion and the state. Our final sessions tried to put our discussions into a broader cultural perspective.

B. *The Motor Vehicle Reference*[8]

I expected a routine discussion of *The Motor Vehicle Reference.* Previously, we had referred in passing to the U.S. Supreme Court's then upcoming reconsideration of *Roe* v. *Wade.*[9] On that issue, the class had emphatically disapproved of any retreat from *Roe*'s assertion of a woman's right to seek an abortion.[10]

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[8] *Supra*, note 5.

[9] 410 U.S. 113 (1973) [hereinafter *Roe*].

[10] See *infra*, note 40.

Whatever they thought of section 94(2) of the B.C. *Motor Vehicle Act*, I assumed they would support a substantive interpretation of section 7. In anticipation of that response, my opening remarks in class challenged the Supreme Court of Canada's interpretation of section 7. Much to my surprise, these students wholeheartedly embraced the critique.

I was taken aback by their consensus that *The Motor Vehicle Reference* was an unwise decision. The students had little difficulty with the ultimate result: in their view, legislation that joined a requirement of absolute liability with the prospect of imprisonment was grossly unjust.[11] Notwithstanding that view, they characterized the Supreme Court of Canada's interpretation of section 7 as unprincipled. As far as they were concerned, the intent of the framers was authoritative and binding. By dismissing that intent out of hand, and rather casually, from their perspective, the Canadian Court had acted improperly.

This response startled me. First, in the context of abortion, the students had already endorsed substantive due process and a liberal[12] interpretation of the U.S. Constitution. Without necessarily precluding original intent as a theory of interpretation, their endorsement of abortion rights made it unlikely that they would consider the intent of the framers a compelling basis for review. In the United States, original intent is a conservative theory of review synonymous with judicial restraint.[13] There, it is awkward, if not impossible, to follow original intent and simultaneously support a

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[11] Subsection (1) of section 94 of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288 provided that anyone who drives despite legal prohibitions or during suspension of his driver's licence commits an offence and is subject to imprisonment. Subsection (2) stated that those who contravene subsection (1) are absolutely liable.

[12] In this paper, I use the words *liberal*, *progressive*, and *conservative* in the way they are popularly understood in contemporary American constitutional discourse. The Warren Court of the 1950s and 1960s may be the best example of a liberal or progressive approach; and today, Justices Brennan and Marshall are the two stalwarts of that tradition. Robert Bork, President Reagan's unsuccessful Supreme Court nominee, is one of the better known contemporary exemplars of a conservative judicial style.

[13] See, for example, E. Meese III, "The Supreme Court of the United States: Bulwark of a Limited Constitution" (1986) 27 S. Tex. L. Rev. 455.

woman's right to seek an abortion.[14] Second, it is rare, and almost unheard of, for Canadians themselves to criticize the Supreme Court of Canada's departure from original intent in this decision. Although a handful of students at Osgoode Hall Law School will typically insist that the intent of the framers is authoritative, the majority invariably concludes that original intent is relevant but not dispositive. In other words, original intent can be invoked to support a just result, but it should not be used to perpetuate an injustice, like segregation[15] or section 94(2) of the *Motor Vehicle Act*. As an academic, I am unaware of any support for a restricted, procedural interpretation of section 7 on grounds of original intent.[16] The argument more often takes the form of a nostalgia about our tradition of parliamentary supremacy, an idealism about democratic process, a Marxist interpretation of power and struggle, or a hostility towards the Americanization of review in Canada.

Cornell students gave a simple and straightforward explanation of their position. In their view, original intent was authoritative in Canada, but not in the United States, because the *Charter* was enacted only a few years ago. Accordingly, the irresolvable problems of ascertainability and reliability that necessarily defeat the attempt to rely on the intent of the framers in the United States do not exist in Canada. Their instinct that timing and context place original intent in a different light was undoubtedly sound.

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[14] Abortion rights can only be reconciled with the intent of the framers if that intent is described in abstract, general terms, such as individual autonomy. At that stage, however, it is a meaningless interpretive tool. Once the *specific* intent of the framers is examined, it becomes virtually impossible to reconcile this theory of interpretation with the constitutional right to an abortion.

[15] Segregation was not considered inconsistent with the equal protection clause as originally proposed. A.M. Bickel, "The Original Understanding and the Segregation Decision" (1955) 69 Harv. L. Rev. 1. The U.S. Supreme Court did not reject the argument from intent until *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[16] In "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 Sup. Ct L. Rev. 69 at 80-82, Patrick Monahan and Andrew Petter provide a critique of *The Motor Vehicle Reference*, which discusses the legislative history and intended scope of section 7 but makes no claim that the intent was binding. Similarly, in "The *Motor Vehicle Reference* and the Relevance of American Doctrine in Charter Adjudication" in R. Sharpe, ed., *Constitutional Litigation* (Toronto: Butterworths, 1986) 69 at 95, I suggest that the Supreme Court of Canada should have given the underlying reasons for those concerns careful consideration; but I do not conclude that the intent was authoritative just because it was *the intent*.

What puzzled me was a Canadian tendency to explain away an instinct this group of American students found compelling. In expecting Cornell students to rationalize *The Motor Vehicle Reference*'s departure from original intent the way Canadians have, I revealed my own limits: I had underestimated *their* powers of cultural discernment. By suggesting that a doctrine should apply in Canada, despite being rejected in the United States, they were telling me that the *Charter*'s distinctive setting could support a different result.

At that point, it seemed appropriate for me to challenge original intent as a theory of interpretation. My first argument was that the students could not assume the Canadian framers' intent was clear and ascertainable *just because* it was recent. After exploring that difficulty, I ventured beyond the technical problem of divining what the intent of the framers was and argued that original intent should never be considered, much less determine the outcome.[17] Although progressive American commentary supports this view, the reality is that, today, the technical problem of reliably ascertaining the intent of the U.S. framers of 1787 is insuperable. For that reason, the pure interpretive question about the moral and jurisprudential authority of original intent no longer exists in the United States. It is inescapably intertwined with the evidentiary problem. Despite my effort to raise the jurisprudential question, the American students would not budge from the view that, for purposes of the *Charter*, the *specific* intent of framers, voiced as recently as 1982, was authoritative.[18]

I puzzled this out on the Thruway. It was not clear why liberal American students would consider a conservative theory of interpretation binding, while most Canadians regard it as only slightly

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[17] The technical arguments are that original intent is so indeterminate that it is infinitely manipulable, and that there is no such thing as intent in constitution-making anyway, because it is not a discrete event participated in by discrete individuals but, more often, a complex process. The jurisprudential argument is that the past has no necessary moral claim on the present and accordingly, that the intent of yesterday's framers should not dictate the needs of today's society.

[18] They concluded that, in *The Motor Vehicle Reference*, Justice Lamer had effectively conceded the existence of a specific intent but had declined to follow it because it would mean that the comments of a few civil servants had frozen the content of one of the *Charter*'s substantial guarantees. See text accompanying note 39, *infra* at 624ff.

relevant, and almost never dispositive. Eventually, I concluded that this divergence of views could be explained by distinctive cultural perceptions about judicial review and constitution-making in Canada and the United States.[19]

Paradoxically, Americans would defend the institution of review to the death while debating its legitimacy all the way. Despite glorifying the Constitution, and the jurisprudence it has generated, controversy about judicial review is ever present in the United States. Discussion is sharply focussed and the commentators bitterly divided. Because it is largely foreign to us, Canadians are confused by this display of schizophrenia. After all, the purpose of review is the same in Canada and the United States: to enforce the Constitution against sources of authority which violate its terms. But still, it is understood differently in the two countries. Traditionally, we neither aggrandized the Supreme Court of Canada nor questioned its authority: lacking the power of "rights review," it truly was the "least dangerous" branch.[20] That realization gave me an important clue to the Cornell students' endorsement of original intent.

In the United States, the purpose of judicial review, institutionally, is to enforce the principle of limited government. Not only does it prevent a tyrannical majority from oppressing powerless minorities, the judiciary also protects the people, collectively, from corruption and abuse of authority at the hands of the other branches of government. In the absence of formal limits on the judiciary's authority, however, Americans learned that their unchecked power can be as tyrannical as any source of political authority. Although review is legitimate if it prevents tyranny by the other branches, it can only avoid being tyrannical itself if *its* scope is limited. Unfortunately, the text of the U.S. Constitution neither confers nor

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[19] Throughout this paper, I make observations that might be characterized as truisms. It is in the nature of a truism that it generalizes. I have tried to indicate where my generalizations would be qualified in a lengthier discussion.

[20] Americans tirelessly debate Alexander Hamilton's 78th *Federalist* description of the judiciary as the least dangerous branch. By contrast, the Supreme Court of Canada was referred to in 1966 as a "quiet court in an unquiet country." R.I. Cheffins, "The Supreme Court of Canada: A Quiet Court In An Unquiet Country" (1966) 4 Osgoode Hall L.J. 259.

limits that authority.[21] The prelude to the court crisis of 1937 revealed that self-restraint is the only real check on the power of the judiciary.[22]

In recent years, it has been the function of constitutional theory to legitimize review, and this can only be done by suggesting what its limits should be. Thus, every theory of review claims to have discovered the magic boundary between the legitimate exercise of judicial authority and encroachments on the other branches.[23] Although original intent is one of many theories, it proposes, uniquely, to limit the judiciary's authority by tying it to the intent of the framers. Because Canadians traditionally have not been concerned about *restraining* the judiciary, and, indeed, under the *Canadian Bill of Rights*, encouraged the courts to be more active, we lack America's innate suspicion of judicial power. Accordingly, *The Motor Vehicle Reference* may have been less problematic at this stage in the *Charter*'s evolution because achieving a just result in a particular case is perceived as a higher priority than prescribing limits on an anti-democratic source of institutional power.[24]

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[21] Although Article III, 52 extends the judicial power to all "[c]ases ... arising under this Constitution," it does not explicitly confer the authority to review the actions of the other branches. Article VI is often cited to provide textual justification for judicial review; it appears, however, to address an issue of federal-state relations and states only that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the Supreme Law of the Land...." See, generally, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) [hereinafter *Marbury*].

[22] The observation was first made by Justice Stone, dissenting in *United States* v. *Butler*, 297 U.S. 1 at 79 (1936), which invalidated the *Agricultural Adjustment Act*, one of Roosevelt's more important New Deal initiatives. Despite precipitating a crisis which resulted in the reversal of precedent, Roosevelt's Court-packing plan demonstrated that the Court is effectively immune from direct executive or legislative interference. Without belittling their importance, the powers to appoint the U.S. Supreme Court and to override its decisions through constitutional amendment constitute checks on its authority that are more formal than real.

[23] P. Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship" (1981) 90 Yale L.J. 1063 provides a good summary of the mainstream theories.

[24] I am not suggesting that there is a lack of concern about the power the *Charter* gives the judiciary. Concerns were voiced during the negotiation of the patriation package, and will be found in much of the commentary on Supreme Court of Canada decisions, as well as in the popular press. What I am suggesting, instead, is that the search for limits based on a theory of interpretation is much more advanced in the United States at this time, for reasons

The above analysis still does not explain why the Cornell students favoured this particular theory of interpretation in this contextual setting. I found the answer in distinctive perceptions of the Constitution itself. In the United States, the most frequently invoked argument against substantive due process is interpretivism. Commentators argue that the authority for review must be found in the text and, therefore, that it is not legitimate for the judiciary to invalidate duly enacted legislation through reliance on extra-textual values.[25] This argument is appealing for two reasons. First, in the search for limits on judicial power, textualism provides a solution that seems obvious, concrete, and objective.[26] Second, experience has proved the point. The unhappy era of *laissez-faire* constitutionalism in the early twentieth century provides a compelling example of the reasons why Americans denounce decisions that invoke extra-textual values to invalidate democratically enacted legislation.[27]

In the context of *The Motor Vehicle Reference*, American students saw a clear, undeniable, and very recent indication that section 7 should not protect substantive values. If the text was ambiguous, the specific intent of the framers made the interpretive issue irrefutable.[28] The availability of evidence from those who directly participated in constitutional reform made it convenient for Cornell students to claim that their intent should prevail. Their insistence that this intent should be considered authoritative can be

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that are both historical and ideological.

[25] As Justice White recently explained, "Fundamental liberties and interests are most clearly present when the Constitution provides specific *textual* recognition of their existence and importance." By contrast, when the Court defines as "fundamental" liberties that are "*nowhere mentioned in the Constitution*," it opens itself to the accusation that "in the name of identifying constitutional principles ... the Court has done nothing more than impose its own controversial choices of value upon the people...." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 at 2194 (1986) (dissenting opinion; emphasis added).

[26] Review pursuant to the words of the text is undoubtedly legitimate; the real question is whether the text should be the *exclusive* source of authority for review.

[27] For a brief summary, see Cameron, *supra*, note 16 at 82-87.

[28] Section 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

traced, I believe, to basic assumptions about the nature of constitution-making.[29] This insight only occurred to me as I followed the contemporaneous debate on the Meech Lake Accord.[30]

Recognizing that American and Canadian students have different perceptions of the process of constitution-making and constitutional reform was the key. In the United States, the American revolutionaries and framers are venerated as great and patriotic men.[31] Ironically, Americans lionize these *individuals* but simultaneously believe that the Constitution belongs to *the people*, and that the people actively participated in its formation.[32] The revolutionary experience, the preamble to the Constitution, its underlying ideology, and the constitutional convention and ratification mechanisms all support this perception.[33] Whatever actually happened, Americans believe that the people collectively won their independence and collectively established the Constitution.

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[29] One other factor should be acknowledged. Generally speaking, American courts rely more heavily on evidence of original intent and legislative history than their Canadian counterparts. Although Canadian courts have adopted a more flexible approach in recent years, the fact remains that reliance on constitutional and legislative intent is a more familiar and authoritative interpretive technique in the United States. Whereas Canadian students might not consider it especially noteworthy, a judicial interpretation that discounted such vital evidence could easily strike American students as unusual.

[30] Although the Accord was initially attacked by feminists concerned about the "distinct society" clause and a handful of others troubled by the consequences for federalism, those indications of discontent subsequently resulted in two provinces refusing to ratify the agreement, a third threatening to revoke its ratification, and widespread popular disapproval.

[31] Although participants in the Declaration of Independence and Constitutional Convention of 1787 are seen this way, the amendments arising from the Civil War recall an unhappy period in national life. To idealize the equal protection clause, Americans overlook the circumstances surrounding the imposition of the Civil War amendments and glorify Abraham Lincoln and the words of the equal protection clause, or otherwise trace its pedigree back to the Declaration of Independence, which asserts that "all *men* are born equal" (emphasis added).

[32] Indeed, one Cornell student, in a paper entitled "Section 33 of the Canadian Charter of Rights and Freedoms," argued for a repeal of section 33 of the *Charter*, saying that "[t]he purpose of the Charter ... is to entrench the liberties that belong to *the people* of Canada" (emphasis added).

[33] Although it analyzes the role a distrust of authority plays in American constitutional culture, J. Cameron, "Liberty, Authority and the State in American Constitutionalism" (1987) 25 Osgoode Hall L.J. 258 summarizes these events and acknowledges the romantic interpretation they have traditionally been given.

In the United States, the Constitution speaks for the people because, metaphorically, it *is* the people.

Canadians, by contrast, do not think this way. Some might consider former Prime Minister Trudeau a visionary, and the patriation of the Constitution a singular achievement. In the circumstances, however, it is difficult to idealize that event. The story of constitutional reform in recent years has been marked by bullying, bitterness, and internecine rivalry. Prime Minister Trudeau threatened to use his formal legal authority in apparent indifference to the objections of his provincial counterparts and the moral conventions of Canadian federalism. Even after *The Patriation Reference*,[34] it was initially unclear whether the Prime Minister would renegotiate with the eight dissident provinces. In the end, the province of Quebec declined to participate in an event we were told to celebrate as the culminating event of our nationhood. The public was involved only peripherally, through lobbying on the part of special interest groups and the contributions of a few significant public figures.[35] Among the literature analyzing this pivotal event is a book titled *And No One Cheered*.[36]

Although American constitution-making may not have been more glorious, Canadians have lived through a process of constitution-making which is much less remote in time. Today, lingering resentment about the process of constitutional reform is manifested in a backlash about the terms of the Meech Lake Accord and the way it was negotiated. In such circumstances, Justice Lamer's dismissal of the section 7 evidence as "the comments of a few federal civil servants" seems less inapt.[37] Canadian students

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[34] *A.G. Manitoba* v. *A.G. Canada*, [1981] 1 S.C.R. 753 (concluding that the federal government's unilateral patriation package was legally valid but unconstitutional in the conventional sense) [hereinafter *The Patriation Reference*].

[35] B.A. Ackerman & R.E. Charney discuss the proposed referendum and the role of the people in Canada's process of constitutional reform in "Canada at the Constitutional Crossroads" (1981) 34 U.T.L.J. 117.

[36] K. Banting & R. Simeon, eds (Toronto: Methuen, 1983); see also R. Sheppard & M. Valpy, *The National Deal* (Toronto: Fleet Books, 1982).

[37] *The Motor Vehicle Reference*, *supra*, note 5 at 508. Dean John Whyte of Queen's University Law School, a participant in the patriation negotiations, might dispute this characterization, but I do not know of anyone else who either has or would dispute it.

regularly invoke those words to rebut the argument that the intent of the framers should carry moral weight.

More poignantly aware of the need for limits on judicial review, and inclined to romanticize the processes that brought their Constitution into existence, American students disapproved of *The Motor Vehicle Reference* by projecting their cultural perceptions onto Canada's *Charter*.[38] By contrast, the political experiences of recent years have given us little reason to exalt the process of constitutional reform or the role of the framers. Until Canadians appreciate the awesome powers of the judiciary, we will be less inclined to distrust the institution of review. From a cultural perspective, these dynamics suggest that the Supreme Court of Canada's rejection of original intent was as sound as the American instinct that it should be binding.

C. *R. v. Morgentaler*[39]

Throughout the spring of 1989, the status of *Roe* v. *Wade* was in jeopardy.[40] In the circumstances, it did not surprise me that

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[38] I do not suggest that all American law students, or even a majority, would consider the intent of the framers binding in these circumstances. I claim only that to the extent that this group of students did, cultural assumptions partially explain their response.

[39] *Supra*, note 6 (invalidating section 251 of the *Criminal Code*, which prohibited abortion except in prescribed circumstances).

[40] The U.S. Supreme Court heard argument in *Webster* v. *Reproductive Health Services* in April 1989 and rendered its judgment on 3 July 1989 (109 S. Ct. 3040 (1989)). This case challenged three elements of Missouri legislation dealing with abortion: (1) a statutory preamble pronouncing that human life begins at conception; (2) a requirement that physicians make specific findings about fetal viability; and (3) a ban on the use of the services of public employees or the facilities of public institutions to encourage or conduct abortion procedures. In deciding the constitutionality of these provisions, the U.S. Supreme Court had the option of overturning *Roe* v. *Wade*, retreating from it by upholding these statutory measures, or of invalidating the provisions on a strict application of precedent. In a sharply divided judgment, a plurality upheld the Missouri legislation. The Court unanimously held that the preamble was not justiciable on the facts before it, and the challenge to the ban on the use of public funds for "encouraging or counselling" abortions was abandoned. However, five judges upheld the viability-testing provision and the ban on the use of public funds for "performing or assisting" abortions. One of the concurring judges would have overruled *Roe*, and one other explicitly held that reconsideration of *Roe* was not necessary. Two judges, joined by two others, registered strong dissents.

students who supported *Roe* found the decision in *Morgentaler* wanting. It bears emphasizing that, ideologically, theirs is a tradition of constitutional liberalism. From an American student's perspective, the U.S. Supreme Court had issued a bold, unequivocal decision protecting the right to an abortion fifteen years ago, and that doctrinal icon was in jeopardy.[41] Alongside *Roe*, the Canadian decision struck them as vacillating and tentative. The American students were uncomfortable with the opinions by Chief Justice Dickson and Justice Beetz, which invalidated the legislation on procedural grounds. In their view, a procedural approach was dishonest, and a transparent attempt to disguise a substantive conclusion.[42] They preferred to engage the issue through the concurring opinion of Justice Wilson, and through the dissent by Justice McIntyre.[43] Moreover, without suggesting that it should

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[41] *Roe* v. *Wade*, *supra*, note 9, not only protected the right to an abortion, but also articulated a set of principles, based on the three trimesters of a pregnancy, to determine the constitutionality of regulations affecting or burdening the constitutional right to an abortion. By any standard, *Roe* was a remarkable decision; particularly noteworthy are its trimester framework, which had the appearance of a statutory scheme, and its protection of a right not explicitly guaranteed by the constitutional text. Although the controversy that followed in its wake polarized the nation, the *Roe* decision is idealized by those who support its result.

[42] Chief Justice Dickson, Justice Lamer concurring, held that Canada's abortion law constituted state interference with bodily and psychological integrity, amounting to a violation of the section 7 guarantee of security of the person. The regulatory framework was unconstitutional because its exculpatory provisions had been implemented in a way that created unfair procedural irregularities. Justice Beetz, Justice Estey concurring, held that the procedural requirements delayed the legal procurement of an abortion, thus creating an unjustifiable risk to maternal health. Although he considered the requirement of a medical opinion justifiable, he concluded that some of the additional procedural delays were unnecessary, and not rationally related to the legislative purpose of protecting the fetus. Both opinions claimed the case did not raise a substantive issue about the status of abortion under section 7.

[43] The style of Justice Wilson's opinion is American: not only is it individualist in tone, it explicitly discusses *Roe* v. *Wade* and concludes that section 7 guarantees a woman's substantive right to seek an abortion. Justice McIntyre's dissenting opinion, joined in by Justice La Forest, is a classic example of judicial restraint. That opinion likewise has numerous counterparts in the American jurisprudence.

have been persuasive, they found it odd that only one of the Court's four opinions cited *Roe* v. *Wade*.[44]

The Supreme Court of Canada attempted to defuse the controversy inherent in its decision by invalidating the statutory framework and simultaneously indicating that more careful legislation might not be unconstitutional. From one perspective, this solution can be considered a masterful stroke of judicial statesmanship.[45] However, under a different conception of its institutional role, the Court can be criticized for refusing to face the substantive issue square on. Any compromise between women's rights and Parliament's prerogative to restrict abortion could only be effected by distorting the concepts of substance and procedure. Under this view, however, such a compromise is inappropriate because the court has a responsibility to choose definitively between the litigants' claims. This class of Cornell students clearly favoured the latter approach. Even though principles of institutional prudence exist in both countries, their response suggested that different perceptions of institutional relations prevail in Canada and the United States.

Cornell students found it puzzling that the Supreme Court of Canada would invalidate an entire regulatory scheme and then encourage Parliament to re-draft the legislation. Their impression was one of a Court unwilling to assert its authority.[46] The point was not that a court could not invalidate an existing statutory scheme without anticipating a fresh legislative initiative. Paradoxically, this extraordinary decision removing all criminal

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[44] Surprisingly, Cornell students rarely, if ever, suggested that the Canadian courts should adopt specific American doctrines. At the same time, however, they concluded that the Canadian courts could benefit from the U.S. jurisprudence by addressing its relative strengths and weaknesses. In the context of abortion, *Roe* v. *Wade* is such a powerful decision that the students found the Supreme Court of Canada's disregard difficult to understand.

[45] Like the U.S. Supreme Court in *Marbury* v. *Madison*, *supra*, note 21, and like its own approach in *The Patriation Reference*, *supra*, note 34, in *Morgentaler*, the Supreme Court of Canada asserted its authority to engage in review, but without denying Parliament its legislative prerogative. But see *infra*, note 47.

[46] Some students had a similar reaction to *The French Language Case*, *supra*, note 7. There, the Court's acquiescence in Quebec's omnibus override legislation struck them as odd. They found it difficult to understand why the Court did not actively discourage reliance on the override, even if it could not prevent it, thereby preserving *its* institutional prerogative. Section 33 of the *Charter* allows legislatures and Parliament to override provisions in the *Charter*.

sanctions, but on *procedural* grounds, was ultimately apologetic. American students interpreted the Court's insistence that it had not addressed the substantive issue as an unnecessary apology, as an attempt to convince Parliament, itself, and the public that the case truly turned on procedure rather than substance, and as a less than sincere effort to preserve an appearance the decision belied. Unlike the decision in *Roe* v. *Wade*, *Morgentaler* refused to discuss the status of abortion or indicate what the Constitution required.[47]

The American students speculated that because our Court was unwilling to portray itself as Parliament's adversary, it self-consciously sought to present itself as a co-operative but flexible protector of individual rights. They also found the decision's aftermath quite unprecedented. For them, a dialogue in which Parliament and the Court each proclaimed the other's responsibility to determine the status of abortion was foreign.[48] Beyond the trite observation that institutions, whether Canadian or American, will

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[47] From an American perspective, the Court's refusal to articulate, or even discuss, what limits the *Charter* would impose on the state's regulatory authority could almost be described as an abdication of its institutional responsibility. Once again, their point of reference was *Roe* v. *Wade*, and its explicit trimester framework.

Nor, on closer examination, does *Morgentaler* bear much resemblance to *Marbury*. There, by asserting its power to supervise both the executive and legislative branches of government, the U.S. Supreme Court maximized its institutional authority, despite denying the relief requested. The same is not true of the decision in *Morgentaler*.

[48] A hearing in Joe Borowski's case, testing the constitutional status of the fetus, was pending at the time *Morgentaler* was decided. (Leave granted 3 September 1987.) In the circumstances, it unquestionably would have been unwise for the Supreme Court of Canada to prejudge that issue in any way. Following *Morgentaler*, however, it initially appeared that Parliament would propose new legislation. When it became impossible to achieve any consensus, the initiative foundered. The institutional see-saw began when the Attorney General of Canada sought a postponement of the Borowski hearing, but not a dismissal of the appeal. When the Court denied this request on 19 July 1988, Parliament announced it would not legislate until the Supreme Court of Canada determined whether the fetus had constitutional rights. When the Court finally heard the case, it concluded that it could not determine that question in the absence of any basis for a constitutional challenge. See *Borowski* v. *A.G. Canada*, [1989] 1 S.C.R. 342. After the course concluded, this legislative hiatus resulted in two biological fathers seeking civil injunctions to prevent their respective co-procreators from obtaining an abortion. In an Ontario case, *Murphy* v. *Dodd* (1989), 70 O.R. (2D) 681 (H.C.), Barbara Dodd's ex-boyfriend was refused an injunction to prevent her abortion. However, Chantal Daigle was forbidden by the Quebec courts from having an abortion until the Supreme Court of Canada reversed the lower courts and granted her appeal. See *Tremblay* v. *Daigle* [1989] 2 S.C.R. 530. If it had not been apparent before, those two episodes made patently clear the institutional inefficiency of leaving the resolution of this issue to the *ad hoc* and adversarial processes of litigation.

seek to avoid unwelcome attention, this incident suggested the significance of cultural attitudes about institutional relations.

In the United States, the separation of powers, together with its system of checks and balances, created adversaries of the three branches of federal government.[49] Very recently, important cases have litigated conflict between the executive and legislative branches.[50] President Reagan became embroiled in the Iran-Contra scandal by defying Congress's prohibition on arms funding. The U.S. Senate rejected presidential Supreme Court nominee Robert Bork in 1988, and shortly thereafter, refused to ratify President Bush's proposed Secretary of Defense, John Tower.[51]

Precisely because they are co-equals, the co-ordinate branches are adversaries. The U.S. Supreme Court has always been aware of these dynamics, including the constant prospect of unpleasant relations with the other branches. Because it cannot compel those branches to obey, and lacks any independent power to enforce its decisions, flagrant disregard is a risk the U.S. Supreme Court must consider in rendering its decisions.[52] From time to time, the

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[49] Obviously, they are not relentless, undeterred foes, and there is considerable co-operation between the branches, which is necessary for them to function at all. Even so, the point remains true at the level of generality.

[50] Litigation over issues such as the balanced budget, the power of Congress to appoint special prosecutors, the legislative veto, and the constitutionality of sentencing guidelines has made separation of powers one of the most hotly debated issues in recent years. Indeed, "Harper's Index" reports a 224 percent increase, since 1959, in the number of U.S. Supreme Court cases that involve disputes over the separation of powers: (September 1989) 279 Harper's 15 (quoting Geoffrey Miller, University of Chicago Law School).

[51] These events can only partly be explained by partisan politics. At least in part, they were contests about the balance of power in a system of government that separates the different branches of government as a matter of constitutional imperative.

[52] One of the reasons the U.S. Supreme Court does not give advisory opinions is that it would be institutionally embarrassing to provide an interpretation and have it disregarded. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). In the jurisprudence, the classic case is *Marbury* v. *Madison*, *supra*, note 21, in which the U.S. Supreme Court held that President Jefferson had acted illegally but concluded that an order of mandamus could not issue because the legislation authorizing the remedy was itself unconstitutional. The orthodox view of *Marbury* is that the Court only invalidated the legislation to avoid the risk, which at the time was a real one, that President Jefferson would simply ignore a mandamus. Although there are many other examples, President Roosevelt's plan to deliver a speech defying the decision he expected the U.S. Supreme Court to reach in the Gold Clause Cases of 1935 is one of the more dramatic ones. When the Supreme Court decided in the government's favour, the speech became unnecessary. (The Gold Clause Cases resulted from various challenges to the Joint

President and Congress respond to important constitutional decisions by threatening to reorganize the Court,[53] to restrict its jurisdiction,[54] or to initiate a constitutional amendment.[55]

To preserve its institutional status, the U.S. Supreme Court must exercise its authority. In other words, to remain a co-equal, the Court must act like a co-equal.[56] The judiciary can unquestionably avoid confrontation with the other branches through the political questions doctrine, Article III's "case or controversy" requirement, or a battery of principles of institutional prudence.[57] However, when it considers it necessary, the U.S. Supreme Court will vigourously defend its authority to interpret the Constitution.[58]

Resolution of 5 June 1933, which took the U.S. dollar off the gold standard. See *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U.S. 240 (1935) (sustaining the power of Congress to invalidate gold clauses in private money contracts); *Nortz* v. *United States*, 294 U.S. 317 (1935) (dismissing a claim for damages suffered when payment on gold certificates was made in dollars rather than gold); and *Perry* v. *United States*, 294 U.S. 330 (1935) (dismissing a claim for damages suffered for payment in dollars rather than gold on government bonds).)

[53] The Court-packing plan of 1937, which would have enabled Roosevelt to increase the U.S. Supreme Court from nine to fifteen members, is the most famous occasion on which the executive branch sought to control the judiciary by altering its composition. Roosevelt's Court reorganization plan was modelled on a similar plan which was drafted, but not implemented, in 1913.

[54] Whether Congress can restrict the Supreme Court's subject matter jurisdiction over controversial subjects such as abortion, school prayer, school busing, and pornography remains unresolved, despite having been debated regularly and at length. Even so, all congressional initiatives proposing to restrict the Supreme Court's jurisdiction have failed in recent years.

[55] The XIth and XVIth Amendments, dealing respectively with governmental immunity and the power to levy an income tax, both had their genesis in U.S. Supreme Court decisions whose reversal was thought necessary. Despite those successes, the unsuccessful attempt, in the early twentieth century, to overcome, through constitutional amendment, a Supreme Court decision invalidating child labour legislation, together with the more recent history of the XXVIIth Amendment (the Equal Rights Amendment), demonstrates how difficult it is to secure any amendment to the Constitution.

[56] This is a task of some delicacy: the U.S. Supreme Court must exercise sufficient power to maintain its institutional status, but not so much as to provoke disobedience or retaliation from the other branches or levels of government.

[57] See, generally, L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: The Foundation Press, 1988) c. 3, especially § 3-7ff.

[58] The principles the Court invokes to avoid a constitutional decision can be traced to the separation of powers. Notwithstanding its respect for the jurisdiction of the other branches, the U.S. Supreme Court has demonstrated its willingness to defend its power of review. See *United States* v. *Nixon*, 418 U.S. 683 (1974), in which the Court denied President

The dynamics of federalism also affect institutional relations in the United States. State autonomy was the practical reality and the underlying assumption at the time the Constitution was ratified.[59] Despite that scheme, adversarial relations between the federal judiciary and the state legislatures have been the norm of constitutional adjudication in the twentieth century.[60] Although conscious of the need to respect state autonomy, the U.S. Supreme Court has exercised control over the state legislatures and officials responsible for the administration of criminal justice. In decisions like *Brown* v. *Board of Education* and *Roe* v. *Wade*, it has decreed, respectively, that segregation is unequivocally unconstitutional and that regulation is only permissible at certain stages and under certain circumstances during a pregnancy.[61] Far from encouraging the legislatures to respond and fill in the gaps, as *Morgentaler* appeared to do, the U.S. Supreme Court often leaves them as little room as possible for further regulation. This approach can only partly be explained by differences in the federal systems of the two countries.[62]

Nixon executive privilege in the Watergate tape case; and *Cooper* v. *Aaron*, 358 U.S. 1 (1958), in which the Court announced that *Brown* v. *Board of Education* was binding, not just on the parties to the litigation, but on the entire nation.

[59] Unlike the *Constitution Act, 1867*, which divides jurisdiction between the two levels of government, the U.S. Constitution is selectively concerned with the scope of federal authority and, just as importantly, with limits on its power. As the Xth Amendment acknowledges, state autonomy is the underlying assumption of the U.S. Constitution. At the same time, however, the supremacy clause in Article VI makes the federal Constitution and laws pursuant to it paramount over state Constitutions and statutes inconsistent with it.

[60] Federalism is an important dimension of American individual rights litigation because whenever the federal judiciary enforces rights, the states lose the authority to enact laws which interfere with any of the Bill of Rights or Civil War amendments. In this way, federalism and individual rights have always been interrelated in the United States.

[61] Although *Brown* v. *Board of Education*, *supra*, note 15 was initially limited by the narrow decision that public school desegregation was uniquely unconstitutional, the Court invoked its full authority to implement that decision and extend its scope through *per curiam* orders. Similarly, despite a complex jurisprudence interpreting its requirements, *Roe* v. *Wade*, *supra*, note 9 promulgated explicit, unequivocal standards to govern the issue of abortion.

[62] Although the federal government has jurisdiction over the criminal law under section 91(27) of Canada's *Constitution Act, 1867*, the states retain their "police power" under the American federal scheme. Part of the explanation of cases like *Brown* and *Roe* is that the U.S. Supreme Court has to be unequivocal and explicit about the Constitution's requirements in order, realistically, to exercise any control. It is undoubtedly more difficult for the U.S.

Separation of powers psychology affects the legislatures as well as the judiciary. Congress often debates the constitutional merits of proposed legislation, and declines to enact laws if there are serious concerns about their constitutionality.[63] At the state level, however, American legislatures are less concerned about the moral limits of their power. This is not to suggest that the states enact statutes without regard to the federal Constitution. Such an assessment would be patently unfair. Nonetheless, the fact of judicial review encourages the legislatures to test the outer limits of their constitutional authority. When a court invalidates legislation which a democratic majority has passed, the adversarial flavour of institutional relations often results in renewed legislative efforts to circumvent or bypass the judicial decree. *Roe* v. *Wade* provides a classic example.[64]

At both federal and state levels, the separation of powers requires each branch to protect its authority from the others. Paradoxically, although separation establishes the judiciary as an independent branch, the power of review renders it impossible for it to function independently of politics. One consequence is that legislatures are free to pursue majoritarian objectives, because the obligation of protecting individuals from the democratic will belongs to the judiciary.[65] At the same time, however, the U.S. Supreme Court threatens the hegemony of the majority. A concept of moral responsibility, which is legal rather than political, has enabled

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Supreme Court to constrict fifty states than it is for the Supreme Court of Canada to supervise the actions of ten provinces, despite the extensive jurisdiction over "property and civil rights" which the provinces possess under section 92(13) of the *Constitution Act, 1867*. Even so, I believe that the American constitutional jurisprudence is as deeply influenced by separation of powers principles as it is by any pragmatic awareness of the difficulty of controlling the states.

[63] See *supra*, note 54.

[64] State legislatures have attempted to circumvent the U.S. Supreme Court's constitutional trimester framework and to discourage abortions in ways too numerous to mention. They have tried to undercut *Roe* v. *Wade* through spousal and parental consent requirements, elaborate "informed consent" procedures, funding decisions, and by regulations about the procedure itself and disposal of fetal remains. See *Webster*, *supra*, note 40.

[65] The classic statement is by J.B. Thayer in *John Marshall* (Boston: Houghton Mifflin, 1901) at 103-04, 106-07, quoted in A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) at 21-22.

legislatures to express hostility toward judicial decisions which defy the collective will on issues like school prayer or capital punishment. In the end, it is impossible for the U.S. Supreme Court to avoid provoking the other branches. Largely due to federalism, but also to the adversarial nature of institutional relations, the American Court could not have responded in *Roe* v. *Wade* the way the Supreme Court of Canada did in *Morgentaler*. Doing so would not only have been incompatible with the judiciary's status as co-equal, but it would also have made it institutionally impossible to issue any constitutional standard on the right of privacy.[66]

A different perception of *Morgentaler* emerges when American assumptions about institutional relations and the separation of powers are grafted onto the *Charter*. The students assumed that Canada's traditional principle of supremacy would induce an adversarial and hostile relationship between the parliamentary and judicial branches. To them, the significance of the *Charter* was that an institution that had been supreme was now forced to yield to the judiciary. In such circumstances, the American instinct was that Parliament would resent this loss of authority.[67] Because that interpretation sees power as discrete and proprietary, it is a typically American response which regards its loss as anathema.

Some of the students assumed that the decision in *Morgentaler* was deferential because the tradition of parliamentary supremacy had not waned sufficiently for the Supreme Court of Canada to exercise its new-found powers confidently. They speculated that the judiciary was concerned about provoking the legislatures to invoke section 33. Again, because it displays a possessive and jealous attitude about power, this too was a typically American interpretation. Although the potential for parliamentary resentment of judicial authority and judicial timidity both exist, neither has crystallized at this stage of the *Charter*'s evolution. Moreover, each projects American values onto our Constitution.

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[66] For a partial explanation of the reasons why, see the discussion of the override and *The French Language Case*, *infra* at 635ff.

[67] And be inclined, as a result, to invoke the override.

Early *Charter* interpretation has not been especially deferential.[68] In any event, given that the parliamentary branches in Canada purposely transferred authority to the judiciary in 1982, any immediate development of adversarial relations would be surprising.[69] Oddly enough, both levels of government fund litigation which challenges the state's authority, and often, the state declines to appeal adverse decisions.[70]

As *Morgentaler* illustrates, relations between Parliament and the judiciary are more co-operative and more subtle in Canada. Despite the division of powers jurisprudence, the judiciary has not been perceived as a threat to the legislature. It has functioned less as an adversary and more as an advisor. Review was instigated under the *Colonial Laws Validity Act* as an advisory mechanism, and the reference procedure continues to this day. These roots confirm that review in Canada rests at least formally and in part on an advisory rationale.[71] Although Prime Minister Trudeau could have exercised his legal authority in defiance of *The Patriation Reference*, that episode is an isolated example.[72] Ironically, although our

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[68] At the same time, however, it is fair to say that it has vacillated between activism and restraint.

[69] Justice Lamer makes this point in *The Motor Vehicle Reference*, *supra*, note 5 at 497. Although some of the provinces were hostile to the concept of constitutional rights at the time the *Charter* was being negotiated, it is significant nonetheless that the *Charter was* enacted. Even if legislatures may not like the results of *particular* decisions, the *Charter* is recent enough to estop them from denouncing the concept of individual rights altogether. Any government that did so would lose many votes.

[70] Documenting this point would unduly lengthen this article. To me, it is striking how often the government accepts a finding of unconstitutionality instead of fighting the legal issue through final appeal. Once again, I believe this response is distinctly Canadian, un-American, and directly attributable to a parliamentary tradition in which adversarial relations between the judicial and law making branches are less apparent.

[71] See, generally, "Introduction" in B.L. Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968).

[72] *Supra*, note 34. Note, as well, that although it disavowed the constitutional amendments of 1982, including the *Charter*, the province of Quebec participates in appeals to the Supreme Court of Canada and, excluding *The French Language Case*, has done little to undermine decisions that affect its autonomy. See, for example, *The Quebec Veto Reference*, *A.G. Quebec* v. *A.G. Canada*, [1982] 2 S.C.R. 793 (rejecting the claim that Quebec has a unique veto over constitutional amendments) and *A.G. Quebec* v. *Quebec Protestant School Boards*, [1984] 2 S.C.R. 66 (invalidating provisions of Quebec's language education law).

constitutional tradition might suggest antagonistic institutional relations, it is precisely because of Parliament's supremacy that the legislatures and the courts do not view themselves as adversaries. For that reason, the Canadian abortion debate saw the judiciary and parliamentary branches defer to each other, not only to avoid responsibility for the issue, but also, to avoid an institutional confrontation. A see-saw of this nature could never occur in the United States.[73]

D. *The French Language Case*[74]

Professor William Tetley of McGill University agreed to provide a guest lecture on *The French Language Case.* Tetley has defended prohibitions on the use of the English language in Quebec, and may be the most vocal anglophone Quebecker to do so. *The French Language Case* invalidated legislation banning the use of the English language in commercial advertising.[75] Bill 178, which was enacted in response to the decision, invoked the section 33 override to protect measures prohibiting any display of the English language on the exterior of commercial establishments, while permitting its use, on a restricted basis, inside.

It would have been impossible to provide American students with a condensed but comprehensive overview of the language issue in Canada. Even without its legal and constitutional components, language is a complex regional, cultural, and historical question in

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[73] Professor Slattery has suggested that the parliamentary branches also have obligations under the *Charter.* Although his is a much more philosophical piece, he claims that the *Charter* mandates a dialogue between Parliament and the courts. My claim is that, although its nature and quality have not yet been fully explored, an institutional dialogue is one feature of our constitutional culture that distinguishes us from the United States. The mutual abdication of responsibility which marks the abortion debate in Canada is an example of a dialogue that foundered, but which exists nonetheless. See B. Slattery, "A Theory of the Charter" (1987) 25 Osgoode Hall L.J. 701.

[74] *Supra*, note 7.

[75] The Supreme Court of Canada held that although the legislation prohibiting English language advertising had initially been protected from the *Charter* by a valid invocation of the override, to the extent that provision had lapsed, the prohibition was inconsistent with section 2(b) of the *Charter.*

this country, and may even be the most important feature of our national existence. In the absence of some parallel in their own experience, my intuition was that Americans would find the dynamics of *The French Language Case* and its legislative aftermath difficult to grasp. The students were visibly disturbed by Tetley's argument that Quebec's action in restricting English language rights was a justifiable measure to preserve one of Canada's founding cultures.[76] Instead, they saw it as a flagrant attack on minority rights. Throughout, they shifted uncomfortably in their chairs. Although some students challenged Tetley's views, it was not an especially lively session. One person explained afterward that further discussion was pointless.

The first assignment required the students to write a short paper on one of three or four subjects. Although Canadian students normally decline the opportunity to write about section 33, nearly half the American class opted to write about the override. The reason why soon became apparent. The override was a concept they found impossible to fathom, much less to accept. From an American perspective, their response was predictable. Culturally and ideologically, it made perfect sense.

As far as they were concerned, the purpose of constitutional rights is to protect minorities from the actions of a legislative majority. Given this assumption, how could a provision allowing the legislature to opt out of its guarantees co-exist with the concept of a Constitution? As Chief Justice Marshall had argued in *Marbury* v. *Madison*, "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it." Significantly, he concluded that between these alternatives "there is no middle ground."[77] In responding to the override, the Cornell students simply rehearsed the first orthodoxy of American constitutionalism.

As I read their papers and revived the issue next class, it troubled me that I found it progressively more difficult to defend the

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[76] See, for example, W. Tetley, "Why Not Let the Majority Have its Way on Signs?" *The Globe and Mail* (17 January 1989) A7.

[77] *Supra*, note 21 at 177.

override. I argued that the framers thought it would only rarely be invoked, on questions of relatively minor political importance.[78] Any notion that the override would not be used on *controversial* issues was naive and absurd, the students retorted. In the United States, they alleged, the legislatures would not be at all hesitant to use a similar power, in which case, they reminded me, it would not be difficult to predict the fate of *Brown* v. *Board of Education* and any number of controversial criminal justice or First Amendment decisions. I found it impossible to disagree with that assessment. As for Canada, *res ipsa loquitur* summed up their assessment of minority language rights in Quebec.

In a variation on my first point, I also argued that the framers believed that the ethic of responsible government would discourage legislatures from invoking the override.[79] The theory was that the morality of relying on overriding constitutional rights would be so questionable that, not only would legislatures shy from using it on important issues, they would also understand that the political costs would invariably outweigh the benefit of any immunity from review that would accrue. Thus, the prospect of political repercussions would discourage any rash or reckless resort to the override.

The American students did not find this explanation even remotely persuasive. They explained that by including an override, the *Charter* promotes the transgression of individual rights. Far from indicating any moral disapproval, the text of section 33 actually *encourages* the state to violate the *Charter.*

In trying to explain how our framers could have overlooked the legitimizing effect of the text, I found a way to show how

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[78] The then Minister of Justice Jean Chrétien stated, in the House of Commons, that section 33 "is unlikely ever to be used except in non-controversial circumstances": Canada, H.C., *Debates* at 13042 (20 November 1981).

[79] Seeking to justify section 33, Jean Chrétien noted that Quebec bowed to "public pressure" and abandoned its one previous attempt to use an override: Canada, H.C., *Debates* at 13043 (20 November 1981). Many commentators echoed the view that use of the override would involve considerable political risk: see P.W. Hogg, "Canada's New Charter of Rights" (1984) 32 Am. J. Comp. L. 283 at 298; and D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 126.

different we are.[80] Despite the influence of natural law concepts, Americans are profoundly positivistic. This is reflected in the fact that they were the first nation to have a written constitution. The constitutional text *is* supreme law, and the U.S. Supreme Court *has* claimed that status for its interpretations of the Constitution.[81] In American culture, the Constitution is not just a legal document, it is a statement of the nation's fundamental values. Action that the text authorizes is not merely legal but is justifiable from a normative point of view as well. Although the text may permit action that is unwise, any further discussion of its constitutional morality is foreclosed. Because the purpose of their Constitution is to make it difficult for legislatures to legislate unwisely, American students found the prospect of an override *sanctioning* outright abridgment of the *Charter*'s guarantees horrifying.

We are not as offended by the override at this point in time because political morals have a different source of authority in our tradition. Instead of being found in a legal text, the source of that authority is organic. As *The Patriation Reference*[82] confirmed, our morals of government are rooted in conventions which depend for their success on negotiation, co-operation, and respect for the principle of responsible government. By contrast, the American system of government is rule-oriented, and based on a conception of social and political relations that is defined institutionally, by legal relations and the specific terms of a constitutional text. Our framers' assumption that the override would only rarely be invoked may well have been naive; more precisely, however, it reflected a different conception of political responsibility. They did not include the override because they expected it to be used at will. Assuming that the democratic process would function smoothly and that the participants would observe the conventions of responsible government, they concluded that legislatures would be constrained

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[80] It should be noted that some of those who participated in the process of constitutional reform contemplated a different role for the override, as a true democratic check on the institution of review.

[81] *Cooper* v. *Aaron*, *supra*, note 58 at 18, provides the classic statement (asserting that "the federal judiciary is supreme in the exposition of the law of the Constitution ... and that is a permanent and indispensable feature of our constitutional system").

[82] *Supra*, note 34.

from exercising an unfettered legal power by the substantive norms of our political tradition.

Finally, I defended the override on its merits. It is not inappropriate, I suggested, for the responsibility over relations between the individual and the state to rest with the legislature rather than the judiciary. Conceding that an argument in favour of review might be irrebuttable in the United States today, I tried to show that the same is not true of Canada.[83]

Once again, their response was revealing. They claimed that the override is illogical because judicial review *is* consistent with democracy.[84] The argument was one only Americans could make. Judicial review is democratic, they insisted, because it protects the individual from the state. In the United States, it is the people, both individually and collectively, which comprise the democratic unit. The institutional structures of the state are an artifice and a threat to a conception of democracy that, symbolically and ideologically, makes the people ultimately supreme. Individual rights must be protected because dignity of and respect for individuals are the prerequisites of a healthy democracy. When the artifices of the state interfere with individual rights, the American concept of democracy is harmed. By forcing the state to respect individual rights, the judiciary reinforces democracy in America.

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[83] Although Canadian legislation may be imperfect and intrusive of individual rights at this point in time, it is still true that many of the battles against discrimination, censorship, and torture of criminal offenders have been largely won. In the United States of the nineteenth and twentieth centuries, the need for a *federal* judiciary to supervise the laws of fifty states which possess unrestricted powers to regulate their criminal and civil justice systems is more apparent. Here, the ten provinces are each more conspicuous in their actions and, constitutionally, do not possess the wide powers the individual U.S. states have traditionally exercised. Finally, the textual separation of powers and the establishment of the judiciary as a co-equal branch under a written constitution may have made judicial review inevitable in the United States. If division of powers review was made inevitable in Canada by the adoption of a federal union, the same is not true of rights review.

[84] As the debate on judicial review attests, not all Americans would make this claim. I suspect, however, that at the level of popular belief, many would agree with this statement. In her paper "The Override Provision of the Canadian Charter of Rights and Freedoms – Does It Make Sense," one student contended that the override is undemocratic: "The override provision ... is not a force for democracy. It allows a government to tyrannize in classical fashion: to repress expression, to detain or imprison arbitrarily, to detain without giving a reason, and to search unreasonably."

By explaining democracy in terms of the prevalence of individual rights over community values, this interpretation was distinctly American. But for them, it is not inaccurate. To Americans, democracy means the people, and the people means individuals. The state can only act with the consent of the governed, and to the extent the state compromises individual rights, it violates the first principle of the American Constitution: self-government.

If the American myth is that democracy *is* the people, its Canadian counterpart is that Parliament is *responsible*. The theory of a parliamentary system is that because it is responsible, it is definitionally impossible for Parliament to be undemocratic. This version of democracy suggests that it is the judiciary that is undemocratic, rather than the representative institutions. According to traditional values, the final responsibility should rest with Parliament, rather than with the judiciary. In ideological terms, the critical point is that whereas the American interpretation of democracy allows individual rights to prevail over collective values, our tradition has been able, thus far, to reconcile the *Charter*'s protection of individual rights with the community's prerogative to enforce its values through the override.

III. CONCLUSION

In teaching this course, I hoped to inculcate some understanding of Canadian constitutional culture in American students, as well as encourage a richer appreciation of their own constitutional tradition. Speaking for myself, I know that this class of fifteen gave me fresh insight into the *Charter*, and deepened my understanding of American constitutional culture at the same time. Although their ability to bridge the cultural gap was limited, they conceded that Canada was more complex and intriguing than they had realized, and acknowledged that Americans have much to learn from us. As for all of us, by the end of the course, this much was true: when we said our good-byes, they realized that they knew why they were happy to be American instead of Canadian, and I realized, one more time, why I like being Canadian. I'm guessing that made the course a success.