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Liberty, Authority, and the State in American Constitutionalism

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LIBERTY, AUTHORITY, AND THE STATE IN AMERICAN CONSTITUTIONALISM*

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This article is the first in a series of inquiries into Canadian constitutional culture by this author.

To think of the U.S. is to think of ourselves – almost.[1]

I. INTRODUCTION

The fifth anniversary of the Charter of Rights and Freedoms came and went on 17 April 1987 with little fanfare. In 1982, buoyant optimism greeted the Charter and most exalted our acquisition of "fundamental rights." Just five years later, a brooding skepticism has intruded. Those who registered their opposition from the start[2] have been joined by others who denigrate the Charter as a regressive document.[3] Still others initially mesmerized by the prospect of "constitutional rights" have now expressed misgivings about the Charter.[4]

Adding to this disquiet, the Supreme Court of Canada's decisions reflect a worrying uncertainty about the Charter. Already, the Court's jurisprudence has shifted dramatically from an early attitude of confident "interventionism" to a more recent posture of deferential "restraint."[5] Like others, the Supreme Court appears ill

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[1]G. Grant, "From Roosevelt to L.B.J." in A. Purdy, ed., *The New Romans: Candid Canadian Opinions of the U.S.* (Edmonton: M.G. Hurtig, 1968) 39 at 39.

[2]See, for example, R. Macdonald, "Postcript and Prelude - the Jurisprudence of the Charter: Eight Theses" (1982) 4 Sup. Ct. L. Rev. 321, and H. Glasbeek and M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2 Socialist Studies 84.

[3]See, for example, A. Hutchinson, "Charter Litigation and Social Change" in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 357; A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct. L. Rev. 473; and A. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1987) 38 U. Toronto L.J. [forthcoming].

[4]See, for example, R. Fulford, "Charter of Wrongs" *Saturday Night* (December 1986) 7 (lamenting the Charter's americanization of our Constitution, and our failure to recognize this inevitability in time).

[5]The two Sunday closing decisions supply persuasive evidence of this shift. In *R.* v. *Big M Drug Mart* [1985] 1 S.C.R. 295, the Supreme Court invalidated federal Sunday closing legislation, making little or no effort to uphold it under section 1. In doing so, the Court concluded that the law was coercive, and imposed an intolerable burden on religious freedom. Less than two years later, *Edwards Books and Art Ltd* v. *Regina* [1986] 2 S.C.R. 713, upheld provincial Sunday

at ease with the Charter.[6]

If unsatisfying, the Court's equivocation is at least understandable. Because individuals can now challenge state authority through the courts, the Charter aggrandizes the judiciary.[7] In such circumstances, it would be unrealistic to expect the Supreme Court to assemble a theory of institutional role overnight. Justice Gerald V. LaForest has candidly admitted that the Court is "still groping": in his words, "[w]hen you are dealing with the Charter, you really don't know which path to choose."[8]

As it gropes for direction, the Court will be hindered by the Charter's origins. By entrenching individual rights, the Charter imports an ideology which is decidedly American.[9] Adopting that ideology after almost two hundred years of evolution has made the mass of American experience impossible to ignore, but impossible to digest. Nonetheless, daunting as it may seem, the logistical problem

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closing legislation as "business" regulation warranting a less exacting section 1 analysis. Though it is possible to tease distinctions from the facts, these decisions cannot be easily reconciled. When other Supreme Court Charter decisions are considered alongside, a shift in attitude toward judicial review becomes difficult, if not impossible, to deny. Compare *Hunter* v. *Southam Inc.* [1984] 2 S.C.R. 145; *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)* [1985] 2 S.C.R. 486; and *R.* v. *Oakes* [1986] 1 S.C.R. 103; with *Jones* v. *The Queen* [1986] 2 S.C.R. 284; *Retail, Wholesale and Dep't Store Union* v. *Dolphin Delivery Ltd* [1986] 2 S.C.R. 573; *Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313; *Public Service Alliance of Canada* v. *The Queen* [1987] 1 S.C.R. 424; *Retail, Wholeseale and Dep't Store Union* v. *A-G of Saskatchewan* [1987] 1 S.C.R. 460; and *Reference re Bill 30, An Act to Amend the Education Act (Ont.)* [1987] 1 S.C.R. 1148.

[6]Its decision in *R.* v. *Morgentaler* [1988] 1 S.C.R. 3, rendered after this article was written, does not change my assessment of the Supreme Court's Charter interpretation. For a brief elaboration, see J. Cameron, "Difficult to see criteria S.C.C. uses for decision" Vol. 7, No. 44 *The Lawyers Weekly* (25 March 1984) 4.

[7]Traditional review provided a limited forum in which individuals could challenge the state's authority through the constitutional division of powers, or pursuant to the federal Bill of Rights statute. They could only challenge that authority, *qua* individuals, in cases of interference with language and denominational school rights. See *infra*, note 60.

[8]K. Makin, "Charter's Mandate Gives Judges Role as Wary Surgeons" *The [Toronto] Globe and Mail* (14 April 1987) 8.

[9]Because it gives individuals rights which can be asserted against the state and are enforced by the judiciary, the Charter rests on ideological concepts that are distinctly American. Although the Charter's text may resemble international and European covenants establishing protection for "human rights," those documents are themselves the offspring of American constitutional ideology. See *infra*, note 54 and accompanying text.

of accessing American doctrine is perhaps the Court's easiest task.[10] Additionally, the Court must also assess the relevance of U.S. jurisprudence from an ideological perspective. Here the quandary arises because American bill of rights jurisprudence is essentially foreign: the Charter's mandate of rights review is unfamiliar, and conflicts with values deeply rooted in Canadian constitutionalism.[11] At the same time, however, the Charter's conceptual origins are unavoidable, and to enforce its guarantees, the Court has been obliged, whether consciously or not, to assimilate some of the substantive values and institutional norms of American constitutionalism. Given these problems, it is hardly surprising that the judiciary's discussions of U.S. doctrine have often been ambivalent. Instead of signalling any particular reaction to American jurisprudence, this equivocation reveals the Court's own diffidence about the institutional role it has been directed to play.[12]

Indeed, the chasm separating the Supreme Court's early interventions from its more recent restraint points out the dilemma inherent in Canada's new constitutionalism. A tension between the Charter's directive to the judiciary to protect individuals from the state, and a tradition of parliamentary supremacy, which recognized virtually no such claim, is patent. Obliged to exercise a "yankee" imperative of review, the Supreme Court is unsure whether to

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[10] On virtually every issue, the jurisprudence is diffuse and obtuse. In addition, the case law can only be understood in the context of its evolution and relationship to the broader scheme of review. In any case, therefore, a Canadian court could only feel confident applying American doctrine to the Charter after conducting a far-reaching and time-consuming inquiry. Despite those difficulties, ignoring American doctrine is not the answer; see, *infra*, note 12.

[11] Rights review is inconsistent with parliamentary sovereignty, which, without doubt, is one of the core values of Canada's traditional constitutional ideology. Though judicial review and parliamentary sovereignty co-existed prior to the Charter, the power of review was limited to questions concerning the division of powers and did not extend independently to issues about relations between individuals and the state. See, *infra*, note 60.

[12] The Court fears that by relying heavily on American doctrine, it may compromise the Charter as an expression of Canadian values. Despite that risk, the judiciary cannot ignore the institutional questions which will inevitably accompany the Charter by declaring American experience irrelevant. See, for example, *The B.C. Motor Vehicle Reference* [1985] 2 S.C.R. 486, in which the Court dismissed the controversy surrounding substantive due process, despite its relevance to the interpretation of section 7 and the broader legitimacy of review. For a critique of this decision, see J. Cameron, "The Motor Vehicle Reference and the Relevance of American doctrine in Charter Adjudication" in Sharpe, *supra*, note 3 at 69 and P. Monahan and A. Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 Sup. Ct. L. Rev. 69 at 78-102.

embrace the creeds of American constitutionalism, or otherwise stand aloof, claiming fidelity to the tenets of pre-Charter constitutional ideology. As a result, the Court is ambivalent, and until it develops a sense of institutional role its jurisprudence will remain uncertain.

Whichever direction the Supreme Court chooses, its decisions should be informed. As James Landis declared in the 1930s, when American constitutional ideology was in upheaval, the sense of confusion prevailing at that time flowed from the fact that "too little delineating of our political ideology has taken place."[13] Five years ago, Canada succumbed to the hypnotic spell of constitutional rights without appreciating the consequences of doing so. This article does not undertake to explain the Charter's genesis, but it does suggest that for years, Canada has been susceptible to the romantic appeal of American constitutional ideology. In part because we understood so little about it, we embraced the Charter on the strength of a series of misperceptions about "rights review." Even so, in rethinking our ideology with the Charter in place, it would be mistaken for us to engage in too obsessive a dissection of American constitutionalism. Our task today is to focus attention on the delineation of indigenous values.

Nonetheless, because of the Charter's ideological origins, our ability to fashion a role which avoids producing a "bad copy"[14] of U.S. jurisprudence will depend, in some part, on our perception of that ideology. For that reason, this article is not about Canadian constitutionalism. Instead of discussing indigenous values or proposing a theory of institutional role, it offers a critical overview of American constitutional ideology.[15]

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[13]Quoted in M. Kammen, *Spheres of Liberty: Changing Perceptions of Liberty in American Culture* (U.S.A.: University of Wisconsin Press, 1986) at 132. These changes are described *infra*, at notes 145-48 and 154-55, and accompanying text.

[14]See, *infra*, note 184.

[15]In discussing this ideology from the revolutionary era to the present, I necessarily advance propositions which may be disputed in the broader literature. Though it would have been impossible to canvas all the scholarship in an article of this kind, skeptical readers should remember that this sketch is drawn exclusively from mainstream American commentaries. It is effectively an American self-portrait - one outlined by Americans but traced and interpreted, for Canadian purposes, by a Canadian. If it is a harsh portrayal, it is still one that is fair.

This is a survey piece, but it is one that makes certain claims about American constitutionalism. Its purpose is to disarm a mythology which, as projected by Americans and absorbed uncritically by others, has been indulged too long. First and foremost, this paper is about the misperceptions an americanized ideology of individual rights can generate. It contends that the commentary on American constitutional ideology, both in the United States and abroad, has been largely distorted by the romantic aura which envelops discussion about constitutional rights and judicial review. Once the reality of American constitutionalism is exposed, both as experience and ideology, the fallacy of this romanticism should become apparent. In truth, the ideology of constitutional rights rests on a distrust of authority which is less than romantic, deeply pessimistic, and distinctly American. Establishing that liberal constitutionalism[16] is based on a distrust of authority is the objective of this paper.

In the end, my hope is that, even without any examination of Canadian constitutional culture, this article will advance our understanding of the Charter. It is time we recognize that, although our interpretation of it must be distinctly Canadian, the Charter itself is inescapably and irreversibly the offspring of American constitutional ideology. As such, we should approach it with a realistic understanding of that ideology. In order to give the Charter an interpretation that is distinctly Canadian, we must first free our minds of the misperceptions we hold about constitutional rights and judicial review.

The article proceeds in six parts. Following this Introduction, Part II describes the cult of the U.S. Constitution, then calls its assumptions into question by exposing the gap between romanticized accounts and the reality of constitutional experience. Once having doubted American orthodoxy that the preservation of liberty requires constitutional rights and judicial review, Part III examines the idea of constitutional liberty. A brief comparison of British and American conceptions of constitutional liberty establishes that, far from representing abstract or immutable principles, the expression is largely descriptive, drawing its definition from the historical, political,

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[16]For a definition, see, *infra*, note 54 and accompanying text.

and cultural experiences of particular societies. In light of that observation, Part IV explores the historical and jurisprudential roots of American constitutional culture. This inquiry attempts to understand why Americans define liberty so dogmatically in terms of constitutional rights and judicial review, and to ascertain what the institutional consequences of doing so have been. Part V offers brief reflections on the requirements of liberty, and is followed by a Conclusion which identifies the challenge we face in re-fashioning Canadian ideology in the era of the Charter.

II. THE AMERICAN EPIC OF CONSTITUTIONAL LIBERTY

> How easily men satisfy themselves that the Constitution is exactly what they wish it to be.[17]

It is difficult, if not impossible, for Canadians to escape America's unrelenting constitutional imperialism. Throughout this past year of bicentenary celebrations, we have been constantly reminded that the story of constitutional liberty in the United States is an epic without equal. In this epic, the cast proclaims its unique attachment to liberty values and asserts the ideological supremacy of the U.S. Constitution.[18] From the revolutionary era to the present, this epic has presented a romanticized version of American constitutional ideology.[19]

The romance begins with the legacy of independence through revolution. In defying colonial authority, Americans did not simply declare their independence: they realized their destiny as

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[17]M. Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Alfred Knopf, 1986) frontispiece (quoting Justice Joseph Story, 1845).

[18]Though the references are far too numerous to list, a statement made in 1986, at celebrations to unveil the refurbished Statue of Liberty, captures the mood of this imperialism. On 4 July 1986, Lee Iacocca, Chair of Chrysler Corp., announced that "today, we [Americans] start the biggest celebration of liberty that this country, and in fact the world, has ever seen". *The [Toronto] Globe and Mail* (4 July 1986) 1.

[19]Without suggesting that this version is universally held or that America lacks a critical tradition, what the next pages describe is the dominant romantic ideology, or the cult of the Constitution, as it is sometimes called.

"emancipators of the world."[20] In their Declaration of Independence, the revolutionaries pronounced certain truths to be "self-evident": all men are created equal, and possess unalienable rights to seek "life, liberty, and the pursuit of happiness."[21] When colonial authority threatened those ends, "the people" exercised their prerogative to re-possess the natural rights they were denied through oppressive imperial rule. According to the epic, the colonists fought the Revolution to preserve liberty and equality, the cornerstone ideals of American constitutionalism.

The struggle for independence created an icon in the concept of a written constitution.[22] John Adams praised the U.S. Constitution as "the greatest single effort of national deliberation the world has ever seen,"[23] and Supreme Court Justice William Johnson subsequently declared it "the most wonderful instrument ever drawn by the hand of man."[24] But Americans do not sanctify their Constitution just because statesmen boast its greatness; they idolize it, in large part, because the Constitution belongs to the people.[25] It is a "political bible," an article of faith to be cherished

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[20]L. Hartz, *The Liberal Tradition in America* (San Diego: HBJ Books, 1955) at 38. The literature is replete with similar references. See, for example, B. Bailyn, *The Ideological Origins of the American Revolution* (U.S.A.: Harvard University Press, 1967) at 20 (quoting John Adams, who declared that "America was designed by Providence for the theatre on which man was to make his true figure, on which science, virtue, liberty, happiness, and glory were to exist in peace"), and 160 (describing the Revolution as a battle by a "new, fresh, vigorous, and above all morally regenerate people rising from obscurity to defend the battlements of liberty and then in triumph standing forth, heartening and sustaining the cause of freedom everywhere").

[21]See, *infra*, note 76.

[22]Prior to emergence of the Constitution in 1787, the thirteen states were governed by the Articles of Confederation. See, *infra*, notes 99-100 and accompanying text.

[23]Quoted in C. Rossiter, *1787: The Grand Convention* (New York: Norton & Co., 1966) at 11.

[24]Quoted in Kammen, *supra*, note 17 at 162.

[25]Significantly, the Preamble states that "We the People ... do ordain and establish this Constitution." For a brief description of the Constitution as a social contract, see, *infra*, note 112.

and possessed by every American.[26] As Max Lerner observed, "[e]very tribe needs its totem and its fetish, and the Constitution is ours."[27]

So convinced are Americans of the superiority of their Constitution that they find it difficult to conceive of any other plan for government.[28] In crisis, rather than take aim at a sacrosanct document, it is characteristic to villify a President, the slaveholding south, or Supreme Court decision-making.[29] Even when its decisions are denounced, the Supreme Court, as guardian of the Constitution, is effectively beyond politics.[30] In popular culture, the Constitution "receive[s] an unquestioned homage for reasons quite

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[26]After describing the Pennsylvania Constitution in those terms, Thomas Paine noted, "[s]carcely a family was without it." N. Adkins, ed., *The Rights of Man* (U.S.A.: Bobbs-Merrill Co., 1953) at 137. The fictions that "the people" collectively created it and that they collectively possess it, are two of the Constitution's enduring myths. Possession is still important in American constitutional culture: as chairman of the Bicentennial Commission, one of former Chief Justice Burger's goals was to place copies of the Constitution on the checkout counter of every supermarket in the United States. "Quotes," A.B.A.J. (1 March 1987) 31.

[27]"Constitution and Court as Symbols" (1937) 46 Yale L.J. 1290 at 1294. As he put it, "[t]alk to men on the street, the men in the mines and factories and steel-mills and real-estate offices and filling stations ... and you will ... find that [the] Constitution and Supreme Court are symbols of an ancient sureness and a comforting stability." *Ibid.* at 1291.

[28]In a reflective speech about the bicentenary celebrations, Justice Thurgood Marshall urged "sensitive understanding of the Constitution's inherent defects," instead of "a blind pilgrimage to the shrine of the original document." Significantly, the published excerpt was titled, "Celebrating the Constitution: A Dissent," *Harper's* (July 1987) 17.

[29]For example, during the legal tenders crisis of the 1870s, an observer cynically inquired, "[is there anyone for] throwing the Constitution overboard? Who would be outside Bedlam and contend for that?" Quoted in Kammen, *supra*, note 17 at 119.

[30]As Robert Dahl observed, "the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it *is* a political institution, and not quite capable of denying it; so that we frequently take both positions at once." "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" (1957) 6 J.P.L. 280-81. For this reason, attempts at executive and legislative interference with Supreme Court review are considered heretical; most are abandoned, and some have been notoriously unsuccessful. For example, when President Roosevelt introduced his court-packing plan in February of 1937, "[o]vernight Supreme Court Justices were once more pictured as demigods far above the sweaty crowd, abstractly weighing public policy in the delicate scales of law." A.T. Mason, *The Supreme Court From Taft to Burger*, 3d ed. (U.S.A.: Louisiana State University Press, 1978) at 102. Later that year, the proposal was defeated.

apart from any virtues of its own"[31] and remains "a sort of abacadabra which [will] cure all disease."[32]

Nor is the academy immune to the cult of the Constitution. Edwin Corwin once described the Constitution as "an expression of Higher Law, of imperfect man's most perfect renderings...."[33] More recently, Henry Monaghan chided a number of leading scholars for presuming the Constitution's perfection.[34] The scholarship based on that assumption largely forecloses critical discussion of the ideology of liberal constitutionalism, and quibbles instead about the details of interpretation.[35] Naturally, taking your ethics for granted makes the rest a mere problem of technique.[36]

Although the U.S. Constitution has inspired critical comment,[37] its ideals have been inspirational around the world. John Locke

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[31]Kammen, *supra*, note 17 at 126-27 (quoting A. Lawrence Lowell).

[32]*Ibid.* at 38 (quoting Thurmon Arnold).

[33]*The "Higher Law" Background of American Constitutional Law* (U.K.: Cornell University Press, 1955) at vi.

[34]"For [them], the Constitution is essentially perfect [because] properly construed, [it] guarantees [most] values [they believe] ... a twentieth century Western liberal democratic government ought to guarantee...." "Our Perfect Constitution" (1982) 56 N.Y.U. L. Rev. 353 at 358.

[35]Curiously, commentators who identify majoritarian democracy as the Constitution's core value do not reject judicial review, but instead offer theories purporting to vindicate that value within a framework for review which remains indisputably countermajoritarian. John Hart Ely provides the classic statement of this theory in *Democracy and Distrust* (U.S.A.: Harvard University Press, 1980). Nor have those who attack the institution of review, ultimately concluding it is indefensible, offered any concrete alternative. Along these lines, the most compelling commentary is by Mark Tushnet in "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 Harv. L. Rev. 781 and "The Dilemmas of Liberal Constitutionalism" (1981) 42 Ohio L. J. 411. Tushnet's answer is that he would "make an explicitly political judgment," one which is "likely to advance the cause of socialism." *Ibid.* at 424.

[36]Hartz, *supra*, note 20 at 10.

[37]See, for example, Letter, H. Laski to O.W. Holmes, in M. Howe, ed., *Holmes-Laski Letters*, Vol. 1, (New York: Atheneum, 1963) at 475 (describing the U.S. Constitution as the "worst instrument of government that the mind of man has so far conceived").

once said "[] in the beginning all the world was America."[38] Despite insisting that "[n]othing is more annoying ... than the irritable patriotism of the Americans," Alexis de Tocqueville's treatise betrayed his fascination with "democracy in America."[39] Even William Gladstone allowed that the American Constitution was "the most wonderful work ever struck off at a given time by the brain and purpose of man."[40] In the era following World War II, the magnetic appeal of a written constitution enshrining individual rights proved irresistible as scores of nations succumbed to the hegemonic power of American constitutionalism. Canadians have discovered how difficult it is to question an ideology that promises to respect those individual "rights" insensitive democratic majorities so often disregard.

Unfortunately, any review of American constitutional history exposes a series of unheroic episodes which are neither isolated nor insignificant in their contradiction of the epic account. Notwithstanding their glorification, the Constitution has failed to protect its cornerstone values. Time and again, liberty and equality have been conveniently forgotten and viciously compromised to political expedience.

Although man was created equal, the Constitution protected the slave system.[41] It required a civil war and the imposition of amendments before the Constitution would address the most

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[38]Hartz, *supra*, note 20 at 61. Locke was not complimenting the Constitution, but instead remarking that, in being free of a history of feudal strife, America effectively replicated the state of nature.

[39]J.P. Mayer, ed., *Democracy in America* (U.S.A.: Anchor Books, 1969) at 237. Thus Tocqueville remarked that in America "civilized man was destined to build society on new foundations ... [and] present the world with a spectacle for which past history had not prepared it." *Ibid.* at 30.

[40]Quoted in Kammen, *supra*, note 17 at 162. At the same time, Gladstone described the British Constitution as "the most subtile organism which had proceeded from the womb and the long gestation of progressive history." For a brief comparison, see, *infra*, III. LIBERTY, AUTHORITY, AND THE STATE.

[41]Despite self-consciously avoiding mention of the word, the Constitution recognized the institution of slavery in three clauses: the three-fifths clause dealing with direct taxes and representation, the slave trade clause, and the fugitive slave clause. Moreover, despite the Declaration of Independence's assertion of egalitarian values, the first ten amendments comprising the bill of rights did not guarantee equality.

egregious mistreatment of blacks.[42] Even so, the Civil War amendments proved ineffective to stem a rising tide of backlash which, by the early twentieth century, had effectively segregated and disfranchised blacks.[43] Once the Supreme Court institutionalized it in 1896,[44] segregation would remain constitutional orthodoxy until 1954.[45] Today the struggle to overcome the savage history of racial subjugation lives on.[46] In addition, despite their commitment to liberty values, Americans have been grossly intolerant of activities considered unpatriotic or un-American.[47] These counter-examples could be multiplied many times over.[48]

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[42]Among other things, the Civil War amendments abolish involuntary servitude (the thirteenth amendment), guarantee the equal protection of the laws (the fourteenth amendment), and prohibit the denial of a vote on grounds of race (the fifteenth amendment).

[43]C.V. Woodward's account, *The Strange Career of Jim Crow*, 3d ed. (Oxford: Oxford University Press, 1974), is authoritative.

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

[45]The history of race relations in this period is, for the most part, horrifying. The Supreme Court began dismantling the doctrine of "separate but equal" in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), by invalidating segregation in the public school system. For an account of segregation in carrier services, see C. Barnes, *Journey From Jim Crow: The Desegregation of Southern Transit* (New York: Columbia University Press, 1983).

[46]As Justice Marshall observed, "[it is no defense] ... that the Constitution was a product of its times, and embodied a compromise that, under other circumstances, would not have been made [because] the effects [of that compromise] have remained for generations." *Supra*, note 28 at 18. Today, the public education system in the United States remains largely segregated, and affirmative action inititiatives have just begun to challenge traditional conceptions of equality.

[47]During and following World War I, scores of radicals, socialists, and pacifists were prosecuted for a variety of "disloyal" words or actions. See generally, Z. Chafee, *Free Speech in the United States* (U.S.A.: Harvard University Press, 1941). Then, throughout the 1950s, a witch hunt against communists was conducted under the *Smith Act* and a variety of other legislative measures. Once again, scores of Americans were convicted or dismissed from employment for their belief in communism, or membership in communist organizations. As Hartz concludes, "[a]t the bottom of the American experience of freedom, not in antagonism to it but as a constituent element of it, there has always lain the inarticulate premise of conformity...." *Supra*, note 20 at 57.

[48]The Court's wartime internment of Japanese-Americans, *infra* note 176, and lochnerian invalidation of legislation ameliorating unsafe or exploitive working conditions, *infra* notes 146-48, supply two additional examples few American commentators will defend. Still others could be added to the list.

It can hardly be denied that American jurisprudence has been, and is today, highly protective of individual liberty. After all, that is the purpose of liberal constitutionalism. Because it seeks to explain that ideology, this article makes no claim that the Constitution denies liberty and equality more often than it protects them, or that the United States protects those values less often than nations without bills of rights. The point is that, to the extent Americans assert the superiority of their system of constitutional liberty, these counter-examples reveal how dramatic and inexplicable its failures have been. The reality of historical experience is that the Constitution's protection of individual liberty has been episodic. Whenever romanticists claim an aggrandized status for American constitutionalism, as they often do, it should be recalled that the reality at least diminishes that claim, if not defeats it.

Apologists insist, however, that human imperfection, and not the Constitution, is responsible for the gap between what is real and ideal. Thus subsequent generations blamed the Europeans and framers for the existence of the slave system;[49] likewise, post-war generations blamed the racists and robber barons of yesteryear for the segregation and laissez-faire doctrines of the early twentieth century; and this generation blames evil or incapable individuals, rather than the presidency itself, for the shortcomings of separation of powers theory. Surely any argument that the Constitution is not responsible for human imperfection must be in vain, because that will be true of every Constitution. Experience tells that precisely because of human imperfection, the choice of institutional arrangements is significant. It is especially worth noting that the institution of judicial review has been a poor proxy for "man's most perfect renderings." Seen always in the eye of the beholder, review can aggravate human imperfection as easily as ameliorate it. At the least, a system of constitutional rights enforced by the judiciary is not a sufficient condition for the protection of liberty.

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[49] In *Dred Scott* v. *Sandford*, 60 U.S. 393 (1856), Chief Justice Taney attempted to shift responsibility for the perpetuation of the slave system back to the framers by concluding that the Court was powerless to depart from their intention to exclude blacks from the Constitution. Charles Evans Hughes once described *Dred Scott* as one of the Supreme Court's three most serious "self-inflicted [institutional] wounds." *The Supreme Court of the United States* (N.Y.: Columbia University Press, 1928) at 50.

Despite the troubling gap between the romantic conception of constitutional liberty and the reality of historical experience, the dominant American ideology remains unshaken in its belief that the preservation of liberty depends on a system of constitutional rights and judicial review.[50] If the foregoing account has any merit, Canadians should find that belief puzzling, if not patently irrational. Thus it becomes critical to understand the assumptions that support this faith. Identifying those assumptions and their roots can tell Canadians whether, in adopting the Charter, we have misunderstood the ideological underpinnings of American constitutionalism, and, in interpreting its guarantees, how similar or different our own values are.

III. LIBERTY, AUTHORITY, AND THE STATE

> Abstract liberty, like other abstractions, is not to be found. Liberty inheres in some sensible object; and every nation has formed to itself some favourite point, which by way of eminence becomes the criterion of their happiness.[51]

Americans believe that their version of constitutional liberty represents self-evident truth.[52] Though this rankles the British, by countering that "the nations who dare to call themselves free have built largely on British experience," Sir Ivor Jennings only confirmed that, as an abstract concept, liberty is meaningless.[53] Inherent in any conception of liberty is a definition of the state. Distinct conceptions of constitutional liberty reflect distinct conceptions of the state and its authority.

Although Britain and the United States each claim fidelity to the ideal of constitutional liberty, their systems of government rest on distinct conceptual foundations. In the United States, the bill of rights and Civil War amendments prohibit the state from abridging

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[50] *Infra*, note 151.

[51] Kammen, *supra*, note 13 at 4 (quoting Edmund Burke).

[52] According to Hartz, America's absolutism derives from "the somber faith that its norms are self-evident." *Supra*, note 20 at 58.

[53] *The Law and the Constitution*, 5th ed. (U.K.: University of London Press, 1959) at 9.

certain individual rights, and the judiciary invalidates government actions inconsistent with those guarantees. In broad terms, liberty comprehends the right of individuals to be free from state authority; constitutional experience has institutionalized that conception of the state; and, in claiming the prerogative of review, the judiciary mediates conflicts between individual freedom and state authority, deciding which will prevail in any case.[54]

By contrast, becauses parliamentary supremacy is the governing principle of British constitutionalism, it is conceptually impossible for an individual to challenge the state's interference with individual liberty. This principle decrees that Parliament may make or unmake any law whatsoever, without submitting its actions to review by the courts.[55] Because Parliament's power is unlimited,[56] democratic process determines how the conflicting imperatives of individual liberty and state authority will be reconciled. As Jennings explained, constitutional liberty consists in "the existence of a free system of government [which] creates an atmosphere of freedom."[57] Though this atmosphere "is more easily felt than analyzed,"[58] the British

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[54]These are the key elements of the American ideology of liberal constitutionalism. It should be noted that this ideology does not give individual liberty absolute protection: not only has the balance between liberty and authority shifted with events, the original conception presupposes a compromise which accepts the legitimacy of the state's power to exercise authority over individuals. Though the demands of individual liberty do not always prevail, this conception is distinctive because it gives individuals a constitutional claim against the state, and recognizes the authority of the judiciary to determine how the requirements of liberty and authority will be reconciled.

[55]A.V. Dicey, *The Law of the Constitution*, 9th ed. (G.B.: MacMillan & Co., 1939) at 39-40. Thus, "[a]n Act of Parliament can do no wrong, though it may do several things that look pretty odd." *City of London* v. *Wood* (1711), 12 Mod. 687.

[56]Though legal restraints on Parliament's authority do not exist, by interpreting laws that abridge liberty restrictively against the state, the judiciary has given individual rights limited protection. When interpretive techniques cannot produce a sympathetic result, however, the courts are bound to apply the law. O.H. Phillips and P. Jackson, *O. Hood Phillips Constitutional and Administrative Law*, 6th ed. (London: Sweet and Maxwell, 1978) at 40.

[57]*Supra*, note 53 at 61.

[58]*Ibid.*

believe that it does not depend for its security on a written bill of rights.[59]

In general terms, constitutional liberty in the United States is defined by the absence of state authority, whereas in Britain, by resting on the unfettered authority of Parliament, it is the opposite.[60] Given the seeming incompatibility of these ideologies, any suggestion that the American revolutionaries sought to emulate the British constitution may appear ludicrous. Curiously, though, despite seeking freedom from Britain, the colonists revolted "not against the English Constitution, but on behalf of it,"[61] and initially, the British ideal offered the model of what a constitution should be.[62] Explanation of this divergence in ideology can be found in subsequent events. The conception of the state which emerged in America would be defined by the circumstances surrounding revolution and the formation of the Constitution. By contrast, the precepts of modern British constitutionalism would not crystallize until the nineteenth century, with the emergence of the cabinet system and responsible government.

To summarize, the British and American ideologies of liberty are informed by distinct attitudes toward state authority. Although some consider that notions of "positive" and "negative" liberty explain those differences, such a distinction is at least incomplete, if not largely unhelpful. First, the dichotomy itself reflects an attitude toward authority. Negative liberty suggests an absence of authority

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[59]The principle of parliamentary supremacy has been modified in recent years by a variety of human rights obligations Britain has assumed through its membership in international communities. For a brief description see Phillips and Jackson, *supra*, note 56 at 41.

[60]In the past, Canada's constitutional tradition has straddled these two ideologies. Although Canada adopted a parliamentary democracy modelled on Britain's system, the division of powers set out in the *Canada Act, 1867* has been enforced through judicial review. Except in the case of language and denominational school rights, however, the *Canada Act, 1867* does not protect individual liberty; as in the British system, conflicts between state authority and individual rights were traditionally resolved through the democratic process. See P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell Co., 1985) at 257-58. By importing the American ideology of individual rights review, the Charter has displaced the traditional principle of parliamentary supremacy.

[61]G. Wood, *The Creation of the American Republic* (U.S.A.: University of North Carolina Press, 1969) at 10.

[62]*Ibid.* at 44.

and positive liberty, its presence. Second, the distinction can be deceptive. In substantive terms, both nations – and Canada as well – are committed to a combination of negative and positive liberty values. Just as the principle of parliamentary supremacy does not mean that Britain's democracy eschews individual freedom, America's liberal constitutionalism does not deny the state a positive role in that nation's pursuit of the "Blessings of Liberty."[63] By locating the power to resolve conflicts between liberty and authority in different institutions, however, the British and American ideologies reveal distinct concepts of the state. In this sense, constitutional liberty has substantive *and* institutional dimensions. As a matter of substance, Britain and the United States will agree in many cases on what liberty requires; nonetheless, the authority to decide that issue resides in different institutions in the two countries. The idea of constitutional liberty not only defines the substantive requirements of liberty, but also expresses a concept of institutional role. And it is that concept of institutional role that largely distinguishes a system of constitutional rights from a traditional parliamentary democracy.[64]

The American conception of constitutional liberty rests on a profound distrust of authority. At least since the Revolution, this distrust has been one of the enduring dogmas of American constitutional culture. Originating in eighteenth-century ideology and events, this distrust is rooted in the revolutionary experience, is manifest in the Constitution itself, and has been a pervasive theme in American constitutionalism since. In 1923, at the height of laissez-faire constitutionalism, Harold Laski would lament, "I wish to heaven that Americans would realize that a constitution built on the historic dogmas of the XVIIIth century has very little application to

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[63]Preamble, *United States Constitution.*

[64]This article focuses on the institutionalization of the Americans' distrust of authority. As described below, it identifies "distrust" as a fundamental theme in American constitutional culture. In doing so, it makes no suggestion that this theme precludes other equally important cultural themes. It only claims that the extent to which this distrust is entrenched in U.S. constitutional culture is inadequately addressed by Americans, and as a result, is not understood at all by Canadians. Individualism and its embodiment in traditional concepts of liberty and equality suggests a second major theme which is worthy of examination by Canadians.

our own time."[65] Although constitutional rights and judicial review are often portrayed as the perfect antidote to the actions of irresponsible democratic majorities, in interpreting the Charter it is critical to recognize that the ideological underpinnings of American constitutionalism are not as admirable as the epic suggests.

Although Americans neither deny nor ignore this distrust, it lacks sufficient appeal to play a leading role in the romantic account. The problem is that because the cult of the Constitution dominates, it is not always understood that liberal constitutionalism rests on an attitude toward the state which is predominantly hostile. In reality, American conceptions of liberty, constitutional rights, and judicial review cannot be understood without reference to the distrust of authority that animates these concepts. Unfortunately, as a result of misperception, the concomitant institutional consequences of permitting an unaccountable judiciary to frustrate the state's democratic processes are also diminished.

By focussing on the revolutionary and Constitution-making eras, Part IV explores the roots of this distrust before discussing its relationship to the institution of judicial review.

IV. LIBERTY AND DISTRUST OF AUTHORITY

A. *Introduction*

> [T]he Constitution is an historically discontinuous composition; it is the product, over time, of a series of not altogether coherent compromises; it mirrors no single vision or philosophy but reflects instead a set of sometimes reinforcing and sometimes conflicting ideals and notions.[66]

More daunting than the U.S. Supreme Court's jurisprudence, the American constitutional scholarship debates more than two hundred years of political experience in a literature that is complex and sophisticated. Highly interdisciplinary, this monumental scholarship explores the ideological origins of the revolutionary

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[65] Letter to Oliver Wendell Holmes, August 10, 1923, *Holmes-Laski Letters*, Vol. 1, *supra*, note 37 at 376.

[66] L. Tribe, *American Constitutional Law*, 2d ed. (New York: Foundation Press Inc., 1988) at 1 (footnote omitted).

movement, examines the theory of the Constitution, analyzes shifts in ideology over the last two hundred years, and attacks or rationalizes the legitimacy of judicial review. The above comprise a few, only, among legions of topics addressed by this diverse scholarship.

Recently, scholars have taken up the challenge to articulate a "true" characterization of American political ideology. This literature debates whether liberalism or republicanism dominates U.S. constitutional culture. Fortunately, this article does not undertake to resolve complex issues of historical interpretation. As Ralph Lerner so aptly stated: "The corpus of early American political writings [takes] on the character of a psychopathologist's cabinet of curiosa."[67] It is unnecessary here to take sides on this issue because both conceptions of the state accept the existence of a cultural distrust of authority. Though Americans may not admit that this distrust diminishes the epic account, they are cognizant that it plays a significant role in their ideological heritage. Without denying its presence, then, commentators analyze its role in shaping America's political ideology and in particular, question whether this distrust points inexorably toward a liberal conception or otherwise can be reconciled with republican values.[68]

Less ambitiously, this article isolates a conception of authority which is not controversial, and then analyzes the connection between that conception and the institution of judicial review. It traces this distrust, in the first instance, through sections reviewing the American Revolution and the formation of the Constitution. The discussion relies heavily, though not exclusively, on mainstream works by Bernard Bailyn,[69] Gordon Wood,[70] Louis Hartz,[71] J.G.A.

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[67]"The Constitution of the Thinking Revolutionary" in R. Beeman, S. Botein, and E. Carter II, eds, *Beyond Confederation: Origins of the Constitution and American National Identity* (U.S.A.: University of North Carolina Press, 1987) 38 at 40.

[68]For further discussion see *infra*, D. *Liberal and Republican Conceptions of the State.*

[69]*Supra*, note 20. Bailyn's seminal book traces the ideological origins of the revolutionary movement, rooting American republicanism in English opposition thought.

[70]*Supra*, note 61. Also rendering a republican interpretation, Wood's book analyzes the evolution of constitutional theory in the years between Independence and the creation of the Constitution.

Pocock[72] and more recently, John Diggins.[73] Though the debate about liberal versus republican conceptions of the state will remain unresolved, that issue is less relevant to Canadians. It is more instructive for us to understand that the institution of review is based on a distrust of authority which has its roots in the ideology and events of eighteenth-century America.

The ensuing section on judicial review faces a different problem, which is that of tracing the evolution of liberal constitutionalism over the last two hundred years. Taking comfort from Professor Tribe's observation,[74] this part of the paper does not propose that a single vision or philosophy has animated the Supreme Court's constitutional jurisprudence. At the same time it does claim that a distrust of authority has been a prevalent theme in constitutional interpretation. Without suggesting that the jurisprudence has always struck an unhappy balance between the requirements of liberty and authority, this article introduces the conceptual foundations of review in order to expose its irresolvable dilemma. That dilemma is easily stated: precisely because of the Americans' distrust of authority, judicial review is itself an institution perpetually in search of its own authority.[75]

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[71]*Supra*, note 20. Hartz explores the distinctive nature of American liberalism, focussing particular attention on the relevance of socio-economic circumstances - in particular, the absence of Old World feudalism - to the development of ideology.

[72]*The Machiavellian Moment* (Princeton: Princeton University Press, 1975). Pocock's provocative book gives American republicanism a Machiavellian interpretation.

[73]*The Lost Soul of American Politics: Virtue, Self-Interest and the Foundations of Liberalism* (Chicago: University of Chicago Press, 1984). Diggins critiques the republican account and reinterprets liberalism from a theological perspective.

[74]*Supra*, note 66.

[75]See *infra*, E. *Judicial review: the "least dangerous branch"*

B. *The American Revolution: Self-Evident Truth*[76]

> Faith ran high that a better world than any that had ever been known could be built where authority was distrusted and held in constant scrutiny; ... where the use of power over the lives of men was jealously guarded and severely restricted. It was only where there was this defiance, this refusal to truckle, this distrust of all authority, political or social, that institutions would express human aspirations, not crush them.[77]

The ideology of the revolutionary movement has shaped all of American constitutionalism.[78] The Declaration of Independence proclaimed this ideology, the Constitution institutionalized it, and it remains vibrant today, two hundred years later.[79] While exalting individualist values, this ideology also embraces an exaggerated distrust of authority. In the revolutionary era, a distrust of authority developed from the perception that corrupt forces in Britain had

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[76]The Declaration of Independence begins with the following:

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.*

[77]Bailyn, *supra*, note 20 at 319.

[78]Few dispute this proposition. For direct support, see Bailyn, *ibid.*, note 20 at 21 and Wood, *supra*, note 61 at ix.

[79]In his critique of the republican account, John Diggins challenges historical interpretations which assert a causal relationship between words and actions. Because it is impossible to establish such a relationship, "ideology" has only an expressive function for him, "not necessarily an originative one." Thus Diggins describes the revolutionary discourse as rhetoric rather than ideology. *Supra*, note 73 at 350. The conflation of ideology and rhetoric is apparent in Ralph Lerner's observation that "[w]hat [the revolutionaries] took to be high principle, even self-evident truth, was in fact ideology, *a dramatic way of making sense of a world somehow gone awry*." *Supra*, note 67 at 39 [emphasis added]. In using the word ideology, I claim only that words suggest perceptions, and do not enter the debate whether ideas, rather than pragmatic interests, actually motivate men and cause events to occur.

Moreover, aware of the difficulties inherent in any attempt to establish historical truth, I undertake only to make a series of empirical observations and to draw conclusions from those observations. In this and the following sections, I note that a revolutionary discourse of distrust was followed by a Constitution institutionalizing a distrust of authority, which, in turn, was followed by the evolution of judicial review, an institution based on a distrust of the authority of the other branches. Tellingly, the perennial controversy about review is rooted in a distrust of judicial authority.

conspired to oppress the thirteen colonies.[80] Because the colonists' complaint of oppression was tenuous, the rebellion was based on an interpretation of events which was somewhat distorted, and consequently, on an ideological reaction against authority.[81]

In contriving this conspiracy, the colonists were inspired by Britain's opposition thinkers. Though this disparate group was effectively ignored in Britain, the colonists absorbed their writings eagerly and relied heavily on them in justifying their rebellion.[82] Albeit deviant in its jealous regard for individualist values and extreme distrust of authority, the opposition commentary was credible because it was rooted in contemporary political thought.[83] The opposition's distrust of authority manifested a deep pessimism[84] which was expressed in a "peculiar strain of anti-authoritarianism

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[80] Although the antecedents of this revolutionary distrust may be found in earlier colonial history, this article does not explore that possibility. Hence it makes no claim that this distrust was generated, uniquely and spontaneously, during the period of the revolutionary movement; it claims only that a rhetoric of distrust crystallized at that time, and subsequently influenced the conception of the state embodied in the Constitution.

[81] See, for example, Wood, *supra*, note 61 at 3 (stating that the American Revolution was "the most wanton and unnatural rebellion that ever existed") and Hartz, *supra*, note 20 at 5 (concluding that because America never experienced a struggle against feudal institutions, it lacked a genuine revolutionary tradition).

[82] As Bailyn puts it, the tradition of opposition thought was not simply sampled, it was literally "devoured" by the colonists at the end of the 17th century and in the early 18th century. *Supra*, note 20 at 34-54. Wood states that "more than any other source, this disaffected whig thought fused and focused the elements that shaped the colonists' conception of the English Constitution and English politics." *Supra*, note 61 at 17. In Britain, the radical whig commentary attracted little attention and received even less respect. *Ibid.* at 15-16. In the colonial environment, however, ideas considered "extreme" and "dislocating" in Britain sounded like "simple statements of fact." Bailyn, *ibid.* at 51.

[83] Democratic institutions had not yet emerged, and contemporary thought viewed politics as "nothing more than a perpetual battle between the passions of the rulers ... and the united interest of the people." Wood, *supra* note 61 at 18. The result was a "perpetual intestine struggle, open or secret, between AUTHORITY and LIBERTY." Kammen, *supra*, note 13 at 21 (quoting David Hume).

[84] This pessimism viewed authority as necessarily antagonistic to liberty because it implied the dominion of some individuals over others. Because power meant domination, it would always threaten individual liberty. In addition, because human nature was governed by a desire to dominate, power and authority were also necessarily aggressive. Thus sources of authority would seek to increase their power at the expense of individual liberty. Given this quest for power, man was inescapably corruptible, and liberty could only be preserved by constraining authority. See Bailyn, *supra*, note 20 at 55-93.

bred in the upheaval of the English Civil War."[85] When applied to contemporary events, these ideas produced a fearful and despairing commentary predicting the imminent demise of constitutional liberty in Britain.[86]

This prognosis coincided with, and reinforced, the colonists' perception of reality between 1763 and 1776. In this period, the English opposition charged that the abuse of executive authority had brought the British Constitution to the brink of a cataclysmic crisis.[87] Its alarmist rhetoric fuelled fears generated by imperial policy in the thirteen colonies after 1763.

The details of British rule in this period, commencing with the Stamp Acts and culminating in the Declaration of Independence, are well known.[88] As a result of revenue acts, the colonists' fears about standing armies, interference with the independence of the judiciary, and a variety of other irritants, the Americans began to believe that corrupt forces had subverted the Constitution and mounted "a deliberate assault ... against liberty," both in England and America.[89] Although the colonists could excuse an isolated intrusion on their liberty, the pattern of imperial policy in these years pointed to "a deliberate, systemmatical plan of reducing [America] to slavery."[90] Thus the colonial perception of events made the opposition prognosis convincing, and Americans concluded that

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[85] *Ibid.* at viii. As Wood puts it, "[t]he revolutionary character of these radical Whigs came more fundamentally from their fierce and total unwillingness to accept the developments of the eighteenth century." *Supra*, note 61 at 15.

[86] *Ibid.* at 15-17.

[87] Though Parliament had established its supremacy, responsible government had not yet emerged. As a result, the King's ministers often secured Parliament's support for the monarch through bribery and influence. Thus the opposition contended that, through this process of executive influence, the Constitution had been subverted by a "gluttonous ministry usurping the prerogatives of the crown and systematically corrupting the independence of the commons." Bailyn, *supra*, note 20 at 130. Responsible government would crystallize in the nineteenth century with the evolution of the cabinet system and the *Reform Act* of 1832.

[88] *For a description of these events, see ibid. at 94-143.*

[89] *Ibid.* at 95.

[90] Wood, *supra*, note 61 at 39 (quoting Thomas Jefferson).

their "dear-bought liberty [stood] upon the brink of destruction."[91] This perception of tyrannical oppression caused by a Constitution gone wrong instilled a distrust of the British and generated a rejection of external authority. Independence became salvation and a defiance of authority literally "poured from the colonial presses and was hurled from half the pulpits of the land"; it leaped "like a spark from one flammable area to another, growing in heat as it went."[92] The American Revolution was not fought because the colonists had never tasted liberty: it was fought to rescue liberty from authority. The intense emotions of this period bred a distrust, not just of colonial authority, but of all authority.[93]

Nonetheless, because the colonists' distrust of authority was associated with imperial rule, Americans were initially confident that Independence would usher in a millenial era.[94] But even the millenium required a conception of the state, and the colonists, "having resorted to power to throw off whatever power did not come from themselves, had [next] to confront the problem of their own power."[95] The years between Independence and the Philadelphia Convention of 1787 demonstrate that "the politics of fear, suspicion, jealousy and hatred" gave Americans "only the language with which to denounce power, not the ideas and emotions to deal with authority."[96] The negative ideology of the rebellion remained powerful, and in 1787 the Americans created a Constitution that institutionalized the revolutionary distrust of authority.

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[91]Bailyn, *supra*, note 20 at 91. They believed that the "whole fabric [of British constitutionalism] was ready to come down in ruins...." Wood, *supra*, note 61 at 36 (quoting James Burgh).

[92]Bailyn, *ibid.* at 304-05.

[93]Thus the true revolutionary creed: "[R]esist not only all authority over us as it now exists, but any and all that it is possible to constitute." *Ibid.* at 318.

[94]The revolutionary movement was "sustained by a powerful, even millenial creed by which Americans saw themselves ... on the verge of ushering in a new era of freedom and bliss." Wood, *supra*, note 61 at 44.

[95]Diggins, *supra*, note 73 at 96.

[96]*Ibid.* at 63-64 (paraphrasing Abraham Lincoln).

C. *The U.S. Constitution: A More Perfect Union*[97]

> Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.[98]

Instead of the millenium, Independence brought chaos and disillusion. Union under national institutions was unrealistic at the outset because the creation of a central authority would revive the distrust that had propelled the revolutionary movement. Instead, the thirteen states established their own Constitutions, and otherwise associated, for limited purposes, under the Articles of Confederation. Even this agreement, which neither created national institutions nor restricted the powers of the states, was contentious.[99] In a climate of economic confusion, social flux, and general dislocation, the Articles of Confederation quickly became dysfunctional, pitching the "designs of providence" into crisis.[100]

The gravamen of the complaint against Britain was that the colonists' liberty had been undermined by the corruption of executive authority. Because external imperial authority was the source of this tyranny, Americans assumed that to achieve liberty, it was only necessary to deny that authority and repose sovereignty in

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[97]The Preamble states that "We, the People ... in Order to form a more perfect Union ... establish this Constitution."

[98]O.W. Holmes, *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920) at 200.

[99]Though the agreement was proposed in 1777, the Articles of Confederation were not ratified until 1781.

[100]Because the Confederation lacked executive and judicial institutions, and had no authority to impose taxes, regulate trade, or issue currency, the form of union created by the Articles was insuperably weak. Moreover, in the absence of restraints, the states engaged in protectionist economic activity, and became embroiled in disputes over frontier boundaries. Internal state politics were also unstable, as measures confiscating property, issuing paper money, and interfering with the recovery of debt caused a widespread perception that state legislation was unjust, unfair, capricious, and arbitrary. See Wood, *supra*, note 61 at 393-429 and R. Bernstein (with K. Rice), *Are We To Be A Nation? The Making of the Constitution* (U.S.A.: Harvard University Press, 1987) at 81-111.

By the 1780s, "[t]he situation of the general government, if it [could] be called a government, [was] shaken to its foundation, and liable to be overturned by every blast." Letter, George Washington to Thomas Jefferson, quoted in J. King, "Trois Sortes de Pouvoir: In Changing Times" (1987) 7 Pace L. Rev. 563 at 565.

"the people." Events revealed, however, that the revolutionary objective of liberty was not secure under a decentralized scheme of self-government. In exercising newly acquired sovereign power, the people acted in callous disregard of the freedom of individuals, and Americans quickly learned that legislative majorities could also be self-seeking, corrupt, and oppressive. This problem, which appeared to be the reverse of that suffered under imperial rule, caused the "inveterate suspicion and jealousy of political power" which had animated the Revolution to be transferred from the British crown to the state legislatures.[101]

Thus Independence proved how resilient the Revolution's "jealousy of power" was. Instead of preventing tyranny, the ideal of popular sovereignty reinforced the view that no constituted authority could be trusted.[102] In short years, Americans moved from challenging British tyranny in the name of liberty and virtue to challenging all power and authority in the name of freedom and equality.[103] As Henry Adams would subsequently state, "[t]he great object of terror and suspicion to the people of the thirteen provinces was *power*; not merely in the hands of a president or a prince, of one assembly or several, or many citizens or of few, but of power in the abstract."[104]

Those who refused to relinquish the ideals of the Revolution became convinced that sweeping reform was necessary. Though the rhetoric of distrust remained fresh, federalist politicians recognized that, by creating no effective authority, the Articles of Confederation did not achieve a workable balance between liberty and authority. Hence the paradox: having rebelled against central authority in the name of liberty, Americans recognized that if liberty were to survive, reforms centralizing authority were needed.

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[101]Wood, *ibid.* at 409. As Judge Alexander Hanson observed in 1784, "[t]he acts of almost every legislature have uniformly tended to disgust its citizens, and to annihilate its credit." *Ibid.* at 406. In 1787, a group of Pennsylvania citizens resolved to settle all cases between themselves by arbitration, "to prevent the people from wasting their property by the chicane of the law." *Ibid.* at 407.

[102]See *ibid.* at 363-72.

[103]Diggins, *supra*, note 73 at 75.

[104]Quoted in Diggins, *ibid.* at 57.

This was a task of some delicacy. Although self-government exposed a conflict between the ideals of popular sovereignty and individual liberty, seeking a solution in a federal republic remained problematic. Madison, for one, believed that the solution lay in a system of government that would remain responsible to the people by permitting no authority, not even that of the people's representatives, to acquire or exercise tyrannical powers.[105] The acceptability of any proposal for centralized institutions would depend on the framers' ability to allay the fear of authority that remained pervasive.

The institutional features of the proposed Constitution responded directly to this endemic distrust, with a separation of powers supplying the palliative.[106] Replying first to charges that the proposed republic would be remote, alien, and distant from the people, the framers argued that the Constitution was consistent with popular sovereignty, and also that its pluralist design would avoid the problem of faction.[107] In addition, they claimed that it would be impossible for the central authority to tyrannize the people, because the Constitution's structures were carefully designed to limit and diffuse the state's authority. The federal government's powers were limited, in the first instance, by those retained by the state governments and the people.[108] Then, to diffuse the powers

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[105]"If the people were as corrupt and vicious ... as the 80s seemed to indicate," only "the institution [of government] managed a certain way could manage an unvirtuous people." Quoted in Wood, *supra*, note 61 at 429.

[106]This Article emphasizes the conception of the state which is reflected in the institutional features of the Constitution, and therefore does not address its broader sociological agenda, which is debated in a rich literature discussing the socio-economic circumstances surrounding the creation of the Constitution. The classic treatment is by Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan Publishing Co., 1941).

[107]See the discussion of the problem of faction in C. Rossiter, ed., *The Federalist Papers*, #10 (U.S.A.: Mentor Books, 1961) at 77-84. *The Federalist Papers* is a collection of essays advocating ratification of the Constitution, in which James Madison, Alexander Hamilton, and John Jay discuss the theory of the Constitution and respond to the arguments of those opposing its adoption. For further discussion, see Wood, *supra*, note 61 at 503-06.

[108]According to the original conception, the federal branches would possess those powers, and only those powers, expressly delegated to them by the terms of the Constitution itself. The sovereign power would rest otherwise, either with the states, or with the people themselves. See Amendments IX and X.

delegated to the federal institutions, the Constitution set up a complex separation of powers, establishing discrete sources of authority in the legislative, executive, and judical branches, together with a system of checks and balances to prevent the undue accumulation of power in any single branch.[109] In theory, liberty would be preserved by a system in which institutional safeguards precluded any branch from appropriating power or encroaching on the jurisdiction of the other branches.

During the ratification debates, the Federalists relied primarily on the separation of powers to meet the fear of authority motivating the opposition. Proponents of the Constitution argued that a separation of powers was "the basis of all free governments," and provided the mechanism by which "the powers of government [would be] so divided and balanced among several bodies of magistracy, as that no one should transcend their legal limits, without being effectively checked and restrained by the other branches."[110] The faith Americans placed in separation of powers theory reveals how deep-seated their distrust of authority was, and demonstrates the degree to which they believed the preservation of liberty depended on the institutionalization of this distrust.[111]

The Constitution addresses the Americans' distinctive fear of authority in other ways as well. Though the epic of constitutional liberty traces the concept of a written constitution to social contract theory,[112] this concept also owes its existence to a distrust of

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[109]For a discussion of the separation of powers, see *Federalist* #47-51, *supra*, note 107 at 300-25.

[110]Wood, *supra*, note 61 at 453 (quoting Thomas Jefferson).

[111]What is striking about *The Federalist Papers* is how many of the essays urging ratification argue the case in negative terms by dwelling on man's imperfection and the threat of tyranny, and then defending the institutional safeguards needed to prevent any abuse of authority. According to Henry Adams, the governing principle of American constitutionalism was that "absolute power in any form was inconsistent with freedom," and therefore, that "public liberties depend upon denying uncontrolled authority in the political system in its parts or its whole." Quoted in Diggins, *supra*, note 73 at 58.

[112]By rejecting the idea that authority could be based on birthright, and reposing sovereign authority in the people, the Americans adopted a Constitution based on social contract theory. The contract portrays the individual as a natural and sovereign being, who is forced to delegate some of that sovereignty to an artificial state, in order to avoid the conflicts which would ensue in a perpetual state of nature. Because the state is created by the people, its authority is derived

authority. No contract, not even a social contract, needs to be written; once again, however, history instructed. Perceiving that they had suffered the abuse of executive colonial authority, as well as the excesses of unfettered majoritarianism, Americans considered it unthinkable that the fate of their liberty be left to fortuity. Unwritten and changeable rules of government were dangerous: authority could only be controlled through "some certain terms of agreement," and a written constitution provided the best security against" the danger of an indefinite dependence on an undetermined power."[113]

Moreover, despite the weakness of the Articles of Confederation, and the careful design of the federal republic, the thirteen states exacted ten amendments as the price for the Constitution's ratification.[114] In part because the states predated the federal government, their resistance to a Constitution which would undercut local autonomy was natural. Additionally, the anti-Federalists revived the rhetoric of distrust which had animated the revolutionary movement, claiming on ideological grounds that the Constitution threatened a return to tyranny, and compromised the republican ideal.[115] To secure its ratification, the framers promised to amend the Constitution and include a bill of rights. Although the separation of powers made the addition of textual guarantees conceptually unnecessary, skeptics unwilling to trust the future of liberty to the principle of implicit limitations on the central government's authority insisted on the inclusion of a textual list of

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from their consent to be governed, and its powers are strictly limited to those that promote individual liberty. By focussing attention on the relationship between individuals and the state, social contract theory is inherently romantic and inescapably individualistic. Despite this romanticism, the social contract holds a negative view of the state in which liberty depends on the absence of authority.

[113]Wood, *supra*, note 61 at 267. It should also be noted that the concept of a written constitution was already familiar to Americans through their experience with colonial charters and state constitutions.

[114]Its opponents claimed that "[t]he tyranny of Philadelphia may be like the tyranny of George III." Wood, *ibid.* at 521 (quoting Patrick Henry).

[115]See *infra*, D. *Liberal and Republican Conceptions of the State.*

freedoms the federal government was strictly prohibited from abridging.[116]

Whether from a liberal or republican perspective, distrust was unquestionably a foundational theme in American constitutional ideology.[117] Although neither the revolutionary movement nor the debate surrounding the framing of the Constitution could predestine the course of subsequent history, the ideology taking shape in those formative years supports a distrustful conception of the state, which, while it has evolved over time, still characterizes American constitutionalism.

D. *Liberal and Republican Conceptions of the State*

> Classical republicanism and American liberalism have usually been regarded as antithetical. The one represents the archaic values of simplicity, frugality, self-control, and duty to the polity; the other, the modern tenets of change, progress, self-interest, natural rights, and freedom from political authority.[118]

It remains to locate the theme of this Article, analyzing the American conception of constitutional liberty in terms of a distrust of authority, within the broader debate about liberalism and republicanism. The republican renaissance has its genesis in classic treatises by Bernard Bailyn,[119] Gordon Wood,[120] and J.G.A.

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[116]The fact that certain bill of rights provisions absolutely prohibit any state interference with certain rights reveals, once again, how profoundly suspicious Americans were of the newly created central authority. See, for example, the first amendment:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.... [emphasis added].*

[117]As Diggins observes, "[t]he techniques of controlling power would be a legacy of both the Federalists and anti-Federalists," and "[s]o too would be the fear of power, as the Federalists and anti-Federalists grew suspicious of each other's moves." *Supra*, note 73 at 49.

[118]*Ibid.* at 19.

[119]*Supra*, note 20.

[120]*Supra*, note 61.

Pocock.[121] Broadly conceived, republicanism contemplates a participatory democratic state based on a concept of collective civic virtue. Citizens of the state are committed to a shared concept of the polity, and their relationship to the state is defined by a communitarian political ethic. As such, republicanism is not antagonistic to authority and in a classical republic, it is the polis, not individual liberty, which prevails.[122]

Liberalism advances a different conception of the state. According to this view, man is atomistic and pre-social. He will seek to advance his own interests and in doing so, to assert his dominion over others. He agrees to surrender some of his natural powers and rights of self-dominion to the state, in order to avoid conflicts inherent in the state of nature which interfere with his individual self-maximization as an individual. Based on social contract and natural rights theory, this conception exalts individualism and can only accept a minimalist state. It is individualistic and inherently distrustful of authority.[123]

Though from different perspectives, the proposed Constitution threatened both conceptions of the state. According to the American adaptation of liberal theory, the Constitution created a central authority which, through the accretion of institutional power, would naturally threaten individual freedom. Walter Whitman summed up liberalism's distrust of authority in the following words: "[r]esist much, obey little."[124]

Although liberalism and republicanism are frequently placed in opposition, proponents of republican theory shared in this distrust. Liberalism is hostile to the state because when the state exercises its authority, it necessarily interferes with individual freedom. By contrast, the perennial threat to republican virtue is not authority

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[121] *Supra*, note 71.

[122] For an extended discussion, see Wood, *supra*, note 61 at 46-91.

[123] *Supra*, note 112.

[124] Diggins, *supra*, note 73 at 14.

itself, but the corruption of authority.[125] The proposed Constitution threatened republican values, in the first instance, because it created a *central* authority. National institutions would compromise the ideal of republican virtue because participatory self-government required a communitarian spirit, which could only be attained in decentralized or geographically homogenous groups.[126] Republican theory also distrusted the Constitution because it created a source of authority which, in being removed from the people, could become corrupt and tyrannous. To a large extent, this was the gravamen of the complaint against colonial rule by the British.[127] By proposing a powerful source of authority, separate from, and therefore inescapably less responsive to, the people, the Constitution not only threatened participatory self-government but also created a potentially irresponsible power structure.

Proponents of both theories integrate the Americans' distinctive distrust of authority into their respective conceptions of the state. Whereas liberalism would deny the state the authority to interfere with individual freedom, republicanism would seek to channel and control that authority, in order to prevent its corruption. Whether the liberal vision dominated the republican, or the converse, it is beyond dispute, as a matter of empirical observation, that the institutions of the Constitution themselves demonstrate an obsessive

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[125] "In classical thought the omnipresent fear was "corruption" -- the citizen's surrender to base material appetites -- a potentially irreversible tendency that could be arrested only if the political theorist or great legislator reeducates the people to the ideals of public duty." Diggins, *ibid* at 19. English opposition thought embraced this fear of corruption. *Infra*, note 127.

[126] Because classical theorists assumed that these values could only flourish in a small republic where citizens participate actively in the workings of government, the anti-Federalists remained suspicious of a remote, central government. Diggins, *supra*, note 73 at 64. For a summary of the republican opposition to the Constitution, see G. Stone, L. Seidman, C. Sunstein, and M. Tushnet, *Constitutional Law* (Boston: Little, Brown and Co., 1986) at 5-6.

[127] The American colonists drew on the critique of the English opposition, which endorsed classical republican theory and explained contemporary events in terms of the corruption of executive power. To the extent that critique also explained events occurring in the thirteen colonies between 1763 and 1776, the American Revolution was fought because of a distrust of authority constituted a particular way, and not because of a distrust of all authority. Hence, the debate about whether republicanism's fears of power gone corrupt, or liberalism's fear of all authority, shaped the American conception of the state in these years.

concern with the management of power, and the structures necessary to contain its evil and expansive tendencies.[128]

For purposes of this article, it is not essential to decide between these competing conceptions.[129] As a matter of historical interpretation it is problematic, in any case, to characterize the Constitution as either liberal or republican: "[b]etween Machiavelli and Locke lies the dilemma of American politics."[130] Both conceptions are elemental themes in U.S. constitutional ideology. At inception, fears about the fate of individual freedom influenced the framers in determining how the authority of the state could be structured to achieve the objective of participatory democracy in a federal republic. Moreover, both conceptions have been present throughout American constitutional history, though in "differing measure and with shifting importance."[131]

In large part because of a focus on the institution of review, this paper favours the liberal account. Though the rhetoric of republicanism is compelling, and has been a prominent theme in American constitutionalism, the institutional history of the Constitution suggests the dominance of liberal values. By idealizing the concept of civic virtue and suggesting that the Constitution represented a publicly-minded citizenry willing to forego individual liberty in the interests of the polis, republicanism generates its own brand of romanticism.

As Diggins persuasively argues, the "liberal legacy has troubled generations of American intellectuals."[132] Republicanism posits an

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[128]Both the proponents and critics of the Constitution agreed that "the degeneration of a government could be avoided," not by "moral principles or rhetorical persuasions but simply by placing a series of obstructions in its path." Diggins, *supra*, note 73 at 59-60.

[129]Because they reflect different methods of resolving the conflict between liberty and authority, discussion of their respective merits as models for government has currency today for theories of judicial review. However, this paper does not propose a theory of review, either for the United States or for Canada.

[130]Diggins, *supra*, note 73 at 16.

[131]M. Sandel, "The Political Theory of the Procedural Republic" in A. Hutchinson and P. Monahan, eds, *The Rule of Law: Idea or Ideology* (Toronto: Carswell Co., 1987) at 92.

[132]*Supra*, note 73 at 5. "Individualism seemed to leave America without a sense of moral community and pluralism without a sense of national purpose." *Ibid.*

optimistic view of man and permits an idealistic interpretation of Independence and the formation of the Constitution.[133] Without denying republican values a role, the theory of the Constitution, its institutional arrangements, and the course of history all seem to vindicate the liberal explanation. If republican and liberal rhetoric both animated the movement culminating in Independence, the Constitution itself responds more to liberal pessimism than to participatory republican progressivism. The American republic did embody a new science of politics, but one based on fear, not of "the familiar subversion [in republican theory] of a virtuous assembly by a corrupt executive," but of man, the "creature of desire who, unless constrained by external checks, will act collectively to coerce, tyrannize and oppress fellow man."[134] Moreover, even if it can be said that the original conception of the Constitution was republican rather than liberal, it was a brand of republicanism which, when its rhetoric was reduced, effectively replicated liberalism.[135]

In the end, it is difficult to dispute that liberalism has dominated America's political culture, especially in this century. If it did not dominate in 1776, 1787, or before the Civil War, it has dominated since, in large part because of the evolution of judicial review.[136] Once again, whether or not liberal values should prevail is a separate question; the point here is to note that, without

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[133]Thus the Revolution was not fought to vindicate liberal laissez-faire individualism, but was instead a herculean effort to preserve America's virtue from the corrupt and corrupting forces of English politics. *Ibid.* at 9-10. Comprising "a truly original formulation of political assumptions" and creating "a distinctly American system of politics," the Constitution was itself visionary. Wood, *supra*, note 61 at ix.

[134]Diggins, *supra*, note 73 at 77.

[135]As Diggins argues, to the extent that the idea of virtue provided the conceptual foundation for a scheme of government which sought to avoid treachery and tyranny, "classical republican rhetoric could achieve little more than negative freedom, freedom from political power and public authority, freedom for man to pursue his own ends, individual freedom - in a word, liberalism." *Ibid.* at 31.

[136]One scholar attributes the debate between "rights-based liberalism" and communitarian republicanism to the advent, in the twentieth century, of a "public life animated by the rights-based liberal ethic." He asserts that "the liberal dimensions of [U.S.] tradition have crowded out the republican dimensions, with adverse consequences for the democratic prospect and the legitimacy of the regime." Sandel, *supra*, note 131 at 85. The "rights-based liberal ethic" is vindicated, primarily, by the institution of review.

excluding a republican counterpoint, liberalism has been the dominant norm in American constitutional culture.

E. *Judicial Review: The Least Dangerous Branch*[137]

> I am moved ... by a sense of the ultimate futility of the quest for an Archimedean point outside ourselves from which the legitimacy of some form of judicial review or constitutional exegesis may be affirmed .... [but] *in matters of power, the end of doubt and distrust is the beginning of tyranny.*[138]

Over the last two hundred years the American conception of constitutional liberty has evolved primarily, though not exclusively, through the institution of judicial review. It is vital to note, at the outset, that review is based on a distrust of authority. Paradoxically, however, at the same time as explaining why judicial review is considered necessary, this distrust also demonstrates why it can never be conceptually legitimate.

Separation of powers theory assumed that relations between the branches would be largely self-executing.[139] Questions about enforcement of the Constitution were bound to arise before long, though, and in 1803, the Supreme Court appropriated the power to review the actions of its co-equal branches.[140] Once having exercised a power of review in a separation of powers context, the

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[137] *Supra*, note 107 at 465. See *infra*, note 152.

[138] L. Tribe, *Constitutional Choices* (U.S.A.: Harvard University Press, 1985) at 7 (emphasis added).

[139] Separation theory assumed that there was no need of additional mechanisms to resolve conflicts between branches of the government. The Constitution detailed the jurisdiction of each branch, thereby limiting the respective powers of each; moreover, the purpose of the text's system of checks and balances was to harness the ambitions of any branch which sought to exceed its authority. As an additional precaution, a bill of rights strictly prohibiting the federal government's interference with certain freedoms was added. Because most of the states had established republican government through written constitutions, the federal Constitution did not address relations between individuals and their states.

[140] In *Marbury* v. *Madison*, 1 Cranch 137 (1803), Chief Justice Marshall held that the incoming Jefferson administration acted illegally in refusing to honour a partisan judicial appointment made by the outgoing Adams administration, but then denied relief because the congressional statute conferring original jurisdiction was unconstitutional. Even though there was no explicit textual basis for doing so, the Court asserted its institutional authority over both the executive and legislative branches.

Court extended that power over the states.[141] Even so, state autonomy remained the norm in the years leading up to the Civil War, and federal relations were characterized by extreme distrust as state governments disputed the locus of sovereignty in the federal union.[142] For that reason, the Court's decisions dealt less often with relations between the individual and the state than with issues touching relations between national institutions and the states, or among the states themselves.[143]

By giving individuals the right to invoke the federal Constitution against the states, the Civil War amendments provided a new forum for the expression of hostility toward the state.[144] This hostility gained momentum in the late nineteenth century as state legislatures addressed the problems caused by massive economic expansion and industrialization. Relying on natural law theory, proponents of laissez-faire capitalism invoked the Constitution to challenge the state's authority to pass legislation interfering with economic liberty.[145] In the years between 1897 and

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[141] In *Fletcher* v. *Peck*, 6 Cranch 87 (1810), the Court invalidated a state statute, and then, over intense objection from the states, declared its authority to supervise the state justice systems. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816) and *Cohens* v. *Virginia*, 6 Wheat. 264 (1821).

[142] As Tribe observes, explicit limitations on government authority were minimal in this period because "it was believed that personal freedom could be secured more effectively by decentralization than by express command." *Supra*, note 66 at 2.

[143] At the same time, however, the contract clause generated a jurisprudence securing the integrity of contractual obligations. See, for example, *The Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819) (invalidating state legislation superseding a Crown Charter establishing Dartmouth College and providing for its governance).

[144] Because the American Constitution presupposes the retention of state autonomy, and the first ten amendments did not apply to the states, there was little bill of rights jurisprudence prior to the Civil War amendments. *Barron* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Following the Civil War, the thirteenth, fourteenth, and fifteenth amendments imposed federal limitations on the states' authority to interfere with individual freedom. *Supra*, note 42. Though the war did not dissolve the distrust affecting federal-state relations, it at least perpetuated the union. Subsequently, by entrenching new individual rights, the Civil War amendments deflected attention from issues of federalism to questions about relations between individuals and the state.

[145] The first case under the Civil War amendments was the *Slaughter House Cases*, 16 Wall. 36 (1873), in which *butchers* challenged Louisiana legislation creating a monopoly in the slaughterhouse business on the ground that it interfered with their natural right of free labour. Over dissenting opinions, the Court dismissed their claim; in the next twenty-five years, however, litigants persistently challenged the state's authority to regulate an individual's

1937, the Court protected laissez-faire individualism from state regulatory authority, at times with undisguised fervour. The Court's decisions in this period often revealed a regard for individualism which was based on a profound rejection of majoritarian authority.[146] By the 1930s, constitutional interpretation would effectively rob the state of its authority to address the socio-economic problems arising from the Depression.[147] The Court's obstruction of state regulatory authority caused a constitutional crisis by provoking President Roosevelt's introduction of a "court-packing" proposal early in 1937.[148]

The legitimacy of review had been tenuous since *Marbury* v. *Madison*. Given a written constitution rationalized by a separation of powers, the absence of any explicit authorization for judicial review made the exercise of such an exceptional power inescapably problematic. Nonetheless, Chief Justice Marshall's prestige, the rhetorical force of *Marbury* v. *Madison*, and the appeal to a written constitution as supreme law all helped to secure the legitimacy of review.[149] Neither a written constitution nor the separation of

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property right in his labour. By the turn of the century, the Court's conclusion that the fourteenth amendment's due process clause protected liberty of contract would recognize this right. See *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897).

[146]The following passage is symptomatic: "To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society ... cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members." *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923) at 561.

[147]In the 1920s and early years of the Depression, by invalidating more than two hundred state measures, as well as virtually all of the Roosevelt administration's New Deal programs, Supreme Court decision making became so debilitating of legislative power as effectively to cripple the state's regulatory authority. By the summer of 1936, President Roosevelt would declare that the Court had created a "no man's land," in which no government, federal or state, possessed the authority to regulate the economy. Quoted in W. Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan" (1966) Sup. Ct. L. Rev. 347 at 378.

[148]For an account of the events leading up to the crisis, see *ibid.*

[149]As Chief Justice Marshall argued:

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?...
>
> The constitution is either a superior, paramount law,... or it is on a level with ordinary legislative acts,... and is alterable when the legislature shall please to alter it.

powers was sufficient to eliminate the risk that power might be abused; hence the perception, which continues to this day, that "government cannot be relied upon to behave voluntarily as the Constitution demands."[150] If the branches of government would not respect the Constitution, some institutional mechanism for compelling that respect had to be found.[151] Trust was reposed in the judiciary, as guardians of the law and "least dangerous branch."[152] Over time, however, as the Court appropriated more authority, it became less credible as the least dangerous branch.

The lack of any explicit textual authorization for review also meant that the Constitution imposed no limitations on the judiciary's powers. It became clear by the twentieth century that by vindicating a negative concept of liberty, the courts were effectively denying legislatures the authority to advance a vision of the modern regulatory state that would supplant the laissez-faire model of minimal state intervention. When the Court refused to accept this emerging concept of the state, the distrust traditionally aimed at other sources of authority was directed against the judiciary. Once again this distrust derived from the negative ideology of early constitutionalism: the fear of a source of authority, which in being removed from the people and unaccountable to them, was effectively unlimited.[153] By denying majoritarian power and thereby displacing the emerging faith in democratic progressivism, judicial

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> If the former ... be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Marbury v. *Madison*, 1 Cranch 137 (1803) at 176-77.

[150] Tribe, *supra*, note 66 at 9.

[151] "[T]he formative experiences of [U.S.] colonial and post-independence periods were not calculated to instill trust in executive or legislative fidelity ... to constitutionally established boundaries on authority." Tribe, *ibid.*.

[152] This expression derives from *Federalist* #78, *supra*, note 107 at 465, in which Alexander Hamilton declared that the judiciary "will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."

[153] This distrust recalls republican values, but also strikes a chord with modern liberalism which draws a distinction between economic and non-economic liberty, and redefines individualism in terms that largely exclude laissez-faire values. See *infra*, note 157.

review exposed the tyrannical authority of an institution whose function it was to prevent tyranny.

In 1937, President Roosevelt addressed the problem of government by judiciary with his court-packing proposal. That spring, the Supreme Court narrowly averted the disastrous institutional consequences of overt executive interference with its composition by abandoning the dogmas on which its defense of economic liberty was based.[154] Thus the Court refuted the doctrines previously applied to preclude interference with laissez-faire values and accepted the state's hegemony in the sphere of economic regulation.[155] By recognizing the state's authority to pursue its conception of the general welfare at the expense of laissez-faire individualism, the Court accepted a vision which preferred democratic, republican values over those of economic liberalism.

It is generally accepted that the institution of review protected individual liberty in a highly selective manner throughout this period.[156] The judiciary's vindication of individual liberty did not disappear, however, with the fundamental re-alignment of ideology caused by the court-packing plan. The self-abnegation precipitated by the crisis was also selective because increasingly after 1937, the judiciary applied its authority to protect non-economic liberty.[157] Today, individual liberty prevails over state authority on a range of important issues, including privacy and autonomy, the communicative

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[154]See, for example, *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937)(upholding state minimum wage legislation); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)(upholding federal regulation of labor relations); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937) (sustaining federal unemployment compensation); and *Helvering* v. *Davis*, 301 U.S. 619 (1937) (upholding federal old age benefits legislation). For an account of the court crisis and of the Supreme Court's reversals, see Mason, *supra*, note 30 at 74-128.

[155]In *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938), Justice Stone explicitly stated that the Court would defer to the legislature's judgment on questions of economic regulation.

[156]In the early twentieth century, the judiciary did little to protect non-economic liberty: not only was this the era of separate but equal, *supra*, note 44; additionally, until the 1930s, the Supreme Court extended little or no constitutional protection to radicals prosecuted for their radical or unpopular speech. See generally Chafee, *supra*, note 47.

[157]Liberal constitutionalism's post crisis double standard is analyzed by R. McCloskey in "Economic Due Process and the Supreme Court: An Exhumation and Reburial" (1962) Sup. Ct. Rev. 584.

rights of the first amendment, and the procedural guarantees applicable in the criminal justice system.

Doctrinal solutions continue to reflect the traditional distrust of state authority. In the first instance, the denial of individual rights is often judged by a standard of review which is hostile, rather than deferential, to the state's authority.[158] For example, in the problematic area of privacy and autonomy, the Court has set rigorous standards to prevent state interference with a woman's right to procure an abortion.[159] This distrust also characterizes much of the jurisprudence dealing with the state's administration of the criminal justice system. It is most manifest, however, in the Court's first amendment jurisprudence. Patently distrustful of any merger between religious and political authority, the Court has decreed that a strict "wall of separation" between church and state be maintained.[160] In addition, the speech clause denies the state the authority to regulate a wide range of communicative activities.[161] It

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[158]See *Loving* v. *Virginia*, 388 U.S. 1 (1967) (articulating the doctrinal requirements of "strict scrutiny"). Though strict scrutiny had its genesis in the Supreme Court's review of race discrimination laws and does not govern in all cases, "heightened" scrutiny is applied in other branches of equal protection jurisprudence dealing, for example, with classifications based on gender, alienage, and certain types of disadvantage. Moreover, the standards developed to judge equality cases have cross-fertilized other areas of constitutional adjudication. See *Police Dep't of Chicago* v. *Mosely*, 408 U.S. 92 (1972) (extending strict scrutiny to first amendment review of content distinctions), *Heffron* v. *Int'l Society for Krishna Consciousness*, 452 U.S. 640 (1981) (applying a specialized form of heightened scrutiny to public forum issues), and *Roe* v. *Wade*, 410 U.S. 113 (1973) (applying strict scrutiny to state interferences with the right to procure an abortion).

[159]*Roe* v. *Wade* denies the state the authority to deny an abortion in the first trimester of a pregnancy, and strictly prohibits the state from adopting regulations which would burden this right in the second trimester. Only in the third trimester is the legitimacy of the state's interest in prohibiting abortions recognized. 410 U.S. 113 (1973). The subsequent case law dealing with the constitutionality of provisions regulating abortion procedures makes it plain that the Court will not tolerate any official interference with an individual's right to seek an abortion. See, for example, *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169 (1986).

[160]See *Everson* v. *Board of Education*, 330 U.S. 1 (1946). Although different rationales are offered to support this wall of separation, each is directed to power, and to the corruption of either temporal or spiritual authority that might occur from any merger. For a discussion, see Tribe, *supra*, note 66 at 1158-66.

[161]The general principle is that content regulations are *per se* impermissible, and can only be justified according to a strict standard of review. *Police Dep't of Chicago* v. *Mosely*, 408 U.S. 113 (1973). Content regulations are impermissible because to allow the state the authority to regulate speech on the basis of its content would be to surrender censorial control. As a result,

is the press clause, however, which, by reference to the "checking function," relies most heavily on a distrust of authority to support its conception of liberty.[162]

Throughout this jurisprudence the original conception, which expresses a hostile attitude toward the state through an atomistic conception of liberty, remains a pervasive theme. Even though the judiciary declines to challenge the state's authority on a variety of current regulatory issues, American constitutionalism is still characterized by a conception of liberty which is rooted in a distrust of authority. Because the judiciary enforces this conception of the state, review is inescapably controversial.

A conflict between individual freedom and state authority is common to all democratic systems of government. In substantive terms, however, that conflict is irresolvable because no general theory can determine how the competing claims of liberty and authority should be reconciled in discrete cases. Limitations on majoritarian power can only be identified by recognizing the demands of individualism, and by the same token, restrictions on individual liberty can only be articulated by reference to some

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the state lacks authority to regulate speech activities which are disagreeable or offensive. Thus *Cohen* v. *California*, 403 U.S. 15 (1971) concludes that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas" and that "governments [could] seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."

This principle does not apply to some categories of speech, such as obscenity, which fall outside the first amendment's protection of speech, or other categories, such as commercial speech, which are governed by a more deferential standard of review. Nonetheless, this neutrality denies the state the authority to regulate speech on the basis of its content, unless a patent harm or other special circumstances are present. As such, it is based on a profound distrust, which refuses to permit the state to make value judgments about the respective merits of different categories of speech and viewpoints. American constitutional culture considers such a power censorial.

[162]See generally V. Blasi, "The Checking Value in First Amendment Theory" (1977) A.B.F. Res. J. 521. Blasi argues, at 538, that one of the most important values attributed to a free press by eighteenth-century political thinkers was "that of checking the inherent tendency of government officials to abuse the power entrusted to them." He concludes that because those views continue to have contemporary relevance, the checking value "rests on a most impressive foundation."

Much of the first amendment jurisprudence on press issues supports this view. In order to prevent censorial interference and protect the press's unique role as watchdog, content control of the media is permitted in limited circumstances only; prior restraints are *per se* unconstitutional, even where publication may threaten legitimate state interests; and, because of the imperative need to encourage robust debate about public issues, the defamation of public officials is constitutionally protected.

notion of the permissible scope of authority. Any definition of individual liberty must therefore be contingent on a concept of state authority and likewise, any definition of the state's authority will be limited by a concept of individual liberty.[163] It is impossible to derive an abstract theory that prescribes a "correct" balance between freedom and authority. Every normative theory is inherently subjective, inescapably arbitrary, and unalterably oblivious to particular circumstances.[164]

In a parliamentary democracy, majoritarian institutions bear the responsibility for accommodating individual freedom and state authority. Thus is this perennial conflict resolved through a conception of institutional role; legislative majorities seek vindication of their power to settle the delicate balance between liberty and authority in successive democratic elections. In the United States, however, this conflict is not resolved through democratic choice, but replayed as a conflict between the judiciary and the legislatures. Thus the American system compounds the substantive conflict between individual freedom and state authority through its overlay of institutional conflict.

Judicial review is inescapably controversial because it is conceptually incapable of resolving either the substantive or institutional conflict. As already observed, it is impossible to articulate a substantive theory which will determine, in abstract, neutral or unarbitrary terms, either what liberty is, or how much authority the state should have. Second, and more important, the contours of the judiciary's authority to engage in this exercise are completely unknown. The power of review is limited only by some vague code of self-restraint.[165] In the end, no substantive theory of

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[163] As Mark Tushnet puts it, [Liberal constitutionalism] is inevitably incomplete, for it proves unable to provide a constitutional theory of the sort that it demands without depending on communitarian assumptions that contradict its fundamental individualism." "Following the Rules," *supra*, note 35 at 785.

[164] "Each version of the Grand Theory is incoherent ... [because] under the guise of limiting arbitrariness ... each introduces its own arbitrariness." Moreover, "[t]here is no reason to believe that any normative theory ... will resolve the contradiction." See Tushnet, "The Dilemmas," *supra*, note 35 at 416.

[165] "[T]he only check upon our own exercise of power is our own sense of self-restraint." *United States* v. *Butler*, 297 U.S. 1 (1936) (Justice Stone, dissenting opinion).

constitutional liberty is articulable, and accordingly established limitations on the institutional authority of the judiciary do not exist. Putting historical experience together with theoretical incertitude, it becomes conceptually irrational to believe that liberty depends for its preservation on a system of constitutional rights and judicial review.

Americans proceed in agonizing search for the theoretical elixir which will resolve these dilemmas. But by distrusting authority, whether it be executive, legislative or judicial, they have resigned themselves to constitutional hiatus, which no substantive or institutional theory of review can fill. While some scholars articulate theories of review which focus on the substantive conflict between liberty and authority,[166] others concentrate primary attention on the institutional conflict between the judicial and legislative branches.[167] Significantly, whatever the focus, prominent scholars have recognized the incoherence of review.[168] Thus does the epic of liberal constitutionalism dissolve. Given its inability to accept the sovereignty of any source of authority, it is less about any noble concept of liberty than it is about a dark and unrequited distrust of authority.[169] What remains is a negative ideology, and a credo which insists that "the end of doubt and distrust is the beginning of tyranny."[170]

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[166]See, for example, P. Bobbitt, *Constitutional Fate* (New York, Oxford University Press, 1982); M. Perry, *The Constitution, the Courts and Human Rights* (New Haven, Yale University Press, 1982); and Tribe, *supra*, notes 66 and 138.

[167]See, for example, A. Bickel, *The Least Dangerous Branch* (New York: Bobbs-Merrill Co., 1962); J. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980); and Ely, *supra*, note 35.

[168]Tribe expressed it well, stating that "[w]hen it comes to legitimacy, all has been said already, and what has been said is all so deeply riddled with problems that it seems hardly worth restating, much less refuting or refining." *Supra*, note 138 at 3.

[169]"American constitutionalists [are profoundly pessimistic.] [To them] [t]here is a feudal bleakness about man which sees him fit only for external domination, and there is a liberal bleakness about man which sees him working autonomously on the basis of his own self-interest." Hartz, *supra*, note 20 at 80.

[170]*Supra*, note 138.

V. MELANCHOLY REFLECTIONS

> It is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much or too little power; and that the line which divides these extremes should be so inaccurately defined by experience.[171]

The foregoing account demonstrated that the idea of constitutional liberty will inevitably be defined in terms that are cultural rather than abstract. To recall the comparative analysis of Part III, both American and British ideologies have their roots in struggles about power. In Britain, Parliament struggled to establish unfettered authority, whereas in the United States, Americans resisted sources of authority. Thus has context conditioned their respective concepts of constitutional liberty. For that reason, each may consider the other irrational. The British find review a bizarre mechanism for controlling power because the judiciary is unaccountable for the way in which it exercises its authority. At the same time, Americans cannot fathom the principle of parliamentary supremacy. Though the British insist that theirs is a system of constitutional freedom, the only measure of liberty is what Parliament actually does. To oversimplify, in the United States constitutional liberty is whatever the judges say it is,[172] and in Britain it is whatever Parliament says it is.[173]

Hence the melancholy reflection that liberty remains fragile, no matter what the institutional arrangements for its preservation are. Democracies make grave errors, and make them often. Even so, malaise with democratic process may not be a sufficient reason for adopting a system of constitutional rights which transfers the responsibility for making political decisions to the judiciary. Although Americans present their system of constitutional rights and

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[171] Kammen, *supra*, note 13 at 50 (quoting James Madison).

[172] In 1907, Charles Evans Hughes declared that "[w]e are under a Constitution, but the Constitution is what the judges say it is." Quoted in Mason, *supra*, note 30 at 126.

[173] *Supra*, note 55.

judicial review as a model of liberty and equality, their experience reveals few reasons to agree with such a claim.[174] True enough, in a perfect world the judiciary might graciously correct the misjudgments of democratic majorities. But in a perfect world, the democratic process would not misfire. In the end, it may be no less irrational to trust the judiciary than it is to trust legislative majorities.[175] The reality is that "rights review" imposes impossible expectations on the judiciary, and because of the institutional consequences of constitutional interpretation, "bad" decisions can often be more damaging and less easily reversed than "bad" legislation.[176] The point here is not to weigh the merits of one ideology against the other. At the same time, however, it is not necessary to glamourize parliamentary supremacy to question the wisdom of including a system of constitutional rights at this stage. When they embraced the Charter of Rights and Freedoms Canadians made certain assumptions and asked the wrong questions. The relevant question was not whether our mixed system of division-of-powers review and parliamentary supremacy is ideal, but rather, whether and how our political ideology would be affected, both beneficially and adversely, by the introduction of constitutional rights. As one of our forefathers so wisely observed during the Confederation debates of 1865, "[the U.S. Constitution] may be a failure for us, paradoxically as it may seem, and yet not a failure for them."[177]

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[174]As Tribe explains, a relatively large role for the judiciary is acceptable "more because it has become an historical given than because any ineluctable logic would have made an alternative course of history unthinkable or patently unwise." *Supra*, note 66 at 15.

[175]As U.S. Supreme Court Justice Robert Jackson so aptly put it: "We are not final because we are infallible, but we are infallible only because we are final." Quoted in Mason, *supra*, note 30 at x.

[176]Recognizing this prospect, Justice Jackson refused, in *Korematsu* v. *United States*, 323 U.S. 214 (1944), to approve the internment of Japanese Americans, concluding (at 246) that "once a judicial opinion rationalizes such an order..., the Court for all time has validated the principle of racial discrimination." He declared (at 244) that "if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient."

[177]*Parliamentary Debates on the Subject of Confederation* (Quebec: Hunter, Rose & Co., 1865) at 145 (quoting D'Arcy McGee).

In institutional terms, it is doubtful that a bill of rights is either a necessary or a sufficient condition for the improvement of the human condition. Though scores of nations have bills of rights replicating the American model, Canadians would likely recoil from the concept of constitutional liberty that prevails in many of them. Even more tellingly, American experience itself reveals flaws in the Constitution's blueprint for liberty. As Madison declared, "a mere demarcation on parchment" is not a sufficient guard against tyranny.[178] Judicial review might be less tyrannical than majority rule, but it can also be more tyrannical. Indeed, a system of constitutional rights and judicial review may even be detrimental to the political process, because it tends to "dwarf the political capacity of the people." When "the correction of legislative mistakes comes from the outside," the people lose the "political experience, and the moral education that comes from fighting the question out in the ordinary way, and correcting their own errors."[179] In the end, any claim that the preservation of liberty requires constitutional rights and judicial review is open to serious question.

Not only is it unclear that the institutions surrounding a bill of rights are necessary for liberty to flourish, it is also far from apparent that America's substantive definition of liberty constitutes self-evident truth, or even a truth that resonates with Canadian values. Rooted as it is in eighteenth-century ideology and in a disinctive attachment to individualist values, this definition of liberty is still predominantly negative. It rests on an excessive individualism and a hostile conception of the state, both which, on further exploration, may be revealed as largely foreign to Canadian constitutional ideology.

In the end, the case against a system of constitutional rights can be put in terms that are both experiential and ideological. In 1982, Canada endorsed American constitutional ideology by introducing a Charter of Rights and Freedoms. Though it was not apparent then, events may reveal the Charter to be as much like black magic as magic.

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[178] *Federalist* #48, *supra*, note 107 at 313.

[179] J.B. Thayer, *John Marshall* (Boston: Houghton Mifflin, 1901) at 106-07.

VI. CONCLUSION

> You say you want a revolution, well you know; we all want to change the world ... You say you'll change the constitution, well you know; we all want to change your head. You tell me it's the institution, well you know; You better free your mind instead[180]

Following the negotiation of the patriation package in November of 1981, a senior official observed "[w]hat exactly we are entrenching we don't know."[181] At the least, we should realize by now that the Charter is impure. In institutional terms if not in substance, what we entrenched is American constitutional ideology. Thus does the Charter perpetuate the perennial dilemma of Canadian identity: that "there could not be a Canada without the United States — and may not be a Canada with one."[182] Although the inescapable reality is that the Constitution will never be purely Canadian, it can be distinctly Canadian. To attain that objective, we must shed the romantic misconceptions we hold about the norms of American constitutionalism.

The most important lesson to learn from U.S. experience is that neither a bill of rights nor judicial review is a panacea for the age-old conflict between liberty and authority. A democratic community cannot escape its responsibility to confront that conflict by deflecting it to an unelected and unaccountable judiciary. As the American experience reveals, the institution of review simply raises questions about the extent and propriety of that delegation of democratic authority. The point is that we cannot expect the Charter of Rights and Freedoms to depoliticize difficult conflicts between freedom and authority, or cure disenchantment with the political process, and we

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[180] J. Lennon and P. McCartney, "Revolution 1" (G.B.: Apple Records Inc., 1968). I am certain that my decision to use these lines predated the highly publicized Nike ad campaign. In any case, they apply more tellingly, in my view, to Canada's newly improved Constitution than they do to Nike's new line of racing shoes.

[181] Quoted in I. Anderson, "The Unfinished Charter" *Maclean's* (30 November 1981) 26 at 27.

[182] J.M.S. Careless, "Horray for the Scars and Gripes" in Purdy, *supra*, note 1, 132 at 134.

should not let it become a forum for indulging sensibilities which seek a return to an erstwhile age of individual hegemonism.

Additionally, though, Canada should recognize that it is just as mistaken to understate the differences between American and Canadian ideology as it is to overstate those differences. Ideological differences do exist, and in giving the Charter life, their relevance must be assessed. Instead of idolizing American constitutional ideology, or blithely pretending that it is not what the Charter is about, Canada should be prepared to explore it, examining the elements which synchronize with our own, and rejecting those which do not.

By now it is somewhat beside the point to complain that the purity of our constitutional system has been compromised by the adoption of an American-style bill of rights.[183] Whatever "purity" is, Canada's constitutional ideology has always borrowed: it is the ability to adapt that has made our tradition both indigeneous and distinctive. That means, therefore, that it is appropriate, in debating Charter interpretation, to voice deep skepticism about the assumptions of American constitutional ideology and to question the infusion of American substantive norms. That process of adaptation is a necessary part of the Charter's ideological agenda. Whatever may be said today about the decision to adopt the Charter, Canada's entrenched rights will truly *become* a "charter of wrongs" if our diffidence makes us more "yankee" than we would choose to become. As Miss Nibsmith entreats, "wake up! Be yourself, not a bad copy of something else."[184]

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[183] *Supra* note 4.

[184] The following conversation between Miss Nibsmith, a British governess, and Francis Cornish, a Canadian artist, took place during World War I.

> NIBSMITH:
> ... Well, it relieves me that you're not just a lost American wandering around in a fog–
> CORNISH:
> I'm not an American, damn it! I'm a Canadian....
> NIBSMITH:
> Sorry, sorry, sorry! Of course you're a Canadian. Do you know what that is? A psychological mess.... Wake up! Be yourself, not a bad copy of something else!

R. Davies, *What's Bred in the Bone* (Toronto: MacMillan, 1985) at 312.