

# Equality before the Law in the Supreme Court of Canada: A Case Study

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# Equality before the Law in the Supreme Court of Canada: A Case Study

## **Abstract**

The twentieth anniversary of the enactment of the Canadian Bill of Rights is being celebrated at a time of great political uncertainty in Canada. The fundamental structure of Canadian federalism, if not its very survival, is the subject of heated debate. Much of the debate revolves around the aspirations of the provinces to gain a larger measure of legislative authority over economic and cultural matters, and their desire to have a greater input into the governing process at the federal level. Within the context of this debate, the role of the Supreme Court of Canada is a crucial element.

# EQUALITY BEFORE THE LAW IN THE SUPREME COURT OF CANADA: A CASE STUDY

By MARC EMMETT GOLD\*

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## I. INTRODUCTION

The twentieth anniversary of the enactment of the *Canadian Bill of Rights*<sup>1</sup> is being celebrated at a time of great political uncertainty in Canada. The fundamental structure of Canadian federalism, if not its very survival, is the subject of heated debate. Much of the debate revolves around the aspirations of the provinces to gain a larger measure of legislative authority over economic and cultural matters, and their desire to have a greater input into the governing process at the federal level. Within the context of this debate, the role of the Supreme Court of Canada is a crucial element.

The judiciary has never been passive in the evolution of Canadian federalism; however guarded and formal their language has been, the courts have played a major political role in defining the governmental structure under which we live.<sup>2</sup> In recent years, that role has been accentuated. With the Supreme Court's expansion of the concept of standing<sup>3</sup> and its recently acquired power to choose its own docket,<sup>4</sup> the number of constitutional cases before the Court has risen dramatically.<sup>5</sup> As a result, increased attention must be paid to the capacity (and desirability) of the Court assuming a larger political role.

Since 1960, one aspect of this role has been the application of the *Canadian Bill of Rights*. It is fair to say that this story is not altogether a happy one, for the Court appears very uncomfortable with its mandate under the Bill of Rights. With proposals on the table to entrench the Bill of Rights in a patriated constitution,<sup>6</sup> it seems appropriate to take a close look at how the Court has

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<sup>1</sup> R.S.C. 1970, App. III [hereinafter the *Canadian Bill of Rights*]. For a short history of the developments leading up to the enactment of the Bill of Rights, see Tarnopolsky, *The Canadian Bill of Rights* (2d ed. Toronto: Carswell, 1975) at 3-14.

<sup>2</sup> Easton defines politics as the authoritative allocation of values for society. See Easton, *The Political System* (N.Y.: Knopf, 1953) at 129-34. As Professor Weiler has noted, all courts perform some political role.

Any appellate court can be located somewhere between the two extreme points on the one scale. The polar alternatives can be labelled: (i) the judge as adjudicator, and (ii) the judge as political actor. Under the first label, the judge's function is to resolve a concrete dispute between two adversaries. Under the second, the judge adopts general policies for the community and gives them the force of law. I must emphasize that these two labels denote *ideal* types; any real-life court inevitably performs a mixture of both functions and thus is positioned somewhere between these artificial models. However, differences in the mix and the position are critical.

See Weiler, *In the Last Resort* (Toronto: Carswell, 1974) at 6.

<sup>3</sup> *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *N.S. Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376.

<sup>4</sup> *An Act to Amend the Supreme Court Act*, S.C. 1974-75-76, c. 18, ss. 4-8.

<sup>5</sup> See Hogg, *Jurisdiction of the Supreme Court of Canada* (unpublished paper delivered at the Conference of the Canada-United States Law Institute, Cleveland, Ohio, Oct. 20, 1979).

<sup>6</sup> See, e.g., *The Constitutional Amendment Bill*, Bill C-60, 1977-78 (30th Parl., 3rd Sess.); The Task Force on Canadian Unity, *A Future Together* (Ottawa: Supp. & Serv. Can., 1979) at 108-109; The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal: Que. Lib. Pty, 1980) at 34; Committee on the Constitution, Can. Bar Ass'n, *Towards a New Canada* (Montreal: Can. Bar Foundation, 1978) at 15; Alta, *Harmony in Diversity: A New Federalism for Canada* (Edmonton: Office of the Premier, 1978) at 29.

operated within the present legal framework. An analysis of some of the formative problems that presently confront the Court should help to illuminate the issues surrounding the proposed entrenchment of the Bill of Rights.

To highlight these problems, this essay examines the case of *Bliss v. A.G. Can.*,<sup>7</sup> wherein the Supreme Court of Canada upheld certain sections of the *Unemployment Insurance Act*<sup>8</sup> against a claim that they violated the norm of equality before the law as enunciated in section 1(b) of the *Canadian Bill of Rights*.<sup>9</sup> Part II of this essay examines the history of the case, and some preliminary observations about the way in which the Court approached the issues are raised. This leads to consideration of the basic problems that plague the court in its treatment of the Bill of Rights—an analysis of these problems is the subject of Part III. Part IV considers the controversy surrounding the meaning of equality before the law. The crucial question is whether meaning can be given to the norm that somehow transcends the personal predilections of the judges who must apply it. The controversy surrounding the institution of judicial review is the subject of Part V. Finally, in Part VI, the *Bliss* case is re-examined in the light of the issues canvassed in the course of this inquiry.

Before turning to these issues, some general remarks are in order. Throughout this essay American examples and doctrines are frequently used in an effort to explore the problems raised by the *Bliss* case. Considering the long experience that the American judiciary has had in reviewing legislation under a Bill of Rights, one need not apologize for frequent references to American doctrine. There is, however, another, more basic, reason why the American experience is relevant. With the introduction of a Bill of Rights into Canadian legal culture, a number of tensions have been created between the ways in which we conceive of the judicial function, and of government in general.

First, there is the tension between what one writer has termed the adjudicative and political roles of the Court.<sup>10</sup> It has already been noted that the Supreme Court of Canada is playing an increasingly political role. The notion of judicially enforceable rights against the government necessarily engenders a

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<sup>7</sup> [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417, 78 C.L.L.C. ¶14, 175.

<sup>8</sup> The *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48 [hereinafter *Unemployment Insurance Act*]. The original unemployment insurance act (S.C. 1940, c. 44) was passed after s. 91(2A) was added to the *British North America Act, 1867*, 30 & 31 Vict., c. 3, granting Parliament the legislative jurisdiction in relation to unemployment insurance. See 1940, 3 & 4 Geo. 6, c. 36. The constitutional amendment was required because of the decision of the Supreme Court of Canada, affirmed by the Privy Council, that declared *ultra vires* the *Employment and Social Insurance Act, 1935*, 25 & 26 Geo. V, c. 38. See *A.G. Can. v. A.G. Ont.*, [1937] A.C. 355, [1937] 1 W.W.R. 312, J.C.P.C.), *aff'g* [1936] S.C.R. 427.

<sup>9</sup> S. 1(b) of the *Canadian Bill of Rights* provides:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, . . .
- (b) The right of the individual to equality before the law and the protection of the law. . . .

<sup>10</sup> See Weiler, *supra* note 2.

rethinking of our entire governmental process. In this respect, one can see a tension between two paradigms of government and of the place of the Court within our governmental structure.<sup>11</sup>

There is another level of tension that underlies the judicial enforcement of a Bill of Rights, and one which also reveals the significance of the American experience. One might term this the tension between the Court as "restrainer" of government and the Court as "director" of government. This tension is an inevitable outgrowth of the change in the nature of government that has occurred within this century. When the ideal of government shifts from that of the "minimal state" to that of the "positive state," so too do notions of "rights." As is well illustrated by the American experience, rights cease to be simply claims of individuals to be left alone; they become claims that the government should act positively. It will become evident that this transformation in the notion of rights has profound implications for the role of the judiciary.

Canadian courts still struggle with the first tension noted above. As a result, the issues bound up with this latter tension have yet to be confronted. Nevertheless, if the American experience is any indication of the shape of things to come, these issues are lurking in the background.

## II. *BLISS v. THE ATTORNEY GENERAL OF CANADA*

### A. *An Outline of the Case*

The facts of the case may be stated quite simply. On September 25, 1975, Mrs. Stella Bliss began working for an automobile dealer in Vancouver, B.C. She was pregnant. In early January of the following year, she was fired because of her pregnancy. Concurrent with an unsuccessful application for unemployment insurance benefits, she lodged a successful complaint with the British Columbia Human Rights Commission and was reinstated in her job. She worked until March 12, 1976,<sup>12</sup> and gave birth to her child four days thereafter. Her doctor certified that she was able to work as of March 22, 1976,<sup>13</sup> and the uncontroverted evidence was that, as of that date, she was capable of,

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<sup>11</sup> See Kuhn, *The Structure of Scientific Revolutions* (2d ed. Chicago: U. Chi. Press, 1970) for a development of the concept of paradigm shift in the history of science. For a fascinating account of the legal relationship between competing legal paradigms in the context of western thought, see Kelly, *Gaius Noster: Substructures of Western Social Thought* (1979), 84 Am. Hist. Rev. 619. See also Smith and Weisstub, *The Evolution of Western Legal Consciousness* (1979), 2 Int'l J. of L. Psych. 215.

<sup>12</sup> It is not clear whether Mrs. Bliss left her job voluntarily or was fired. In a submission to the Unemployment Insurance Commission filed on her behalf, her union (Local 1 of the Service, Office, and Retail Workers Union of Canada) claimed that she had been fired. Collier J., sitting as the Umpire, thought that the question was unclear.

A note about the sources of my information: The Judgments of the Umpire, and of the Federal Court of Appeal which reviewed that decision, are not reported. They have been compiled, along with the relevant documents submitted to the Commission, in what the Supreme Court terms the "Appeal Case" (or Appeal Book). All references to these materials are to the *Appeal Case* compiled by the Court. For the representation to the Commission by the union, see *Appeal Case* at 46. For the remarks of Collier J. noted above, see *Appeal Case* at 51.

<sup>13</sup> *Appeal Case*, *id.* at 51.

and available for, work. Unable to find suitable employment, she renewed her claim for unemployment insurance benefits. Once again, she was unsuccessful.

The *Unemployment Insurance Act*<sup>14</sup> sets out the general conditions that one must satisfy in order to qualify for benefits. Section 17(2) provides that one qualifies for benefits if he or she has had eight or more weeks of insurable employment within the qualifying period<sup>15</sup> and has had an interruption of earnings from unemployment. In addition, section 25 provides that no benefits will be paid for any working day for which the claimant fails to prove that he or she was either capable of, and available for, work but unable to find suitable employment on that day, or incapable of work by reason of any prescribed illness, injury or quarantine on that day.

Until 1971, there were no provisions in the Act for the payment of maternity benefits. Following the recommendations of a White Paper<sup>16</sup> which was tabled in 1970, the Act was revised in 1971 to include the provision of maternity benefits.<sup>17</sup> The legal framework is as follows: section 30(1) provides that, notwithstanding sections 25 or 46, maternity benefits will be paid provided that the claimant has had ten or more weeks of insurable employment in the twenty weeks that immediately preceded the thirtieth week before her expected date of confinement. In effect, this means that in order to qualify for maternity benefits, the claimant must have been working (or receiving benefits)<sup>18</sup> at the time she got pregnant. If she qualifies under this section, benefits may be paid for a total of fifteen weeks.<sup>19</sup> The claimant need not establish her willingness or capacity to work.

This special regime for maternity benefits is reinforced by the provisions

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<sup>14</sup> This paper deals with the Act as it was at the time that Mrs. Bliss made her claim. There have been recent amendments to the Act pursuant to Bill C-14, passed by the House of Commons December 22, 1978, which have the effect, among other things, of lengthening the basic qualification period to twenty weeks. The amendments do not change the special regime for maternity benefits.

<sup>15</sup> The basic qualifying period is the period of fifty-two weeks that immediately precedes the week in which the claim for benefits is made. See Douglas, "The Canadian Unemployment Insurance Programme," [1976] *Law Society of Upper Canada Special Lectures* (Toronto: De Boo, 1976) 149 at 160.

<sup>16</sup> Dep't of Lab., *Unemployment Insurance in the 70's* (Ottawa: Queen's Printer, 1970).

<sup>17</sup> S.C. 1970-71-72, c. 48. The revised Act also corrected the anomaly in the old Act with respect to illness benefits. When illness benefits were incorporated into the Act in 1955 they were only payable if a person fell ill while receiving benefits. The 1971 revision allowed one to receive benefits if the job was lost due to illness. See Douglas, *supra* note 15.

<sup>18</sup> S. 30(1) provides that any weeks in which the claimant has received benefits immediately preceding the thirtieth week before her expected date of confinement shall be deemed to be weeks of insurable employment.

<sup>19</sup> Under s. 30(2) of the *Unemployment Insurance Act* as it was at the time of Mrs. Bliss's claim, the fifteen-week period was defined as the period that begins eight weeks before the week in which the claimant is expected to be confined, or that period that begins eight weeks before the expected week of confinement and ends six weeks after the week in which her confinement occurs. After the enactment of the *Statute Law (Status of Women) Amendment Act, 1974*, Bill C-16, 1974-75-76 (30th Parl., 1st Sess.) the fifteen-week period could begin eight weeks before, or at the actual time of, confinement.

of section 46, which provide that unless a claimant qualifies under section 30, she may not claim ordinary benefits (assuming that she left work because of pregnancy) for a period of approximately fifteen weeks.<sup>20</sup> This disqualification obtains even if the claimant is able and willing to work.

In summary, the Act creates three kinds of benefits for those who, having been employed in insurable employment for a certain period of time, cease to be employed. The first class may be termed the ordinary benefits, available to those unemployed who are capable of, and available for, work. The second class may be termed the illness benefits. They are available even though the claimant is (obviously) incapable of working. Maternity benefits differ from the first two classes in the following ways. First, the woman claiming maternity benefits must have been employed for a longer period of time than those claiming the other kinds of benefits. Second, the time period during which she must have worked in order to qualify is more circumscribed than is the ordinary qualifying period—the claimant must have been working, or receiving benefits, at the time she got pregnant. Finally, although maternity benefits are available even though a woman is incapable of, or unavailable for, work, she cannot get ordinary benefits, even if she is capable of, and available for, work, so long as her interruption of employment was due to pregnancy.

It is clear that Mrs. Bliss did not fulfil the conditions of section 30 and therefore did not qualify for maternity benefits. It is equally clear that, but for the fact that her unemployment was caused by her pregnancy (thereby invoking section 46), she would have been entitled to ordinary benefits.<sup>21</sup>

The Unemployment Insurance Commission treated her as if she were applying for maternity benefits, and found her ineligible.<sup>22</sup> Unsuccessful in an appeal to the Board of Referees—the only issue that the Board felt that it ought to consider was whether or not she had worked the requisite number of weeks to qualify under section 30<sup>23</sup>—she appealed to the Umpire.<sup>24</sup>

In the appeal she asserted that section 46 was rendered inoperative by virtue of section 1(b) of the *Canadian Bill of Rights*.<sup>25</sup> She made two related

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<sup>20</sup> *The Unemployment Insurance Act*, s. 46.

<sup>21</sup> See *Appeal Case*, *supra* note 12, at 52 per Collier J.

<sup>22</sup> Ruling of April 5, 1976. See *Appeal Case*, *id.* at 34, as corrected by the Record of Interview, June 11, 1976, *op. cit.* at 35.

<sup>23</sup> Record of Proceedings and Decision of the Board of Referees, *Appeal Case*, *id.* at 36-37.

<sup>24</sup> The Umpires are appointed by the Governor in Council from the ranks of the judges of the Federal Court of Canada, the judges of superior, district or county courts of the Provinces who are members of the Pension Appeals Board, and the members of the Tax Review Board. The Umpire is not bound by the formal rules of evidence, nor is he required to hold a hearing.

For a discussion of the administrative procedures see Issalys and Watkins, *Unemployment Insurance Benefits: A Study of Administrative Procedure in the Unemployment Insurance Commission* (Ottawa: Law Reform Comm'n, 1977). See also Douglas, *supra* note 15.

<sup>25</sup> The argument that s. 46 could be construed so as to entitle her to ordinary benefits was not considered by the Umpire, nor by the courts that reviewed his decision.



arguments. First, she claimed that the impugned section constituted sex discrimination because unemployed pregnant (or "delivered") women, who are capable of, and available for, work, are denied benefits whereas men (who cannot fall within the maternity benefit regime) who are capable of, and available for, work will receive benefits. Second, she argued that section 46 discriminated between classes of women in the following way: a pregnant or delivered woman (who is capable of, and available for, work) is denied benefits whereas a non-pregnant woman in the same circumstances will receive benefits. This was alleged to constitute a denial of equality before the law.

These arguments found favour with Collier J., sitting as the Umpire. He first considered the "purpose and scheme of the statute as a whole."<sup>26</sup> The general purpose was said to be the limited replacement of lost earnings for those who have suffered an interruption of earnings.<sup>27</sup> After briefly considering the complicated provisions of the *Unemployment Insurance Act*, Collier J. concluded that the general scheme of the Act was to provide benefits to those who are capable of, and available for, work.

The "availability" provisions are, to my mind, more than mere disentitlement formulas. They are the source of a basic concept in the legislation: provided a claimant is capable of and available for work, entitlement is the rule.

Section 46 is a departure, and more, from the general statutory scheme. It plainly denies benefits to certain claimants, who might otherwise be covered by the entitlement provisions, even though those claimants prove themselves separated from employment, capable of and available for work, but unable to obtain suitable employment. . . . I am driven to the inescapable conclusion that the impugned section, accidentally perhaps, authorizes discrimination by reason of sex, and as a consequence, abridges the right of equality of all claimants in respect of the Unemployment Insurance legislation.<sup>28</sup>

As a result, the decision of the Board of Referees and of the Commission was set aside. The Attorney General of Canada sought the review of this decision, and on June 2, 1977, the Federal Court of Appeal delivered a judgment reversing Collier J. and affirming the Board of Referees' denial of benefits to Mrs. Bliss.

### B. *The Federal Court of Appeal*

Writing for a unanimous court,<sup>29</sup> Pratte J. reviewed the kinds of benefits available under the *Unemployment Insurance Act*, and then turned to the issue of the Bill of Rights. First, he rejected the claim that discrimination by means of

<sup>26</sup> *Appeal Case*, *supra* note 12, at 59.

<sup>27</sup> This has become the dominant rationale for almost all unemployment insurance programmes. See Blaustein and Craig, *An International Review of Unemployment Insurance Schemes* (Kalamazoo: Upjohn Inst. of Empl. Research, 1977) at 1. It is worth noting that this is not always the case. In the United States, during the 1930's and 1940's, the "payment of benefits" rationale was in competition with the notion that unemployment insurance schemes existed to encourage employers to stabilize employment. See Burns, *Unemployment Compensation and Socio-Economic Objects* (1945), 55 Yale L.J. 1 at 7-8. This latter rationale was also accepted in Canada. See Careless, *Initiative and Response* (Montreal: McGill-Queen's U. Press, 1977) at 26-27.

<sup>28</sup> *Appeal Case*, *supra* note 12, at 63-64.

<sup>29</sup> The bench was composed of Pratte, Heald and Urie JJ.

sex alone would violate the *Canadian Bill of Rights*. He then defined the issue as "not whether the Respondent [had] been the victim of discrimination by reason of sex but whether she [had] been deprived of the 'right to equality before the law' declared by s. 1(b) of the Canadian Bill of Rights. . . ." <sup>30</sup> Mr. Justice Pratte then volunteered the observation that section 46 did not discriminate against Mrs. Bliss by reason of her sex.

Section 46 applies to pregnant women, it has no application to women who are not pregnant, and it has no application, of course, to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women. <sup>31</sup>

Turning to the claim that the *Unemployment Insurance Act* denied Mrs. Bliss the right to equality before the law, Pratte J. noted that equality before the law "cannot be interpreted literally as meaning that all persons must have, under all statutes, exactly the same rights and obligations." <sup>32</sup> He found instead that it must mean that an individual has the right to "be treated by the law in the same way as other individuals in the same situation." <sup>33</sup> Pratte J. then went on to define the "sameness" of a situation in terms of relevance:

When a statute distinguishes between persons so as to treat them differently, the distinctions may be either relevant or irrelevant. The distinction is relevant when there is a logical connection between the basis for the distinction and the consequences that flow from it; the distinction is irrelevant when that logical connection is missing. In the light of those considerations, the right to equality before the law could be defined as the right of an individual to be treated as well by the legislation as others who, if only relevant facts were taken into consideration, would be judged to be in the same situation. <sup>34</sup>

He then noted the "equality in the administration and application" test of equality before the law enunciated by Ritchie J. in the *Lavell* case, <sup>35</sup> and concluded that, on either of the tests considered, section 46 of the *Unemployment Insurance Act* did not deprive Mrs. Bliss of her right to equality before the law. <sup>36</sup>

Pratte J. concluded his reasons for judgment by making the following observations. First, he found that Parliament must have considered that unemployment caused by pregnancy ought to be treated differently from either unemployment caused by illness, or unemployment giving rise to the payment of ordinary benefits, and "[w]hile such a distinction may be thought to be unwarranted, it cannot be said to be entirely without foundation." <sup>37</sup> What was

<sup>30</sup> *Appeal Case*, *supra* note 12, at 73.

<sup>31</sup> *Id.* at 73-74.

<sup>32</sup> *Id.* at 74. Pratte J. distinguished *The Queen v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, on the ground that this was not a case of it being an "offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity." *Op. cit.* at 298 (S.C.R.), 486 (D.L.R.), 367 (C.C.C.).

<sup>33</sup> *Appeal Case*, *id.* at 75.

<sup>34</sup> *Id.*

<sup>35</sup> *A.G. Can. v. Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481, 23 C.R.N.S. 197.

<sup>36</sup> *Appeal Case*, *supra* note 12, at 76.

<sup>37</sup> *Id.*

this foundation? Mr. Justice Pratte observed that unemployment caused by pregnancy

is usually the result of a voluntary act. Moreover, Parliament possibly considered desirable that pregnant women refrain from work for 14 weeks on the occasion of their confinement. It was not illogical, then, to deny them during that time, the benefits which are payable only to those who are available for work and to grant them the right to receive benefits of a new kind, payable without regard to the capacity to work or the availability for work. Having created this new kind of benefit in favour of pregnant women, Parliament had to determine on what conditions they would be payable. More precisely, it had to determine after what period of employment women would be entitled to receive them. . . . Parliament chose to provide that the period of employment required to qualify for the pregnancy benefits, which are in certain respects more generous than the ordinary benefits, should be longer than the period required for those other benefits. That decision may be thought to have been unwise, but nevertheless, it cannot be said that it was founded on irrelevant considerations. . . .<sup>38</sup>

As a result, the decision of Collier J. was set aside and the matter was referred back to him on the basis that section 46 did not contravene section 1(b) of the *Canadian Bill of Rights*. On June 14, 1977, Collier J. affirmed the decision of the Board of Referees.<sup>39</sup>

On September 29, 1977, the Federal Court of Appeal granted leave to appeal to the Supreme Court of Canada.<sup>40</sup>

### C. *The Supreme Court of Canada*

Mr. Justice Ritchie, in writing the decision of the Court affirming the Federal Court of Appeal, began his judgment by noting "the heavy financial burden"<sup>41</sup> on Parliament in discharging its constitutional authority under section 91(2a) [Unemployment Insurance] of the *British North America Act*.<sup>42</sup> The *Unemployment Insurance Act* was characterized as a "scheme for the insurance of those unemployed members of the work force who fulfil the qualifications therein specified."<sup>43</sup> He argued that the fact that the Act differentiates between people who fulfil its conditions and those who do not cannot be the basis for invalidating the legislation.

It was, in my view, necessary for the effective exercise of the authority conferred by s. 91(2) (a) of the *British North America Act* that Parliament should prescribe conditions of entitlement to the benefits for which the Act provides. The establishment of such conditions was an integral part of a legislative scheme enacted by Parliament for a valid federal purpose in the discharge of the constitutional authority entrusted to it under s. 91(2) (a) and the fact that this involved treating claimants who fulfill the conditions differently from those who do not, cannot, in my opinion, be said to invalidate such legislation.<sup>44</sup>

He then went on to consider the combined operation of sections 30 and 46, which he characterized as a "complete code dealing exclusively with the

<sup>38</sup> *Id.* at 76-77.

<sup>39</sup> *Id.* at 659.

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Supra* note 7, at 185 (S.C.R.), 418 (D.L.R.), 234 (C.L.L.C.).

<sup>42</sup> *British North America Act, 1867*, 30 & 31 Vict., c. 3 [hereinafter *B.N.A. Act*].

<sup>43</sup> *Supra* note 7, at 185-86 (S.C.R.), 418 (D.L.R.), 234 (C.L.L.C.).

<sup>44</sup> *Id.* at 136 (S.C.R.), 418-19 (D.L.R.), 234 (C.L.L.C.).

entitlement of women to unemployment insurance benefits during the specified part of the period of pregnancy and childbirth."<sup>45</sup> He appears to have dismissed the claim that this constituted discrimination by reason of sex. "[T]hese provisions form an integral part of a legislative scheme enacted for valid federal objectives and they are concerned with conditions from which men are excluded. Any inequality between the sexes in this area is not created by legislation but by nature."<sup>46</sup>

It also appears that he would deny that discrimination by reason of sex would, in and of itself, violate the *Canadian Bill of Rights*, for he cites with approval the reasoning of Mr. Justice Pratte, noted above.<sup>47</sup> It must be noted that counsel for Mrs. Bliss made the same concession in the *factum* submitted to the Court.<sup>48</sup>

He then considered the claim that section 46 violated equality before the law because it denied pregnant and child-bearing women (who fail to fulfil the conditions required by section 30(1) of the *Unemployment Insurance Act*) benefits available to other claimants both male and female, who had fulfilled the ordinary requirements for entitlement.<sup>49</sup> He distinguished the case from *Drybones*, and dovetailed the analysis into the definition of equality before the law that he enunciated in the *Lavell* case.

There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *Regina v. Drybones* . . . and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during which no benefits are available. The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected; the other involves a definition of the qualifications required for entitlement to benefits, and in my view the enforcement of the limitation provided by s. 46 does not involve denial of equality of treatment in the administration and enforcement of the law before the ordinary courts of the land as was the case in *Drybones*.<sup>50</sup>

He then turned to the "relevant facts" test enunciated by Mr. Justice Pratte in the Federal Court of Appeal,<sup>51</sup> and the argument that it was not relevant to differentiate between pregnant and child-bearing women who fall outside section 30(1) of the *Unemployment Insurance Act*, and all other claimants who are capable of and available for work. Mr. Justice Ritchie disposed of this argument by referring to the "pre-1971 assumption 'that women eight weeks before giving birth and six weeks after, were, generally speaking, not capable of nor available for work. . .'" He concluded that:

<sup>45</sup> *Id.* at 190 (S.C.R.), 422 (D.L.R.), 236 (C.L.L.C.).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 190-91 (S.C.R.), 422 (D.L.R.), 236 (C.L.L.C.).

<sup>48</sup> Appellant's *Factum* at 8.

<sup>49</sup> By considering the question of equality before the law after a finding that there was no discrimination on the basis of sex, the court is implicitly adopting a view of equality before the law that gives it a life independent of the enumerated categories of discrimination in the opening words of s. 1 of the Bill of Rights. See MacPherson, *Developments in Constitutional Law: The 1978-79 Term* (1908) S. Ct. L. Rev. 77 at 113-15.

<sup>50</sup> *Supra* note 7, at 191 (S.C.R.), 422 (D.L.R.), 236 (C.L.L.C.).

<sup>51</sup> *Id.* at 191-92 (S.C.R.), 423 (D.L.R.), 237 (C.L.L.C.). This definition of equality before the law was accepted by counsel for Mrs. Bliss, *supra* note 48, at 10-11.

there can . . . with all respect, be no doubt that the period mentioned in s. 46 is a relevant one for consideration in determining the conditions entitling pregnant women to benefits under a scheme of unemployment insurance enacted to achieve the valid federal objective of discharging the responsibility imposed on Parliament by s. 91(2A) of the *British North America Act*.<sup>52</sup>

Mr. Justice Ritchie then cited a remark made by Mr. Justice Laskin in the case of *Curr v. The Queen*<sup>53</sup> which, though concerned with the "due process" provision of the *Canadian Bill of Rights*, was thought to apply "with equal force"<sup>54</sup> to the case at hand.

[C]ompelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*.<sup>55</sup>

He then cites with approval the remarks of Mr. Justice Martland, who had considered the meaning of "equality before the law" in two earlier cases.<sup>56</sup> The essence of Mr. Justice Martland's approach, adopted by Mr. Justice Ritchie, is captured in the following sentence from the *Prata* case: "Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective."<sup>57</sup>

This test being "directly applicable to the circumstances here disclosed,"<sup>58</sup> Mr. Justice Ritchie dismissed the appeal.

#### D. *A Preliminary Critique*

At this point in the inquiry, two of the "approved" definitions of equality discussed in the *Bliss* case will be examined. There will be occasion to examine the other definitions of equality in Part V of this paper following an analysis of the problems that confront the Court in a case such as this.

The first to be examined is the "valid federal objective" test. The concern here is only with the question of how this approach functions as a test of the compatibility of a piece of legislation with the *Canadian Bill of Rights*, for if it can be shown that the test, as conceived and applied by the Court, could never function to render legislation inoperative, one would be driven to question the validity of the test as a test. This, it is suggested, is the fatal flaw of the "valid federal objective" test as enunciated and applied by the Supreme Court of Canada. Consider how it functions.

What is obvious at the outset is that the "bite" of this test will depend

<sup>52</sup> *Bliss*, *id* at 193 (S.C.R.), 424 (D.L.R.), 237 (C.L.L.C.).

<sup>53</sup> [1972] S.C.R. 889, 26 D.L.R. (3d) 603, 7 C.C.C. (2d) 181.

<sup>54</sup> *Supra* note 7, at 193 (S.C.R.), 424 (D.L.R.), 238 (C.L.L.C.).

<sup>55</sup> *Supra* note 53, at 899 (S.C.R.), 613-14 (D.L.R.), 191-92 (C.C.C.).

<sup>56</sup> *R. v. Burnshine* [1975] 1 S.C.R. 693, 44 D.L.R. (3d) 584, 15 C.C.C. (2d) 505; *Prata v. M.M.I.*, [1976] 1 S.C.R. 376, 52 D.L.R. (3d) 383, 3 N.R. 484.

<sup>57</sup> *Id.* at 382 (S.C.R.), 387 (D.L.R.), 490 (N.R.).

<sup>58</sup> *Supra* note 7, at 194 (S.C.R.), 425 (D.L.R.), 238 (C.L.L.C.).

upon the conception that the Court adopts of the concepts of "validity" and "objective."<sup>59</sup> One could imagine the Court giving a narrow or wide reading to those terms. For example, the criterion for *validity* might mean whether or not the law in question conformed to the norms embodied in the Bill of Rights. Therefore a law that was directed at the suppression of a minority on account of race could not be said to have been passed for a *valid* federal objective. On the other hand, one could imagine a very wide meaning given to the term. As long as a law was directed at an objective that was within the legislative competence of Parliament, the criterion of validity would be satisfied. Thus, if the above-mentioned law was an amendment to the *Criminal Code*<sup>60</sup>—the enactment of criminal laws being clearly within Parliament's legislative competence—the law would not be deemed to lack the validity required by the test.

Similar considerations apply to the question of objectives. On a narrow reading, one might inquire into the purpose of the law independent of the broad constitutional authority to pass laws of that kind. One would ask, for example, whether it is an appropriate exercise of the criminal law power to punish one racial class more severely than another. On a wider reading, one would ask only if the law was, in fact, criminal legislation. If it was, then it was passed for the valid federal objective of making laws in relation to criminal law.

The way in which this test was applied in the *Bliss* case makes it evident that the Court has given a very wide reading to these terms. The key to the reasoning of the Court is embodied in a passage already cited, in which Mr. Justice Ritchie equates the "valid federal purpose" with Parliament's constitutional authority to pass laws in relation to unemployment insurance.<sup>61</sup>

The outcome is that the validity of the "federal objective" seems to be defined exclusively in terms of the constitutional authority of Parliament under the *B.N.A. Act*, or, to put it more bluntly, the test as applied by the Court appears to circumvent the Bill of Rights altogether. Unless the questions of validity and objective (purpose) are defined in terms other than those pertaining to the division of legislative authority under the *B.N.A. Act*, no law that would pass the *ultra vires* test would fail the "valid federal objective" test as applied by the Court. Thus the test is, at least as it is now applied, functionally impotent.

What then of the "relevant facts" test of which the Court approved? *Prima facie*, this is consistent with the conventional wisdom surrounding the meaning of equality before the law, but, upon closer examination, it too breaks down

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<sup>59</sup> On the distinction between concepts and conceptions, see Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978) at 134-35.

<sup>60</sup> R.S.C. 1970, c. C-34.

<sup>61</sup> Consider as well the following excerpt from the judgment, where Mr. Justice Ritchie notes that s. 46 "constitutes a limitation on the entitlement to benefits of a specific group of individuals *and as such* was part of a valid federal scheme." *Supra* note 7, at 191 (S.C.R.), 423 (D.L.R.), 237 (C.L.L.C.) [emphasis added].

as a test. The key is in the concept of relevance. Mr. Justice Pratte had defined a relevant distinction in terms of a "logical connection between the basis for the distinction and the consequences that flow from it."<sup>62</sup>

It appears that Pratte J. has enunciated a test which is tautological. Suppose that a law treated class X differently than it did class Y. The very fact that the law distinguished between them means that there will be a logical connection between the basis of the distinction and the consequences that flow from it. It is easy to imagine the kinds of laws that could be passed without violating this test. This test, with its definition of relevance, turns out to be even more impotent than was the "valid federal objective" test. With respect to the latter, there is at least the possibility that a court would be persuaded to question a law's purpose more closely, and in a manner independent of the question of legislative competence. With the "relevance as a logical connection" test, the conformity of the law with the Bill of Rights is guaranteed.

The functional sterility of these two tests suggests a deep problem that haunts the Court in its interpretation and application of the *Canadian Bill of Rights*. It is this problem that is now considered.

### III. THE CONSTRAINTS OF CANADIAN LEGAL CULTURE

#### A. *General Comments*

To state the issue simply, judicial review under the *Canadian Bill of Rights* is problematic in the context of Canadian legal culture.<sup>63</sup> The evolution of doctrine under the Bill of Rights can be understood only in terms of the Supreme Court's reluctance to interfere with the substantive policies enacted by Parliament. Part of this reluctance flows from the general problems inherent in judicial review, a matter discussed in Part V of this essay. However, some of this reluctance must be attributed to the political and legal philosophy that is a central part of Canadian legal culture.

A qualification is in order. It is misleading to speak of our legal culture as if it were a homogeneous, monolithic whole.<sup>64</sup> Different visions of the way in which the legal order should be arranged are in competition with each other in every law school in the country. In addition, the way in which the Supreme Court of Canada treats issues arising under the Bill of Rights is not the only

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<sup>62</sup> *Appeal Case*, *supra* note 12, at 75. Although Mr. Justice Ritchie did not cite this part of Mr. Justice Pratte's definition, it is the core aspect of the test as conceived by the latter. If Mr. Justice Ritchie did not approve of this aspect one would expect some explicit reference thereto.

<sup>63</sup> We may think of legal culture as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught." See Ehrmann, *Comparative Legal Cultures* (Englewood Cliffs, N.J.: Prentice-Hall, 1976) at 8. As such, it is part of the wider concept of political culture.

<sup>64</sup> For a fascinating account of Canadian political culture(s), see Bell and Tepperman, *The Roots of Disunity* (Toronto: McClelland & Stewart, 1979).

way in which these questions are addressed by the Canadian judiciary. Lower court judges have taken a more searching look at the implications of the Bill of Rights for their function,<sup>65</sup> and even within the Supreme Court itself, differences in judicial approach can be discerned.<sup>66</sup> This being so, it is still possible to identify the dominant tradition of Canadian legal culture, and to reveal the extent to which it affects the Supreme Court in its interpretation of the Bill of Rights.

The defining characteristic of the Canadian legal system is the central place occupied by the principle of the supremacy of Parliament. It is said to be part of our inheritance from English law,<sup>67</sup> and part of Canadian constitutional law by virtue of the preamble to the *B.N.A. Act* which provides for "a constitution similar in principle to that of the United Kingdom."<sup>68</sup>

According to Dicey, the Parliamentary supremacy principle meant that Parliament can make or unmake any law whatsoever, and that no person or body has the right to override or set aside the legislation of Parliament.<sup>69</sup> In his own words, "[t]he one fundamental dogma of English Constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament."<sup>70</sup>

Dicey's interpretation is only one of many possible interpretations of the principle,<sup>71</sup> and it has not enjoyed universal approval by students of constitutional law.<sup>72</sup> Nevertheless, there are two reasons why, at this point in the inquiry, it ought to be considered at face value. First, it is intimately connected with Dicey's conception of the rule of law, which has figured so prominently in the Court's interpretation of the Bill of Rights.<sup>73</sup> Second, despite the criticism levelled at it, Dicey's conception of the supremacy of Parliament has been taken seriously by both scholars and judges, and it played a formative part in the evolution of the Bill of Rights jurisprudence over the last two decades.

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<sup>65</sup> See, e.g., the judgment of Stephenson J. in *R. v. Mackay* (1975), 70 D.L.R. (3d) 214, 30 C.C.C. (2d) 349, *rev'd* 5 A.R. 154 (Alta. D.C.). Also compare the way in which the *Bliss* case was treated by Collier J., sitting as the Umpire, with the way in which the Supreme Court of Canada handled it.

<sup>66</sup> Compare the judgment of Beetz J. in *A.G. Can. v. Canard*, [1976] 1 S.C.R. 170, 52 D.L.R. (3d) 548, [1973] 3 W.W.R. 1 with the judgments of Ritchie and Martland JJ. in the same case. Also compare the judgment of Laskin J. (as he then was) and Ritchie J. in the *Lavell* case, *supra* note 35.

<sup>67</sup> See Laskin, "The British Tradition in Canadian Law," in *The Hamlyn Lectures*, 21st Ser. (London: Stevens, 1969).

<sup>68</sup> 30 & 31 Vict., c. 3.

<sup>69</sup> Dicey, *The Law of the Constitution* (10th ed. London: Macmillan, 1965) at 39-40.

<sup>70</sup> *Id.* at 145.

<sup>71</sup> Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 145.

<sup>72</sup> See, e.g., Lyon, *The Central Fallacy of Canadian Constitutional Law* (1976), 22 McGill L.J. 40; Beaudoin, *La Cour Supreme et la Protection des Droits Fondamentaux* (1975), 53 Can. B. Rev. 675 at 708.

<sup>73</sup> *Lavell*, *supra* note 35. On Dicey's conception of the Rule of Law as it has affected Canadian legal culture, see Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business* (1979), 17 Osgoode Hall L.J. 1 at 3-7.



The striking feature about Dicey's definition is the subordinate role that it dictates for the judiciary with respect to Parliament. Taken seriously, it means that a court cannot refuse to apply a valid law of Parliament, regardless of its content. It follows that any inquiry into the "purpose" of the law will only be in order to discover the "intent" of Parliament; it will not be to question the appropriateness of the objective sought. The corollary of this is that, whatever moral rights one may claim against the government, they are not legally enforceable in the absence of a positive law embodying those rights.<sup>74</sup>

The controversy surrounding the Bill of Rights, even before it was enacted, reveals the degree to which Dicey's notion of the supremacy of Parliament was taken seriously. Though doubts were expressed as to the scope of the Bill—whether Parliament had the authority to pass a Bill of Rights with the rights enumerated as they were<sup>75</sup>—concern about the Bill of Rights centred on the consequences of its non-entrenchment in light of the Parliamentary supremacy principle.<sup>76</sup>

First, it was noted that the Bill of Rights could be repealed at any time. As such it was perceived to be a weak guarantee of those human rights and fundamental freedoms that "shall continue to exist" in Canada. What should one make of this? Except to the extent that entrenchment might have a greater symbolic value (especially as a "signal" to the judiciary to take the Bill of Rights more seriously), the fact that the Bill of Rights is not entrenched does not appear to have any great significance for several reasons. First, Parliament need not repeal the Bill of Rights to avoid its operation. Either by including a "*non-obstante*" clause into its legislation,<sup>77</sup> or by invoking the *War Measures Act*,<sup>78</sup> Parliament can circumvent the Bill of Rights altogether. Second, one must not overlook the political constraints militating against repeal of the *Canadian Bill of Rights*. Just as Parliament could, but would not, repeal the *Supreme Court Act*,<sup>79</sup> so too would Parliament be reluctant to incur the political costs of repealing the Bill of Rights. In the final analysis, no Bill of Rights can guarantee fundamental rights when the government is determined to deny them; it is erroneous to think that all it takes is a more activist court or an entrenched Bill of Rights. Our ultimate protection resides in the degree to

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<sup>74</sup> In Bentham's words the idea of enforceable moral rights against the government is "nonsense on stilts." See *Anarchical Fallacies: Being an Examination of Rights Issued During the French Revolution*, published in French as *Sophismes Politiques* (Paris: Dumont, 1816).

<sup>75</sup> Pigeon, *The Bill of Rights and the British North America Act (1959)*, 37 Can. B. Rev. 66.

<sup>76</sup> What follows is an attempt to distill the concerns expressed in the voluminous literature produced in response to the proposal to enact the Bill of Rights; see generally (1959), 37 Can. B. Rev. for a collection of articles on this subject.

<sup>77</sup> The *non obstante* clause refers to that part of section 2 of the Bill of Rights which contemplates that Parliament can avoid the application of the Bill to its legislation by inserting a clause into the legislation expressly declaring that it shall operate notwithstanding the Canadian Bill of Rights.

<sup>78</sup> The *Canadian Bill of Rights*, s. 6.

<sup>79</sup> R.S.C. 1970, c. S-19.

which these fundamental rights are taken seriously by all branches of government, and by the public at large.<sup>80</sup>

The second aspect of the non-entrenchment question also concerns the Parliamentary supremacy principle. If Parliament is supreme, how can it bind itself with respect to the substance of future legislation?<sup>81</sup> Since Parliament can "unmake" any law, would not any Act passed subsequent to the Bill of Rights, though inconsistent with the Bill of Rights, implicitly repeal the Bill of Rights? This point can be stated in a more moderate way. If Parliament is supreme, and given that the Bill of Rights is directed at it as well as the courts,<sup>82</sup> would not the fact that Parliament passed a law after the enactment of the Bill of Rights be proof that it was consistent with it?<sup>83</sup>

In addition to the attention paid by scholars to these aspects of Parliamentary supremacy, a great deal of debate surrounded a related aspect of the Bill of Rights. It was assumed, subject to the problems alluded to above, that

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<sup>80</sup> Jackson, *The Supreme Court in the American System of Government* (Cambridge, Mass.: Harv. U. Press, 1955) at 81; consider also the remarks of Professor Tarnopolsky, *The Supreme Court and the Canadian Bill of Rights* (1975), 53 Can. B. Rev. 649 at 652:

One must be realistic and understand that the most one can expect from a written Bill of Rights and judicial review is control of administrative and police action and the occasional invalidation of legislative action, subject to being overridden in the latter instance by a Parliament determined to have its way even in the face of a determination that its legislative acts are in contravention of civil liberties.

Whether the courts do hold legislative or administrative action inoperative or invalid, is not always as important as the fact that they *can* do so, and as the fact that in rendering their decisions they can amplify the terse terms of a Bill of Rights and infuse them with principles to which society aspires and will compel, even indirectly, the public servants to adhere to. Even in the United States, the Supreme Court has invalidated very few Acts of Congress, but its judgments are guidance of what will be tolerated.

For an argument that the *only* effective (and possible) restraints on the abuse of state power reside in the opinions of the population as to what forms of governmental action are impermissible, see Hayek, 3 *Law, Legislation and Liberty* (Chicago: U. Chi. Press, 1979), ch. 18.

<sup>81</sup> For a discussion on the "manner and form" controversy, see Tarnopolsky, *supra* note 1, at 435-38; and Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), ch. 3.

<sup>82</sup> The *Canadian Bill of Rights*, s. 3, directs the Minister of Justice to examine every bill and regulation to ensure that it is not inconsistent with the Bill of Rights.

<sup>83</sup> In *Miller v. The Queen*, [1977] 2 S.C.R. 680, 11 N.R. 386, 31 C.C.C. (2d) 177, where the Court held that the death penalty was not cruel and unusual punishment contrary to s. 2(b) of the Bill of Rights, Mr. Justice Ritchie came very close to adopting this position. After noting that Parliament had amended those parts of the *Criminal Code* dealing with the death penalty *after* the enactment of the Bill of Rights, he noted:

In my view the fact that Parliament saw fit to retain the death penalty as part of the *Criminal Code* after the enactment of the *Bill of Rights* constitutes strong evidence of the fact that it had never been intended that the word "punishment" as employed in s. 2(b) should preclude punishment by death in the case of an individual who has been duly convicted of murder.

*Op. cit.* at 705 (S.C.R.), 394 (N.R.), 196 (C.C.C.).

The Chief Justice disagreed. He stated that, "the *Canadian Bill of Rights* cannot be governed in its interpretation and application by the course of parliamentary legislation, especially post-*Canadian Bill of Rights* legislation." *Op. cit.* at 686 (S.C.R.), 406 (N.R.), 181 (C.C.C.). The Chief Justice is correct.

Parliament could pass a Bill of Rights directing the courts to declare inoperative any legislation that was inconsistent with the Bill of Rights. The question is whether Parliament had done this.

Recall the wording of the *Canadian Bill of Rights*. Section 2 reads, in part, as follows: "Every law of Canada shall, . . . be so construed and applied as not to abrogate, abridge or infringe, or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared. . . ."<sup>84</sup> It does not say that 'Parliament shall pass no law infringing the right to'<sup>85</sup> nor does it say that, in cases of conflict, the judge should give overriding effect to the Bill of Rights. It is possible to read it as merely a symbolic articulation of basic principles to guide judges in their interpretation of the law; it is also possible to read it as a mandate for judicial review. In consideration of the problems alluded to above, it was not surprising that a great number of scholars opted for the former interpretation,<sup>86</sup> and that judges, called upon to interpret the Bill of Rights, seized on the ambiguity of the Bill to avoid interfering with otherwise valid Acts of Parliament.

In an early case under the Bill of Rights, Mr. Justice Davey of the British Columbia Court of Appeal was of the opinion that the Bill of Rights was no more than a statute of interpretation, which must yield if an Act of Parliament could not be "construed and applied" in accordance with it.<sup>87</sup> This interpretation is totally consistent with the Parliamentary supremacy principle, and it survived for a number of years until it was repudiated by the majority opinion in the *Drybones* case.

Perhaps the best testament to the hold that Parliamentary supremacy exercises over the Canadian legal mind is found in Chief Justice Cartwright's dissent in *Drybones*. In an earlier case,<sup>88</sup> he had argued, in dissent, that the Bill of Rights was more than an interpretation statute. His remarks were cited with approval by Mr. Justice Ritchie in *Drybones*.<sup>89</sup> However, in *Drybones*, the Chief Justice had changed his mind.<sup>90</sup>

Although the *Drybones* case need not be discussed at length, since it has already attracted a considerable amount of comment,<sup>91</sup> there are aspects of the case that help illustrate the influence that the Parliamentary supremacy principle has had on the courts' application of the Bill of Rights.

The manner in which the majority arrived at the conclusion that the im-

<sup>84</sup>The *Canadian Bill of Rights*, s. 2.

<sup>85</sup>*Cf.* The opening words of The First Amendment: "Congress shall make no law respecting an establishment of religion. . . ." *U.S. Const.*, amend. I.

<sup>86</sup>Laskin, *Canada's Bill of Rights: A Dilemma for the Courts?* (1962), 11 I.C.L.Q. 519.

<sup>87</sup>*R. v. Gonzales* (1962), 32 D.L.R. (2d) 290, 37 W.W.R. 257, 132 C.C.C. 237 (B.C.C.A.).

<sup>88</sup>*Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651, 41 D.L.R. (2d) 485, [1964] 1 C.C.C. 1. The majority did not reach this issue, as they found no inconsistency between the impugned legislation and the Bill of Rights.

<sup>89</sup>*Supra* note 32, at 293 (S.C.R.), 481 (D.L.R.), 362 (C.C.C.).

<sup>90</sup>*Id.* at 287-88 (S.C.R.), 476 (D.L.R.), 357-58 (C.C.C.).

<sup>91</sup>See the articles cited in Whyte and Lederman, *Canadian Constitutional Law* (Toronto: Butterworths, 1977) at 4-127.

pugned provisions of the *Indian Act*<sup>92</sup> violated the Bill of Rights deserves mention. One searches in vain for an inquiry by the Court into the possible justifications for this differential treatment accorded native people with respect to their drinking habits. What is presented is an enunciation of what equality before the law is not, and the conclusions that follow from it.<sup>93</sup>

There is also the issue of whether or not the Bill of Rights can be applied sensibly without an inquiry into the reasons for which a given law was enacted. It has been noted that this reluctance to question purpose is a direct product of the adherence to the Parliamentary supremacy principle. That it should carry on into the application of the Bill of Rights is unfortunate, for the following reasons.

First, such an approach, exemplified in the "valid federal objective" test, can render the Bill of Rights ineffective. This also results in an indefensible conception of equality before the law. The second reason is, in a sense, the reverse of the first. If the Court applies the Bill of Rights without inquiring into the possible reasons for which the impugned legislation was passed, the Court might render inoperative legislation that could well be supported by its justification, were it only known. Nevertheless, one must remember that the Court is behaving in accordance with the apparent logic of our legal culture when it fails to inquire searchingly into the purposes of legislation.

Though *Drybones* established the principle that the Bill of Rights can be used to render legislation inoperative, it did not usher in a golden age of Canadian jurisprudence. On the contrary, the Court appeared afraid of the implications of its decision, and the post-*Drybones* decade of litigation under the Bill of Rights was characterized by a marked retrenchment on the part of the Court. Once again, it was the effect of the Parliamentary supremacy principle that underlay this development.

Returning to the question of the scope of the Bill of Rights, recall that the early debates presented the issue as one of whether or not the Bill of Rights was more than a statute of interpretation. It was perceived that a choice had to be made between the Bill of Rights as a mandate for judicial review (in the strongest sense), or the Bill of Rights as a set of canons of construction. Why can it not be both?

Consider the ways in which a law may violate a fundamental right. Assume that a law which discriminated between blue and brown-eyed persons for no apparent reason would violate equality before the law. It might do so in one of two ways. First, the law might embody that discrimination on its face—"only blue-eyed people shall have the right to receive X." In the face of such a law, no canon of interpretation will help the judge. The law can apply "equally" to all covered by it; there is not much he or she can do except invoke the Bill of Rights as a mandate for declaring that law inoperative. Consider, however, the other way in which equality before the law might be infringed. Suppose the law said nothing about the colour of one's eyes, but provided merely that all poor people have the right to X. In fact, only blue-eyed people get any X; all brown-eyed people get turned down because of an alleged lack

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<sup>92</sup> R.S.C. 1970, c. I-6

<sup>93</sup> *Supra* note 32, at 297 (S.C.R.), 484 (D.L.R.), 365-66 (C.C.C.).

of need. Faced with this situation, the best avenue for the judge to pursue is via the interpretive function of the Bill of Rights. Such a law may have been "applied" in violation of the Bill of Rights, and the judge can direct a non-discriminatory application without overturning the substance of the legislation.

With some exceptions, the Court has not pursued the interpretive path.<sup>94</sup> Dominated by its conception of Parliamentary supremacy, it sees the "spectre of *Drybones*"<sup>95</sup> in every case that comes before it. The sorry result is that the Court has failed to employ the techniques that its predecessors used to such advantage in the years of the "Rand" Court.<sup>96</sup> It is not submitted that the Supreme Court should overturn *Drybones*, but it would be to everyone's advantage if the Court strengthened the function of the Bill of Rights as a source of principles of interpretation.

It was noted at the beginning of this section that the Parliamentary supremacy principle denies the existence of enforceable moral rights against the government except to the extent that they are embodied within the positive law. Also, it was noted that the scope of the Bill of Rights was uncertain for the first decade of its existence. Within this formative period, the Court was struggling with the implications of the Bill of Rights for the principle of Parliamentary supremacy. One way to avoid this problem was to find no inconsistency between the impugned legislation and the Bill of Rights. A device that served this purpose was to "freeze" the meaning of the contents of the Bill as of the date of its enactment.<sup>97</sup>

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<sup>94</sup> See the dissenting judgment of Laskin J. (as he then was) in *Burnshine*, *supra* note 56; see also the judgment of Laskin J. (as he then was) in *R. v. Brownridge*, [1972] S.C.R. 926, 28 D.L.R. (3d) 1, 7 C.C.C. (2d) 417. The irony is that many of the definitions of equality before the law enunciated by the Court make sense only with respect to challenges based upon a maladministration of an otherwise unimpeachable law.

<sup>95</sup> Lyon, *supra* note 72, at 58.

<sup>96</sup> See Gibson, *And One Step Backward: The Supreme Court and Constitutional Law in the Sixties* (1975), 53 Can. B. Rev. 621. For a discussion of the importance of Mr. Justice Rand to Canadian law, see Pollock, *Mr. Justice Rand: A Triumph of Principle* (1975), 53 Can. B. Rev. 519.

<sup>97</sup> In *Robertson and Rosetanni*, *supra* note 88, the *Lord's Day Act*, R.S.C. 1952, c. 171, was challenged as being inconsistent with the right to freedom of religion guaranteed by s. 1(c) of the Bill of Rights. Mr. Justice Ritchie, writing for the majority, found no such inconsistency. In the course of his reasons for judgment, he had this to say: "It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with 'human rights and fundamental freedoms' in any abstract sense, but rather with 'such rights and freedoms' as they existed in Canada immediately before the statute was enacted." *Supra* note 88, at 654 (S.C.R.), 491 (D.L.R.), 8 (C.C.C.). Mr. Justice Pigeon makes the same point in *Drybones*, *supra* note 32, at 305 (S.C.R.), 490 (D.L.R.), 371 (C.C.C.).

In *Smythe v. The Queen*, [1971] S.C.R. 680, 19 D.L.R. (3d) 480, 3 C.C.C. (2d) 366, which concerned the power of the Attorney-General to choose either indictment or summary conviction for prosecuting violators of the *Income Tax Act*, R.S.C. 1970, c. I-5, the Court found in favour of the discretionary power by considering the meaning of equality before the law as it was before the Bill of Rights was passed. In the *Lavell* case, *supra* note 35, the Court did one better, and found the meaning of equality before the law to be that as expressed in Dicey, in his articulation of the concept of the Rule of Law. See text accompanying notes 275 *et seq.* Note that Mr. Justice Ritchie in the *Lavell* case rejected the idea that "the egalitarian concept exemplified by the 14th Amendment of the U.S. Constitution" was relevant to the meaning of equality before the law in Canada, *supra* note 35, at 1365 (S.C.R.), 494 (D.L.R.), 210 (C.R.N.S.).

The clearest articulation of this "no new rights" thesis has been given by Mr. Justice Martland: "Section 1 of the Bill declared that six defined human rights and freedoms 'have existed' and that they should 'continue to exist.' All of them had existed and were protected under the common law. *The Bill did not purport to define new rights and freedoms.*"<sup>98</sup>

Although this is a difficult position to defend,<sup>99</sup> it is understandable in light of the problems discussed above. If the Court freezes the meaning of such terms as "equality before the law," it can be said to be acting in accordance with the principle of the supremacy of Parliament. It also insulates the Court from the charge that it is "legislating" unjustifiably (a problem addressed in Part V of the paper) and serves to keep the Court from declaring inoperative a great bulk of the legislation that it may be called upon to evaluate.

Thus far, the effect of the concept of Parliamentary supremacy on the Court's approach to the Bill of Rights has been examined. It is now convenient to separate three concerns for more critical analysis: the Parliamentary supremacy concept, the fact that the Bill of Rights is not entrenched in the Constitution, and the apparent reluctance of the judiciary to interfere with the legislative function of Parliament.

## B. *Dominant Themes of Canadian Legal Culture Examined*

### 1. The Supremacy of Parliament

It is not within the scope of this paper to trace comprehensively the evolution of the concept of Parliamentary supremacy.<sup>100</sup> What is striking about that evolution is how the principle has been turned on its head since the time of its initial formulation. The principle had its genesis in the constitutional struggles of seventeenth century England. Parliament opposed the King's claim that he was above the law, and the principle of the supremacy of Parliament was invoked in the name of the Rule of Law.<sup>101</sup> It would have surprised a seventeenth century Parliamentarian to hear that his Parliament was somehow legally unfettered. With time, the principle developed into its present form, largely as a result of the victory of positivism in English political and legal theory. Dicey, writing in that tradition, expressed the principle in the terms noted above.

At one level, it appears absurd to go back to the seventeenth century for the meaning of this principle; if the Court is to be criticized for relying

<sup>98</sup> *Burnshine*, *supra* note 56, at 702 (S.C.R.), 590 (D.L.R.), 511 (C.C.C.); *Miller*, *supra* note 83, at 690 (S.C.R.), 410 (N.R.), 184 (C.C.C.) *per* Ritchie J.

<sup>99</sup> The problem with this approach is that it ignores the important distinction between a *conception* of equality before the law (or any other norm) and the *concept* of that norm. See Dworkin, *supra* note 59.

<sup>100</sup> For a brief history see Wade and Phillips, *Constitutional Law* (London: Longman, 1970) at 38-45.

<sup>101</sup> See Hayek, *supra* note 80, at 4:

[T]he claim of Parliament to sovereignty at first meant only that it recognized no other will above it; it only gradually came to mean that it could do whatever it liked — which does not necessarily follow from the first, because the consent on which the unity of the state and therefore the power of any of its organs are founded may only restrain power but not confer positive powers to act.

on outmoded definitions of basic rights, even older definitions of our basic concepts ought not to be relied upon.<sup>102</sup> At another level, the exercise proves to be anything but absurd. It may be that the dominant conception of the supremacy of Parliament is not only inconsistent with the concept of "rights," but is based upon a set of false assumptions about the nature of political and legal obligation.<sup>103</sup> Nevertheless, it is necessary to examine critically the extent to which the supremacy of Parliament is the defining principle of Canadian constitutional law.

The obvious problem in incorporating this notion from English law is the fact that Canada, unlike England, is a federal state with a written constitution.<sup>104</sup> Powers are divided between Parliament and the provincial legislatures; there is no supreme Parliament in the way that there may be in a unitary state. The answer given to this claim is that, within these spheres of legislative competence, Parliament and the legislatures are supreme.<sup>105</sup>

One writer has challenged this piece of conventional wisdom, arguing that this is a "mental-set" inappropriate to the reality of Canadian constitutional law.<sup>106</sup> He argues that too much has been made of the preamble to the *B.N.A. Act*, and too little attention paid to the way in which Canadian constitutional theory should be structured by the *B.N.A. Act* as a whole.<sup>107</sup> While not rejecting the fact that Parliamentary supremacy is a principle of Canadian law, he attempts to demonstrate that it is not the organizing principle. A similar point was made by a noted student of Canadian law, who argued that the principle of Parliamentary supremacy is a principle that is defined and limited by the constitutional law of the country.<sup>108</sup> In addition, Dicey himself recognized that, in a federal state, it is the law, not Parliament, which is supreme.<sup>109</sup>

Recognising that the Parliamentary supremacy principle may not, in fact, be the defining principle of Canadian constitutional law still leaves one with the question of whether or not the norms embodied in the Bill of Rights can be considered a part of Canadian constitutional law in the sense of circum-

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<sup>102</sup> Tarnopolsky, *supra* note 80, at 666-67.

<sup>103</sup> According to Hayek, "[t]he conception that there must be an unlimited will which is the source of all power is the result of a constructivistic hypostasation, a friction made necessary by the false factual assumptions of legal positivism but unrelated to the actual source of allegiance." *Supra* note 80, at 34.

<sup>104</sup> Although the Canadian constitution is more than the *B.N.A. Act*, and the "unwritten" constitution of the United Kingdom contains many Acts, the *B.N.A. Act* is the central part of the Canadian constitution. It does not have a counterpart in the law of England.

<sup>105</sup> See *A.G. Ont. v. A.G. Can.*, [1912] A.C. 571 at 581, 3 D.L.R. 509 at 511 (P.C.) *per* Earl Loreburn L.C.

<sup>106</sup> Lyon, *supra* note 72, at 44.

<sup>107</sup> One should add that it is ultimately the principle of constitutionalism itself that holds the key to the role of the principle of Parliamentary supremacy. At least in its original conception, constitutionalism meant limiting government. See Wheare, *Modern Constitutions* (2d ed. London: Oxford U. Press, 1966) at 202.

<sup>108</sup> Beaudoin, *supra* note 72.

<sup>109</sup> *Supra* note 68, at 138-80.

scribing the supremacy of Parliament. This leads us to the second element in this analysis.

## 2. Is the Bill of Rights Part of the Constitution?

It is an interesting comment on the manipulability of concepts to note how judges use certain words to bolster their arguments. When they are inclined not to apply the Bill of Rights, they invoke the fact that it is a mere statute. When they wish to invoke the Bill of Rights, they speak in terms of its being a quasi-constitutional document. What is surprising in all this is that the same judge can say that it is a "mere statute" in one case, and call it a "quasi-constitutional document" in another.<sup>110</sup> Nevertheless, it is clearly open to the Court to consider the Bill of Rights as more than just another statute.

By virtue of section 91(1) of the *B.N.A. Act*, Parliament has the power to amend the Constitution of Canada insofar as it does not affect provincial matters.<sup>111</sup> Inasmuch as the Bill of Rights is confined, by its terms, to laws within the competence of Parliament,<sup>112</sup> there is no reason not to view the Bill of Rights as an implicit amendment to the Canadian constitution. This is mentioned only to point out that, within the present state of affairs, it appears that the Court is much freer to develop a creative Bill of Rights jurisprudence than it has, at least to the extent that the Court has felt precluded from doing so because of the "status" of the Bill of Rights.

## 3. Interfering With the Legislative Prerogative

The last element in this summary of the problems of the Bill of Rights is the manifest reluctance of the Court to interfere with the substantive policies of Parliament. Though the pros and cons of judicial review are considered in a later section of this paper, it is important to note that there are very good reasons why a court should be so reluctant. One need only refer to the activism of the American Supreme Court in the early decade of this century to see how

<sup>110</sup> In *Morgantaler v. The Queen*, [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161, 20 C.C.C. (2d) 449, the Chief Justice stated:

It cannot be forgotten that [the Bill of Rights] is a statutory instrument, illustrative of Parliament's primacy within the limits of its assigned legislative authority, and this is a relevant consideration in determining how far the language of the *Canadian Bill of Rights* should be taken in assessing the quality of federal enactments. . . .

*Op. cit.* at 632 (S.C.R.), 173 (D.L.R.), 461 (C.C.C.). See also *Curr v. The Queen*, [1972] S.C.R. 889 at 899, 26 D.L.R. (3d) 603 at 613-14, 7 C.C.C. (2d) 181 at 191-92.

*Cf.* The remarks of the Chief Justice in *Miller, supra* note 83, at 690 (S.C.R.), 410 (N.R.), 184 (C.C.C.), where he calls the Bill of Rights a quasi-constitutional document. The same point was made in Laskin, *The Role and Function of Final Appellate Courts: The Supreme Court of Canada* (1975), 53 Can. B. Rev. 469.

<sup>111</sup> The scope of this power was considered recently by the Supreme Court in *In re Section 55 of the Supreme Court Act* (1979), 102 D.L.R. (3d) 1. Although it is beyond the scope of this essay to comment on that case, it appears that the Court has given a narrow reading to the amending power when it remarks that "the power of amendment . . . is limited to matters of interest only to the Federal Government." *Op. cit.* at 12. This echoes the narrow reading given to the phrase "laws of Canada" in s. 101 of the *B.N.A. Act*. See *Que. North Shore Paper Co. v. C.P. Ltd.*, [1977] 2 S.C.R. 1054, 9 N.R. 471.

<sup>112</sup> *The Canadian Bill of Rights*, s. 5(2).



judicial review can frustrate what may appear to have been progressive and desirable legislation.<sup>113</sup> Nevertheless, the Supreme Court of Canada has an advantage over its American counterpart—or more correctly, Parliament has an advantage over both Congress and the state legislatures. In the United States, it is difficult, if not sometimes impossible, for the legislature to re-enact legislation found to be in violation of the Bill of Rights. Therefore, a decision against the validity of an Act of Congress has serious consequences, and the courts have evolved a doctrine that dictates that constitutional questions are to be avoided if at all possible.<sup>114</sup>

Parliament is not constrained so severely. When the court declares a given law to be inoperative, Parliament can re-enact it with the *non obstante* clause, and it will stand. The advantages of the *non obstante* clause are two-fold. First, it allows Parliament to pursue its policies without judicial interference. (This is an advantage when the judicial intervention is ill-advised. It is obviously a disadvantage if Parliament's objectives are, in some way, odious. One can only repeat what was said earlier: ultimately Parliament can prevail; the Bill of Rights is but a check on the speed with which it can pursue its ends.) Secondly, it forces Parliament to come out of the closet if it chooses to re-enact the legislation in question. It will force Parliament to give a clear statement of its justification for pursuing that policy, and thus enhance the accountability of Parliament to the public at large.

In light of the above considerations, it is open to the Court to take a fresh look at the Bill of Rights, and to free itself from some of the fetters that it has imposed upon itself. The question that arises is, of course, why they should do so. This leads to the next part of the inquiry: the meaning and value of equality before the law.

#### IV. EQUALITY BEFORE THE LAW

##### A. *General Observations*

It has become a convention of style to begin any discussion of equality with the admission that, although few concepts have been more central to Western moral thought, none has proven more difficult to define. A large part of the difficulty stems from two related sources. First, the search for a conclusive definition of equality before the law is likely to prove barren. It is a concept that can be understood only within the context of how it evolved historically and how it functions in legal and political argument. Second, the trend of modern views of morality has been to retreat from the idea of absolute moral values. Forms of moral relativism assert that morality is subjective. Some theories of morality posit that it is impossible to reason about such matters;

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<sup>113</sup> See Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation, 1978) at 427-55. This era is often referred to as the "Lochner" era, after the case of *Lochner v. N.Y.*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), where the Supreme Court struck down state maximum hour legislation. This characterization of this period in American legal history is somewhat misleading, as more statutes were upheld than struck down during this time. See Tribe, *op. cit.* at 435.

<sup>114</sup> *Spector Motor Co. v. McLaughlin*, 323 U.S. 101 at 105, 65 S. Ct. 152 at 154, 89 L. Ed. 101 at 103 (1944).

moral arguments are merely expressions of emotion or intuition—for some, a matter of “cheers and boos”<sup>115</sup>—with no correspondence to the world of fact.

Putting these two elements together, it is evident that one is not likely to arrive at a conception of equality before the law that will appear to escape the criticism that it is both limited by its cultural context and ultimately subjective.

Against this background, the difficulty that a court must face in deciding cases that raise the equality provision of the Bill of Rights may be appreciated. If all value judgments are subjective, then the moral authority of a court in expounding its culturally limited conceptions is suspect. One must ask if *anyone* can justify a conception of equality in terms other than personal predilections.<sup>116</sup>

A way out of this apparent dilemma involves combining both an internal and external theoretical perspective on the subject.<sup>117</sup> An external perspective will reveal the evolution of the concept of equality before the law to be part of the evolution of a paradigm of law and society; this leads to an appreciation of the potential effect on competing conceptions of equality on our social order. In addition, it is evident that the choice between morality as “objective” or “subjective” is a false one, at least from an external perspective. Values are neither sewed into the fabric of the universe, nor are they a matter merely of feelings. One can only make sense out of moral concepts (like “rights,” “obligations,” etc.) within the context of an institution, or social practice, within which moral arguments are made.<sup>118</sup> Those social practices “serve” the particular social order out of which they grew. Therefore, it makes sense to accept the cultural contingency of any given system of morality without being driven to the conclusion that one is free to invent whatever morality one likes.<sup>119</sup> It follows that the first order of business is to describe the political morality within which particular concepts evolved. The perspective must then be shifted to look inside the political morality described. This is done for two different reasons.

First, ultimately, it is the individual who must make up his or her mind as to the meaning and value of any given ethical norm. To this extent, there is a necessarily subjective element in morality. At the end of the day, one either is or is not persuaded by moral arguments. It therefore seems important to address these questions from the perspective of one engaged in the practice of

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<sup>115</sup> The phrase is from Barry, *And who is My Neighbour?* (1979), 88 Yale L.J. 629 at 639n. 37. Holmes said that “morality is a body of imperfect social generalizations expressed in terms of emotions,” in *Collected Legal Papers* (New York: Harcourt, Brace, 1921) 303 at 306. For an argument that the “subjectivity of value” does not lead to the impossibility of reasoned discourse about ethics, see Mackie, *Ethics, Inventing Right and Wrong* (N.Y.: Penguin, 1977).

<sup>116</sup> Professor Weiler asks whether phrases like “equality” are “simply grants of an open ended discretion to the judges to develop their conceptions of the principles of just governance.” *Supra* note 2, at 207.

<sup>117</sup> See Mandel, *Dworkin, Hart, and the Problem of Theoretical Perspective* (1974), 14 L. & Soc. Rev. 57.

<sup>118</sup> See Smith, *Legal Obligation* (Toronto: U. of T. Press, 1976).

<sup>119</sup> See Hayek, *supra* note 80, at 98.

moral dialogue. The method to be employed might be called the method of "reflective equilibrium."<sup>120</sup>

In essence, this involves testing our personal judgments on moral questions against the principles that can be developed to justify those judgments. When we put hypothetical cases to ourselves, we are testing the adequacy of those principles to explain the new case. The exercise moves from the judgment to the principle and back again, until a state of rest is reached ("reflective equilibrium") such that we are satisfied that our moral principles accord with our personal sense of morality. In the context of this inquiry, the exercise will begin with the principles articulated—*i.e.*, various conceptions of equality before the law—and move to the consideration of particular cases.

The second reason for employing an internal perspective flows from our traditional expectations that a judge will decide a case on the basis of *legal* standards, within what one writer has termed the "institutional morality" of a given legal system.<sup>121</sup> In other words, the limitations that impose themselves on the judicial task must be explored; limitations that are bounded by the background political morality of which the legal system is a part.

Before proceeding, it would be helpful to reflect upon the value that the norm of equality has for us.

Equality is valued for both intrinsic and instrumental reasons. It has intrinsic value because it expresses our deepest aspirations and sentiments of justice.<sup>122</sup> It proclaims that, despite differences in talents, wealth and opportunity, there is something about man as a moral being which makes all men equal.<sup>123</sup> In one form or another, the idea of equality expresses our vision of how social life ought to be.<sup>124</sup>

Equality also has instrumental value for us. In the liberal tradition,<sup>125</sup> the principle of equality before the law is considered essential for the maintenance of a free and open society.<sup>126</sup> In addition, whether the idea of equality expresses itself in the notion of political equality, or as part of a justificatory

<sup>120</sup> Rawls, *A Theory of Justice* (Cambridge: Belknap, 1971) at 20. It is possible to employ this method without employing Rawls's well-known concept of the "original position," or indeed, of adopting a contractarian theory of justice.

<sup>121</sup> Dworkin, *supra* note 59, ch. 4.

<sup>122</sup> "[J]ustice is the soul of law, and equality is in the heart of justice." Smith, *Regina v. Drybones and Equality Before the Law* (1971), 49 Can. B. Rev. 163 at 163.

<sup>123</sup> Rawls, *supra* note 120, at 504-512. Dworkin argues that the basic right that individuals have in a liberal democracy is "the right to treatment as an equal." See *supra* note 59, at 227. This is not the right to receive equal shares of whatever burden or benefit is distributed; rather it is the right "to be treated with the same respect and concern as everyone else." *Op. cit.* As enunciated by Hayek, "[t]he basic conception of classical liberalism . . . is that government must regard all people as equals, however unequal they may in fact be. . . ." *Supra* note 80, at 142.

<sup>124</sup> Rawls, *id.* at 9-10.

<sup>125</sup> The term "liberal" is used to refer to the position of classical liberalism. For a discussion of the change in the meaning of liberalism, see Hayek, *The Constitution of Liberty* (Chicago: U. Chi. Press, 1960) at 397-411.

<sup>126</sup> *Id.* at 210.

theory of social obligation, equality is valued because it seems necessary for the legitimation of compliance with the social order.<sup>127</sup>

Equality is both a legal and moral concept,<sup>128</sup> which is not surprising, since law and morality serve many of the same purposes. They are both products of social life, of the need to reconcile competition and cooperation in a world of scarce resources and limited human knowledge.<sup>129</sup> Underlying any given conception of morality must therefore be an image of the social ideal: how men ought to behave in social life and how these scarce resources ought to be distributed.

One need not justify the emphasis on the normative. No society can exist for any length of time by force alone; the stability of a social order depends upon the extent to which the power of authority is recognized as legitimate by the polity, and, ultimately "legitimacy" is a question of "right." It was this need for legitimacy that prompted the King to claim a "divine right" to rule his domain. When that ideology collapsed in the West, a number of moves were made. One was to claim an identity of interest between the citizen and the State, with the latter being seen as the embodiment of the cultural spirit of the people, or the embodiment of Reason. Another was to ground the legitimacy of authority in the consent of the governed. This could take the form of a pragmatic appeal to democracy, or an appeal to some hypothetical social contract. Another form was to claim that authority is legitimate only to the extent that it is exercised in accordance with a higher law, the contents of which are discoverable by man's rational capacities.

In all of these cases, there are two common elements. First, there is some image of the social ideal. Second, there is a moral, political and legal theory embodying that image, which is used to justify the extant social order (or to criticize it). Such a theory inevitably has some version of what constitutes a "right."

Imagine a society wherein all men shared the same vision of the social ideal. One would imagine a general consensus on moral questions,<sup>130</sup> and, assuming that the social order conformed to the social ideal as best it could, a general acceptance of the legitimacy of the social order. The concept of the "ideal" necessarily implies that the social order will not fully realize the ideal, so one would imagine that, even within this hypothetical order, a certain degree of conflict will be present as the social order is "tested" against the ideal.<sup>131</sup> Generally, however, one would expect that there would be a sufficient consensus

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<sup>127</sup> Dworkin, *supra* note 59, at 205.

<sup>128</sup> A Bill of Rights "fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects the inherent equality of men." Dworkin, *id.* at 185.

<sup>129</sup> See Hart, *supra* note 71, at 189-95. Hayek, *supra* note 80, at 13.

<sup>130</sup> One might ask whether moral questions would arise in such a society at all. See Rawls, *supra* note 120, at 129-30.

<sup>131</sup> It would appear that this process of "stretching" the conventional morality of culture is one of the driving forces behind the evolution of all social practices. See Hayek, *supra* note 80, at 161. The same point was made by Roberto Unger in his lectures in Jurisprudence, Harvard Law School, January 1979.

for the law to have a clear answer to the question: what does equality before the law mean?

The brutal fact is that ours is not such a society. It is riddled with conflict at the fundamental level of the ideals of social life,<sup>132</sup> and, as a consequence, it is much more difficult to define clearly what is meant by equality before the law. As one writer puts it, "[o]nce loosed, the idea of Equality is not easily cabined."<sup>133</sup>

In order to give the ideal some meaning there must be a limit to the range of discourse. The concern is with equality before the *law*, and this suggests an important factor in this inquiry. The concept of equality before the law is one which traditionally has been elaborated and applied by judges. As a result, it is intimately connected with the demands put on judges to give reasons for their decisions.

This demand for a reasoned decision, perhaps the greatest constraint that legal theory places on the arbitrary exercise of judicial power,<sup>134</sup> necessitates an inquiry into the kinds of reasons that are sufficient to justify a judicial decision. This will depend upon one's vision of the judicial function (and of the legal philosophy that both informs and rationalizes judicial behaviour). Different conceptions of equality demand different approaches to the judicial function, and therefore imply different modes of justifying the judicial decision. It may be the case that certain conceptions of equality strain our conception of the judicial function to such a degree that they will be rejected, not because they are meaningless or self-contradictory, but merely because they cannot be realized within the judicial context as we appreciate it. It may also become evident that certain conceptions of equality are so inconsistent with our present social structure that, notwithstanding their possible appeal, they could not be realized without a radical transformation of our society—a transformation perhaps not best suited to the judicial role.

In order to bring these matters to light, it is helpful to consider briefly the evolution of the concept of equality before the law, and relate it to the political, moral and legal theories with which it appears compatible. It will become evident that modern Western thought has moved beyond the classical liberal formulation of the concept, and this has produced a crisis in the traditional conception of the judicial function.

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<sup>132</sup> See Kennedy, *Form and Substance in Private Law Adjudication* (1976), 89 Harv. L. Rev. 1685 at 1731.

<sup>133</sup> Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights* (1966-67), 80 Harv. L. Rev. 91. Unger makes a similar point in *Law and Modern Society* (N.Y.: Free Press, 1976) at 173: "By a paradox which Tocqueville first described and whose source in the very structure of modern society we are now able to identify, the love of equality increases with every step toward the equalization of circumstances."

<sup>134</sup> Mr. Justice Marshall of the U.S. Supreme Court dissenting in *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 at 110, 93 S. Ct. 1278 at 1336, 36 L. Ed. 2d 16 at 88 (1973) made the following remarks about the importance of the reasoned decision: "Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process."

## B. *The Evolution of the Concept*

### 1. The Liberal Conception

In the *Lavell* case, Mr. Justice Ritchie defined equality before the law in terms of Dicey's conception of the Rule of Law. Whatever one may think of the validity of Dicey's interpretation and its appropriateness as a standard in modern society, Mr. Justice Ritchie was not wholly off the mark. Equality before the law is derived from the concept of the Rule of Law, and both have their roots in Greek philosophy.<sup>135</sup> The Greek concept of *isonomy*—equal laws for all persons—appears to have predated democracy as a political ideal;<sup>136</sup> indeed, the notion of democracy may have been derived from it. It is implicit in Aristotle's assertion that "it is more proper that the law should govern than any of the citizens."<sup>137</sup>

The concept of a government of law, not of men, was transmitted to English legal thought through the influence of the Roman jurists who had assimilated the Greek ideal. It was the ideal under which the constitutional battles of the seventeenth century were fought. Thus did the Rule of Law become a principle of English, American and Canadian law.

There is a great deal of confusion and controversy surrounding the meaning and value of the Rule of Law,<sup>138</sup> but within the liberal tradition, its meaning is fairly clear. To bring this out, it is convenient to clarify what the Rule of Law is not.

First, it is not a rule *of* law, but a rule *about* the law. It is a meta-legal principle that points towards an ideal of what the law should be.<sup>139</sup> As such, it must not be confused with the concept of legality.<sup>140</sup> Nor can it be defined as that which the "Sovereign" says it is.<sup>141</sup> The ideal of the Rule of Law, and the principles derived therefrom, stand apart from the positive law of the state, although not necessarily as part of some "higher law."

The Rule of Law requires that laws be general, abstract and applicable to particular cases irrespective of the consequences.<sup>142</sup> From this ideal can be

<sup>135</sup> See generally Hayek, *supra* note 125, at 104ff.

<sup>136</sup> It is interesting to note that, in terms of modern history, the attempt to realize the liberal ideal preceded the movement towards democratic government. See MacPherson, *The Real World of Democracy* (Toronto: C.B.C., 1965) at 1-11.

<sup>137</sup> Aristotle, *Politics* at 1287a, cited in Hayek, *supra* note 125, at 165.

<sup>138</sup> Hayek, *The Confusion of Language in Political Thought* (London: Inst. of Econ. Aff., 1968).

<sup>139</sup> Hayek, *supra* note 125, at 206.

<sup>140</sup> Thus, however "legal" were the actions of the Nazi state, they were not in accordance with this conception of the Rule of Law. Cf. Finer, *The Road to Reaction* (Boston: Little, Brown, 1945) at 60.

<sup>141</sup> This is the view taken by Friedman, who defined the Rule of Law as "whatever Parliament as the supreme lawgiver makes it." See "The Planned State and the Rule of Law," in Gaston, ed. *Law and Social Change in Contemporary Britain* (London: Stevens, 1951) 284.

<sup>142</sup> See Hayek, *supra* note 138. In this context the term abstract means that "[t]he rule must apply to an unknown number of future instances" and not aim at concrete results for particular people. See Hayek, *supra* note 80, at 35. See generally Raz, *The Rule of Law and Its Virtue* (1977), 93 L.Q. Rev. 195.

derived the idea that the law must apply equally (or at least potentially equally) to all.<sup>143</sup>

In order to understand the implications of this conception of equality before the law, reference must be made to some well-known distinctions in political philosophy. First, it is necessary to contrast two conceptions of freedom.<sup>144</sup> One has been called "negative liberty": the freedom to pursue one's ends independent of the arbitrary will of another. This is freedom *from* coercion. The other conception of liberty is "positive." It is the power to realize one's wants and desires. The former focusses on the value of being left alone; the latter on the value of being able to achieve one's ends.

It is also necessary to contrast two ways in which equality is discussed. First, there is a concern for the degree to which the laws apply equally to all. This is called the principle of "formal equality," because it is primarily a principle about the form of the laws. It is silent (although not neutral) about the degree of material inequality that may result from the operation of the principle in social life. Second, equality is part of any evaluation of the actual distribution of goods in society. This may be called the principle of "distributional equality."

It is also necessary to contrast two ways of looking at morality, which may be called the deontological and the teleological approaches. The latter, of which utilitarianism is the best-known example, either defines the concept of a "right" in terms of some conception of "the good," or interprets "the right" in terms of the maximization of the good.<sup>145</sup> It follows that questions of morality boil down to an evaluation of the result, or "end-state" produced by action.<sup>146</sup>

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<sup>143</sup> Smith, *supra* note 118, at 122-24.

<sup>144</sup> See Berlin, "Two Concepts of Liberty," in Quinton, ed., *Political Philosophy* (Oxford: Oxford U. Press, 1967).

<sup>145</sup> The distinction between the two forms of utilitarianism is set out by Hare, *Freedom and Reason* (London: Oxford U. Press, 1964).

Act-utilitarianism is the view that we have to apply the so-called 'principle of utility' directly to individual acts; what we have to do is to assess the effect on total satisfactions of the individual act in question and its individual alternatives, and judge accordingly. Rule-utilitarianism, on the other hand, is the view that this test is not to be applied to individual actions, but to *kinds* of action. . . . Actions are to be assessed by asking whether they are forbidden or enjoined by certain moral rules or principles; and it is only when we start to ask which moral rules or principles we are to adopt for assessing actions, that we apply the utilitarian test.

See generally Bayles, ed., *Contemporary Utilitarianism* (Garden City: Anchor Books, 1968).

The common feature of all teleological theories of ethics is the subordination of the concept of duty, right conduct, or moral obligation to the concept of the good or the humanly desirable. Duty is defined as that which conduces to the good, and any statement enjoining a particular course of conduct as a duty or moral obligation is regarded as acceptable only if it can be shown that such conduct tends to produce a greater balance of good than do possible alternatives.

See Olson, "Teleological Ethics," in Edwards, ed., 8 *Encyclopedia of Philosophy* (N.Y.: Macmillan, 1972) 88. See also Rawls, *supra* note 120, at 30.

<sup>146</sup> Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. Burns and Hart (London: Athlone, 1970), ch. 3, para. 1.

In contrast, deontological theories emphasize the priority of the concept of "right" over that of "the good."<sup>147</sup> In other words, however "good" is the net product of one's actions, such actions are not necessarily "right" or moral. As a rule, the questions of right and wrong are seen as a function of the means by which actions are taken not by a consideration of their results alone.<sup>148</sup>

There is a complicated relationship between these ways of viewing morality, and theories of the proper mode of judicial reasoning. The relationship between teleological theories of morality and teleological theories of judicial reasoning is clear enough; judges should decide cases on the basis of the desirable results in every given case.<sup>149</sup> This notion of legal reasoning, exemplified by those loosely referred to as "the Realists," is at odds with the traditional notion that the judge must decide cases according to the legal rules available to him.<sup>150</sup>

The relationship of deontological moral theory and this traditional notion of judicial reasoning, often called "formalism," is less tidy than that which obtains between the teleological theories considered above. One might call it a relationship of style, rather than of logical entailment. The idea is that legal decisions, like moral decisions, should not turn on the discrete results of a given case, but must follow from the impartial application of norms to the facts at hand. In deontological moral theory the criterion has been the universalizability of the moral principle invoked to judge the rightness of an action;<sup>151</sup> in law, the criterion is the application of pre-existing rules (or neutral legal principles)<sup>152</sup> to the case before the court.

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<sup>147</sup> The term "deontology" derives from the Greek words *deon* (duty) and *logos* (science). Etymologically it means the science of duty. In current usage, however, its meaning is more specific. A deontological theory of ethics is one which holds that at least some acts are morally obligatory regardless of their consequences for human weal or woe. The popular motto, "Let justice be done though the heavens fall" conveys the spirit that most often underlies deontological theories.

See Olson, *supra* note 145, vol. 2, at 343.

<sup>148</sup> The roots of this approach go back to Kant. See *Foundations of the Metaphysics of Morals*, trans. Beck (Chicago: U. Chi. Press, 1950). Modern expositors of this position are Rawls, *supra* note 120; Fried, *Right and Wrong* (Cambridge, Mass.: Harv. U. Press, 1978); and Dworkin, *supra* note 59.

<sup>149</sup> See Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication* (1960), 27 U. Chi. L. Rev. 661 at 690-91: "Judicial decisions should be gauged by their results and not by either their coincidence with a set of allegedly consistent doctrinal principles or by an impossible reference to neutrality of principle. The effects, that is to say, of a decision should be weighed and the consequences assessed in terms of their social adequacy."

<sup>150</sup> See the judgments of Laskin C.J.C. and Dickson J. in *Harrison v. Carswell*, [1976] 2 S.C.R. 200, 62 D.L.R. (3d) 68, 25 C.C.C. (2d) 186, for a contrast in modes of judicial reasoning.

<sup>151</sup> For a recent discussion of the processes of universalization, see Mackie, *supra* note 115, at 83-102. A crucial point, often missed by critics of Kantian ethics (and imperfectly appreciated by Kant himself), is that universalization is a purely negative test from which no specific rules can be derived. It functions to "weed out" certain principles which (by definition) could not be viewed as "moral." As such, even within the liberal paradigm, it is a necessary but not sufficient condition of justice. See Hayek, *supra* note 80, at 43.

<sup>152</sup> See Wechsler, *Toward Neutral Principles of Constitutional Law* (1959), 73 Harv. L. Rev. 1.



The relationship between deontological moral theory and formalism in legal reasoning has been termed a matter of style for the following reason. Whereas the teleological approach to legal reasoning denies that there is a difference between the processes of legal and moral decision-making, the formalist can accept the difference. It makes no difference to the formalist whether or not the initial formulation of the norm was inspired by notions of "right," or whether it was the product of some utilitarian calculation on the part of the legislature. However, once the norm is a part of the law, it is to be applied without regard to whether or not it increases "utility," or any other measure of the "good" in the given case. Therefore, it seems correct to contrast teleological theories of legal reasoning with approaches that are otherwise at odds. For example, both the refined positivism of Hart and the idealism of Dworkin are approaches to adjudication which are opposed to the teleological approach.

With these distinctions in mind, the following may be said about the liberal ideal of equality before the law.

First, it is a principle primarily concerned with the means by which government action is taken. Taken at its face value as a formal principle, equality before the law appears to enjoin government from passing any laws which do not apply equally to all. It will become evident that this is neither possible nor desirable. The problem thus becomes one of deciding which bases of differentiation are compatible with equality before the law, a problem of considerable dimension.

Though the liberal conception of equality before the law is often characterized as a formal principle, it does impose limits on the substance of the laws in the following way. It may be the case that certain "ends" are unrealizable unless the strictures of formal equality are abandoned. One of the attacks on the principle of formal equality, and the Rule of Law, comes from those who recognize the limits that these principles place on government's ability to restructure the social order.

Second, its essential thrust is negative. It is directed at minimizing the governmental coercion of individuals to the greatest extent possible. The core value that it serves is "negative liberty." The economic order with which it is most compatible is the market.

Thus there is a compatibility among the liberal notion of the Rule of Law, negative liberty, and formal equality. If the government is itself bound by its own laws (The Rule of Law), and the laws are to apply equally to all (formal equality), it was believed that the resulting legal order would leave the individual with the greatest degree of (negative) liberty possible in social life. Theoretically, it does make sense to assume that a ruler would be reluctant to pass an oppressive law when he too would be bound by it. Empirically, where the Rule of Law had its firmest roots in practice (England of the eighteenth and nineteenth centuries) the individual enjoyed a degree of liberty unequalled in the world.

The third element of the liberal conception of equality concerns the justificatory theories underlying it. The interesting point is that both deontological and teleological theories claim to be the true foundation for equality before the law. The deontological theories, whether natural law theories or variations

on a Kantian transcendentalism, ground the idea of equality in man's moral and rational nature.<sup>153</sup> The teleological theories, particularly utilitarianism, claim that adherence to such a principle increases the "good" in society.<sup>154</sup>

The final point concerns the nature of the legal theory that will be compatible with the liberal conception of equality. Even if one believes in the utilitarian justification for the principle, it will be in the form of "rule-utilitarianism."<sup>155</sup> As such, the theory of adjudication might not seem to differ substantially from that of a "rights" theory. Both will be concerned not with the consequences of applying the principle in a given case—the rule-utilitarian, because he refers to the rule or principle, whose utility has been pre-determined, the "rights-theorist" because consequences have no overriding moral significance—but with the application of the principle itself. In this sense, borrowing a phrase from an American writer, one could say that such a notion of equality before the law can be applied as a neutral principle.<sup>156</sup>

## 2. The Attack on the Liberal Conception of Equality

The essence of the attack on the principle of formal equality is captured by the oft-cited remark of France, who ridiculed "the majestic equality of the law that forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread."<sup>157</sup> This remark reveals a truth about the liberal conception of equality, and (hence) freedom, which only the most resolute liberal dares acknowledge. The truth is that a regime of formal equality necessarily produces great inequalities in wealth and power in society. As a consequence the freedom protected by formal equality "may mean freedom to starve."<sup>158</sup> The attack on the liberal notion of equality—given the interrelationship of it, the market, and individualism—represented nothing less than an attack on that whole structure of social life as it evolved into the modern Western industrial society.

The Marxist theorists have taken this critique as far as it can go. Freedom does not consist in being left alone, but in recognizing the objective truths of history and acting in accordance with them.<sup>159</sup> The liberal idea of equality, the

<sup>153</sup> See Locke, *The Second Treatise of Government* (N.Y.: New Amer. Libr., 1960); Kant, *supra* note 148; and Raphael, "Human Rights, Old and New," in Raphael, ed., *Political Theory and the Rights of Man* (London: Macmillan, 1967) 54. Cf. Neilsen, *Scepticism and Human Rights* (1968), 52 *Monist* 573.

<sup>154</sup> See Bentham, *supra* note 146. Mill had a conception of equality, expressed in the following way: "[a]ll persons are deemed to have a right to equality of treatment, except when some recognized social expediency requires the reverse." See "Utilitarianism," in Lerner, ed., *Essential Works of John Stuart Mill* (N.Y.: Bantam, 1971) at 247.

<sup>155</sup> See *supra* note 145.

<sup>156</sup> Wechsler, *supra* note 152.

<sup>157</sup> France, *The Red Lily (Le Lys Rouge)*, (N.Y.: Brentano's, 1898) (translated from French) at 117.

<sup>158</sup> Hayek, *supra* note 125, at 18.

<sup>159</sup> See Kerimov, *Liberty, Law and the Legal Order* (1963), 58 *Nw. U.L. Rev.* 643 at 644: "[a]ctual rather than illusory liberty can exist only when the actions of people proceed from necessity which has been recognized, when their activity corresponds to existence's objective conformity with necessity, when they rely in practice upon the objective laws of nature and society."

Marxist argues, is bankrupt; people are not equals, and to treat them equally is to treat them unequally.<sup>160</sup> The individualism of liberalism prevented man from reconciling his existence with that of others. Only when the individual merges his interests with that of the collectivity will he truly be free. The entire superstructure of law must be eliminated;<sup>161</sup> no notion of the Rule of Law can be permitted to impede the radical transformation of society.

This is a caricature at best, but it is meant to reveal the degree to which the liberal notion of equality was perceived to be a denial of something important about social life. The Marxist critique focusses on positive freedom and, potentially, some variant of distributional equality.<sup>162</sup> Its legal theory is clearly teleological in its thrust.<sup>163</sup> Underlying it is an image of social life opposed to the classical liberal ideal.<sup>164</sup>

### 3. The Post-liberal Assimilation

Philosophical and political developments in the nineteenth and twentieth century have produced a confusing situation wherein our faith in the liberal ideal has been shaken severely. The philosophical background essentially consisted of the victory of utilitarianism as a justificatory theory of morality and politics, the rise of positivism in legal and social theory, and the ultimate inability of utilitarianism and positivism to support a strong theory of individualism. The latter could not do so because it held that law can have any content whatsoever,<sup>165</sup> and the former, because ultimately the collective welfare can always outweigh the interests of the individual.<sup>166</sup> In fact, even Mill's defence

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<sup>160</sup> Lenin, "State and Revolution," in Mendel, ed., *Essential Works of Marxism* (N.Y.: Bantam, 1961) 175 at 180.

<sup>161</sup> Marx and Engels wrote of western law that it "is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economic conditions of existence of your class," in Mendel, *id.* at 29. For a discussion of the Marxist conception of law and its relation to the concept of the Rule of Law, see Thompson, *Whigs and Hunters* (London: Allen Lane, 1975) at 258-69. Cf. Horwitz, *The Rule of Law: An Unqualified Human Good?* (1977), 86 Yale L.J. 561.

<sup>162</sup> For an argument that the notion of "to each according to his needs" is egalitarian, see Vastos, "Justice and Equality," in Brandt, ed., *Social Justice* (Englewood Cliffs: Prentice-Hall, 1962) 40. Cf. Hunt, *The Theory and Practice of Communism* (London: Bles, 1950) at 238-40.

<sup>163</sup> Because of Marx's assumption that law would wither away once class antagonisms are eliminated, we do not find a detailed discussion of post-revolutionary legal forms. Aware of the danger of equating Sovietism with Marxism, it is interesting to see how Soviet legal theorists conceive of the role of the judge. It is teleological with a vengeance. "The law of the Soviet regime is a political directive, and the role of the judge does not consist in applying the law in accordance with the requirements of bourgeois juridical logic but in applying it strictly as an expression of the policy of the Party and Government. . . ." See Korowicz, *Protection and Implementation of Human Rights within the Soviet Legal System* (1959), 53 Am. Soc. Int. L. Proc. 248 at 249.

<sup>164</sup> It is beyond the scope of this essay to examine the internal coherence of such an alternative vision of the social ideal. For a telling critique of the idea of equality of result as the basis for social order, see Bedau, "Radical Egalitarianism," in Bedau, ed., *Justice and Equality* (Englewood Cliffs, N.J.: Prentice-Hall, 1971) 168.

<sup>165</sup> See Hart, *supra* note 71, at 181-207.

<sup>166</sup> Conklin, *The Utilitarian Theory of Equality Before the Law* (1976), 8 Ottawa L. Rev. 485.

of liberty on utilitarian grounds contains so much room for collective action that, as social facts change, there is little left of liberty that cannot yield to the utilitarian calculus.<sup>167</sup>

A related development was the collapse of both natural law theory and the belief in the Rule of Law as a norm superior to that of the sovereignty of the legislator. By the time of Dicey, the Rule of Law was defined in terms of procedure and legality, and in time it collapsed into the notion of Parliamentary supremacy.<sup>168</sup> Although the Rule of Law need not be seen as a principle of natural law, this philosophical development combined with political developments to further complicate the equation.

The modern era is one of positive government.<sup>169</sup> The rise of the welfare state, and the corresponding need for extensive administrative and legislative regulation of social life, appears inconsistent with classical liberal ideology. The essence of the socialist critique has been assimilated into academic thought. Government has a positive duty to redress the inequalities of the marketplace, to ensure not merely negative liberty, but what Rawls has called "the worth of liberty."<sup>170</sup>

The Realist movement in the United States attacked the formalism of traditional legal reasoning, arguing that the right answer in a given case was a function of the social consequences produced by that decision. Recourse to "neutral" principles was attacked as impossible at best, and a fraud at worst.<sup>171</sup>

Recent developments in American constitutional law have not made it any easier to dismiss the Realists' critique. With the decision in *Brown v. Board of Education*,<sup>172</sup> the Court embarked on another period of judicial activism. However, this was a different form of activism from that of the "Lochner era." Whereas the previous activism was an attempt to contain the "progressive" legislatures in their attempt to create the welfare state, the modern work of the Court has been marked by two distinct characteristics in the equal protection area. First, the Court has ordered government to make radical changes in the *status quo* in the name of "rights," and second, the Court has been imposing affirmative duties on government to ensure that the individual realizes the value of his or her rights and freedoms.<sup>173</sup> As a noted student of the Court remarked:

These two characteristics of the decisions dealing with Equality seem to me to reflect a change in our philosophy concerning the roles of law and government in relation to human rights. The original Bill of Rights was essentially negative. It

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<sup>167</sup> Wolff, *The Poverty of Liberalism* (Boston: Beacon Press, 1968) at 21-25.

<sup>168</sup> See Friedman, *supra* note 141.

<sup>169</sup> For a challenging analysis of the impact of positive government on Canadian federalism, see Cairns, *The Other Crisis of Canadian Federalism* (1979), 22 Can. Pub. Admin. 175.

<sup>170</sup> *Supra* note 120, at 204.

<sup>171</sup> For a modern version of this critique, see Miller and Howell, *supra* note 149.

<sup>172</sup> 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

<sup>173</sup> There is some reason to believe that the present Court is backing off from the imposition of positive duties on government. See, e.g., *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376 (1977).

marked off a world of the spirit in which government would have no jurisdiction; it raised procedural barriers to unwarranted intrusion. It assumed, however, that in this realm the citizen had no claim upon government except to be let alone. Today, the political theory which acknowledges the duty of government to provide jobs, social security, medical care, and housing extends to the field of human rights and imposes an obligation to promote liberty, equality, and dignity. For a decade and a half recognition of this duty has been the most creative force in constitutional law.<sup>174</sup>

This "most creative force" has not been without its cost. It has provoked another crisis of legitimacy. The Court is now being attacked for usurping the legislative function and for deciding cases on the basis of non-legal standards.<sup>175</sup> The contrast between this kind of criticism and that which defined academic response in the "Lochner era" serves to illuminate the changes in the western social ideal that inform legal, moral and political theory.

The age of classical liberalism is clearly past. Government is concerned with questions of distributive justice, although it is fair to say that the philosophy governing redistribution and spending is far from coherent.

Given this kind of government, no conception of equality before the law will be adequate if it does not take account of the fact that government is expected to act positively. In acting positively, the government cannot be confined to the requirements of the Rule of Law in the classical liberal sense, nor to the demands of formal equality derived therefrom.<sup>176</sup> However, the value of the principle of formal equality ought not to be discounted. At the very least, it can force government to justify its deviations from the principle. This means that, whether it is the content of the law, or its manner of application, that is challenged as violative of equality before the law, the thrust of the judicial task is essentially negative. It is concerned primarily with whether there is an inequality before the law such as to justify judicial action to redress it.<sup>177</sup> In fact, it is difficult to imagine how else it could proceed. Just as the nature of scientific reasoning proceeds on the basis of the "falsification principle"<sup>178</sup>—a theory is "true" only to the extent that it resists attempts to falsify it—so too does moral reasoning proceed.<sup>179</sup> Although equality or justice may resist definition, inequality and injustice can be recognized. The tough question concerns the kinds of reasons that can be deployed to justify an inequality, assuming that such an inequality has been shown to exist.

### C. *Testing Our Conceptions of Equality*

At the outset, two possible meanings of equality before the law may be disposed of. The first would hold that the legislature can make no distinctions

<sup>174</sup> Cox, *supra* note 133, at 93.

<sup>175</sup> See Berger, *Government by Judiciary* (Cambridge: Harv. U. Press, 1977).

<sup>176</sup> "Liberal" and radical theorists appear to agree on this point. See Hayek, *supra* note 125, at 231-33. Cf. Unger, *supra* note 133, at 192-200.

<sup>177</sup> Rawls, *supra* note 120, at 199; Llewellyn, *The Common Law Tradition* (Boston: Little, Brown, 1960) at 60.

<sup>178</sup> Popper, *The Logic of Scientific Discovery* (N.Y.: Basic Books, 1959). Cf. Kuhn, *supra* note 11, at 146-47.

<sup>179</sup> Hayek, *supra* note 80, at 153-76.

at all in the laws that it promulgates. This is recognized as impossible by both judges<sup>180</sup> and scholars<sup>181</sup> alike; the art of governing means making distinctions, and a workable conception of equality before the law must take into account this fact. Second, the notion that equality before the law imposes no limits on the kinds of distinctions that government makes, so long as the law is otherwise valid, can be rejected. Unless no other plausible meaning is discerned, one is entitled to proceed on the basis that our notion of equality will place some limits on the legislature. Otherwise, as was evident with respect to the "valid federal objective" test, the notion of equality is rendered superfluous. Having said this, some of the more plausible formulations of the concept require examination.

1. Equality before the law means the equal application of the law to all to whom that particular law extends.

This, in essence, is a formulation of the principle that found favour with both Canadian and American courts in the early years of the enforcement of their respective Bills of Rights. In the case of *Regina v. Gonzales*,<sup>182</sup> Mr. Justice Tysoe of the British Columbia Court of Appeal defined equality before the law as "a right to every person to whom a particular law relates or extends, no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends. . . ."<sup>183</sup> The same construction was placed on the equal protection clause of the Fourteenth Amendment by the United States Supreme Court in *Powell v. Pennsylvania*,<sup>184</sup> when it wrote that equal protection was not violated so long as the law "place[d] under the same restrictions, and subject[ed] to like penalties and burdens, all who . . . [were] embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same [regulated activities]."<sup>185</sup>

This "test" was ultimately rejected by both the Supreme Court of Canada and its American counterpart.<sup>186</sup> This is best exemplified by Mr. Justice Ritchie's remarks in *Drybones*, which note that "the most glaring discrimina-

<sup>180</sup> "[T]he very idea of classification is that of inequality." *Atchison v. Matthews*, 174 U.S. 96 at 106, 19 S. Ct. 609 at 613, 43 L. Ed. 909 at 913 (1899) per Brewer J; "it would be a practical impossibility . . . for an orderly society to exist if there were equal laws for everyone in the sense of the same laws for everyone." *R. v. Gonzales* (1962), 32 D.L.R. (2d) 290 at 295, 37 W.W.R. 257 at 263, 132 C.C.C. 237 at 242 per Tysoe J.A.

<sup>181</sup> Tussman and tenBroek, *The Equal Protection of the Laws* (1949), 37 Cal. L. Rev. 341.

<sup>182</sup> *Supra* note 180.

<sup>183</sup> *Id.* at 296 (D.L.R.), 264 (W.W.R.), 243 (C.C.C.).

<sup>184</sup> 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253 (1888). The *U.S. Const.* amend. XIV, s. 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>185</sup> *Id.* at 687 (U.S.), 997 (S. Ct.), 257 (L. Ed.) per Harlan J.

<sup>186</sup> Tribe, *supra* note 113, at 994-96.

tory legislation against a racial group would have to be construed as recognizing the right of each of its individual members to "equality before the law," so long as all the other members are being discriminated against in the same way."<sup>187</sup> Thus, as a test directed at the content of a given law, this formulation is clearly inadequate; in no sense does it capture the notion of human dignity—the right to be treated as an equal—that is so central to our notion of equality. Note, however, that a law may be challenged under the Bill of Rights either because of its content or because of its administration. In the latter case, the formulation under question does become relevant, and indeed, is a necessary element in our understanding of equality before the law. In the search for a clear "test," or a definition of equality, the Court must not forget that different considerations become relevant depending on the nature of the challenge to the legislation in question.

2. Equality before the law means equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land.

This was the definition enunciated by Mr. Justice Ritchie in the *Lavell* case,<sup>188</sup> a formulation adapted from Dicey's notion of the Rule of Law. It is not necessary to repeat the arguments that have been made against this formulation.<sup>189</sup> However, it is necessary to point out that Dicey's emphasis on the "ordinary courts of the land" represented a misreading of the function of the administrative tribunal in modern society. This misreading resulted from his analysis of the German situation extant at the turn of the century.<sup>190</sup> Once one corrects this, and incorporates the notion that, regardless of whether courts review the actions of administrative tribunals, the actions of the tribunal ought to be subject to the principle of equality before the law, it is apparent that once again the Court has failed to differentiate between challenges to the content of a law, and challenges to the manner of its administration.

As a test directed at the content of a given law, it has very limited relevance.<sup>191</sup> In fact, the same objections levelled at the first formulation considered could apply with equal force to this one. However, as a principle directed at the manner in which a law is applied or enforced, it does have some relevance in the same way as did the first formulation. One can only explain the Supreme Court's use of this formulation in so clearly an inappropriate context as a device to avoid dealing with the serious problems posed by judicial review of the *Indian Act*.<sup>192</sup>

3. An individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something that his fellow citizens are free to do without having committed any offence or having been made subject to any penalty.

<sup>187</sup> *Supra* note 89, at 297 (S.C.R.), 484 (D.L.R.), 365 (C.C.C.).

<sup>188</sup> *Supra* note 35, at 1366 (S.C.R.), 495 (D.L.R.), 211-12 (C.R.N.S.).

<sup>189</sup> See Tarnopolsky, *supra* note 1, at 158-60.

<sup>190</sup> See Friedmann, *Legal Theory* (3d ed. London: Stevens, 1953) at 502-503; Hayek, *supra* note 141, at 28-29; and Tarnopolsky, *id.* at 158.

<sup>191</sup> It would be relevant in the context of a law which, for example, exempted politicians from the norms of the *Criminal Code*.

<sup>192</sup> R.S.C. 1970, c. I-6.

This formulation was applied by Mr. Justice Ritchie in the *Drybones* case.<sup>193</sup> It suggests that a distinction based on race, at least for some purposes, will violate equality before the law. It was noted earlier that the Court refrained from inquiring into the possible justifications for the difference in treatment between native people and other Canadians. It raises the question as to when, if ever, race will be a factor that legitimately can be employed to furnish the basis of a distinction in the law.

What if it were a "fact" that all persons of race X were one thousand times more likely to commit a violent crime when intoxicated than those of race Y? What if race X were one thousand times more vulnerable to a certain disease than were those of race Y? Could this justify different drinking laws for the races, or, compulsory inoculation of race X? What if convicted persons of race X had a recidivism rate one thousand times greater than that of persons of race Y? Would that justify different rules with respect to sentencing? To parole? What if members of race X *wanted* to be treated differently than all those of other races? Would that justify the law? Could a dissenting member of race X complain? Does it depend on whether the different treatment is "benign?" With respect to whom?

Some of these questions will be dealt with at a later stage in this inquiry. For the moment, this formulation is at least provisionally acceptable, for it does express the important element in our own considered judgments about equality: that treating people as equals makes distinctions based on race (or some other immutable characteristic) immediately suspect. If one had to choose between a blanket rule allowing or prohibiting such a distinction, one would surely want to choose the latter.

4. Equality before the law means that the distinctions in the law must be relevant.

It has already been noted that this test can be rendered impotent when relevance is defined in terms of a logical connection between the classification and its consequences in law. The fact is that relevance is not a criterion of logic, but of context; a distinction is or is not relevant to the extent that it is related to the purpose or ends of the rule in question. Thus this formulation can be recast in fairly familiar terms: equality before the law means that the classification must be related to the purpose of the law. Requiring that the means employed be related to the ends sought is a demand that the laws be rational. As such, it is often said that the classification must be reasonably related to the purpose of the law.<sup>194</sup> In American parlance, this is referred to as the "minimal scrutiny" standard of judicial review.

How one defines the purpose of the impugned law will determine whether or not it passes this test. If the purpose is defined in very narrow terms, the test can always be satisfied. For example, a law which granted rights to class X but not to class Y could be said to have the purpose of benefiting class X, and the demand for rationality would be satisfied. Similarly, if the purpose is framed in terms sufficiently broad, the test would also be satisfied. Let us say

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<sup>193</sup> *Supra* note 33, at 297 (S.C.R.), 484 (D.L.R.), 365 (C.C.C.).

<sup>194</sup> See Tussman and tenBroek, *supra* note 181.



that an impugned law was part of the *Criminal Code*.<sup>195</sup> One could define its purpose as legislation in the discharge of the criminal law power. As such, it would pass the test. This, in effect, is the extent to which the valid federal objective test can be seen to be an application of this formulation.

If it is obvious that the crucial aspect of this test resides in the manner in which the purpose of the law is defined, it is equally obvious that this opens up a series of difficult questions for the court.

First, the judiciary cannot avoid making some judgment about the purpose of the impugned law. It would render superfluous the demand for equality before the law if the court merely accepted the government's evaluation of the purpose at face value. Whatever "extra" is demanded by the concept of "reasonableness," it is clear that it is the court's job to come to an independent evaluation of the purpose of the law in question.

How does the court define the purpose of a law? If the essence of the judicial function under a Bill of Rights is to assess the adequacy of the reasons that the government offers for an alleged violation of equality before the law, the judiciary must confront the relationship between the reasons offered by the government in the context of the litigation, and the reasons for which the law was passed initially. To appreciate the latter, the court will be forced "back into history." Leaving aside the question of (a) whether there is a record of the legislative history, (b) whether judges will look at it, and (c) whether it is sufficiently unambiguous to afford guidance to the judiciary, the problem of legislative motive must be confronted.

Despite disclaimers to the contrary, American courts have evaluated the motives of legislators in deciding whether or not to strike down a piece of legislation.<sup>196</sup> Canadian judges have acted similarly when they have decided questions of *ultra vires* in constitutional cases.<sup>197</sup> The real question is more complex than whether judges should be concerned with motive. The problem arises when the motive is "bad," but the law could otherwise be supported as having a valid purpose. This was the problem when Congress passed a law prohibiting the burning of draft cards.<sup>198</sup> There was little doubt that the motive

<sup>195</sup> R.S.C. 1970, c. C-34.

<sup>196</sup> The American courts have looked at motive in such cases as *Califano v. Goldfarb*, 430 U.S. 199 at 212-17, 97 S. Ct. 1021 at 1030-32 (1977); *Epperson v. Arkansas*, 393 U.S. 97 at 107-109, 89 S. Ct. 266 at 272-73, 21 L. Ed. 2d 288 at 236-37 (1968); and *Flemming v. Nestor*, 363 U.S. 603 at 613-21, 80 S. Ct. 1367 at 1374-78, 4 L. Ed. 2d 1435 at 1446-50 (1960). In certain cases, the Supreme Court has insisted that both motive and impact be proved in the context of equal protection challenges against allegedly discriminatory laws: *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); and *Arlington Hts. v. Metro Housing Develop. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977). Despite this fact, the Court has said that it would not inquire into motive: *U.S. v. Darby*, 312 U.S. 100 at 115, 61 S. Ct. 451 at 457, 85 L. Ed. 609 at 617 (1941); and *Palmer v. Thompson*, 403 U.S. 217 at 224-25, 91 S. Ct. 1940 at 1944-45, 29 L. Ed. 2d 438 at 444-45 (1971).

<sup>197</sup> See *Reference re Alberta Statutes*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, *aff'd* [1939] A.C. 117; and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541.

<sup>198</sup> 50 U.S.C.A. §462(b) provided that an offence was committed by any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificates. . . ."

of the legislators was to punish those who were burning their draft cards in protest against the war in Viet Nam. Nor was there any doubt that such a law passed for this reason would be invalid under conventional First Amendment doctrine.<sup>199</sup> Nevertheless, ignoring a number of cases wherein it had considered motive, the Supreme Court upheld the law as serving the legitimate purpose of protecting draft cards, necessary for the maintenance of the viability of the draft process. It went further and stated that the reasons motivating the enactment of the law were irrelevant for the purposes of evaluating that law's constitutionality.<sup>200</sup>

This clearly is unacceptable. Both Canadian and American courts have recognized that both the purpose and the effect of such a law are relevant to questions of its conformity with constitutional imperatives.<sup>201</sup> The difficulty is intractable. Either the court looks at the legislative history to determine the motivating reasons, in which case it will be forced to come to terms with the possibility of "mixed motives," or it ignores that aspect of the legislative process and evaluates the law in terms of what it can glean from the text itself. If it opts for the latter approach, its evaluation of the law's purpose will be less than fully informed. The Anglo-Canadian tradition is to eschew the use of legislative history and to take the law as you find it. However well or badly this convention has served the judiciary in the past,<sup>202</sup> and whatever may be the practical difficulties in distilling a motive from the mass of legislative history that might be available,<sup>203</sup> the question is whether a Bill of Rights can be applied intelligently and effectively without the judiciary involving themselves in this difficult process. Canadian judges, in dealing with questions of *ultra vires*, seem more amenable to the idea of consulting legislative history now than they were in the past.<sup>204</sup> There do not appear to be any reasons why, if such an approach is warranted in those cases, it is not so demanded when the case involves the Bill of Rights.

Assuming that the court has come to a determination of the purpose of the law, there is one basic question: are there any limits to the kinds of purposes that a government may pursue?

There are good reasons for putting the Canadian situation to one side for the moment, and looking at the American experience in this regard. When Canadian courts have imposed limits on the ends that government was seeking to achieve, it was in the context of the federal-provincial division of powers. The notion of implicit limitations on governmental power has never gained

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<sup>199</sup> See Tribe, *supra* note 113, at 591-98.

<sup>200</sup> *U.S. v. O'Brien*, 391 U.S. 367 at 383, 88 S. Ct. 1673 at 1682, 20 L. Ed. 2d 672 at 683 (1968). For an argument that this case was wrongly decided, see Tribe, *id.* Cf. Ely, *Legislative and Administrative Motivation in Constitutional Law* (1970), 79 Yale L.J. 1205 at 1222.

<sup>201</sup> How could it be otherwise, assuming that the argument that the essence of the judicial inquiry is into the reasons offered in justification for the law is valid?

<sup>202</sup> See Kilgour, *The Rule Against the Use of Legislative History: 'Canon of Construction' or Counsel of Caution?* (1952), 30 Can. B. Rev. 769.

<sup>203</sup> Tribe, *supra* note 113, at 595-96.

<sup>204</sup> See the *Anti-Inflation* reference, *supra* note 197. See also *Blaikie v. A.G. Que.*, [1978] C.S. 37, 85 D.L.R. (3d) 252, 30 N.R. 225 *per* Deschenes C.J.S.C.

acceptance in Canada,<sup>205</sup> because of the manner in which the principle of Parliamentary supremacy has been defined. The American experience is helpful because it illustrates both the necessity and the danger of courts' imposing substantive limits on the policies that a legislature may pursue.

The starting point for an understanding of American Constitutional law on this issue must be Chief Justice Marshall's oft-cited remark in *McCullock v. Maryland*: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."<sup>206</sup> It was once thought that the question of the legitimacy of governmental ends could be "reasoned out" of the nature of government and the natural rights of man. Within a classical liberal mindset, it was believed that it was not legitimate for a government to take property from A to give to B.<sup>207</sup> By the end of the nineteenth century, doctrinal developments in American constitutional law had paved the way for the Court to strike down "social welfare" legislation on the grounds that redistribution was not a legitimate function of the legislature.<sup>208</sup> As has been well documented elsewhere,<sup>209</sup> the political vision motivating the Court was not consistent enough to withstand the "external" attacks on its viability in an era of increasingly pervasive government. Broadly speaking, the Court's activism in the field of social and economic legislation came to an end in 1937 when the Supreme Court upheld minimum wage laws for women.<sup>210</sup> At least in some areas, the Court has abandoned the task of imposing limits on the ends that government might seek to achieve,<sup>211</sup> returning to the minimal scrutiny implicit in Chief Justice Marshall's *dictum*.

What then of the "reasonableness" component of the formulation under question? When one remembers the unfortunate history of substantive due process during the early part of this century, it is not surprising that the American courts would show a remarkable deference to the legislature in those areas of legislation where the Court previously had intervened actively. It is fair to say that the demands of "rationality" are exceptionally weak.<sup>212</sup>

<sup>205</sup> The idea of an implied Bill of Rights was suggested in a number of cases in the Supreme Court, e.g., *Switzman v. Elbling*, [1957] S.C.R. 285 at 328, 7 D.L.R. (2d) 337 at 371, 117 C.C.C. 129 at 166 per Abbott J. The idea has been buried by the judgment of Mr. Justice Beetz in *A.G. Can. v. Dupond*, [1978] S.C.R. 770 at 796-98, 84 D.L.R. (3d) at 438-40, 19 N.R. 478 at 495-98.

<sup>206</sup> 17 U.S. (4 Wheat.) 316 at 421, 4 L. Ed. 579 at 605 (1819).

<sup>207</sup> See Mr. Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 368 at 388, 1 L. Ed. 648 at 648 (1798).

<sup>208</sup> See Tribe, *supra* note 113, chs. 7-8.

<sup>209</sup> *Id.* at 442-49.

<sup>210</sup> *West Coast Hotel v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703.

<sup>211</sup> Another example would be in the area of Congress' power to regulate commerce. See Tribe, *supra* note 113, at 232-39. But see *Nat'l League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465 (1976). For a provocative argument that this case can be read as a recognition of individuals' rights to governmental services, see Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services* (1977), 90 Harv. L. Rev. 1065.

<sup>212</sup> See Note, *Legislative Purpose, Rationality, and Equal Protection* (1972), 82 Yale L.J. 1065.

The Court will rarely strike down legislation that is either underinclusive or overinclusive.<sup>213</sup> Government may proceed to tackle a problem one step at a time,<sup>214</sup> or it may adopt prophylactic measures to address a problem. As Mr. Justice Holmes said, "the machinery of government would not work if it were not allowed a little play in its joints."<sup>215</sup>

The Court has upheld legislation based not on the reasons actually advanced in its support, but "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy."<sup>216</sup> As Professor Tribe notes, the "remarkable deference to state objectives has operated in the sphere of economic regulation quite apart from whether the conceivable 'state of facts' (1) actually exists, (2) would conceivably justify the classification if it did exist, or (3) has ever been urged by those who promulgated it or have argued in its support."<sup>217</sup> It is only when a distinction in the law is "clearly wrong, a display of arbitrary power"<sup>218</sup> that the court will interfere.

It is clear how far removed this is from the demands of the principle of formal equality. No longer must the law apply equally to all; it is sufficient that there be some relation between the means chosen and ends desired. Were this the extent of it, the demand of equality before the law would be a fairly easy one to meet. Nevertheless, it would still be an important restraint. At the core of the liberal conception of equality before the law is the belief that liberty is best protected when government is precluded from acting arbitrarily in its law-making power. However manipulable the concepts of rationality and purpose are, they do serve the important function of making the government tailor its legislation more closely to the specific goals that it seeks to achieve. It will become evident that this demand for legislative rationality can have a significant effect when judges take it seriously. It is obvious, however, that this is not the full extent of what equality before the law demands.

The *Canadian Bill of Rights* lists certain rights and freedoms which are said to exist "without discrimination by reason of race, national origin, colour, religion or sex."<sup>219</sup> It has been argued that, when these are implicated, there is no room for a "reasonable basis" test. Dissenting in *Lavell*, Laskin J. (as he then was) wrote:

It was urged . . . that the discrimination embodied in the *Indian Act* . . . is based upon a reasonable classification of Indians as a race. . . . Reference was made in this connection to various judgments of the Supreme Court of the United States. . . .

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<sup>213</sup> See Tussman and tenBroek, *supra* note 181.

<sup>214</sup> *Ry. Express Agency v. N.Y.*, 336 U.S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949); *Williamson v. Lee Optical*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955).

<sup>215</sup> *Bain Peanut Co. v. Pinson*, 282 U.S. 499 at 501, 51 S. Ct. 228 at 229, 75 L. Ed. 482 at 491 (1931) *per* Holmes J.

<sup>216</sup> *Allied Stores v. Bowers*, 358 U.S. 522 at 530, 79 S. Ct. 437 at 443, 3 L. Ed. 2d 480 at 487 (1959).

<sup>217</sup> Tribe, *supra* note 113, at 996.

<sup>218</sup> *Mathews v. deCastro*, 429 U.S. 181 at 185, 97 S. Ct. 431 at 434 (1976), quoting from *Helverling v. Davis*, 301 U.S. 619 at 640, 57 S. Ct. 904 at 908, 81 L. Ed. 1307 at 1315 (1937).

<sup>219</sup> *The Canadian Bill of Rights*, s. 1.

Those cases have at best a marginal relevance because the Canadian Bill of Rights itself enumerates prohibited classifications which the judiciary is bound to respect. . . .

I do not think it is possible to leap over the telling words of s. 1 . . . in order to explain away any such discrimination by invoking the words "equality before the law" in clause (b) and attempting to make them alone the touchstone of reasonable classification. . . . [T]he proscribed discriminations in s. 1 have a force either independent of the subsequently enumerated clauses (a) to (f) or, if they are found in any federal legislation, they offend those clauses because each must be read as if the prohibited forms of discrimination were recited therein as a part thereof.<sup>220</sup>

The implication of these remarks appears to be that any law that classifies on the basis of one of the listed prohibited grounds *per se* violates the *Canadian Bill of Rights*.<sup>221</sup> In order to evaluate this position—which may appeal to some—it is advisable to consider how the American courts have dealt with analogous problems.

One year after the Supreme Court had renounced its active intervention in social and economic legislation, Mr. Justice Stone, in upholding such a piece of legislation, made the following observations in a footnote to his opinion.

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular . . . minorities; . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .<sup>222</sup>

The message in this footnote was translated into what is now called the "strict scrutiny" doctrine. When legislation makes distinctions that are "suspect," or distributes burdens or benefits in a manner not consistent with "fundamental rights," the legislation will be struck down in the absence of a compelling governmental justification.<sup>223</sup>

Laws which discriminate on the basis of race appear to be the clearest candidates for strict scrutiny. Dissenting in the infamous case of *Plessy v. Ferguson*,<sup>224</sup> Mr. Justice Harlan affirmed that the constitution is colour-blind.

<sup>220</sup> *Supra* note 35, at 1386-87 (S.C.R.), 510 (D.L.R.), 226-27 (C.R.N.S.).

<sup>221</sup> This is not the current view of the Court. See *Bliss, supra* note 7, at 190 (S.C.R.), 422 (D.L.R.), 236 (C.L.L.C.).

<sup>222</sup> *U.S. v. Carolene Prods. Co.*, 304 U.S. 144 at 152-53, 58 S. Ct. 778 at 783-84, 82 L. Ed. 1234 at 1240-42 (1938).

<sup>223</sup> *Tribe, supra* note 113, at 1000-25.

<sup>224</sup> 163 U.S. 537 at 559, 16 S. Ct. 1138 at 1146, 41 L. Ed. 256 at 263 (1896).

In the aftermath of *Brown v. Board of Education*,<sup>225</sup> however, the question of whether racial classifications always attract strict scrutiny has become a major and problematic theme in American constitutional law.

Without attempting a review of the case law and literature on this subject, the following general observations are in order.<sup>226</sup> The Court is willing to accept racial classifications if they are part of an effort to remedy past discrimination, at least when such a past discrimination has been determined, either judicially or administratively, to have existed. There is a sometimes hesitant acceptance of the principle that there is a difference between racial distinctions that represent a prejudice against the minority, and those that represent an effort by the majority to redress past injustices. When a majority burdens itself, the dangers referred to by Mr. Justice Stone are not present.

This, of course, does not answer the philosophical question of whether racial classifications violate the principle of equality before the law. If the classical liberal mind-set were dominant, the conclusion would be that they do. However, it has been noted that there may be good reasons for permitting a violation of formal equality in the interest of treating people as equals. A *per se* rule, such as was articulated by Mr. Justice Laskin in *Lavell*, appears to preclude that possibility. So would the automatic invocation of strict scrutiny whenever legislative classifications were drawn on the basis of race.

Strict scrutiny has been termed strict in theory and fatal in fact,<sup>227</sup> for only in the war-time cases concerning the dislocation of the Japanese-Americans was government regulation upheld after being subjected to this level of scrutiny.<sup>228</sup> The problems with this mode of analysis are obvious.

First, it is clear that the Court must face the issue of what "rights" are fundamental. Despite Mr. Justice Stone's allusion to the first ten amendments to the Constitution, the Court has not limited fundamental rights to those explicitly listed in the Constitution. The emerging concept of privacy,<sup>229</sup> for example, under which the abortion cases were decided,<sup>230</sup> represents an attempt by the Court to explore the underlying rationale for a regime of "rights." Many members of the Court have noted the difficulties inherent in such an approach, and have resisted this line of analysis.<sup>231</sup> Whether one ties the concept of fundamental rights to the text of the Constitution, or goes "behind" the text to discover the implications of the rights therein expressed, the central problem

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<sup>225</sup> *Supra* note 172.

<sup>226</sup> Tribe, *supra* note 113, at 1043-52.

<sup>227</sup> Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* (1972), 86 Harv. L. Rev. 1 at 8.

<sup>228</sup> *Hirabayashi v. U.S.*, 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943); *Korematsu v. U.S.*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944).

<sup>229</sup> See Tribe, *supra* note 113, at 886-990.

<sup>230</sup> *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

<sup>231</sup> See the dissenting opinions of Black J. and Stewart J. in *Griswold v. Conn.*, 381 U.S. 479 at 507, 527, 85 S. Ct. 1678 at 1695-96, 1706, 14 L. Ed. 2d 510 at 529-31, 542 (1965).

is the same.<sup>232</sup> In one form or another, the Court is imposing substantive limits on the ends of government.<sup>233</sup>

Similarly, the Court must articulate those bases of classification that are deemed "suspect." What criteria are available for this task? The argument is often made that classification based on gender, no less than on race, is a clear case for the invocation of strict scrutiny. Women, although not a "discrete and insular minority" as such, traditionally have been excluded from equal status with men. It is hard to find any society that, to some degree or another, is not male-dominated.<sup>234</sup> If the paternalistic attitude of whites toward blacks is viewed as unsupportable, so too should the paternalistic attitude of men toward women. As one writer put it:

Once thought normal, proper, and ordained in the "very nature of things," sex discrimination may soon be seen as a sham, not unlike that perpetrated in the name of racial superiority. Whatever differences may exist between the sexes, legislative judgments have frequently been based on inaccurate stereotypes of the capacities and sensibilities of women. In view of the damage that has been inflicted on individuals in the name of these "differences," any continuing distinctions should, like race, bear a heavy burden of proof.<sup>235</sup>

However, this "heavy burden" means the certain invalidation of any such law. Once again, the Court would be denying the legislature the full extent of its legislative power.<sup>236</sup>

Not all agree. A distinction is often made between the implications of using the due process clause as opposed to the equal protection clause in striking down legislation. Mr. Justice Jackson wrote: "Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. . . . invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand."<sup>237</sup> Whereas the due process line of attack puts certain rights beyond the reach of government, the equal protection clause is said to impose only a norm of even-handedness on government. It can always recast its legislation in narrower or broader terms to comply with the imperative.

However, this is only half-true. It ignores the fact that government, con-

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<sup>232</sup> It may be said that there is a crucial difference between limiting oneself to the text, and elaborating on the rights therein enumerated. See Monaghan, *The Constitution Goes to Harvard* (1978), 13 Harv. Civ. Rts. - Civ. Lib. L. Rev. 117. The difference concerns the legitimacy of the judicial enterprise, a subject addressed in Part V of this essay. For an argument that confining oneself to the strict text is impossible, see Ely, *Constitutional Interpretivism: Its Allure and Impossibility* (1978), 53 Ind. L.J. 399.

<sup>233</sup> This point is made in the seminal article by Tussman and tenBroek, *supra* note 181.

<sup>234</sup> See generally Goldberg, *The Inevitability of Patriarchy* (N.Y.: Morrow, 1973); and Sullerot, *Woman, Society and Change* (London: Weidenfeld & Nicolson, 1971).

<sup>235</sup> Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?* (1971), 84 Harv. L. Rev. 1499 at 1508.

<sup>236</sup> One must note that, even if sex-based classifications were deemed to be suspect, the Court could avoid striking down legislation by characterizing the distinction as one not based on sex. The *Bliss* case is a prime example of this device.

<sup>237</sup> *Ry. Express Agency*, *supra* note 214, at 112 (U.S.), 466 (S. Ct.), 540 (L. Ed.).

strained by the suspect class concept, may not be able to achieve its ends at all. Nor can it "even-handedly" burden rights deemed beyond their reach by due process analysis, such as the right to control one's reproductive organs.<sup>238</sup> It is illusory to bifurcate the Court's review of legislation under the two clauses of the Fourteenth Amendment; both represent norms of "fairness" that the Court takes seriously,<sup>239</sup> and much of equal protection analysis draws upon substantive due process notions of implied rights against the government.

This argument also ignores the fact that the equal protection doctrine has not stopped at restraining government from acting arbitrarily; one dominant theme in the history of the past decades has been the judicial imposition of affirmative duties on other branches of the government.<sup>240</sup> No matter what one thinks of the propriety of such a position, it is clear that it is a response to the breakdown of liberal ideology and a commitment by some judges to the "positive" conceptions of freedom and equality described earlier. In the present context of equal protection doctrine, Professor Tribe is clearly correct when he notes that "[n]either in theory nor in operation can a norm of equality be given real content without imposing significant constraints upon the substantive choices that political majorities and their representatives might feel strongly inclined to make."<sup>241</sup>

The problems of defining fundamental rights and determining which classifications are suspect or invidious are difficult, though not impossible. However, in the context of a "two-tiered" analysis, where the application of strict scrutiny means the certain invalidation of the impugned legislation, the Supreme Court of the United States has been reluctant to add new "rights" and "suspect classes" to the list. As a result, despite suggestions to the contrary in the case law,<sup>242</sup> distinctions made between the rich and the poor have not been deemed "invidious;"<sup>243</sup> nor has education been deemed a fundamental right, despite the obvious importance that it has for the development of other fundamental rights.<sup>244</sup> Furthermore, and most importantly for the purposes of this analysis, classifications based on gender have not been deemed sufficiently suspect to attract strict scrutiny.<sup>245</sup>

Though the two-tiered analysis served the admirable purpose of allowing government a wide latitude in economic and social legislation, while still pro-

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<sup>238</sup> The *Roe* case, *supra* note 230.

<sup>239</sup> Speaking of the relationship between equal protection and due process, Mr. Justice Marshall remarked that, "the elements of fairness should not be so rigidly cabined." *U.S. Dept. of Agr. v. Murry*, 413 U.S. 508 at 518, 93 S. Ct. 2832 at 2838, 37 L. Ed. 2d 767 at 776.

<sup>240</sup> See Cox, *supra* note 133. For a comprehensive investigation into the extent of some of these duties in certain institutional contexts, see Frug, *The Judicial Power of the Purse* (1978), 126 U. Pa. L. Rev. 715.

<sup>241</sup> Tribe, *supra* note 113, at 991.

<sup>242</sup> *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1954); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

<sup>243</sup> *San Antonio Ind. Sch. Dist.*, *supra* note 134.

<sup>244</sup> *Id.*

<sup>245</sup> *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971). See generally Tribe, *supra* note 113, at 1063-70.



protecting rights deemed fundamental (including the right not to be "used" by those whose motives were tainted with prejudice),<sup>246</sup> it suffered from inflexibility. Rights were either "fundamental" or they were not; classifications were either suspect or they were not. In the former sets of cases, the legislation fell; in the latter, it was upheld without more than a cursory glance at the reasons for its enactment. This problem was one that was not lost on either the judges or the students of the Court.<sup>247</sup>

In *Danridge v. Williams*,<sup>248</sup> Mr. Justice Marshall, writing in dissent, rejected the two-tiered analysis that the Court employed, and enunciated a sophisticated balancing test which he urged the Court to adopt. "[C]oncentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."<sup>249</sup>

In a series of cases dealing with gender discrimination,<sup>250</sup> aliens,<sup>251</sup> and illegitimacy<sup>252</sup> the court has employed a mode of review that has been termed "intermediate scrutiny."<sup>253</sup> Attention is paid to legislation that burdens important interests, or that discriminates on the basis of categories that suggest that closer attention needs to be paid to the reasons offered in justification. Attention is also focussed on the structure of the rule-formulating and rule-applying processes that are in issue.<sup>254</sup>

Whereas any conceivable justification was sufficient for a law to be upheld under the minimal scrutiny standard, and whereas virtually no justifications could save a law that was scrutinized strictly, the techniques of intermediate review represent a more flexible approach to the question.

First, the Court insists that the state interest offered in justification be important. No longer is the invocation of "administrative convenience" automatically sufficient to save the law. When an individual's interest is important, the weight of convenience decreases.<sup>255</sup> In this respect, the Court is willing to reject utilitarian justification for line-drawing when important individual interests are implicated. Second, the Court requires a closer fit between the

<sup>246</sup> See Dworkin, *supra* note 59, at 234-38, on the subject of "external preferences."

<sup>247</sup> See Gunther, *supra* note 227.

<sup>248</sup> 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).

<sup>249</sup> *Id.* at 520-21 (U.S.), 1180 (S. Ct.), 522-23 (L. Ed.).

<sup>250</sup> *E.g.*, *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) *per* Powell J.

<sup>251</sup> *E.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976).

<sup>252</sup> *E.g.*, *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1967).

<sup>253</sup> Gunther, *supra* note 227, at 18.

<sup>254</sup> Tribe, *Structural Due Process* (1976), 10 Harv. Civ. Rts. - Civ. Lib. L. Rev. 269.

<sup>255</sup> *Ylandis v. Kline*, 412 U.S. 441 at 458-59, 93 S. Ct. 2230 at 2236-40, 37 L. Ed. 2d 63 at 74-76 (1973) *per* White J.; *Stanley v. Illinois*, 405 U.S. 645 at 656, 92 S. Ct. 1208 at 1215, 31 L. Ed. 2d 551 at 562 (1972).

“means” and the “ends” than it did under minimal scrutiny.<sup>256</sup> Third, the Court refuses to accept a “conceivable” justification to the law in question; it demands that the justification be pressed in the litigation itself.<sup>257</sup> Fourth, the Court insists that the justification offered be one that indeed was a motivating factor in the enactment of the law — not one that was constructed after the fact.<sup>258</sup> Finally, the Court has been suspicious of *per se* rules, or irrebuttable presumptions; it has noted that individualized determinations of (for example) need may be required when a law is subject to intermediate scrutiny.<sup>259</sup>

#### D. *Towards a Model for Decision*

The Canadian judiciary ought to apply the standard of intermediate review when issues arise under the Bill of Rights. When a law differentiates between races, or between the sexes, it should not be declared inoperative automatically. The issues involved in contemporary “rights” controversies are too complex to yield to the rigidity of *per se* tests. Laws that do differentiate on an enumerated basis should be evaluated closely to determine whether or not they are supported by good reasons.<sup>260</sup> In the instance of a *prima facie* case of such discrimination being established, it should be the burden of the government to come forward with a justification for the impugned classification.<sup>261</sup>

The objection to this approach will be that it leaves too much to the discretion of the judge. If this is the case, it makes the task of legitimating judicial review a most difficult one. Recall the allusion to the ‘neutral principles vs. teleological approach debate,’ and the question of whether the Court can employ a flexible approach without sacrificing its integrity as a judicial body. It is suggested that the opposition of these two approaches to judicial reasoning is less problematic than would seem to be the case.

The primary objection against a “result-oriented” jurisprudence, quite apart from the fact that most judges do not behave this way,<sup>262</sup> is that the criteria for the adequacy of the result to be reached must be those of the judges themselves. Such an approach, by under-valuing the role of rules and principles as constraints on judicial action, cannot be reconciled with our notion of a judicial decision being determined by the law. It collapses law into politics to a degree that threatens the independence and the impartiality of the judiciary. On the other hand, the concept of neutral principles is problematic in the context of constitutional adjudication. It is simply not the case that the answer to complex questions of rights, especially competing rights, can be gleaned

<sup>256</sup> Craig, *supra* note 250.

<sup>257</sup> See *Cleveland Bd. of Educ. v. Laflour*, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974).

<sup>258</sup> *Id.*

<sup>259</sup> See Tribe, *supra* note 113, at 1092-97. See also Tribe, *supra* note 254.

<sup>260</sup> This, in essence, was the approach adopted by Mr. Justice Beetz in *Canard*, *supra* note 66.

<sup>261</sup> Can. Bar Ass'n, *supra* note 6, at 17.

<sup>262</sup> See Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice* (1979), 92 Harv. L. Rev. 864 at 869-70. See also Llewellyn, *supra* note 177.

from highly abstract norms without some attention to the social context, and hence to the results desired. If this is the case, the problem of the legitimacy of judicial review must be confronted.

The answer lies in the fact that the notion of rights puts limits on the kinds of factors that are relevant in a given case. The opposition between deontological and teleological moral theory is not that the former is oblivious to the consequences of a given act, but that concepts of "right" impose limits on the kinds of "consequences" that are relevant. As Rawls notes: "It should be noted that deontological theories are defined as non-teleological ones, not as views that characterize the rightness of institutions and acts independently from their consequences. All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."<sup>263</sup> Similarly, it is not a fatal flaw in a theory of adjudication that the judge considers the consequences of his decision. What really matters is that he decide the case on the basis of the rights involved.<sup>264</sup> It is this aspect which limits the kinds of arguments that a government may make in support of an impugned law, and which imposes a structure of discourse on the judge called upon to decide the case.

It is therefore a false choice with which legal theory is presented. The issue is not whether the judges need be completely bound by a pre-existing rule; one need not be a Realist to appreciate the open-texture of legal rules, and to appreciate the discretion implicit in standards like "reasonableness" and "due care." The issue is whether a norm like equality before the law embodies, within its internal logic, sufficient guidance for the judge to enable him to sort out the adequacy of the reasons offered in justification of the law in question.

Certain kinds of reasons are easy to dispose of. Since a distinction based on gender or race appears to violate the norm of treating people as equals, it cannot be justified by reference to a prejudice against the group discriminated against. To do so would be a denial of human dignity, the essence of our concern for equality.

A more difficult problem arises when the government offers a factual justification for the impugned discrimination. There are dangers in this kind of justification, and yet upon what basis can the Court reject it?

Some insight into this problem might be gained by considering the techniques of intermediate scrutiny referred to above. The Court must analyze carefully the facts asserted in justification of the impugned legislation. These facts must have been the motivating factors in the enactment of the law, this is not enough. For such a law is apt to be both over and under-inclusive. Furthermore, to the extent that the law places a burden on the group discriminated against, it is a clear denial of the dignity of those individuals who do not fit within the facts argued in justification of the law. It would be far better if the Court denied government the power to use "shorthand" in fashioning the laws, and insisted that the laws be drawn to fit the facts. At the very least, the Court

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<sup>263</sup> Rawls, *supra* note 120, at 30.

<sup>264</sup> See Dworkin, "Hard Cases," in Dworkin, *supra* note 59, at 81-130.

should insist that provision be made for rebutting the presumption that those with characteristic X fit the facts underlying the law in question. This would involve the Court in restructuring the processes of government; action which raises the problem of the legitimacy of judicial review.

Even more problematic is the question of whether or not an appeal to the "common good" is sufficient to justify such a discrimination, assuming that it was *bona fide* and not tainted by prejudice. This represents the classic debate between utilitarianism and "rights theory." At the outset, the extreme cases where the very survival of the polity is at stake may be disposed of; all theories must recognize an exception for such catastrophic events.<sup>265</sup> In less extreme cases the question is not clear.

If the foundation for the principle of equality before the law were based on utilitarian considerations, it would be plausible to conclude that such reasons as "the public interest" or "common good" would suffice to justify a deviation from formal equality. This is not the case. The utilitarian cannot support a strong enough conception of equality before the law to satisfy either our intuitive or considered judgments about equality.<sup>266</sup> If rights mean anything at all, it must be the case that the interests of the majority are not sufficient to counterbalance the individual right.

The problem, however, runs even deeper. It is not merely that one must choose between competing moral theories. The government is expected to work towards the greatest common good. As one writer put it, "democracy is a sort of applied utilitarianism."<sup>267</sup> If this is the case, then two institutions of government appear to be at odds.

One way out would be to accept this opposition. Parliament should be free to pursue utilitarian goals, and the Court should constrain it with the institution of rights. The problem is, of course, that this would render the art of governing an impossible one. The better way, and the one consistent with the fact that the Bill of Rights is directed at both Parliament and the courts, is to recognize the fact that both institutions have a responsibility to ensure that efforts to increase the common good are not undertaken in a way that sacrifices the rights of individuals. In short, both the Courts and the legislatures have a responsibility to work toward justice in our society. This may mean that the Court ought to leave the legislature some room in coming to its own conclusions about questions of rights. It does not mean that the Court is absolved from its duty to examine carefully the kinds of reasons that govern-

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<sup>265</sup> See Fried, *supra* note 147, at 194. In these situations, difficult questions are raised as to whether the court should review the question of the actuality of the emergency. See Marx, *The Apprehended Insurrection of October 1970 and the Judicial Function* (1972), 7 U.B.C.L. Rev. 55. See also Tarnopolsky, *supra* note 1, at 321-48.

<sup>266</sup> See Rawls, *supra* note 120, at 26; Conklin, *supra* note 166; and Dworkin, *supra* note 59, at 234-35. For a telling criticism of utilitarianism see Nozick, *Anarchy, State and Utopia* (N.Y.: Basic Bks., 1974) at 41.

<sup>267</sup> Ely, *supra* note 232, at 407. See also Mackintosh, "The Future of Representative Parliamentary Democracy," in Neilson and MacPherson, eds., *The Legislative Process in Canada: The Need for Reform* (Montreal: Inst. for Research on Pub. Policy, 1978), at 303, 318.

ment advances in support of any such determination. However fuzzy this may be, it is unavoidable that the Court will be required to draw the line in each individual case, and it must do so on the basis of the degree of infringement of the right in question and the importance of the asserted governmental interest.

What other kinds of reasons might be persuasive to justify an alleged violation of equality before the law? Is a reason that is essentially "paternalistic" ever sufficient to counter-balance a right? Can the government claim the right to deviate from the principle of equality before the law because the individual or group in question is believed to require different treatment? Put this baldly, the answer is clear. If treatment as an equal means anything at all, it surely means having the same "dignity of choice" as do all others.<sup>268</sup> Furthermore, the logic of unqualified paternalism would justify the most odious racist and sexist legislation.

The problem is more complex. What if the group itself desires separate treatment? Is this not the formative problem with respect to native people in Canada? Recall that in the *Lavell* case virtually all of the native organizations supported the rule that excluded native women who married non-natives from the reserve.<sup>269</sup> This is clearly a case where a substantial portion of the group desired the maintenance of a status relationship with the State. Therefore, quite apart from the problems inherent in Parliament's jurisdiction over "Indians and lands reserved to the Indians,"<sup>270</sup> one confronts the question of what to do with a group that, by and large, does not want formal equality with the rest of the polity. What then?

As a starting point, it seems clear that the in-group acceptance of differential treatment is the *sine qua non* of its moral justification.<sup>271</sup> This position, however, is dangerous. One need not be a social psychologist to recognize the possibility that the self-image of an individual or group might be jaundiced by prejudicial treatment at the hands of the majority. Paternalism exercised over time can produce an in-group acceptance of the imputed lack of capacity implied by such treatment.<sup>272</sup> At the very least, therefore, the Court should be suspicious of such justifications. Furthermore, what if there is a dissident within the group? Is he or she to be denied equality before the law because others of his or her group desire to be treated differently? Once again the debate boils down to the meaning of rights; can one person's right be sacrificed to the interests of others? Subject to the administrative problems alluded to in the context of factual justifications, the Court should require that the dissenting individual be afforded the opportunity to "opt out" of the paternalistic regime.

The problem becomes more complex when the justification offered in

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<sup>268</sup> This ignores the problem of children and other groups deemed to lack the capacity of choice. See Tribe, *supra* note 113, at 1077-82.

<sup>269</sup> See the judgment of Laskin J. in *Lavell*, *supra* note 35, at 1378 (S.C.R.), 504 (D.L.R.), 220 (C.R.N.S.).

<sup>270</sup> The *B.N.A. Act*, s. 91(24).

<sup>271</sup> Hayek, *supra* note 125, at 154. Cf. Raz, *supra* note 142, at 209.

<sup>272</sup> Williams, "The Idea of Equality," in Bedau, *supra* note 164, at 124.

support of a deviation from equality is not paternalistic, but is that the deviation is required in order to treat people as equals.<sup>273</sup> What if an individual rejects the government's determination of what it takes to treat him as an equal? What moral justification can government muster? Also, what if an individual excluded from such a scheme complains of unequal treatment?

These are inescapable problems that a court must confront when it tries to give meaning to the principle of equality before the law. It may, of course, decline to confront them overtly by framing the inquiry solely in terms of the appropriate level of review.<sup>274</sup> It has become evident, however, that unless the Court takes a mechanistic approach to this question, it cannot avoid dealing with the underlying moral problems. Furthermore, the result of this process may be that the court will have to strike down legislation enacted by Parliament. It is because of this latter possibility that consideration of the problems of judicial review becomes important.

## V. JUDICIAL REVIEW

### A. *The Problems*

There are two kinds of problems that must be confronted, and although they interact, it is useful to separate them for analytical purposes. The theoretical problem consists of reconciling judicial review with democracy.<sup>275</sup> The practical problems concern the competence of judges to make and justify intelligent decisions under the Bill of Rights.

#### 1. The Anti-democratic Character of Judicial Review

All judges in Canada, and most judges in the United States, are appointed, not elected.<sup>276</sup> This is believed to be necessary to maintain the "ostensible impartiality"<sup>277</sup> of the court, the absence of which undermines the legitimacy of its adjudicative function. Given the necessarily creative role that judges exercise in the elaboration of the law, the fact that judges are not elected has produced a crisis in legal theory, even at the level of the garden variety lawsuit

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<sup>273</sup> Consider the *Unemployment Insurance Act*, s. 30. The maternity benefit provisions were a response to the different health needs of women. This different treatment, it might be said, is justified in order to treat women as equals.

<sup>274</sup> That this has been the major concern of critics of the American courts was noted by one student of the court. The commentary "has focussed not so much on various dimensions of the concept of equality as on the levels of scrutiny the Court has applied to equal protection claims." Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality* (1975), 61 Va. L. Rev. 945 at 950.

<sup>275</sup> Although we can reconcile the concept of Parliamentary supremacy with the concept of judicial review, under the Bill of Rights, the familiar opposition of these two concepts is a problem if we see "Parliamentary supremacy" as reflecting a concern for democratic values.

<sup>276</sup> See the *Supreme Court Act*, R.S.C. 1970, c. S-10, s. 4; *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 5(2).

<sup>277</sup> The phrase is from Eckhoff, *Impartiality, Separation of Powers and Judicial Independence* (1966), *Rettsferdighet og rettssikkerhet* 12. See also Lederman, *The Independence of the Judiciary* (1956), 34 Can. B. Rev. 769 at 1139.

between individuals.<sup>278</sup> However one justifies such "interstitial" law-making on the part of judges,<sup>279</sup> the problem is much more difficult when the courts review legislation under a Bill of Rights.

At its least intrusive, judicial review involves a potential interference with the substantive policies enacted by a democratically constituted legislature.<sup>280</sup> At its most intrusive, it may involve the court in declaring public policy for the country at large—even to the extent of dictating to the legislature how it must allocate its financial resources.<sup>281</sup> In either case, the political role of the court is obvious, and it may not be an exaggeration to say that the question of the appropriateness of this judicial function is (or should be) "tearing at the vitals of the law faculties and the bar associations"<sup>282</sup> of our country.

The problem is summed up neatly by one writer as follows:

[J]udicial review remains an enigmatic institution. It operates principally in states with democratic philosophies; yet it claims the right to frustrate, in certain situations, the will of the majority. Its decisions are often pre-eminently political, yet they are made by men not themselves responsible to the electorate. The theoretical power of the judge of constitutionality is awesome; yet in the end he has "neither sword nor purse" and must depend on others to give his decision meaning.<sup>283</sup>

Although the major counter-arguments to this problem are subsequently considered, it is appropriate to consider one such argument at this juncture. It has two branches. The first is to de-emphasize the anti-democratic character of judicial review, by focussing on the political aspects of the appointment of judges, the possibility of constitutional amendment, and the constraints that social consensus and institutional factors impose on the court seeking to lead "where others are too reluctant to follow."<sup>284</sup> The second branch of the argument is to down-play the "democratic" character of the legislative process. Reference is made to the influence of interest groups, the control of the powerful over public opinion; in short the whole range of arguments about how democracy fails in practice.<sup>285</sup> This argument can be applied easily to the Canadian context. Given the rise of "executive federalism"<sup>286</sup> and the concentration

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<sup>278</sup> See Weiler, *Legal Values and Judicial Decision Making* (1970), 43 Can. B. Rev. 1. Modern legal theory is obsessed with this aspect of the judicial function. See Hart, *supra* note 71; Dworkin, *supra* note 59; Llewellyn, *supra* note 177; and Smith, *supra* note 118.

<sup>279</sup> The phrase is from *South Pac. Co. v. Jensen*, 244 U.S. 205 at 221 (1916).

<sup>280</sup> This statement is somewhat misleading. A great deal of the Courts' work is (or should be) the review of actions taken by non-elected government officials, like policemen. In these cases, the anti-democratic argument does not apply in the same way. See the discussion of this issue in Weiler, *supra* note 2, at 186-224.

<sup>281</sup> See *Wyatt v. Stickney*, 344 F. Supp. 373, 387 (M.D. Ala. 1972), *aff'd Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974).

<sup>282</sup> Jaffe, *English and American Judges and Lawmakers* (Oxford: Clarendon Press, 1969).

<sup>283</sup> Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971).

<sup>284</sup> Tribe, *supra* note 113, at 51.

<sup>285</sup> Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice* (1974), 122 U. Pa. L. Rev. 810.

<sup>286</sup> Smiley, *Canada in Question: Federalism in the Seventies* (2d ed. Toronto: McGraw-Hill Ryerson, 1976) at 54-79.

of power around the office of the Prime Minister,<sup>287</sup> it is not hard to disagree with the distinguished parliamentarian who noted that the democratically elected Parliament is not in control of the policy and direction of government.<sup>288</sup>

It is hard to see, however, even granting this argument the fullest force it deserves, how the problem of the anti-democratic nature of judicial review is solved. Whatever are the failings of the democratic ideal in practice, no one could argue that judicial review is more democratic than is the legislative process.<sup>289</sup> The fact remains that the executive and legislature are more accountable to the people than are the judges, and although Canadian political theory does not ground the legitimacy of government in the consent of the people to the same extent as does the American,<sup>290</sup> Canada is sufficiently "democratic" to make the problem a real and difficult one. It does not enhance one's understanding of the problem, and its possible resolution, to obscure the issue; it is better to admit, as did the late Professor Bickel, that "supreme judicial autonomy is not easily reconciled with any theory of political democracy, Madisonian or majoritarian."<sup>291</sup>

## 2. The Problem of Institutional Competence

When a court reviews the substance of an impugned law, as opposed to its application, it assumes that it is competent to understand and evaluate the legislative "calculus" that produced the law in question. In some cases the problem is not acute. A given law might reflect a legislative judgment no more complex than that the dissemination of hate literature ought to be prohibited under the criminal law. The issue is not primarily one of understanding why the legislature enacted the law; the problem is in reconciling such a law with the principle of free speech. But in other cases, the problem is acute.

Consider the *Unemployment Insurance Act*. It is the framework for a government programme which paid out more than 4,500,000,000 dollars in benefits for the year 1978 alone.<sup>292</sup> It is the product of a complex calculation of costs and benefits, of statistical probability, and of economic effect. In short, it is the product of a government institution which draws upon experts in various disciplines and embodies their expertise in a piece of legislation.

Judges are drawn from the ranks of lawyers. As such, they can claim certain skills and talents. They are not, however, philosopher kings. Their training does not guarantee them any expertise in other branches of learning—an expertise which appears essential for an intelligent evaluation of some legislation. Quite apart from the theoretical problems noted above, the court is

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<sup>287</sup> Smith, "President and Parliament: The Transformation of Parliamentary Government in Canada," in Kruhlak *et al.*, *The Canadian Political Process: A Reader* (Toronto: Holt, Rinehart & Winston, 1973).

<sup>288</sup> Stanfield, "The Present State of the Legislative Process in Canada: Myths and Realities," in Neilson and MacPherson, *supra* note 267, at 39.

<sup>289</sup> Choper, *supra* note 285.

<sup>290</sup> The source of government's legitimacy is, theoretically at least, in the Crown.

<sup>291</sup> Bickel, *The Supreme Court and the Idea of Progress* (N.Y.: Harper & Row, 1970) at 112.

<sup>292</sup> Conversation with Ms. E. Gattuso of the Unemployment Insurance Comm'n, Montreal, Quebec.



simply not the best institution to resolve these questions of social and economic policy. The indisputable truth of this observation is, as much as is the lesson of history,<sup>293</sup> the reason why many American judges are inclined to defer to the legislature in such matters.<sup>294</sup> Even Mr. Justice Laskin, who one can say is one of the more "activist" judges on the Supreme Court of Canada, noted that: "it is important that members of the public understand that it is to the government and legislature, federal or provincial, that they must generally look for the consideration and solution of social problems. . . ."<sup>295</sup>

Many supporters of judicial review might not dissent from this observation. Their strategy would be to abandon any claim to judicial competence in these matters, and to retreat to those areas where the case for judicial competence is at its strongest. It may be said that in areas like criminal procedure, the court is the most competent institution to evaluate the fairness of a practice, and the court should confine its review function to these questions of "legal" values, leaving to other institutions the job of determining economic rights.

There is something attractive about this position, but it is unstable, and it yields too much ground to the opponents of judicial review. It is unstable because, in an era of positive government, legal controversies do not come so neatly packaged to the Court. The *Bliss* case is a classic case in point. At issue was Mrs. Bliss's legal right to equality before the law in the context of a complex programme of social and economic regulation and redistribution. A boundary line drawn to insulate economic and social legislation from review is an unsatisfactory way to deal with an alleged infringement of "rights" in an era when government benefits have become so important to the well-being of the polity.

This position is also unsatisfactory for another reason. It implicitly assumes that certain kinds of "facts" are determinative of the issue. More specifically, it assumes that utilitarian determinations of efficiency and cost-benefit are, in themselves, an answer to an alleged violation of a right. Whether this is so is a complex problem of moral philosophy, one that is hardly alleviated when it is transferred to the legal context. If it is true that "democracy is a sort of applied utilitarianism," it is possible to see how the theoretical and institutional problems overlap. However, even if it is assumed that these kinds of facts are relevant at least some of the time, another problem related to judicial competence must be faced. This is the problem of the kinds of information upon which the Court will base its decision.

In a lawsuit between individuals, an incomplete factual base is tolerated in the interest of forwarding other values deemed more important than the

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<sup>293</sup> The "Lochner Era" in American constitutional law, *supra* note 113.

<sup>294</sup> Writing for the majority in *Danridge*, *supra* note 248, at 487 (U.S.), 1153 (S.Ct.), 503 (L. Ed.), Mr. Justice Stewart stated: "the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court . . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allowing limited public welfare funds among the myriad of potential recipients."

<sup>295</sup> Laskin, *A Judge and His Constituents* (1976), 7 Man. L.J. 1 at 14.

discovery of truth.<sup>296</sup> However comfortable we are with such an arrangement—one that is built into our concept of the adversary system<sup>297</sup>—it appears unsatisfactory when the court is called upon to review the substance of an impugned law. Recalling the despairing plea of Mr. Justice Laskin in the *Manitoba Egg Reference*,<sup>298</sup> it is clear that an intelligent decision on matters of social policy cannot be made without a fairly complete data base.

It was noted earlier that the Court is now less hostile to the use of legislative history and other “extra-legal” materials than it was in the past. Assume also that the Court will make greater use of “Brandeis” briefs in its deliberations. Coupled with much-needed reforms in the law of evidence, would this not solve the problem of inadequate information?

It is clear that these reforms are directed only at the sources of information and the manner in which it is transmitted to the Court.<sup>299</sup> They do not address the problems inherent in having judges evaluate the kinds of information that will be relevant in constitutional cases. Such information may be statistical, sociological or economic:<sup>300</sup> in short, information bearing upon the legislative calculus that produced the law in question. Furthermore, such reforms raise serious questions about the function of this kind of information. Can its use be limited to helping establish a reasonable basis for the law in question,<sup>301</sup> or will it spill over, as it has in the United States, into a device whereby laws

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<sup>296</sup> See *Phillips v. Ford Motor Co.*, [1971] O.R. 637 at 657, 18 D.L.R. (3d) 641 at 661 (C.A.) *per* Evans J.A.:

A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice for the litigants . . . [a court] cannot embark upon a quest for the ‘scientific’ or ‘technological’ truth when such an adventure does violence to the primary function of the court, which has always been to do justice according to law.

For a discussion of the different values at stake, see Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials* (1966), 66 Col. L. Rev. 223. For a different view of the problem, see Frankel, *The Search for Truth: An Umpireal View* (1955), 123 U. Pa. L. Rev. 1031.

<sup>297</sup> See Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 5. There is some evidence to the effect that the “inquisitorial” system is no more efficient in yielding “facts” than is the adversary system. See Lind *et al.*, *Discovery and Presentation of Evidence in Adversary and Non-Adversary Proceedings* (1972), 71 Mich. L. Rev. 1129; Brett, *Legal Decision Making and Bias: A Critique of an ‘Experiment’* (1973), 45 U. Colo. L. Rev. 1.

<sup>298</sup> *A.G. Man. v. Man. Egg and Poultry Ass’n*, [1971] S.C.R. 689, 19 D.L.R. (3d) 189, [1971] 4 W.W.R. 705. See Strayer, *Judicial Review of Legislation in Canada* (Toronto: U. of T. Press, 1968) at 177, for a note on the absence of evidence in reference cases.

<sup>299</sup> There are three stages in the process: (1) sources of information (2) manner of transmission and (3) manner of evaluation.

<sup>300</sup> See Korn, *Law, Fact, and Science in the Courts* (1966), 66 Colo. L. Rev. 1080; Coleman and Walls, *The Evaluation of Scientific Evidence*, [1974] Crim. L. Rev. 276; Finkelstein and Fairley, *A Bayesian Approach to Identification Evidence* (1970), 83 Harv. L. Rev. 489; Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process* (1971), 84 Harv. L. Rev. 1329; and Martin, *The Proposed “Science Court”* (1977), 75 Mich. L. Rev. 1085.

<sup>301</sup> See the *Anti-Inflation* reference, *supra* note 197; and the *Craig* case, *supra* note 250.

are challenged on the basis of statistical or sociological evidence?<sup>302</sup> How reliable is this kind of evidence, and how can a court come to grips with the inevitable intra-disciplinary controversy surrounding the reliability of the proffered evidence?<sup>303</sup>

Consider also the problem of the effectiveness of judicial review. At the outset, it is evident that the courts are ill-prepared to engage in a comprehensive review of any particular social problem. The theoretical problems aside, the judiciary must await the accidents of litigation before it can get involved. When it does, it typically deals with but one aspect of a larger problem. As Mr. Justice Frankfurter remarked, "[o]nly fragments of a social problem are seen through the narrow windows of a litigation."<sup>304</sup> Lacking the resources of other branches of government, the Court is clearly not the best forum for systematic social reform.

In addition, there is the question of the effectiveness of the judicial remedy.<sup>305</sup> Again, the theoretical and practical problems combine to produce a most difficult dilemma for the Court.

It is often said, in support of judicial review, that fears of judicial tyranny are unwarranted, for the courts have very limited remedial powers. Reference is then made to Hamilton's remark about the judiciary possessing "neither sword nor purse."<sup>306</sup> Speaking of the remedial powers of the judiciary, Sir Kenneth Diplock remarked:

They can enjoin, they can award punishment or exact compensation for breaches of their rules of conduct, but that is all. There are thus today wide areas of legislative activity for which the courts are unfitted by the very nature of the judicial process. The Courts could never have created the Welfare State.<sup>307</sup>

Mr. Justice Laskin made a similar point when he noted that courts "cannot compel the enactment of desirable legislation or the implementation of desirable policies."<sup>308</sup>

If it could be assumed that this is an accurate description of how the judiciary views its function, and thus how it behaves, the only argument against

<sup>302</sup> See the *Brown* case, *supra* note 172; and Cahn, *Jurisprudence* (1955), 30 N.Y.U.L. Rev. 150.

<sup>303</sup> It is of crucial importance that a legal decision be based upon factual assumptions that are fairly stable. At the moment, the courts' assessment of scientific evidence is reminiscent of the old practice of oath-swearing; more attention is paid to the credentials of the experts testifying than to the substance of their testimony.

<sup>304</sup> *Sherrer v. Sherrer*, 334 U.S. 343 at 366, 68 S. Ct. 1097 at 1102, 92 L. Ed. 1429 at 1444 (1948).

<sup>305</sup> For an anthropological account of why any legal remedy is apt to be only partially effective, see Moore, *Law as Process* (London: Routledge & Kegan Paul, 1978) at 54-81.

<sup>306</sup> Hamilton, "The Judges as Guardians of the Constitution," in Wright, ed., *The Federalist* (Cambridge: Belknap, 1961) 489 at 490.

<sup>307</sup> Diplock, *The Courts as Legislators*, presidential address to the Holdsworth Club, 1965, at 15.

<sup>308</sup> Laskin, *supra* note 295.

judicial review on this issue would be that it is ineffective. To be sure, the reversal of a conviction, or the granting of a benefit, is an important matter to someone whose rights have been infringed. Nevertheless, the underlying problems would still remain, and it is the legislature that would have the responsibility to remedy them.

The problem is that, at least in the United States, this is not an accurate picture of the remedial powers of the judiciary. Invoking their "broad and flexible" equitable jurisdiction, the Court has imposed affirmative duties on states to refashion their educational system to achieve the desegregation mandated by *Brown*.<sup>309</sup> In the reapportionment cases,<sup>310</sup> electoral districts were ordered to be redrawn. The Courts have ordered government to spend more money on welfare,<sup>311</sup> they have taken over the administration of prisons,<sup>312</sup> school systems;<sup>313</sup> in short, the Courts' remedial powers have become so broad and extensive that the "neither sword nor purse" *dictum* is clearly inapplicable.

This "imperfectly bridled managerial drive"<sup>314</sup> may not have been altogether effective in achieving what it set out to do, but one thing is certain. It has been effective in provoking serious doubts about the competence and the legitimacy of the American courts in "managing" the affairs of government as they are now doing.<sup>315</sup> A central question that must be addressed is the extent to which such activity threatens to change fundamentally our perceptions of the courts, and, indeed, the way in which the entire institutional framework of the judiciary is set up. It is worthwhile to note that this is not a problem that one can safely confine to the United States. The possibility of our judges being drawn along a similar path is real, assuming that the courts take their mandate under the Bill of Rights seriously, and assuming that it is not possible to restrict the scope of the Bill of Rights to the enforcement of "negative rights."<sup>316</sup>

There is another element in an analysis of judicial competence. Throughout the discussion of the meaning of equality before the law, it has become clear that there were difficult and controversial questions of moral philosophy that were impossible to ignore. In an earlier discussion of judicial competence it was noted that these philosophical questions are embedded in the theoretical debate surrounding the legitimacy of judicial review. If we must become phil-

<sup>309</sup> See cases cited in Tribe, *supra* note 113, at 1032-42. See also Tribe, *supra* note 262.

<sup>310</sup> *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). See cases cited in Tribe, *supra* note 113, at 740n. 11.

<sup>311</sup> See generally Frug, *supra* note 240.

<sup>312</sup> See the *Wyatt* case, *supra* note 281, and cases cited in Frug, *id.* at 718-19nn. 16, 17. For a defence of his actions, see Johnson, *The Constitution and the Federal District Court Judge* (1976), 54 Tex. L. Rev. 903.

<sup>313</sup> *Morgan v. Kerrigan*, 379 F. Supp. 410 (U.S. Dist. Ct.) *per* Garrity J., *aff'd* 509 F. 2d 580.

<sup>314</sup> Bickel, *supra* note 291, at 104.

<sup>315</sup> Berger, *supra* note 175.

<sup>316</sup> See Fried, *supra* note 148, at 108-63, for a discussion of negative and positive rights and how they interact.

osophers to understand the work of the Court,<sup>317</sup> it is equally true that our judges must become sensitive to philosophy to do the work of the Court. Can judges really be expected to be competent in coming to grips with such difficult issues? In addition, do we want our judges to be so involved?<sup>318</sup>

Perhaps this is overstating the case. Most cases will not raise such difficult questions for the Court, and even when they do, we are entitled to expect a reasoned *legal* decision from the Court. Such expectations, if honoured, will impose considerable constraints on the court. No one could accuse Professor Dworkin of having a limited vision of the function of the judiciary; his work is dedicated to revealing not only how judges decide hard cases, but also to legitimating judicial reference to legal principles that may not be embodied in the positive law of the state. Yet even he recognizes the limitations that the institutional setting imposes on the courts.<sup>319</sup> "A Supreme Court decision is still a legal decision, and it must take into account precedent and institutional considerations between the Court and Congress, as well as morality."<sup>319</sup>

Nevertheless, the fact remains that, in some cases, the Court must decide to what extent these "institutional considerations" sufficiently counterbalance a violation of an individual's right. This will only be possible if judges can draw upon a theory of rights that is part of what Professor Dworkin calls the "institutional morality" of the legal system. The Canadian legal culture, however, lacks such a theory of rights.<sup>320</sup>

### 3. Maintaining the Independence of the Court

The essence of a "decision according to law" is that it be the product of a non-discretionary process of the application of legal norms to the particular facts of the case. The acceptability of the process turns, in part, upon whether the court is perceived as acting impartially. Our entire institutional framework is directed towards ensuring that the ideal is approximated as clearly as possible.<sup>321</sup> However one views the debate about the political implications or philosophical viability of "formalism,"<sup>322</sup> this strain in legal reasoning reflects

<sup>317</sup> Freund, *The Supreme Court of the United States* (Cleveland: World, 1961).

<sup>318</sup> Rodell asks if we want our judges to be involved in politics "up to their robe-rimmed necks." See *Nine Men* (N.Y.: Random House, 1955) at 301.

<sup>319</sup> *Supra* note 59, at 185.

<sup>320</sup> This is somewhat of an over-simplification. Canadian legal culture recognizes the rights of "natural justice" as applied to the administrative process, and, of course, we have "rights" embodied in the *Canadian Bill of Rights* and in provincial human rights legislation. But we have no systematic theory of rights that can explain (and transcend) the positive law of the state; nor do we seem to care very much. As one writer observed. "In no other mature country does it seem likely that political figures concentrate so much on the geographic distribution of public power to the apparent neglect of debate over the ends and purposes toward which authority is organized." See Black, *Divided Loyalties* (Montreal: McGill-Queens U. Press, 1975) at 1.

<sup>321</sup> One could point to the institution of trials in public, the separation of functions between court and legislature, the manner in which judges are appointed, the adversary system, and the legal values of certainty and generality in the law. See generally Miller, *Public Confidence in the Judiciary* (1970), 35 *Law & Contem. Prob.* 69.

<sup>322</sup> See Kennedy, *Legal Formality* (1973), 2 *J. Leg. Stud.* 351; Kennedy, *supra* note 132. See generally Shklar, *Legalism* (Cambridge: Harv. U. Press, 1964).

a deep concern for insulating the judiciary from charges of subjectivity in decision-making. To the extent that the court's decision is viewed as one which does reflect the subjective predilections of the judges, confidence in the judicial process breaks down.

This means more than whether the results reached in a certain case are agreed with, though some theorists would argue that this is the only criterion for evaluating a case.<sup>323</sup> This is not to say that we ought to be unconcerned with the results in a given case, just as the consequences of any given moral position cannot be ignored. Indeed, the acceptability of any "impartial" process must ultimately depend upon the justice or injustice that is generated by that process.<sup>324</sup> Nevertheless, how "we get there" is an equally important, if not more important, component of what is demanded from the judicial process.<sup>325</sup>

Having said this, it is clear that judicial review presents enormous problems for the maintenance of the "ostensible impartiality" of the court.<sup>326</sup> Can the Court justify its decisions—especially those which represent substantive interference with legislative policies—in the traditional language of legal reasoning?

This, of course, is the essence of the "neutral principles" debate that has been ongoing in American legal scholarship since the desegregation cases.<sup>327</sup> A brief comment is in order. Restricting a court to the articulation of neutral principles—"reasons that in their generality and their neutrality transcend any immediate result that is involved"<sup>328</sup>—appears consistent with classical liberal ideology. This is no more than asking that judges and legislators approach the ideal of the Rule of Law. However, modern government, for better or worse, has moved beyond the liberal ideal, accompanied, if not motivated by, a change in our conception of basic concepts like freedom and equality. What then of neutral principles?

If principles are ultimately references to the ends of our legal system,<sup>329</sup> and the ends of the legal system reflect an image of the social ideal, it is only when there is a fair degree of consensus on that level that sense can be made out of "neutral principles." The principles, in fact, would not be neutral at all, but they would reflect an image of the social ideal that is acceptable to most. Indeed, the notion of neutral principles could only have arisen at a time when

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<sup>323</sup> One writer comments that "there is but one truly basic principle governing assessment of the courts: that of the 'gored ox.'" Miller, *supra* note 314, at 74.

<sup>324</sup> Rawls, *supra* note 133, at 59.

<sup>325</sup> Tribe, *supra* note 254.

<sup>326</sup> See the remarks of Lord Radcliffe, cited in Jaffe, *supra* note 282, at 7.

<sup>327</sup> See Wechsler, *supra* note 152; Miller and Howell, *supra* note 149; and Deutsch, *Neutrality, Legitimacy, and the Supreme Court* (1967-68), 20 *Stan. L. Rev.* 169. This debate echoes the earlier controversy surrounding formalism, and the Realists' attack on that mode of legal reasoning. At a more abstract level, it is a debate between deontological and consequentialist moral theory.

<sup>328</sup> Wechsler, *id.* at 19.

<sup>329</sup> See Smith and Coval, *The Causal Theory of Law* (1977), 36 *Camb. L.J.* 110.

there was faith in the ultimate harmonization of conflicting interests in society. The 1950's was such a time, and the late Professor Fuller could write of "shared purposes,"<sup>330</sup> and Professors Hart and Sacks could base their approach to legal reasoning on a notion of an ever-expanding "social pie."<sup>331</sup>

Recent events have shattered that illusion. There is no consensus about the basic social ideal in our western societies and, in the Canadian context, our constitutional crisis reveals how little sense the notion of shared purposes makes for us. It seems that in this respect it matters little if one is a "consequentialist" or not. If one wants to defend judicial review, one must come to terms with the fact that the judiciary will be making substantive value choices. What happens to the ideal of the impartial judge when the judiciary moves from its adjudicative role to a more political one?

In a perceptive though disturbing article, Professor Chayes has sketched some of the implications of this paradigmatic shift.<sup>332</sup> For our purposes, it is useful to note the image of the judge that he sees emerging from this "public law" model of adjudication. "The judge is not passive, his function limited to analysis and statement of governing legal rules; his is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome."<sup>333</sup> Although he appears comfortable with the shift that he discerns as having taken place, Professor Chayes does allude to the problem of reconciling the impartiality of the judge with this political role when he asks: "Can the disinterestedness of the judge be sustained . . . when he is more visibly a part of the political process?"<sup>334</sup>

It may be the case that our notion of the proper judicial functions is out-moded. It may also be the case that there ought to be less concern with maintaining the "neatness" of our conceptions of the judicial function than with developing a constitutional tradition that gives full expression to the important political and social ideals of our society. Nevertheless, given all the problems inherent in judicial review, it must be asked whether too much is being given up in the appearance of impartiality for a gain that is both speculative and controversial.

Having looked at some of the central problems inherent in judicial review, it is important to consider some of the ways in which it may be justified. Once again, the initial focus is on the American experience, largely because it is in the United States that the debate about the legitimacy of judicial review has been most extensive. However, there is a further reason. It is sometimes said that judicial review is consistent with the American system of government though not consistent with the Canadian. As a matter of descriptive history, this may be true. However, this obscures the deep problems that surround all of the justifications offered for judicial review in the United States.

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<sup>330</sup> Fuller, *The Forms and Limits of Adjudication* (1978-79), 92 Harv. L. Rev. 353.

<sup>331</sup> Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. Cambridge: n. pub., 1958).

<sup>332</sup> *The Role of the Judge in Public Law Litigation* (1976), 89 Harv. L. Rev. 1281.

<sup>333</sup> *Id.* at 1302.

<sup>334</sup> *Id.* at 1309.

## B. *The Possible Justifications*

Three major arguments in defence of judicial review are considered.<sup>335</sup> They are: (1) that judicial review was intended to be part of the judicial arsenal; (2) that judicial review is implicit in the idea of a federal state with a written constitution; and (3) that judicial review, properly understood, enhances rather than inhibits the political process. These theoretical justifications have been highlighted for two reasons. First, they are the ones which have dominated the debate in the United States. Second, it seems clear that if they prove persuasive, the practical problems that were considered above become less relevant, though no less problematic. The intuitive idea is that if judicial review can be justified theoretically, we may be more prepared to accept the institutional problems that accompany it.

### 1. That Judicial Review Was Intended to Be Part of the Judicial Function

One properly may ask why this question is addressed at all, for it is clear that there is nothing in either the American Constitution or in the *Canadian Bill of Rights* that expressly confers this power on the judiciary. Nevertheless, a discussion of some of the problems inherent in this argument for judicial review facilitates the exploration of other issues of concern.

There are three arguments that have been made in support of this proposition. The first is historical, and it is based upon a certain reading of the records of the debates of the Constitutional Convention. It is fair to say that these debates may be read either way.<sup>336</sup> Stronger support may be found in one of Hamilton's essays in the *Federalist*<sup>337</sup> where he argues that judicial review flows inevitably from the nature of constitutional government, but this is another matter.

The second argument was made by Chief Justice Marshall in the seminal case of *Marbury v. Madison*,<sup>338</sup> but it is generally acknowledged that his justifications for the power of judicial review were not conclusive.<sup>339</sup> Once again, the argument for judicial review seems to turn on the implicit logic of constitutional government.

The third argument attempts to ground judicial review in the supremacy clause of the American Constitution.<sup>340</sup> Again, it has been demonstrated that this argument does not support the case for judicial review of Congressional

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<sup>335</sup> In the interest of keeping some coherence in the flow of the text, references to particular writers have been kept at a minimum. The reader who is interested in pursuing these questions will find the literature referred to in these notes.

<sup>336</sup> See Gunther, *Constitutional Law* (9th ed. Mineola: Foundation Press, 1975) at 18-19.

<sup>337</sup> *Supra* note 306.

<sup>338</sup> 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

<sup>339</sup> Van Alstyne, *A Critical Guide to Marbury v. Madison*, [1969] Duke L.J. 1.

<sup>340</sup> U.S. Const. art. VI, §2 reads, in part, that the Constitution "shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." This argument was advanced by Wechsler, *supra* note 152, at 3-5.



enactments.<sup>341</sup> If the power of judicial review is to be justified, it appears that one must go beyond the intentions of the framers of the Constitution.

Let it be assumed for the moment that judicial review was so intended. There are at least two problems with this position.

The first concerns the broad question of why future generations ought to be bound by the original intentions of the drafters of a Constitution. At one level this appears to be a rather weak objection. Is it not the essence of constitutionalism that the written constitution should bind future generations (subject to the power of amendment)? It would take this discussion too far afield to consider the philosophical problems that this "inter-generation" problem poses;<sup>342</sup> the remarks made here are much more modest.

If the hypothetical original intention with respect to the legitimacy of judicial review is accepted, must the original intention with respect to the meaning of the particular provisions of the Constitution also be accepted? This is the position that has been taken by some scholars<sup>343</sup> and it is not without a certain allure, for it offers some answer to the anti-democratic argument against judicial review. However, it is a highly problematic position to say the least, if indeed it is a defensible position at all.<sup>344</sup>

It is problematic in light of the American courts' treatment of certain clauses in the Constitution. Mr. Justice Holmes's famous *dictum* notwithstanding,<sup>345</sup> the framers of the American Constitution did draft a document which reflected a certain liberal social ideal. It is not a question of whether "substantive due process" was a legitimate doctrinal development, but of whether one is able to say that, for example, the contract clause of the Constitution<sup>346</sup> is to be read in the light of the framers' original intention. Its meaning was not so confined by the courts<sup>347</sup> and, despite a recent case to the contrary,<sup>348</sup> it is

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<sup>341</sup> Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962) at 11-12.

<sup>342</sup> See Rawls, *supra* note 133, at 284-93 for a discussion of the problem of justice between generations.

<sup>343</sup> See, e.g., Berger, *supra* note 175.

<sup>344</sup> A variety of this approach has been termed the interpretivist approach by Professor Ely, *supra* note 232. The essence of this approach is that the judges must confine their task to enforcing the norms clearly stated (or implicit) in the Constitution. See also Grey, *Do We Have an Unwritten Constitution?* (1975), 27 *Stan. L. Rev.* 703; and Munzer and Nickel, *Does the Constitution Mean What it Always Meant?* (1977), 77 *Colo. L. Rev.* 1029.

<sup>345</sup> Dissenting in *Lochner*, *supra* note 113, at 75 (U.S.), 546 (S. Ct.), 949 (L. Ed.). Mr. Justice Holmes argued that the fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics."

<sup>346</sup> *U.S. Const.* art. I, §10(1) provides, in part, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

<sup>347</sup> Tribe, *supra* note 113, at 466, neatly summarized the origins of the contract clause in the following way: "Responding to state debtor relief laws enacted to combat the economic depression that preceded the adoption of the Constitution, the clause was included primarily to protect private contracts from improvident majoritarian impairment." For a brief overview of the evolution of contract clause doctrine, see Tribe, *op. cit.* at 465-73.

<sup>348</sup> *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 98 S. Ct. 2716 (1978).

clear that the scope of the clause had to change with the transformation of American government. Unless one is prepared to argue that the *Lochner* case was rightly decided on the merits, we are forced to accept the rather conventional position that the Constitution is, to use a Canadian expression, like a "living tree." If this is the case, leaving aside for a moment the question of whether or not some clauses in the Constitution were intended to have an open texture, it amounts to acceptance of the idea that the original intention ought not to govern in certain cases.<sup>349</sup> Does this not undermine the argument that the assumed original intention to confer the power of judicial review is determinative of the issue?

The counter-argument is obvious, and needs no elaborate statement. One needs only to distinguish between the original meaning of an individual clause and the image of the over-all framework of government that is implicit in the Constitution.<sup>350</sup> That having been done, it can be argued that the fundamental framework of separated and divided powers, and the concern with individual liberty that underlies this framework, requires the institution of judicial review to perfect the design. Yet, once again, the shift is away from the original intention to the logic of the system of government.

A second problem exists with respect to the original intention. The most difficult cases in terms of the question of the legitimacy of judicial review have been those which have arisen under the provisions of the Fourteenth Amendment; the desegregation, reapportionment, and abortion cases. Despite judicial *dicta* to the contrary,<sup>351</sup> a strong case can be made for the proposition that the Fourteenth Amendment was not intended to apply to these kinds of cases at all.<sup>352</sup> It seems to be a weak argument to say that a reconsideration of these issues would result in the overturning of a great deal of the Court's work.<sup>353</sup> The real argument must be that either the original intention should not govern, or that the drafters of the Fourteenth Amendment intended the court to flesh out its meaning in the light of changing conceptions of due process and equal protection.<sup>354</sup> In the former case, the argument concedes the force of the anti-democratic argument to the extent that it would be answered by an adherence to an interpretivist approach. In the latter case, even if it survives the historical attack, the question is not avoided. Why should the Court have a greater right to determine the meaning of these open-textured phrases than Congress? The conclusion is inescapable: one must examine the extent to which judicial review is implicit in the idea of constitutional government.

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<sup>349</sup> Cf. Bork, *Neutral Principles and Some First Amendment Problems* (1971), 47 Ind. L.J. 1 at 8.

<sup>350</sup> See Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: La. St. Univ. Press, 1969). One might also argue that the "original intention" argument disregards the distinction between concepts and conceptions.

<sup>351</sup> E.g., Chief Justice Warren's remark in *Brown*, *supra* note 172, at 489 (U.S.), 689 (S. Ct.), 878 (L. Ed.), that the legislative history of the Fourteenth Amendment was "inconclusive."

<sup>352</sup> Berger, *supra* note 175.

<sup>353</sup> See Gray, *supra* note 344, at 710-12.

<sup>354</sup> See Berger, *supra* note 175, at 99-116, for a critique of this position.

## 2. The Logic of Constitutionalism

There are two parts to this argument. The first concerns the implications that are said to flow from the fact that the United States and Canada are federal states. The second concerns the protection of individual rights thought to be implicit in the American governmental framework.

It has been said that judicial review is essential in a federal state with a written constitution. "A written constitution would promote discord rather than order in society if there were no accepted authority to construe it, at the least in cases of conflicting action by different branches of government or of constitutionally unauthorized governmental action against individuals."<sup>355</sup> In fact, it has been argued that one can separate the questions of federalism and individual rights, and at least one jurist has suggested that judicial review is legitimate only with respect to the former category of problems.<sup>356</sup>

Assume for the moment that these questions can be separated. Does the logic of federalism really lead to the necessity for judicial review? The starting point must be to distinguish between the review of federal legislation and the review of state or provincial legislation. There is a strong argument that it is only the review of state legislation which is demanded by federalism. In the words of Holmes: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."<sup>357</sup> It is also the case that the American courts, with few exceptions, have given up trying to control the federal government in the expansion of its powers under the commerce clause and in the exercise of its spending power.<sup>358</sup>

In Canada, arguments in support of judicial review are often based upon the division of legislative power in the Constitution.<sup>359</sup> There is no doubt that some mechanism is required to resolve jurisdictional disputes between Parliament and the provincial legislature(s), especially in an age of positive government. However, apart from questions of conflicting laws, it is not clear that the courts should be the institution seized with the task of "umpiring" Canadian federalism.<sup>360</sup>

First, there is the question of the courts' institutional competence. It is by no means clear that the courts are able to handle many of the complex issues raised in certain constitutional cases.<sup>361</sup> Second, one must be concerned with

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<sup>355</sup> Rostow, *The Democratic Character of Judicial Review* (1952), 66 Harv. L. Rev. 193 at 195.

<sup>356</sup> Hand, *The Bill of Rights* (Cambridge: Harv. U. Press, 1958).

<sup>357</sup> "Law and the Court," in *Collected Legal Papers*, *supra* note 115, at 295-96.

<sup>358</sup> See *supra* note 211.

<sup>359</sup> See Hogg, *supra* note 81, at 42-46.

<sup>360</sup> Weiler, *supra* note 2, at 172-78. Cf. Hogg, *supra* note 81, at 42-46. The following argument borrows heavily from that of Professor Weiler.

<sup>361</sup> *C.I.G.O.L. v. Gov't of Sask.*, [1978] 2 S.C.R. 545, 91 D.L.R. (3d) 555. See Paus-Jenssen, *Resource Taxation and the Supreme Court of Canada: The Cigol Case* (1979), 5 Can. Pub. Pol. 45.

the Supreme Court's apparent difficulty in giving persuasive reasons for its decisions even in terms solely of past precedent.<sup>362</sup> Third, it appears that even when the Court does a fairly good job doctrinally, the results prove unacceptable to many of the actors in the political sphere, with the result that the decision will stand only until the politicians agree to get around it.<sup>363</sup> The emergence of "executive federalism" has institutionalized much co-operation and consultation between the central and provincial government. As a result, it is possible to imagine most jurisdictional disputes being resolved extra-judicially.

Even if one were to reject the idea that the courts should get out of the field altogether, the logic of federalism does not determine the issue. The real issue is the degree to which the governmental system can be seen as a means towards the protection of individual rights. Again, the American and Canadian contexts must be considered separately.

It is fairly clear that protection of individual rights was the idea behind the establishment of the American system of government. However, it was not so much in the "federalist" aspects of the system as it was in the notion of separated and divided powers.<sup>364</sup> The question still remains: is judicial review necessary to achieve this desired limitation on arbitrary authority? The answer is not self-evident.

If one defines "constitutional justice" as that condition in which citizens may trust their government to uphold certain rights considered inviolable, it is clear that judicial review of statutes is only one way of obtaining this happy state. In fact, in a given country political factors may perhaps provide a better check than the courts on attempts to establish majoritarian tyranny.<sup>365</sup>

Even if it is assumed that judicial review is the best means of protection in the American context, it is not clear that it can be or should be assimilated into the Canadian context.

First, it is clear that the Canadian federation was not constituted for the purpose of serving individual rights. In fact, the very process whereby Confederation came to be had very little to do with the rights of the affected citizens.<sup>366</sup> Moreover, there was a philosophical antipathy to any notions of non-positive rights inherent in English legal culture at the time of Confederation.

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<sup>362</sup> See, e.g., *R. v. Dominion Stores Ltd.* (1979), 106 D.L.R. (3d) 581, 30 N.R. 399, 50 C.C.C. (2d) 277 (S.C.C.).

<sup>363</sup> See, e.g., *Capital Cities Comm. Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609; *Public Service Bd. v. Dionne*, [1978] 2 S.C.R. 191, 83 D.L.R. (3d) 178; *A.G. Que. v. Kelloggs Co. of Can.*, [1978] 2 S.C.R. 211, 83 D.L.R. (3d) 314. It now seems likely that any revision to our Constitution will acknowledge some degree of provincial legislative competence in the area of communications.

<sup>364</sup> See *Myers v. U.S.*, 272 U.S. 52 at 293, 47 S. Ct. 21 at 85, 71 L. Ed. 160 at 242-43 per Brandeis J.:

[T]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

<sup>365</sup> Cappelletti, *supra* note 283, at 1.

<sup>366</sup> See generally Waite, *The Life and Times of Confederation* (2d ed. Toronto: U. of T. Press, 1967) at 1864-67.

Apart from certain guarantees in the *B.N.A. Act* respecting language and education rights,<sup>367</sup> the language of rights is absent in that document. Second, the formal legal basis upon which Canadian judges exercise the power of judicial review on questions of jurisdiction is of no value to those who would ground the practice in the logic of our form of government.<sup>368</sup> Third, whatever "separation of powers" concepts one can read into the *B.N.A. Act*, it is clear that the executive and the legislature are not separated in the same way as they are in a republican form of government. Though there are very real doubts about the control that Parliament exercises over the executive in fact,<sup>369</sup> it seems to be a large jump to argue that judicial review is required to save Parliament from the executive. The answer surely lies in reforming Parliamentary practice to make the executive more accountable to the House.

This leads to the third argument made in support of judicial review: that it is necessary to maintain the integrity of the political process.

### 3. Protecting the Political Process from Itself

In the previous section reference was made to Mr. Justice Stone's famous footnote to introduce the concept of strict scrutiny in equal protection analysis. Recall that he suggested that a higher standard of review might be justified with respect to governmental action that undermines the integrity of the political process. In the context of the concerns about the anti-democratic nature of judicial review, the intuitive appeal of this line of reasoning is obvious. When the political process cannot be seen as representative of the interests of the polity, or when it attempts to insulate itself from criticism or from the possibility of informed dissent, the argument for judicial deference seems attenuated. Indeed, is it not the duty of the Court to protect the integrity of the political process by keeping it open?

Many students of the American legal system, otherwise critical of much of the court's activism, have embraced this rationale for judicial review. Professor Ely has attempted to explain much of the work of the Warren Court on this basis. The cases "ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation that those processes have reached, has been unduly constricted."<sup>370</sup>

This argument seems most compelling in the areas of freedom of expression and voting rights. In the former case, the idea is that freedom of expres-

<sup>367</sup> The *B.N.A. Act*, ss. 93, 133.

<sup>368</sup> Some argue that the legal basis upon which judicial review rests is the *Colonial Laws Validity Act*, 1865, 28 & 29 Vict., c. 63 (Imp.): Strayer, *Judicial Review of Legislation in Canada* (Toronto: U. of T. Press, 1968) at 8. Others would ground the practice in the idea of constitutionalism: see Hogg, *supra* note 78, at 44-46. Note that the latter justification is framed exclusively in terms of the division of legislative powers.

<sup>369</sup> See Smiley, "Federalism and the Legislative Process in Canada," in Neilson and MacPherson, *supra* note 267, at 73.

<sup>370</sup> *Toward a Representation - Reinforcing Mode of Judicial Review* (1978), 37 Md. L. Rev. 451 at 456.

sion is a necessary condition for democracy.<sup>371</sup> In the case of voting rights in particular and political rights in general, the idea is equally clear. The political process demands deference from the court only to the extent that it can be said to be "democratic." When there are restrictions on the right to vote,<sup>372</sup> the right to present oneself as a candidate,<sup>373</sup> or the degree to which one's vote is to count equally with the votes of others,<sup>374</sup> the legitimacy of the process is thrown into question.

The notion that freedom of expression is essential to the workings of a democratic system was articulated by Chief Justice Duff in *Reference Re Alberta Statutes*,<sup>375</sup> by Mr. Justice Rand in the *Saumur* case,<sup>376</sup> and by Mr. Justice Abbott in the *Switzman* case.<sup>377</sup> It is not without its problems, however, two of which are worth mentioning here.

First, it is not clear what the court is to do when the legislature enacts laws that restrict the exercise of this freedom in the interest of guaranteeing the value of this freedom for others. This is the case when the rich and powerful threaten to dominate the "marketplace of ideas." In *Buckley v. Valeo*,<sup>378</sup> the Supreme Court of the United States struck down those provisions of the *Federal Election Campaign Act Amendments*<sup>379</sup> of 1974 that limited the amount that a candidate could spend on his or her campaign. They did so on First Amendment grounds. The "political process" rationale seems problematic in a case such as this, given a legislative determination that such action was required to keep the process open.

The second problem concerns the extent to which this argument implies that the value of freedom of expression is purely instrumental. Is there not an intrinsic value to this freedom? Is it not a part of our self-development to have the freedom to express ourselves?<sup>380</sup> Mr. Justice Rand saw this aspect when he wrote that "freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."<sup>381</sup> The point is, of course, that the political

<sup>371</sup> Meiklejohn, *Free Speech and Its Relation to Self Government* (Port Washington: Kennikat, 1972).

<sup>372</sup> See, e.g., *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969).

<sup>373</sup> See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968).

<sup>374</sup> See, e.g., the *Reynolds* case, *supra* note 310.

<sup>375</sup> *Supra* note 192, at 133 (S.C.R.), 107 (D.L.R.).

<sup>376</sup> *Saumur v. A.G. Que.*, [1953] 2 S.C.R. 299 at 330-32, [1953] 4 D.L.R. 641 at 670-73, 106 C.C.C. 289 at 321-25.

<sup>377</sup> *Supra* note 205, at 326-28 (S.C.R.), 369-72 (D.L.R.), 164-67 (C.C.C.).

<sup>378</sup> 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

<sup>379</sup> 1974, 88 Stat. 1291.

<sup>380</sup> See the opinion of Mr. Justice Harlan in *Cohen v. California*, 403 U.S. 15 at 24, 91 S. Ct. 1780 at 1787-88, 29 L. Ed. 2d 284 at 293 (1971); see also the opinion of Mr. Justice Brandeis in *Whitney v. California*, 274 U.S. 357 at 375, 47 S. Ct. 641 at 648, 71 L. Ed. 1095 at 1105 (1927); see generally Mill, *Considerations on Representative Government* (London: Parker & Bourne, 1861).

<sup>381</sup> *Supra* note 376, at 329 (S.C.R.), 670 (D.L.R.), 321 (C.C.C.).

process rationale fails to capture this aspect of freedom of expression,<sup>382</sup> and therefore fails to answer the complex problems of judicial legitimacy raised by the cases where related aspects of humanness are given special protection by the courts.<sup>383</sup>

The voting rights cases, especially the reapportionment cases,<sup>384</sup> seem tailor-made for the line of argument being considered. It is noteworthy that, quite apart from the question of the legitimacy of the Court's intervention,<sup>385</sup> serious questions have been raised about the wisdom and success of the Court's "one man, one vote" rulings.<sup>386</sup> In fact, the anti-democratic argument is answered only imperfectly by these cases; while the Court "granted equal access to representative institutions . . . it also treated the institutions as though they were unfit to decide the main questions."<sup>387</sup>

Putting aside these problems with the freedom of expression and voters' rights cases, it must be asked whether the logic of these cases can be extended to cover the cases alleging violations of the norm of equality before the law. To do so, one must argue that equality before the law represents a value intrinsic to democracy. At least one writer doubts if this is so. "Neither egalitarian nor due process values are part of the internal logic of democracy itself. If we choose judicial supervision of legislation which may run afoul of these values, we must do so with full recognition of the infringement on democratic principles."<sup>388</sup> It will be argued later that this position is only half-true, and that equality before the law is a value without which democratic government could not work. For the moment, accept the argument that equality before the law is not a value intrinsic to democracy. How might it be countered?

One way would be to answer in the language of classical liberalism. The only legitimate end of government, democratic or otherwise, is the advancement of individual liberty. Since adherence to the principle of equality before the law is necessary for the safeguarding of freedom, it follows that equality before the law is a value central to democratic theory. The problem with this argument is obvious. There is a distinction made between two conceptions of freedom. The freedom that is central to democracy is one aspect of what we would call positive freedom: the freedom to participate in the affairs of government. If this is what is meant, it is clear that the logic of the speech and voting cases cannot be extended to cover equality before the law in general. However, if freedom is being referred to in the negative sense of the word, which

<sup>382</sup> Tribe, *supra* note 113, at 576-79. See also Tribe, *op cit.* at 501-506, for an analogous argument with respect to procedural due process.

<sup>383</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade* (1973), 82 Yale L.J. 920.

<sup>384</sup> See, e.g., the *Reynolds* case, *supra* note 310; *Lucas v. Colorado*, 377 U.S. 713, 84 S. Ct. 1418, 12 L. Ed. 2d 568 (1964); and *Roman v. Sincock*, 377 U.S. 695, 84 S. Ct. 1449, 12 L. Ed. 2d 620 (1964). See generally Tribe, *supra* note 113, at 738-61.

<sup>385</sup> One writer has questioned whether the Fourteenth Amendment was intended to apply to the question of the franchise. See Berger, *supra* note 172, at 69-98.

<sup>386</sup> See generally Elliott, *The Rise of Guardian Democracy* (Cambridge: Harv. U. Press, 1974).

<sup>387</sup> *Id.* at 2.

<sup>388</sup> Weiler, *supra* note 2, at 210.

was the thrust of the liberal theorists, then democracy has been redefined as limited by certain values that it must serve. In other words, democracy is a means to a higher end: it is not the ultimate political ideal. This, of course, turns the anti-democratic argument on its head. Again, it must be asked whether this idea, so deeply imbedded in American legal culture, ought to be transplanted to Canada. Before this question is addressed, there are four related problems that need to be discussed.

The first concerns the effect of judicial activism on the political process. De Toqueville remarked that eventually all political questions become legal questions in the United States.<sup>389</sup> The history of the last few decades certainly confirms the truth of that *dictum*. Does this not result in a situation where the legislative branch of government is able to duck controversial issues, knowing that the Court will be forced to confront them and take the "heat"?<sup>390</sup> Indeed, can it not be said that judicial review causes "laxness and irresponsibility in the state and national legislatures, and political apathy in the electorate"?<sup>391</sup>

In rebuttal, it has been said that this argument is not true in fact, and even if it were, it would be wrong to attribute political indifference to judicial review.<sup>392</sup> One thing is certain: when the court strikes down legislation on the basis that the government cannot interfere with the rights of the individual, or when the court imposes affirmative duties on the government, the political process has no choice but to abandon the field to the judiciary.

The second problem concerns the extent to which the political process is responsive to the legitimate claims of the polity. In the United States, it seems clear that the political process was unable to achieve a break-down of the segregated school systems. Subject to all of the problems already considered, judicial review may seem necessary in situations where no other means of redress are available for instances of clear violation of rights. However, is this the case in Canada?

Consider the case of capital punishment. Let it be assumed that there is agreement that it constitutes a form of punishment that no longer should be considered legitimate in our society. Contrary to the wishes of the majority of Canadians, Parliament abolished capital punishment.<sup>393</sup> At the same time, the Supreme Court of Canada decided that it was not cruel and unusual punishment.<sup>394</sup> One could multiply examples where the political process was more responsive and "liberal" than the judicial process. The point to be made is

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<sup>389</sup> *Democracy in America* (N.Y.: New Amer. Libr., 1966) at 207.

<sup>390</sup> Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," in *Legal Essays* (Boston: Boston Book Co., 1908) 39. For a similar argument made in the context of the question of entrenching the Bill of Rights in the Canadian Constitution, see Schmeiser, *The Case Against Entrenchment of a Canadian Bill of Rights* (1973-74), 1 Dal. L.J. 15.

<sup>391</sup> Rostow, *supra* note 355, at 200-201. In fact, one writer has suggested that the court is justified in intervening whenever the political process appears unwilling to act: Carter, "When Courts Should Make Policy: An Institutional Approach," in Gardner, ed., *Public Law and Public Policy* (N.Y.: Praeger, 1977) 141.

<sup>392</sup> Rostow, *id* at 200-201.

<sup>393</sup> *Criminal Law Amendment Act (No. 2)*, 1976, S.C. 1974-75-76, c. 105.

<sup>394</sup> *Miller*, *supra* note 83.



that one must look at the total output of the governmental process before one makes the argument for judicial review.<sup>395</sup>

The third problem is one considered throughout this paper. If it is to be accepted that there are individual rights which should override the majority will as expressed in a piece of legislation, the fact that the judicial articulation of these rights cannot be confined to those that are listed expressly in the Bill of Rights must also be accepted. This is due not only to the fact that the existence of unenumerated rights is recognized in both the American<sup>396</sup> and Canadian Bills of Rights,<sup>397</sup> but, more fundamentally, to the way in which the enumerated rights are defined.<sup>398</sup> Also, the fact that such rights do not make sense in the absence of a coherent theory of rights<sup>399</sup> demands a creative judicial elaboration of the implications and extensions of the Bill of Rights. The dangers for judicial integrity that this poses have been noted, as well as the question of the court's competence to handle such a task. The problem is aggravated by the Canadian Supreme Court's apparent inability to come to grips with the Bill of Rights.

The final problem is closely related to the latter. The path of judicial review under a Bill of Rights is a slippery one for a variety of reasons. First, the American experience demonstrates that judicial activism is impossible to constrain by arbitrary line-drawings between "social and economic legislation" and issues of rights. Nor has it been limited to protecting those rights clearly enumerated in the Constitution or those even contemplated by the framers. Second, the cost to an activist court is the increased litigational pressure that would seem to follow inevitably when the court becomes a forum for resolving broad issues of social policy. At a time of growing awareness that the judicial system cannot bear an unlimited increase in the amount of litigation, and furthermore, that the judicial process may not be the best way of resolving many of the problems that it has handled traditionally, does it make sense to encourage a greater "litigiousness" on the part of the public?

With all of these problems in mind, it appears that the task of defending judicial review is a difficult one. It is not, however, impossible.

### C. *The Case for Judicial Review Restated*

The essence of the argument for judicial review may be captured in the following two propositions: (1) Parliament should not have unlimited power but should be limited by principles of justice; and (2) the judiciary has some role to play in this process. To be sure, these two propositions are weak, and

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<sup>395</sup> This is the central theme of an article by Russell, *A Democratic Approach to Civil Liberties* (1969), 19 U. Toronto L.J. 109, wherein he argues against an expanded role for the courts. See also Jaffe, *supra* note 282, at 5.

<sup>396</sup> *U.S. Const.*, amend. IX, reads as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

<sup>397</sup> *The Canadian Bill of Rights*, s. 5(1) reads as follows: "Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act."

<sup>398</sup> Phrases like equality before the law have an open texture.

<sup>399</sup> See Dworkin, *supra* note 59, at 101-105.

they are not incompatible with a variety of roles for the judiciary. For example, one might argue that civil liberties are best protected by improving the representative function of the legislative process. The court ought not to exercise the power of review, but should protect individual liberties, as they have done in the past, by processes of construction and separation of powers.<sup>400</sup> One might argue on the other hand that the court should accept Parliament's determination that a given law does not violate the Bill of Rights;<sup>401</sup> one could improve the internal process of verification by establishing interparty standing committees in Parliament to scrutinize proposed legislation.<sup>402</sup>

In this section the argument for retention of the principle of judicial review is made, but nothing within this section is to be taken as a denial that much should be done to improve the democratic character of our legislative process, or to improve the process whereby Parliament checks its legislation against the Bill of Rights. Nor is it being suggested that invalidating legislation is the only way that courts can protect individual rights; as noted before, when it is the application of a law (rather than its content) that is challenged, the courts can further the ends of the Bill of Rights without a major interference with the substantive policies of Parliament.

### 1. Why the Power of Parliament Should Be Limited

The starting point is the uncontrovertible fact that we, as citizens, do care and ought to care about the justice of our laws and legal institutions. Therefore, we must care about equality, for "equality is the heart of justice."<sup>403</sup> Even the most confirmed positivist cannot deny that the normative evaluation of the law is an important, indeed crucial, aspect of social life.<sup>404</sup> However, quite apart from the intrinsic importance of trying to approach the ideal of just institutions, there is a very practical reason why government ought to be limited by principles of justice. It is here that the importance of the principles of equality before the law to democratic government becomes evident.

There are two basic "devices" of social order. They are power and the concept of obligation.<sup>405</sup> Although it is possible to imagine a society wherein social order was maintained solely through the exercise of state power, it is inconceivable that such a society would be stable over any length of time. Nevertheless, ours is not such a society; order is maintained largely because the polity has internalized some notion of the obligation to comply with the institutions of government.

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<sup>400</sup> See Russell, *supra* note 395; and Schmeiser, *supra* note 390.

<sup>401</sup> This seems to be an implicit premise in the argument made by Driedger, *The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint* (1977), 9 Ottawa L. Rev. 303. He argues that the fact that the Court has not struck down the great majority of laws that it evaluates signifies the respect that Parliament has for fundamental rights.

<sup>402</sup> See Russell, *supra* note 395.

<sup>403</sup> Smith, *supra* note 122, at 163. Rawls has called justice "the first virtue of social institutions." *Supra* note 120, at 3.

<sup>404</sup> Hart, *supra* note 71, at 201-207.

<sup>405</sup> See Smith, *supra* note 118, at 234-40, for a compelling demonstration that all legal relations can be broken down into these two elements.

It is not necessary to enter into the difficult controversy concerning what obligation, if any, one has to obey the law.<sup>406</sup> Nor is it necessary to argue, as do the natural law advocates, that an unjust law is not a law. It is sufficient to accept the notion that a system of laws, though valid, may fail to invoke the perception of obligation on the part of those citizens to whom the law is directed. This may occur, for example, when the formal properties of the law are inconsistent with the idea of obligation-creating norms.<sup>407</sup> It is perfectly rational to admit the existence of a law, but to deny that it gives rise to an obligation to comply with it.

This does not mean that one is free to ignore any law with which one disagrees; there may be imperfectly just laws which nevertheless impose obligation because of the relative justice of the over-all structure of the obligation-creating social practice. However, the fact remains that the moral authority of the law is diminished to the extent that it deviates from certain basic principles of justice, of which equality before the law is one. When this moral authority is diminished, social order is maintained more by power than by right. Surely it is of the utmost importance in a democratic system of government that the citizens' perception of their obligations be as strong as possible. It therefore seems appropriate to view equality before the law as an important principle of democratic government, if not in the pure theoretical sense, then at least functionally. Furthermore, it is important to re-examine the content of the democratic ideal in the name of which judicial review is resisted. It is a mechanism whereby governments can be changed without bloodshed: as such, it is a precious institution for which it is worth fighting. However, there is no reason why democratic government must mean government by the unlimited will of the "majority." It simply is not the case that the output of a modern democratic legislature has any necessary connection with that which is just. Driven to maintain itself in power, governments prove unable to resist the pressures from the coalitions of organized interests without whose support the government will fall. "The result of this process will correspond to nobody's opinion of what is right, and to no principles; it will not be based on a judgment of merit but on political expediency."<sup>408</sup> If there is concern about justice, then the legislative will must be limited, and the only way to do so is by demanding that governments conform to principles of justice.

To be sure, one can agree with all of this while still denying that judicial review is necessary or appropriate to secure Parliament's compliance with these norms. Indeed, if it were certain that Parliament would so comply, there would be no reason to involve the judiciary at all. Is this a reasonable assumption to make?

## 2. Why the Judiciary Has a Role to Play

There are two reasons why the judiciary has a major role to play; first, to protect the right of individuals to just government in an era of the positive state, and second, to keep the values of justice alive in public opinion.

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<sup>406</sup> See Rawls, *supra* note 120, at 350-55.

<sup>407</sup> See Smith, *supra* note 118, at 140-43.

<sup>408</sup> Hayek, *supra* note 80, at 9.

The first reason is the one traditionally offered by classical liberalism, but it has been challenged on the grounds that it reflects an outmoded perception of modern government and the danger to individual liberty that modern government poses.<sup>409</sup> It is not entirely evident that the liberals' fears are no longer relevant.

History gives no assurance that the government will not abuse its powers by sacrificing minority interests to those of the transient coalition called "the majority." Is the era of religious intolerance really over? Can it truly be said that racism and sexism have been eliminated from our culture? The fact is that Canadians have been so preoccupied with distinguishing themselves from Americans<sup>410</sup> that they are only now awakening to the fact that they too have these serious social problems with which to contend. Even if our present government cannot be viewed as potentially tyrannical, what about government one hundred years hence? What kinds of social problems will it confront? What kinds of pressure might exist that would make government more responsive to sacrificing the interests of some for the sake of others? It simply is not known. Why abandon one device of checking this potential abuse of power?

In response it will be said that, in the final analysis, the judiciary will be powerless to stop a government determined to accomplish its goals, especially when the government is backed by strong public opinion. The real protection of individual rights must come from the political process and public opinion.

To this one must respectfully demur. However, it is no answer at all, for two reasons. First, the protection of individual rights is hardly enhanced by the judiciary abandoning the field. It may be said that, given all that is known about the complexity of the philosophical problems necessarily implicated when questions of rights are involved, the court can hardly claim a special competence to deal with these matters. Without implying anything base about the political process, or anything particularly mystical about the judiciary, one might agree with the writer who remarked that "[t]here is no need to throw to the dogs everything that is not fit for the altars of the gods."<sup>411</sup> The courts are the best institution available within which a dialogue on rights can take place, and unless our concern for individual rights is to be ignored totally, the courts ought not to be abandoned.

Second, government may act in the best of faith, and still violate rights. The demands on government are so great, and time is so scarce, that inadvertent violations of rights seem unavoidable. It is true that an improvement in the internal processes of the legislature could go a long way toward minimizing this possibility, but again, another "check" is not without value. This is

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<sup>409</sup> Russell, *supra* note 395, at 109-15.

<sup>410</sup> Lipset, "Value Differences, Absolute or Relative: The English Speaking Democracies," in Blishen *et al.*, eds., *Canadian Society: Sociological Perspectives* (3d ed. Toronto: Macmillan, 1968) 478 at 480. See also Underhill, *In Search of Canadian Liberalism* (Toronto: Macmillan, 1960) at 12.

<sup>411</sup> Tourtoulon, cited in Cohen, *The Ethical Basis of Legal Criticism* (1931), 41 Yale L.J. 201 at 206.

especially so in the age of positive government, where so much of social life is subject to legal regulation.

The second reason for maintaining the institution of judicial review is the educative function that it serves. This argument accepts the truth that the ultimate safeguard for individual rights consists in the degree to which they are taken seriously by the public at large. It argues that it is in the dialogue on rights that takes place within the judicial context that these ideals are kept alive.<sup>412</sup> Cardozo made this point over half a century ago when he wrote that the major value of judicial review consists not in those cases where legislation is struck down: "Rather shall we find its chief worth is making vocal and audible the ideals that might be otherwise silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges."<sup>413</sup>

Before the *Bliss* case is reconsidered, three more questions concerning judicial review must be addressed—questions to which we have referred throughout the course of our inquiry.

The first concerns the nature of parliamentary government. Quite apart from the theoretical problems addressed earlier, it might be said that judicial review is inconsistent with this form of government for another, more practical reason. The argument is that the value of efficient government that is implicit in a parliamentary, as opposed to a republican, form of government is seriously compromised when the judiciary is interposed as another source of power. This fact, combined with the theoretical argument, is marshalled in opposition to an increased role for the judiciary.

However, it is the very efficiency of parliamentary government that may make the case for judicial review all the more persuasive. What is at issue is whether it is necessary to alter our conception of how government is to function. Canadians must begin to decide whether they value individual rights more than they do governmental efficiency.

The second question concerns the appearance of judicial impartiality, which, it was noted, was threatened by judicial activism. Does this not cut both ways? Is not public confidence in the court undermined when it fails to provide a remedy for a clear violation of rights? Does it not appear far from impartial when it constantly defers to the State?<sup>414</sup>

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<sup>412</sup> See Jaffe, *supra* note 275, at 19:

The power of Parliament and of its executive, in theory unqualified, will in practice be limited by the Constitution as currently expounded and by the public opinion which can be mobilized to reinforce it. In this area there is no organ so competent to expound and so potent to mobilize public opinion as the judiciary.

<sup>413</sup> *The Nature of the Judicial Process* (New Haven: Yale U. Press, 1921) at 93.

<sup>414</sup> See Tribe, *supra* note 113, at iv:

Judicial neutrality inescapably involves taking sides. The judgment of the Court, though it may be to elude an issue, in effect settles the substance of the case. Judicial authority to determine when to defer to others in constitutional matters is a procedural form of substantive power; judicial restraint is but another form of judicial activism.

The final question concerns the problem of giving meaning to such norms as equality before the law. Equality before the law cannot be given a strict definition, nor can an adequate "test" be found for when it has been infringed. However, though there may be no "right" answer to a given question, it certainly is important that the judges try to find the best answer.<sup>415</sup> There is a certain structure to the inquiry into rights, and if it can be done in an intelligent way—sensitive to all of the institutional problems noted above—there is no need to abandon the enterprise altogether. In the section that follows, the attempt is to show how such an inquiry should be approached.

## VI. THE *BLISS* CASE RECONSIDERED

### A. *The Problem with Section 46*

At the outset, it is important to recall the nature of the argument that Mrs. Bliss made before the Court. She argued that she was entitled to ordinary benefits, having worked the requisite number of weeks, being unemployed, and being willing and able to work. Her claim was that section 46, by barring her from claiming ordinary benefits, created an irrelevant distinction between women in her situation and other men and women who were willing and able to work, and thus violated her right to equality before the law.

In Part IV, it was suggested that the Court ought to take a flexible approach to the resolution of these questions, focussing on the nature of the legislative classification, the importance of the benefit denied, and the importance of the government's reason for tailoring the law as it did. Throughout the inquiry, the core values that are served by the principle of equality before the law must be kept in mind. They include the treatment of individuals as equals, and the non-arbitrary exercise of governmental power.

With respect to the nature of the classification, a distinction must be made between the establishment of the conditions of entitlement for ordinary and maternity benefits, and the provisions of section 46 which bar from ordinary benefits all women who, having left work due to pregnancy, fail to comply with section 30. In section 2 of this Part, the question of whether the provisions of section 30 are consistent with the principle of equality before the law is addressed. For the moment, the focus is on section 46.

Section 46 is part of a comprehensive legislative scheme designed to alleviate the hardships that workers experience during times of unemployment.<sup>416</sup> Benefits are paid out of a fund that is constituted by contributions from employers, employees and government.<sup>417</sup> As such it can be described fairly as an insurance scheme, notwithstanding the fact that the inclusion of maternity and illness benefits makes such a description somewhat less tidy.<sup>418</sup>

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<sup>415</sup> Dworkin, *supra* note 59, at 186.

<sup>416</sup> Blaustein and Craig, *An International Review of Unemployment Insurance Schemes* (Kalamazoo: Upjohn Inst. Empl. Res., 1977) at 1.

<sup>417</sup> Douglas, *supra* note 15.

<sup>418</sup> See Issalys and Watkins, *supra* note 24, at 9. One writer suggests that maternity benefits ought not to be included in an unemployment insurance scheme. See Kelly, *Unemployment Insurance in the 70's: A Look at the White Paper* (1970), 18 Can. Tax J. 301 at 304.

This insurance scheme is designed to protect those workers with a *bona fide* attachment to the labour market. What constitutes such an attachment has been, and continues to be, a matter of considerable controversy. In 1962, the *Report of the Committee of Inquiry into the Unemployment Insurance Act* (The Gill Committee) recommended that the qualifying period, which then was thirty weeks of employment within the two years preceding the claim for benefits, be extended so that benefits be paid only to those with a "genuine attachment" to the labour market.<sup>419</sup> The White Paper,<sup>420</sup> upon which the Act of 1971 was modeled, rejected the conclusions of the Gill Committee and recommended that the qualification period be reduced to eight weeks of employment in the year preceding the claim. The Minister of Labour defended this position in Parliament,<sup>421</sup> and it was embodied in the Act.

These differences in opinion about what constitutes a sufficient attachment to the work force reveal the conflicting goals that the Act must accommodate.<sup>422</sup> The Act must temper the hardships of unemployment without creating a system that undermines the incentive to work. It must provide coverage for those in need of it, but it must not encourage people to work merely for the purpose of qualifying for benefits.

The basic device that the Act employs to accommodate these goals is the requirement that, as a general rule, one must establish the willingness to, and the availability for, work in order to receive unemployment insurance benefits.<sup>423</sup> In principle, this will filter out those claims that represent an attempt to abuse the scheme.

Except for section 46, Mrs. Bliss would have been entitled to receive ordinary benefits, since she had worked the required number of weeks and was willing and able to work. The question becomes one of evaluating the reasons why section 46 was inserted into the Act. Before doing so, a number of points need to be made.

First, it is clear that a law can violate the principle of equality before

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<sup>419</sup> Can., *Report of the Committee of Inquiry into the Unemployment Insurance Act (Gill Report)* (Ottawa: Queen's Printer, 1962) at 120-21.

<sup>420</sup> Can. Dept. of Lab., *Unemployment Insurance in the Seventies* (Ottawa: Queen's Printer, 1970).

<sup>421</sup> The Honourable Bryce Mackasey noted that the government will "consider someone as attached to the work force if that person has as few as eight weeks of contributions. I say that because we are interested in the future of that worker and not in his past history." *Can H. of C. Deb.*, April 19, 1971, at 5040.

<sup>422</sup> As one writer put it:

The Gill Committee considered unemployment insurance to be for persons who could demonstrate that employment held an important, if not the principal, place in their manner of earning a living. To allow people to qualify when they had an inconsiderable record of employment was to take the risk of attracting people into insured employment merely for the purpose of qualifying for benefits. The authors of the White Paper consider unemployment insurance to be for those who have a bona-fide attachment to the labour force . . . not just for those who have a relatively long attachment to employment.

See Kelly, *supra* note 418, at 303.

<sup>423</sup> The *Unemployment Insurance Act*, s. 25. See also the judgment of Collier J., *supra* note 12, at 63.

the law even if it does not classify on the basis of one of the characteristics enumerated in the Bill of Rights.<sup>424</sup> It will do so when the classification employed in the law is arbitrary with respect to the purposes of the law,<sup>425</sup> and, as was illustrated in Part IV, whatever weight one might give to the legislative articulation of the purposes of the law, it is the court which must decide ultimately on this question.

This having been said, one possible justification for section 46<sup>426</sup> can be disposed of. The argument would be as follows. The "right" to unemployment insurance benefits was a right created by Parliament. As such, Parliament can determine the conditions under which people receive or are denied benefits. The legislative process must be allowed a degree of flexibility; otherwise it could not function. It is not the business of the court to tell Parliament how it should allocate its resources.

It is not necessary to deny the importance of letting the legislature have a little "play in the joints" in order to reject this line of reasoning as a conclusive justification for the law in question. It really amounts to a denial that the court should review the substance of the legislation, regardless of how it is drafted. It reduces the question of the law's compatibility with the Bill of Rights to a non-issue, in much the same way as the "valid federal objective" and "relevance as logic" tests that were considered earlier. If one is prepared to take rights seriously (to borrow Professor Dworkin's phrase),<sup>427</sup> more must be demanded in the way of justification.

This also raises the second point that demands highlighting and that concerns the nature of the rights in question. To make the point, it is helpful to imagine another argument that the government might advance in support of section 46. In order to minimize the many problems inherent in judicial review, the court should not interfere with the policies of Parliament unless there is a clear violation of individual rights. However, this does not obtain with respect to unemployment insurance benefits. One's "right" to benefits is a creature of Parliament, and it can limit that right as it sees fit. One could hardly equate a right to unemployment insurance benefits to the right, for example, to a fair trial.

At the core of this argument, which partakes of the positivist flavour of the argument considered above, is an implicit distinction between fundamen-

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<sup>424</sup> See *Curr*, *supra* note 110, at 896 (S.C.R.), 611 (D.L.R.), 189 (C.C.C.); *Burnshine*, *supra* note 56, at 700 (S.C.R.), 588-89 (D.L.R.), 509-10 (C.C.C.); and *Bliss*, *supra* note 7, at 190-91 (S.C.R.), 422 (D.L.R.), 236 (C.C.C.L.). See also MacPherson, *supra* note 49, at 113-14; and Smith, *supra* note 122.

<sup>425</sup> Tussman and tenBroek, *supra* note 181.

<sup>426</sup> "Possible" justification is used advisedly, because no justifications were advanced at all in the course of the litigation. This is a function of how the Court has approached these questions in the past; the government, knowing that the Court will not demand an articulation of the purposes of the law, does not advance any in support of the impugned law. This is a product of our legal culture, and it is an example of how the Court affects the quality of "lawyering" in Canada. Whatever becomes of our Bill of Rights, one must hope that the Court will demand a better and more comprehensive articulation of the governmental purpose embodied in a law under review.

<sup>427</sup> *Supra* note 59.



tal rights (as embodied in the Bill of Rights), and legislatively created "rights" in a scheme such as the *Unemployment Insurance Act*. However, when considering the evolution of doctrine in the United States, it is evident that such a distinction will lead to an overly rigid approach to constitutional adjudication. What is really at issue in the justification under consideration is whether the "right" to unemployment insurance is one which is sufficiently important to trigger a searching judicial inquiry into the manner in which these rights are distributed. In order to avoid such an inquiry, Parliament must be prepared to deny either that this right is important or, indeed, that it is a right at all.

That unemployment insurance benefits are important to recipients requires no elaborate proof. The very fact that an unemployment insurance scheme exists with almost universal coverage is ample testimony to this fact. It is not the case that even with respect to maternity benefits, the benefits paid are somehow unnecessary for the well-being of the recipient. As the Minister of Labour remarked in Parliament:

I think that before we get too smug about women in the work force, we should realize it is a sad commentary that at least one million women in the Canadian work force are in it not because they want to buy a second automobile or a colour television set but because their income means the difference between poverty and survival.<sup>428</sup>

This is equally true with respect to all those in need of unemployment insurance benefits. This fact reveals the reason why the other branch of the possible justification—that the benefits are, in some way, not rights—should not be accepted.

Underlying this argument is the distinction that often is made between rights and privileges. It is a distinction which, at least in this case, does not obtain. First, it is a distinction that is analytically unsound.<sup>429</sup> More importantly, it is a distinction that ought to be abandoned as a matter of policy in this age of positive government. Benefits such as those under question are as important to individuals as are the traditional property rights protected by the law.<sup>430</sup> The question is not whether the court should impose an affirmative duty on Parliament to create a right to unemployment insurance benefits.<sup>431</sup> Parliament has created these benefits and, having done so, no play

<sup>428</sup> *Supra* note 421, at 5039.

<sup>429</sup> Smith, *supra* note 118, at 233-43.

<sup>430</sup> See Reich, *The New Property* (1964), 73 Yale L.J. 733. For an argument that welfare rights are constitutionally protected "property" in the United States, see Dolzer, *Welfare Benefits as Property Interests: A Constitutional Right to a Hearing and Judicial Review* (1977), 9 Admin. L. Rev. 525. See also Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment* (1969), 83 Harv. L. Rev. 7. Cf. Winter, *Poverty, Economic Equality, and the Equal Protection Clause* [1972] Supreme Ct. Rev. 41.

<sup>431</sup> See Michelman, *id.* The core idea of such a right depends, in part, on the notion that equality before the law may be violated not only by legislative classifications, but by the legislature's failure to classify. See Tribe, *supra* note 113, at 993-94. In consideration of the different health needs of women, one could fashion an argument that the norm of "treatment as an equal" required the enactment of a regime of maternity benefits. Professor Michelman seems to believe that Rawls's *A Theory of Justice* may be invoked in support of a constitutional right to welfare. See Michelman, "Constitutional

on words should obscure the fact that these benefits must be distributed in a manner consistent with the Bill of Rights. The American courts have abandoned the rights-privileges distinction for the purposes of constitutional adjudication,<sup>432</sup> and there is precedent in the Supreme Court of Canada for doing the same. In the *Canard* case,<sup>433</sup> Mr. Justice Beetz was prepared to look behind this distinction in the context of a woman's expectation of being the administratrix of her deceased husband's estate. The same spirit should animate the court's inquiry into the question of unemployment insurance benefits.

With these questions out of the way, what can be made of section 46? It functions to deny any benefits to those women who, though willing and able to work, left work because of pregnancy and did not comply with the requirements of section 30. If the overall purpose of the Act is to provide benefits to those with a *bona fide* attachment to the work force and who are willing and able to work, but cannot find employment, it seems that section 46 creates an arbitrary exception for women in Mrs. Bliss's situation. She is within the class of people for whom the Act was designed, but is denied benefits.<sup>434</sup>

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Welfare Rights and a Theory of Justice," in Daniels, ed., *Reading Rawls* (New Haven: Yale U. Press, 1921) 319. Support for this position may be gleaned from Rawls's notion that individuals have a right to a fair share of society's resources, that share being determined by the principle of maximum. At the same time, Rawls explicitly restricts the scope of his principles of justice to the over-all structure of society. See Rawls, *supra* note 120, at 7. The basic principles do not relate to a particular distribution resulting from a particular law. *Op. cit.* at 64. In fact, Rawls recognizes that the maximum principle will *not* yield answers sufficiently clear to guide the judiciary in imposing duties on the legislature. "The resolution of these issues is best left to the political process provided that the requisite equal liberties are secure." *Op. cit.* at 372-73. It is for this reason that this essay is not an investigation into the compatibility of the *Unemployment Insurance Act* with Rawls's principles of justice.

<sup>432</sup> *Sherbert v. Verner*, 374 U.S. 398 at 404, 83 S. Ct. 1790 at 1794, 10 L. Ed. 2d 965 at 971 (1963); *Shapiro v. Thompson*, 394 U.S. 618 at 627, 89 S. Ct. 1322 at 1327, 22 L. Ed. 2d 600 at 611 (1969); *Goldberg v. Kelly*, 397 U.S. 254 at 262, 90 S. Ct. 1011 at 1017, 25 L. Ed. 2d 287 at 296 (1970); *Bell v. Burson*, 402 U.S. 535 at 539, 91 S. Ct. 1586 at 1589, 29 L. Ed. 2d 90 at 94 (1971).

<sup>433</sup> *Supra* note 66.

<sup>434</sup> It is in this case that the relevance of the "*Gonzales*" test considered in Part II of this essay becomes evident. When one looks beyond the manner in which Parliament drafted the law in question, and postulates an overriding purpose to the Act, it then becomes possible to argue that the law does *not* apply equally to all to whom it applies. But there is a problem with this mode of reasoning.

One might want to argue that sections 30 and 46 must be read together, and that s. 46 was inserted to "perfect" the special regime of maternity benefits. The argument would proceed on the premise that the fact of pregnancy is of crucial importance, and that Parliament was entitled to treat unemployment caused by pregnancy differently than unemployment caused by other circumstances. In this way, Mrs. Bliss was not entitled to ordinary benefits notwithstanding her availability for work; she was entitled only to the benefits of section 30 and she failed to satisfy the conditions embodied therein. The argument assumes that Parliament, having created a regime of maternity benefits, can restrict ordinary benefits to those who, but for the fact that they were pregnant, would qualify for ordinary benefits. In section 2 of this Part this question is addressed more closely. For the purposes of this Part, assume that Parliament was entitled to create a special regime of maternity benefits. This does not answer the question that is posed by section 46: is there a good reason for denying Mrs. Bliss the ordinary benefits contemplated by the Act?

Mr. Justice Collier suggested that section 46 might have been a response to the assumption that women, for a period before and after childbirth, are incapable of working.<sup>435</sup> Quite apart from the question of whether this is a fair assumption to make, this is not a reason for denying benefits to someone who has been certified to be able to work. Nor is it defensible as an exercise of over inclusive line-drawing.<sup>436</sup> In this case, it is only women who are the subjects of this exclusion and, given the importance of the benefits at stake, the conclusive presumption of their inability to work should give way to a more flexible and personal determination.

A more plausible reason for the presence of section 46 would be to make it clear that a woman receiving maternity benefits is not entitled to claim ordinary benefits at the same time. However, Mrs. Bliss was not receiving, nor was she even claiming, maternity benefits. If this is the purpose of section 46, it has no application to the case at hand.

Perhaps there is a different rationale for section 46. The provisions of section 30 were designed to prevent women from claiming maternity benefits in circumstances where they began employment after becoming pregnant. The purpose of this restriction is said to be the protection of the fund against the fraud and abuse that such a practice is felt to be. Could it not be said that section 46 is but another element in this design?

The problem with this line of reasoning is that there is no question of fraud in circumstances like those of Mrs. Bliss. She was not claiming maternity benefits, which are paid regardless of the claimant's ability or willingness to work. She was claiming ordinary benefits on the basis of being available to work. If this basic requirement is adequate to protect the fund against fraud and abuse in all other circumstances, then it is also adequate in her case. By virtue of her willingness and ability to work, Mrs. Bliss should not have been treated differently from all those for whom the ordinary benefit provisions were designed.

The unjustifiable arbitrariness of section 46 is revealed when its functional implications are examined more closely. In effect, it forces Mrs. Bliss, and women in her situation, to subsidize the costs of administering the maternity benefit provisions of the Act. It is using her labour, and hence her contributions to the fund, in a way that denies her the right to be treated as an equal. If the right to equality before the law is to mean anything at all, it means that her rights to these benefits may not be sacrificed in the interest of securing some greater overall good: in this case the amount of cash in the fund.<sup>437</sup>

So it seems that, having regard to the overall purposes of the Act, and in consideration of the nature of the rights involved, the Court should have declared section 46 inoperative as violating the principle of equality before

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<sup>435</sup> *Appeal Case*, *supra* note 12, at 64.

<sup>436</sup> For a discussion of over-inclusiveness and the degree to which it is tolerated, see Tussman and tenBroek, *supra* note 181. See also Tribe, *supra* note 113, at 997-99.

<sup>437</sup> When important rights are at stake, arguments of efficiency cannot be allowed to prevail.

the law.<sup>438</sup> This would be an example of the Court ensuring that a probably inadvertent violation of rights did not pass unremedied. Furthermore, in the light of the discussion regarding the meaning of equality before the law and of the problems inherent in judicial review, it cannot be said that such a decision by the Court departs so radically from the reasons why our judges are entrusted with the task of applying the norm of equality before the law.

More controversial issues arise when the maternity benefits regime is considered as a whole. Although these issues were not raised in the *Bliss* case they were the subject of an unsuccessful appeal to the Umpire by Mrs. Santos.<sup>439</sup> Her claim for maternity benefits was denied because she had only nine weeks of insurable employment, rather than the ten weeks as required by section 30(1) of the Act. Her appeal to the Board of Referees was unsuccessful, and Lief D.J., sitting as the Umpire, found the *Bliss* case determinative of the issue.

It is important to consider the issues arising out of this case for two reasons. First, they highlight the way in which the law reflects certain stereotypical attitudes about women. Second, they raise basic questions that must be confronted by a court which takes seriously its mandate under the Bill of Rights.

## B. *The Problem with Section 30*

### 1. General Remarks

At issue is the degree to which the special qualifying period contemplated by section 30 is compatible with equality before the law. As was noted in Part II, the provisions of section 30 restrict the availability of maternity benefits to those women who were working, or receiving benefits, at the time that they became pregnant. In the discussion of section 46 it is noted that one of the justifications for this provision is the prevention of fraud and abuse. It is the adequacy of this reason, and the related question of the "voluntariness" of pregnancy, which form the basis of this section of the inquiry.<sup>440</sup>

The maternity benefit provisions of the Act can be located somewhere in the middle of a spectrum that would be circumscribed in the following way. At one extreme could be imagined an unemployment insurance scheme wherein no provisions for maternity benefits existed. This was the situation in Canada prior to the enactment of the revised Act in 1971. At the other extreme could be imagined a scheme wherein maternity benefits were not distinguished

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<sup>438</sup> See MacPherson, *supra* note 49. Section 46 has also attracted adverse comment from members of Parliament. Speaking in the House with respect to Bill C-205 which, *inter alia*, would delete section 46 from the Act, Mr. C.L. Caccia noted that "There is an arbitrary and somehow inflexible assumption of the period during which women are not available or capable of work." *Can. H. of C. Deb.*, June 6, 1960, at 1864. The Canadian Human Rights Commission has also pressed for the repeal of s. 46. See *Annual Report* (Ottawa: Supply & Serv., 1978).

<sup>439</sup> *Santos v. Can. Empl. and Imm. Comm'n.*, unreported decision of the umpire, June 16, 1980.

<sup>440</sup> For the reasons considered in connection with section 46, the possible justifications based upon Parliament's supposed insulation from judicial scrutiny shall be ignored.

from ordinary benefits in any way. The *Unemployment Insurance Act* is located somewhere in the middle of this spectrum because to qualify for maternity benefits a woman must have worked more weeks in insurable employment—and worked these weeks during a more circumscribed period—than anyone else claiming any other kind of benefit under the Act. Is this consistent with equality before the law?

In order to begin an analysis of this question, it is helpful to consider the situation where no provisions are made for maternity benefits. Fortunately, the American experience is helpful in this regard.

Unemployment insurance is a matter of state control in the United States, and most state plans do not provide maternity benefits.<sup>441</sup> The lack of such provisions has been the subject of a number of constitutional challenges in the courts.

In *Geduldig v. Aiello*,<sup>442</sup> the issue was whether the equal protection clause rendered invalid the exclusion of “normal pregnancies” from the class of injuries and illnesses covered by a California insurance programme.<sup>443</sup> Two years later, in *General Electric Co. v. Gilbert*,<sup>444</sup> the Supreme Court considered a challenge to a private employer’s disability plan which did not provide for maternity benefits.<sup>445</sup> In neither case did the Court strike down the plans under review. When one considers the reasons advanced by the Court for not interfering with these plans, one finds echoes of our Court’s reasoning in the *Bliss* case.

Mr. Justice Stewart, writing for the majority in *Geduldig*, did not consider the exclusion of maternity benefits to be a gender-based discrimination. “The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities.”<sup>446</sup> The same conclusion was reached in the *Gilbert* case by Mr. Justice Rehnquist.<sup>447</sup> The same point was made in the context of the *Unemployment Insurance Act* by both Mr. Justice Pratte in the Federal Court of Appeal<sup>448</sup> and Mr. Justice Ritchie in the Supreme Court.<sup>449</sup>

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<sup>441</sup> Blaustein and Craig, *supra* note 416, at 90.

<sup>442</sup> 417 U.S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974).

<sup>443</sup> The plan in question covered private employees who, temporarily unable to work because of illness or injury, were not covered by the workmen’s compensation scheme of the state.

<sup>444</sup> 429 U.S. 125, 97 St. Ct. 401, 50 L. Ed. 2d 343 (1976).

<sup>445</sup> The challenge was brought as a class action under the provisions of Title VII of the Civil Rights Act of 1967. Section 703(a)(1) provides, in part, that it is an unlawful employment practice for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, sex or national origin.” See U.S.C.A. §2000e-2(a).

<sup>446</sup> *Supra* note 444, at 496n. 20 (U.S. (not in S. Ct. or L. Ed.)).

<sup>447</sup> *Supra* note 444, at 136 (U.S.), 408 (S. Ct.), 353 (L. Ed.).

<sup>448</sup> *Appeal Case*, *supra* note 12, at 73-74.

<sup>449</sup> *Supra* note 7.

Having reached this conclusion, the Court in *Geduldig* subjected the plan to the minimal scrutiny appropriate to such "economic regulation," and held that the state interest in maintaining the self-supporting nature of the plan's fund was a sufficient justification for the denial of maternity benefits.<sup>450</sup> In *Gilbert*, the majority made much of the fact that the net value of the insurance package seemed to be equal for men and women.<sup>451</sup>

If these cases are correct, then it would appear that they afford considerable assistance to one who is disposed to uphold the provisions of the *Unemployment Insurance Act*. If an outright denial of maternity benefits is not in violation of the principle of equal protection—a principle which has been construed widely by the American courts—and it is not considered to be a function of a gender-based classification, how can a scheme which does provide for maternity benefits run afoul of an analogous constitutional norm?

The short answer is that these cases are wrong. Only women can get pregnant, and in the words of an American judge, "[n]obody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother."<sup>452</sup> In response to this obvious fact, and in the light of the cases considered above, the *Pregnancy Discrimination Act* was signed into law by President Carter on October 31st, 1978.<sup>453</sup> The law extends the protection of Title VII to prohibit discrimination against pregnant women, and it requires employers to treat pregnant women in the same way as other employees are treated. Employers are required to provide the same disability pay, sick leave and health insurance to women who are unable to work because of pregnancy. If the cases were to arise again, they surely would be decided differently;<sup>454</sup> once a gender-based distinction is found to have been made, the efficiency argument advanced in *Geduldig* would not have prevailed.

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<sup>450</sup> *Supra* note 442, at 493 (U.S.), 2490 (S. Ct.), 262 (L. Ed.). The Supreme Court of the United States is not consistent with respect to the level of scrutiny that should be applied in cases of gender discrimination. Despite allusions to minimal scrutiny in *Reed*, *supra* note 245, and to strict scrutiny in *Frontiero v. Richardson*, 411 U.S. 667, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973), it seems clear that the Court applies a mode of intermediate scrutiny to gender-discrimination cases. See Gunther, *supra* note 227, at 34. See also Tribe, *supra* note 113, at 1063-66.

<sup>451</sup> *Supra* note 444, at 138 (U.S.), 409 (S. Ct.), 354 (L. Ed.) *Cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S. Ct. 347, 54 L. Ed. 2d 356 (1978), where the same could not be said to exist.

<sup>452</sup> *Phillips v. Martin-Marietta Corp.*, 416 F. 2d 1257 at 1259 (5th Cir., 1969) *per Brown C. J.*

<sup>453</sup> 42 U.S.C.A. §2000e. The Act appears to have been a definite response to the manner in which the *Gilbert* case, *supra* note 444, was decided.

The Canadian Human Rights Commission has recommended that a definition of "sex" be added to s. 20 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, specifying that the prohibition of discriminatory practices based on sex includes discriminatory practices based on pregnancy or childbirth. See *Annual Report*, *supra* note 438, at 7.

<sup>454</sup> It is true that *Geduldig* was not decided on the basis of Title VII, but on the basis of the equal protection clause of the Fourteenth Amendment. It therefore becomes a question of whether or not the Court will read the changes in Title VII into their conception of the Fourteenth Amendment. This question implicates the interesting problem of whether the Court can tolerate a different interpretation of the Constitution on the part of the legislature. See Tribe, *supra* note 113, at 27-33.

It is useful to note that these cases can be approached in a radically different way. The basis of this alternative mode of analysis is the judicially recognized fundamental right to control one's own reproductive organs, and the concept of substantive due process.<sup>455</sup>

In *Cleveland Board of Education v. LaFleur*,<sup>456</sup> pregnant teachers challenged a school board rule which required them to leave work four months prior to their expected date of delivery, and not return to work until several months after childbirth. These rules were challenged on the basis that they burdened and penalized the exercise of their fundamental right to decide whether or not to bear a child. Their challenge was successful.

One year later, the Court decided the case of *Turner v. Department of Employment Security of Utah*.<sup>457</sup> At issue was a state statute rendering pregnant women ineligible for unemployment insurance benefits for twelve weeks prior to, and six weeks after, childbirth. The conclusive presumption that pregnant women were unable to work, considering the fundamental right at stake, was held to violate the due process clause of the Fourteenth Amendment, and the statute was struck down.

Having previously noted the somewhat unhappy history of substantive due process, there are two additional reasons why this mode of analysis should not be applied to the subject of this inquiry.<sup>458</sup> First, it is clear that the major

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<sup>455</sup> *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 610 (1965); *Esenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Doe v. Boulton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

<sup>456</sup> *Supra* note 206.

<sup>457</sup> 423 U.S. 44, 96 S. Ct. 244, 46 L. Ed. 181 (1975).

<sup>458</sup> It is interesting to note that dissatisfaction with substantive due process analysis is not confined to those who are displeased with the results reached in cases like *LaFleur*, *supra* note 257. Consider the comments of the editors of a comprehensive work on sex discrimination and the law:

[T]he use of due process rather than sex discrimination reasoning poses serious problems. The *LaFleur* case provides an excellent example. In using a due process approach, the Court was treating pregnancy as a unique problem, rather than comparing the school districts' rules relating to pregnancy-based disabilities to their rules relating to other temporary disabilities, as an equal protection approach would mandate. Because the case was decided only on the due process issue, the school boards can still discriminate against women by requiring them to show their capacity to continue work or to return to work while not requiring employees with other potentially disabling physical conditions to make the same showing.

A second problem with the Due Process Clause is that it implies a balancing test, whereas an equal protection approach based on sex as a suspect classification would have triggered strict scrutiny. Thus, discrimination may be upheld more readily under the former than under the latter. A third is that considering the issue on either a due process or an equal protection-fundamental rights basis rather than on an equal protection-sex discrimination basis tends to obscure the question of the justice or injustice of the pervasive sex discrimination in our legal system and public institutions.

See Babcock *et al.*, *Sex Discrimination and the Law: Causes and Remedies* (Boston: Little, Brown, 1975) at 128-29.

According to the view that I take of adjudication under a Bill of Rights, I find myself unable to agree with the thrust of these comments. First, once we accept the principle that a *per se* rule about taking sex into account is not the beginning of the

premise of the reasoning in the *LaFleur* case is not available to the Supreme Court of Canada given the present state of the law. In the *Morgentaler* case,<sup>459</sup> the Court rejected the argument that a woman has the fundamental right to decide whether to carry her child to delivery.<sup>460</sup> And whatever one thinks of the "right and wrong" of abortion, the answer to this difficult moral question is far from clear.<sup>461</sup>

Even if this premise were available to the Court, there is a further problem with this mode of analysis. One of the themes of this article has been the idea that there are no short-cuts to resolving the difficult problems inherent in judicial review under the Bill of Rights. By invoking the notion of a fundamental right, either in the context of due process or equal protection analysis, and denying the relevance of the causal connection between the law in question and the degree to which it inhibits the exercise of that right,<sup>462</sup> one advances these rights at the expense of an informed analysis of all of the issues

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judicial role, I fail to see how a court can dispense with the necessity of coming to terms with the relative weights of the rights in question and the reasons for their restriction. Second, the invocation of strict scrutiny analysis only serves to obfuscate the implicit balancing that underlies it. Nevertheless, I do agree that, in certain cases, the focus of the Court must be on the institutionalized sexism in our culture. As one writer put it:

[R]acism and sexism should not be thought of as phenomena that consist simply in taking a person's race or sex into account. . . . instead, racism and sexism consist in taking race and sex into account in a certain way, in the context of a specific set of institutional arrangements and a specific ideology which together create and maintain a *system* of unjust institutions and unwarranted beliefs and attitudes.

See Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics* (1976-77), 24 U.C.L.A. L. Rev. 581 at 591-92.

<sup>459</sup> *Supra* note 110.

<sup>460</sup> *Id.* at 671 (S.C.R.), 203 (D.L.R.), 491 (C.C.C.); see also the judgment of Laskin C.J.C. at 632-33 (S.C.R.), 173-74 (D.L.R.), 461-62 (C.C.C.):

This Court indicated in the *Curr* case how foreign to our constitutional traditions, to our constitutional law and to our conceptions of judicial review was any interference by a Court with the substantive content of legislation. No doubt, substantive content had to be measured on an issue of *ultra vires* even prior to the enactment of the *Canadian Bill of Rights*, and necessary interpretative considerations also had and have a bearing on substantive terms. Of course, the *Canadian Bill of Rights* introduced a new dimension in respect of the operation and application of federal law, as the judgments of this Court had attested. Yet it cannot be forgotten that it is a statutory instrument, illustrative of Parliament's primacy within the limits of its assigned legislative authority, and this is a relevant consideration in determining how far the language of the *Canadian Bill of Rights* should be taken in assessing the quality of federal enactments which are challenged under s. 1(a). There is as much a temptation here as there is on the question of *ultra vires* to consider the wisdom of the legislation, and I think it is our duty to resist it in the former connection as in the latter.

I am not, however, prepared to say, in this early period of the elaboration of the impact of the *Canadian Bill of Rights* upon federal legislation, that the prescriptions of s. 1(a) must be rigidly confined to procedural matters. There is often an interaction of means and ends, and it may be that there can be a proper invocation of due process of law in respect of federal legislation as improperly abridging a person's right to life, liberty, security and enjoyment of property. Such a reservation is not, however, called for in the present case.

Are his latter remarks a hint that he would be prepared to invoke notions of substantive due process in an "appropriate" case? An intriguing possibility indeed!



at stake. As was evident in connection with the two-tiered mode of analysis in the American courts, a greater flexibility is required in such matters.

## 2. Addressing the Problem

The problem with section 30 is not that it is a set of provisions which apply only to women; by recognizing that treating women as equals may require taking their special health care needs into account, the fact that the law is drafted in terms of gender is not, in itself, a problem.<sup>463</sup> Nor is there a problem with respect to the fifteen week period during which maternity benefits may be paid regardless of the recipient's ability or willingness to work. This is not a case of denying benefits during this period, as it was in the *Turner* case considered above. Nor is it a case of women being precluded from working; if they want to return to work, they are free to do so.<sup>464</sup> The problem lies in the length of time that a woman must work, and the period in which she must have worked in order to qualify for maternity benefits. The question that must be addressed is whether there are good reasons for distinguishing in this way between maternity benefits and all other benefits available under the *Unemployment Insurance Act*.<sup>465</sup>

Under the Act, benefits may be paid to those workers unable to work because of illness.<sup>466</sup> According to the regulations promulgated under the Act, illness is defined only as that which renders a claimant incapable of working.<sup>467</sup> The basic qualifying period is the same as that for ordinary benefits.

When a claim for illness benefits is submitted to the Commission, a medical certificate may be required and the claimant may be requested to undergo a medical examination.<sup>468</sup> The practice of the Commission is to require the submission of a medical report, but it does not conduct a detailed examination into the nature and causes of the illness. Benefits may be paid

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<sup>461</sup> For a fascinating insight into how different legal cultures deal with the same problem, see Kommers, *Abortion and Constitution: United States and West Germany* (1977), 25 Am. J. of Comp. L. 255.

<sup>462</sup> See *Dunn v. Blumstein*, 403 U.S. 330 at 339-40, 92 S. Ct. 995 at 1001-1002, 31 L. Ed. 2d 274 at 283 (1972).

<sup>463</sup> See Tribe, *supra* note 113, at 1073:

Women will not enjoy truly *equal* rights in the labor market until it is recognized that their health care needs are indeed different from men's and that insurance coverage for absences incurred during pregnancy and childbirth may be needed if women are in fact to be placed in positions of equal opportunity.

<sup>464</sup> It once was believed that it was dangerous for a woman in an advanced state of pregnancy (or recently delivered) to work. This may have informed the law in question. The better view appears to be that one's ability to work after delivery is very much an individual matter. See *LaFleur*, *supra* note 257, at 645 (U.S.), 799 (S. Ct.), 63 (L. Ed.).

<sup>465</sup> What is at issue is *not* Parliament's right to have created maternity benefits, but the manner in which they were created.

<sup>466</sup> S. 29. Like maternity benefits, the illness benefits are paid for a period of fifteen weeks. See Douglas, *supra* note 15.

<sup>467</sup> S. 160, promulgated 6 July 1971; SOR/71-324. Subsequent changes in the Act and regulations have not altered or expanded this basic definition.

<sup>468</sup> *Id.*

in cases where a claimant underwent voluntary surgery, and the Commission makes no inquiry into the necessity of the operation.<sup>469</sup> Illness benefits are available to men who choose to have any number of sex-related operations, such as a vasectomy, and they need not have worked longer than a person who is claiming ordinary benefits. Women seeking maternity benefits are subject to a longer qualifying period, and one which is restricted to the time surrounding their becoming pregnant.<sup>470</sup> This, it is suggested, is a *prima facie* case of a denial of equality before the law, and one that demands reasons in justification on the part of government. There are two such reasons that have been advanced.<sup>471</sup>

First, it is argued that pregnancy is usually a voluntary condition. Since women voluntarily render themselves unable to work for a given period of time, Parliament is entitled to treat them differently from those who have lost their jobs through circumstances beyond their control. This theme appears in much of the case law on the subject,<sup>472</sup> and it figured in the debates in Parliament when the subject of maternity benefits was being discussed. Whereas opponents of the concept of maternity benefits argued this theme against their inclusion in the Act,<sup>473</sup> it can be used to justify the different treatment accorded maternity benefits. Superficially attractive though this argument is, it is less persuasive upon closer examination.

First, it will not always be true that a woman's pregnancy is a voluntary condition. A woman may become pregnant as a result of having been raped. She may become pregnant because the birth control method she was using proved ineffective,<sup>474</sup> or, one's religious beliefs may preclude the use of artifi-

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<sup>469</sup> Conversations with Ms. E. Gattuso.

<sup>470</sup> In the *Geduldig* case, *supra* note 442, the same situation obtained; included in the class of compensable illnesses were a range of sex-related disabilities which applied only to men. As Mr. Justice Brennan noted in dissent, *op. cit.* at 501 (U.S.), 2494 (S. Ct.), 267 (L. Ed.):

[T]he State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.

<sup>471</sup> As noted earlier, *supra* note 426, these reasons were not advanced in the course of the litigation. This is due, to some extent, to the fact that the argument being considered was not pressed before the Commission or before the courts. These reasons have been gleaned from an analysis of the Parliamentary debates surrounding the 1971 revision of the Act, from the literature and case law on the subject of maternity benefits, and from conversations with officers of the Commission.

<sup>472</sup> "Unemployment caused by pregnancy . . . is usually the result of a voluntary act." *Bliss* case, *per Pratte J.* in the Federal Court of Appeal: *Appeal Case*, *supra* note 12, at 76. The same point was made by Mr. Justice Rehnquist in the *Gilbert* case, *supra* note 444, at 136 (U.S.), 408 (S. Ct.), 353 (L. Ed.).

<sup>473</sup> The Honourable Member from Battle River noted: "Surely pregnancy ought to be regarded as a voluntary act by which a woman removes herself from the work force . . ." *Can. H. of C. Deb.*, April 20, 1971, at 5106.

<sup>474</sup> See Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination* (1975), 75 Col. L. Rev. 441 at 444n. 18.

cial birth control devices, and an unintended pregnancy might result. Once pregnant, a woman may not have a free choice whether or not to carry her child to delivery. Her religious beliefs may rule out abortion. Even if this is not the case, she will not have the right to terminate her pregnancy for non-medical reasons.<sup>475</sup> Even if she qualifies for a medical abortion, she may live in an area where abortion facilities do not exist, and she may be too poor to gain access to a facility where she can have her pregnancy terminated.

Second, the question of leaving one's employment voluntarily is dealt with separately in the Act.<sup>476</sup> The practice of the Commission is to inquire into the reasons why the claimant left his or her employment and, depending on the circumstances, benefits may be denied for a period of one to six weeks.<sup>477</sup> To be sure, there is the possibility that one might be barred from receiving benefits for six weeks, as was Mrs. Bliss, but there is also the possibility of only one week's exclusion.

Third, there is the question of the way in which illness benefits are treated. As noted above, one's "illness" very well may have been a voluntarily chosen operation. Surely there must be more to the special regime for maternity benefits than the arguable fact that pregnancy is a voluntary condition. This leads to the second justification for the scheme.

The purpose of restricting the availability of maternity benefits to those women who were working, or receiving benefits, when they became pregnant was to preclude pregnant women from seeking employment for the sole purpose of qualifying for maternity benefits.<sup>478</sup> The unemployment insurance scheme is to protect those who have a real attachment to the work force; as the Commission's brochure remarks with respect to maternity benefits, "a baby bonus it's not."<sup>479</sup> The idea is to protect the integrity of the fund by preventing what is perceived to be an abuse of the plan. In fact, this argument was made in Parliament in support of the maternity benefit provisions when the issue of fraud was raised.<sup>480</sup> If this is an acceptable reason, then it may become easier to accept some of the problems inherent in the justification considered above.

If the argument was simply one of saving money, it would not be that persuasive. If women have the right to be treated as equals, and this right includes the right to maternity benefits, their rights cannot be sacrificed merely to save the government money; but it is not so simple. If women have rights to maternity benefits, then other unemployed persons have rights as well. If the limitation on the availability of maternity benefits is necessary to protect the rights of others, the argument is less utilitarian and more consistent with contemporary notions of rights and the ways in which they may be circum-

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<sup>475</sup> *Morgentaler*, *supra* note 110.

<sup>476</sup> *The Unemployment Insurance Act*, s. 41.

<sup>477</sup> Conversation with Ms. E. Gattuso.

<sup>478</sup> *Id.*

<sup>479</sup> *Empl. & Imm. Can., A Baby Bonus it's Not* (Ottawa: unpublished pamphlet, 1978).

<sup>480</sup> The Honourable Mr. B. Mackasey, *Can. H. of C. Deb.*, Jan. 9, 1973, at 114.

scribed.<sup>481</sup> At this level, the government's interest in the overall cost of the programme is clearly a legitimate one.

The flaw in this argument is that the increase in the availability of maternity benefits would not work to the disadvantage of other unemployed claimants. To be sure, there would be an added cost to the programme as a whole, but while the amount would be substantial considered alone, it would represent a very small increase in the overall cost of the programme.<sup>482</sup> If it is the case that women are being treated unfairly by the Act as it now stands, the increased cost is the price that must be paid. However, there are a number of potential objections to this conclusion that deserve some attention.

The first would concern the overall purposes of the unemployment insurance scheme. Do pregnant women who seek employment have a sufficient attachment to the labour force to warrant their inclusion in the plan? The short answer is that this cannot be known in the abstract. However, one who works for twenty-eight weeks, as did Mrs. Bliss, has as much a connection with the labour market as does a person who worked for eight weeks and thus qualified for ordinary benefits.

On this point it would be tempting to borrow a page from the American technique of intermediate review, and require a more individualized determination of one's attachment to the work force, but it is hard to imagine upon what criteria such a determination would be made. Would one be questioned about the reasons for taking a job? Would one require a pregnant woman to swear that she plans to return to work after having given birth? All this seems unmanageable, if not undesirable. Benefits would be granted or withheld on the basis of one person's subjective evaluation of the intentions of the claimant. Without entering into the controversy concerning the balance to be struck between rule-adherence and discretion in the administration of programmes such as this one, it seems clear that, in this instance, explicit guidance in the rules with respect to what constitutes a sufficient attachment to the work force is both desirable and necessary. Anything less would open the door to the perception, if not the actuality, that the programme was being administered in an arbitrary way.

The second point directly concerns the policy underlying the different qualifying period under consideration. The argument is that, but for this differ-

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<sup>481</sup> See Dworkin, *supra* note 59, at 191-93.

<sup>482</sup> Based on figures provided by the Commission, the following statistical projection appears plausible. In 1978, the total amount of benefits paid was \$4,538,200,000. Maternity benefits represented 4.8% of the total *claims* made in that year, and this represents approximately 96,000 women who applied for maternity benefits. By virtue of the combined effects of sections 30 and 46, approximately 5,000 women were turned down in their claims. The average weekly payment of benefits was \$117.59 in 1978, and maternity benefits are paid (usually) for fifteen weeks. On the basis of this data (and ignoring the obvious problem of the number of women who never apply because of section 30), the increased cost would be in the neighbourhood of \$8,800,000. This represents an increase of less than one-fifth of one percent of the total outlay in benefits for the year 1978. Even if the expected number of claims is doubled, the figure is still low. Remember as well that the fund out of which the benefits are paid is constituted, in part, by contributions from employees and employers.

ence, pregnant women will abuse the plan. Is this a fair assumption? Some women may abuse the plan by seeking employment for the sole purpose of qualifying for benefits; however, it must be asked how consistent the Act is with respect to the prevention of abuse in general.<sup>483</sup>

The unemployment insurance scheme is subject to abuse by everyone who works. Those who claim ordinary benefits may have elected to work for the sole purpose of qualifying for benefits. Those who receive illness benefits, to the extent that their inability to work was a function of a voluntary (and perhaps unnecessary) operation, may have anticipated the need or eventuality of that operation, and gone to work solely to collect benefits later.

The government can answer that, with respect to ordinary benefits, there is some measure of protection against fraud by nature of the requirement that people receiving such benefits must demonstrate a continuing willingness to rejoin the work force. However, anyone who works with the intention of abusing the plan will surely be able to avoid getting a job later while still giving the impression that they are available for work. With respect to illness benefits, the government cannot make the same argument, but it might say, with some plausibility, that the number of such "fraudulent" claims is apt to be a very small percentage of the total illness benefits paid out.

How many pregnant women are likely to go to work for the sole purpose of collecting maternity benefits later? It seems that if a woman, pregnant or otherwise, chooses to work, it is usually because she needs to work. Furthermore, a woman who discovers that she is pregnant may go to work because of the increased financial burden that raising a child entails. Assuming that she works the same number of weeks as do all others who qualify for benefits, she should receive them.

Underlying this argument is the belief that, if women are to enjoy an equal opportunity to participate in social life, the social value of child-bearing ought to be given full currency in the law. The *Unemployment Insurance Act* took a step in the right direction by recognizing the concept of maternity benefits, but it erred in treating pregnancy as a special case distinct from other temporary medical conditions.<sup>484</sup> The Court should have insisted that the same regime apply to maternity benefits as applies to illness benefits.

It is true that a comprehensive reform of the law relating to the welfare of child-bearing women must involve more than changes to the *Unemployment Insurance Act*. Attention must be directed to the various social welfare plans and the labour laws. Indeed, a revolution must take place in the way in which the role of women in our society is perceived. The resolution of these problems requires a systematic approach that is not available in the context of litigation arising out of one section of one statute. Does this mean that the court ought not to intervene? It does not.

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<sup>483</sup> It is also possible to imagine a woman being pregnant without her knowing it. She subsequently begins to work, finds out that she is pregnant, but cannot qualify for maternity benefits when she needs them. In such a case, no question of fraud could be raised.

<sup>484</sup> See Babcock *et al.*, *supra* note 449, at 314-15.

Merely because a judicial remedy is limited, and a more comprehensive remedy could be fashioned only by the legislature, does not lead one to conclude that the court should refrain from acting.<sup>485</sup> To borrow a phrase from the Chief Justice, the better way is not the only way.<sup>486</sup> It may be the case that it takes a judicial act to spur the legislature to action, or, what is more likely, the failure of the court to act may keep the legislature from reconsidering its policies. Nevertheless, the real importance of cases such as this transcends the immediate result that may be reached. Their importance consists in the opportunity, so far avoided, for the Supreme Court to embark upon a discussion of what rights we have in this age of modern government.

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<sup>485</sup> See Weiler, *supra* note 2, at 206.

<sup>486</sup> *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, 41 D.L.R. (3d) 367 at 385, 13 R.F.L. 185 at 204.