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RIGHTS AND JUDGES IN A DEMOCRACY: A NEW CANADIAN VERSION†

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On both sides of the Canadian-American border, the last decade has been an exciting time for those interested in the perennial problem of what should be the role of courts in protecting fundamental rights in a democracy. The United States has witnessed a remarkable flourishing of constitutional theory reflecting on the appropriate scope and method of its long-established institution of judicial review.¹ In Canada, public life has been absorbed in a debate over the even more basic issue of whether Canadian judges should have any such constitutional role at all.

Canadians sought a constitutionally entrenched Charter of Rights not just for its own sake, but also as part of a larger effort at constitutional renewal. The hope was that such a Charter would preserve a united Canada in the face of the serious threat posed by French Canadian nationalism within a potentially independent Quebec.² In this Article, I comment on those features

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1. Within the voluminous literature of the last few years, there exist some notable book-length treatments of this subject. See R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); C. BLACK, *DECISION ACCORDING TO LAW* (1981); P. BOBBITT, *CONSTITUTIONAL FATE* (1982); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); J. ELY, *DEMOCRACY AND DISTRUST* (1980); M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982).

2. The Charter of Rights and Freedoms is Part I (§§ 1-34) of the Constitution Act, 1982. At the request of the Canadian Parliament, the United Kingdom Parliament, by means of the Canada Act, 1982, formally enacted this law in order to incorporate the existing Canadian constitutional documents (in particular, the British North America Act of 1867, as amended since then) in the new Constitution Act, 1982, and to create a new domestic procedure for amending the Canadian Constitution in the future (§§ 38-49). The Canada Act, 1982, thereupon terminated the future authority of the United Kingdom Parliament over Canada.

The best succinct analysis of the legal background to, and potential meaning of, each of the provisions of the new constitution, including the Charter, is P. HOGG, *THE CANADA ACT, 1982 ANNOTATED* (1982). The best scholarly account of the historical, political and legal aspects of the constitutional struggle is *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY, AND THE CONSTITUTION ACT* (K. Banting & R. Simeon ed. 1983) [hereinafter cited

of the Canadian debate and its denouement that are noteworthy within the Canadian context, as well as those that illustrate some of the universal themes of constitutional theory.

The first question that might occur to an American is why there might even be a heated debate about putting the people's rights into the constitution.³ In fact, this proposal was strongly favored by the Canadian public.⁴ It had a powerful champion in Prime Minister Pierre Trudeau, who considered the Charter the major legacy of his fifteen years in power. Opposition to the Charter, however, came from almost all the provincial government leaders, who voiced in practical, down-to-earth terms the theoretical criticisms developed by a number of serious constitutional scholars.⁵

The source of the provincial leaders' concern was the same as the source of the Charter's popular attraction: observation of Canada's next-door neighbor's two centuries of experience with constitutionalized rights. The lesson that Canadians gleaned from the American experience with the institution is that the

as AND NO ONE CHEERED]. A fine journalistic account of the critical events from the spring of 1980 to the spring of 1982 is R. SHEPPARD & M. VALPY, *THE NATIONAL DEAL* (1982).

3. As background to this account, one should know that in 1960 Canada did achieve a Bill of Rights. See W. TARNOPOLSKY, *THE CANADIAN BILL OF RIGHTS* (Rev. ed. 1975). This legal statement of the rights of Canadians was, however, contained in a simple Act of Parliament. Consequently, it was theoretically repealable in the same way and was applicable only to federal, not provincial, government action; all of which led the Supreme Court of Canada to denude the Bill of any significant legal force. The proponents of a constitutionally entrenched Charter saw this new legal status as the solution to deficiencies in the old Bill of Rights. See Tarnopolsky, *The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms*, *LAW & CONTEMP. PROBS.*, Summer 1981, at 169 (1981) (presenting as good a statement as any of this position).

4. Although American commentators living in Canada often depict Canadians as more concerned with order than liberty, see E. FRIEDENBERG, *DEFERENCE TO AUTHORITY: THE CASE OF CANADA* (1980); Kaufman, *Canada: An American Discovers Its Difference*, *N.Y. Times*, May 15, 1983 (Magazine), at 61, the Canadian public actually strongly supported the proposed Charter. The Gallup Poll of July 1980 disclosed that 91% of Canadians supported a Charter of Rights and only two percent were opposed. See D. HOFFMAN, *WHO'S AFRAID OF A BILL OF RIGHTS?* 1 n.2 (1981). Another public opinion survey in April 1981, taken at the height of the federal-provincial battle about constitutional change, found that 84% of all respondents still favored the Charter and 63% strongly supported it. This proportion was considerably more than even the proportion supporting patriation of the Canadian Constitution from Britain. See Ackerman & Charney, *Canada at the Constitutional Crossroads*, 34 *U. TORONTO L.J.* 117, 129 n.31 (1982).

5. Among the best pre-Charter critiques of constitutionalizing rights in Canada are Russell, *A Democratic Approach to Civil Liberties*, 19 *U. TORONTO L.J.* 109 (1969); Schmeiser, *The Case Against Entrenchment of A Canadian Bill of Rights*, 1 *DALHOUSIE L.J.* 15 (1973); and Smiley, *The Case Against the Charter of Rights*, 2 *CAN. J. POL. SCI.* 277 (1969). A post-Charter piece in the same vein is Macdonald, *Postscript and Prelude—the Jurisprudence of the Charter: 8 Theses*, 4 *SUP. CT. L. REV.* 321 (1982).

merit of a *constitutional* Charter of Rights depends less on the abstract values expressed in the legal document than on the solution to the practical problem of translating those principles into sensible real-life judgments. Is it better to rely on an informal sense of self-restraint on the part of elected political leaders or on enforcement of a written constitution by an independent judiciary? A comparison of the records in the two countries by no means indicated that, even without constitutional backing, the rights of Canadians were more in jeopardy than those of Americans.⁶

Disagreement over the Charter has been a major theme in the constitutional controversy that has engaged the Canadian federation for the last two decades,⁷ a controversy that has called into

6. A nice recent illustration of this point concerns the death penalty, which has, in the last decade or two, raised popular emotions on both sides of the border. The United States Supreme Court has backed and filled on the question of whether and when capital punishment is constitutionally permissible. *Compare* *Furman v. Georgia*, 408 U.S. 238 (1972) with *Gregg v. Georgia*, 428 U.S. 153 (1976). Notwithstanding the numerous obstacles the Court has placed in its path, the death penalty is gaining momentum in the United States. See Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982). The Supreme Court of Canada refused even to countenance the argument that such a substantive moral issue might be the subject of serious judicial scrutiny under the "cruel and unusual punishment" clause in our statutory Bill of Rights. See *Miller v. The Queen*, [1977] 2 S.C.R. 680 (Can.) (one of the series of decisions that drew almost all the teeth from that document and helped propel us towards constitutional entrenchment). But at the very time that the Court was giving us this hands-off verdict, the Canadian Parliament was voting to repeal the death penalty, see P. HOGG, *supra* note 2, at 46, a position it has maintained since then in the face of substantial popular opinion to the contrary. See *Special Report: Hanging*, MACLEAN'S, Oct. 8, 1984, at 48.

I do not suggest that this type of comparison is decisive as to the worth of the constitutional rights. One could as easily argue that differences in both the nature of the crime problem in the two countries and the resulting public mood made this an easier issue for Canadian politicians to handle without constitutional restraints, and that with the addition of the latter the Canadian polity might do even better than it has. My point in this example is that one cannot resolve that question by a priori reasoning about the value of the ideals expressed in a proposed constitutional document. The issue ultimately turns on more practical, institutional considerations.

7. The manner in which the specific issue of constitutionalizing rights was confronted in Canada tended to reinforce the division between the two positions. See generally R. SHEPPARD & M. VALPY, *supra* note 2. In his final effort to solve the issue, Prime Minister Trudeau introduced a resolution in the Canadian Parliament in October 1980 that would lead to patriation of the Canadian Constitution with both a domestic amending formula and a Charter of Rights. This Resolution was referred to a Joint Committee of the House of Commons and the Senate of Canada to hear representations from the public and to consider revisions to the initial proposals.

In the Joint Committee, consideration of the Charter focused almost exclusively on its substantive content. The tenor of the discussion and movement in this forum indicated that the reach of the Charter had to be expanded and its language tightened up to insure that no one's rights were left uncovered. The placement of unequal treatment on account of age or disability on the same constitutional plane as race or religion in § 15 of the Charter, with little or no regard to whether any such addition made sense in institutional terms, exemplified this concern.

question all aspects of our governmental arrangements. The seemingly endless debate climaxed in a final Conference of First Ministers in November 1981. The result was an Accord on the Charter—as well as a formula for patriation and amendment of the Constitution—embodying a compromise that most Canadian commentators considered to be a distasteful political expedient worked out in the wee hours of the morning.⁸ I suggest, however, that Canadians in fact devised a rather ingenious alternative both to the British parliamentary sovereignty which we inherited and to the American practice of judicial supremacy over fundamental rights which has so long beguiled us.

Before describing this solution and enumerating its virtues, let us examine in the Canadian context the perennial and universal dilemma of rights and judges in a democracy. The conflict has its roots in the fact that in a society civilized enough to adopt and live by a Charter of Rights, the kinds of cases likely to arise under such a document rarely have clear-cut answers, as a matter of either moral principle or legal interpretation. Thus, by putting these rights in its constitution, a nation in fact transfers the final authority for settling inherently contestable dilemmas about the appropriate limits of public action from the political to the judicial branch of government.

I. THE SIGNIFICANCE OF LANGUAGE RIGHTS

Illustrations of the moral controversy in real-life constitutional cases abound; for example, the abortion issue has produced constitutional *causes célèbres* in the United States, West Germany, and elsewhere.⁹ I will focus on the language

The Government of Canada, consistent with Canadian constitutional tradition, sought to achieve the consent of the provinces to this constitutional package through conferences of Federal and Provincial ministers both before and after the October Resolution. In this forum, the First Ministers focused on the grand question of whether there should be constitutional entrenchment at all. They paid little or no attention to the content of particular rights (language being the one exception, for reasons to be noted shortly) and very little to the suggestion that some rights might more appropriately and safely be entrenched than others.

8. Prime Minister Trudeau responded to a final question at a press conference asking him what he thought of the recent Accord: "You are asking me now if I consider it a success? No, I consider it an abject failure!" He abruptly stood up and walked hurriedly outside into the rain and his waiting black limousine, leaving the riddle behind him." R. SHEPPARD & M. VALPY, *supra* note 2, at 322.

9. While the United States Supreme Court struck down restrictive American abortion laws, holding that they unduly infringed on a woman's freedom of choice, *see Roe v. Wade*, 410 U.S. 113 (1973), the West German Constitutional Court found the liberalized

issue¹⁰ for it has been as central to the Canadian experience with rights and constitutions as race has been in the United States. In fact, securing minority language rights was the principal motivation for Prime Minister Trudeau's making the Charter the centerpiece of his project for constitutional renewal of Canadian federalism.

The peculiar features of the language issue in Canada are vividly illustrated in our most famous civil rights controversy, the Manitoba School Crisis of the 1890's.¹¹ In that case, the French Catholic minority asserted its right to have "separate but equal" education in its own schools funded out of the public coffers. The French considered oppressive the English-dominated provincial legislature's attempt to force all students, including French Catholics, into a single, "integrated" public school system.¹² Paradoxically, the Manitoba minority lost that struggle¹³

German law unconstitutional because it gave insufficient protection to the fetus' right to life, see Judgment of Feb. 25, 1975, Bundesverfassungsgericht, 39 Bundesverfassungsgericht [BVerfG] 1. See generally Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255 (1977). The Parliamentary Committee also considered the subject of abortions in its deliberations about the content of the Canadian Charter. Because there were powerful interest groups on each side of the question, however, this was one issue as to which the parliamentarians saw discretion to be the better part of valor and left the relevant provisions of the Charter oblique on the matter. Both sides have now propelled the controversy into the judicial arena. See *infra* notes 84-85.

10. The best overview of the language issue in Canada is R. WARDHAUGH, *LANGUAGE AND NATIONHOOD: THE CANADIAN EXPERIENCE* (1983). My sketch of the problem here draws on an earlier piece, Weiler, *Writing a Constitution to Protect Minorities: The Canadian Experience*, in *MINORITIES: COMMUNITY AND IDENTITY* 315 (C. Fried ed. 1983).

11. The best short account of the Manitoba School Crisis is T. BERGER, *FRAGILE FREEDOMS* 58-92 (1981). The technical legal issues are explored in D. SCHMEISER, *CIVIL LIBERTIES IN CANADA* 158-69 (1964). A fine book-length study is P. CRUNICAN, *PRIESTS AND POLITICIANS; MANITOBA SCHOOLS AND THE ELECTION OF 1896* (1974).

12. This testifies to the differences between race and language. While each constitutes an external badge of identity—thus the basis for invidious discrimination—language poses a rather more profound problem. Not only does it shape the way an individual thinks and views the world, language is also an inherently social activity. It is not enough to have a constitutional right to speak the language of one's choice. One needs to have listeners who can understand.

Those who support linguistic equality, then, are not simply against adverse negative treatment on account of one's mother tongue, but also for the positive social conditions within which one's language and culture can survive and flourish. The key vehicle for resisting assimilation into a "language-blind society" is education, through which not just the language but also the history, culture, and sense of group identity are transmitted to the young. I should note that in Canadian constitutional history, there was an intimate connection between language and religion in the understanding of minority rights, and that is why I refer throughout to the French-Catholic minority.

13. The initial response of the French Catholics in Manitoba was to try to assert their constitutional rights. The narrow construction which the British Privy Council placed on this legal restraint on Parliamentary sovereignty, see *City of Winnipeg v. Barrett*, 1892 A.C. 445 (P.C.) (Can.), however, frustrated this tack. Despite this defeat, the Privy Council found that Canada's highly centralized, quasi-federal constitution also

largely because Canada's French Catholic Prime Minister, Wilfred Laurier, considered it essential to defend the principle of provincial autonomy just then emerging within the Canadian federal regime. Laurier believed that this constitutional principle was vital to the Quebecois (the French in Quebec), because it would keep the authority over education and other areas of public life in the hands of the provincial government in Quebec City, the only government in North America whose constituency was predominantly French.

In these fateful events of nearly a century ago lie the seeds of the modern Canadian dilemma. In fact, throughout the 1970's Canada witnessed an eerie replay of the contest between the strategy of individual constitutional rights as the ideal technique for protecting the French Canadian minority—the position of Trudeau and his federal government in Ottawa—and the alternative of provincial rights (or even more radical forms of Quebecois nationalism)—now identified with Quebec Premier René Lévesque and his Parti Québécois.¹⁴

The virtues of the individual rights strategy are evident: through a constitutional guarantee of individual language rights, Canada could undo its past injustice towards the French Canadian minority as exemplified by the Manitoba School case. Such measures would, it was hoped, avert the serious threat to Canadian unity posed by the coexistence of two linguistically separate Canadas, the French in Quebec and the English everywhere else.¹⁵ As Trudeau has argued since his days as a constitutional

provided a protective jurisdiction of the central government against denial of minority language education rights by the provinces. See *Brophy v. Attorney-General of Manitoba*, 1895 A.C. 202 (P.C.). Charles Tupper, the English Protestant leader of the then-incumbent Canadian Government, introduced legislation in Ottawa to roll back Manitoba's new education policy, but this measure was opposed by Laurier's Liberals. The Liberals forced and won an election on the issue in 1896 and negotiated a compromise with the Manitoba Premier which effectively denied the French-Catholics their own schools in that province.

14. The best treatment in English of the ferment in Quebec is K. McROBERTS & D. POSGATE, *QUEBEC: SOCIAL CHANGE AND POLITICAL CRISIS* (Rev. ed. 1980). A succinct statement of the issues is A. BERNARD, *WHAT DOES QUEBEC WANT?* (1978). There is a nice summary of the contrasting positions of Trudeau and Lévesque in TRENT, *Common Ground and Disputed Territory*, in *MUST CANADA FAIL?* 139 (R. Simeon ed. 1977).

15. While French Canadians were 25.7% of the Canadian population in 1971, they were 80% of the population of Quebec, and just 4.4% of the rest of Canada. Indeed, if one views the 190,000 Francophones in Northwest New Brunswick and the 270,000 in Eastern Ontario as part of a single Quebec and "contact regions," Francophones comprise only 1.5% of the rest of Canada (which constitutes two-thirds of the Canadian population as a whole). The population figures in this note and in most of those that follow are drawn from R. LACHAPPELLE & J. HENRIPIN, *THE DEMOLINGUISTIC SITUATION IN CANADA* (1982), in particular the comprehensive census tables in the book's Appendix.

law professor in Montreal,¹⁶ only if effective legal guarantees against unfriendly provincial governments solidify the precarious situation of the French language outside Quebec will the Quebecois be able to consider all of Canada their homeland, throughout which they can travel and live with confidence in governmental support of their linguistic and cultural heritage. Although entrenchment of his Official Languages policy at the federal level was an important constitutional goal for Trudeau, his major aim was to prod provincial governments to provide education rights to their French Canadian minorities.

It required the election in the late 1970's of a separatist government in Quebec for English Canada finally to accept this position.¹⁷ By that time, though, bitter opposition to these federal remedial measures had emerged within Quebec. Sophisticated Quebecois felt that this legal lifeline had come a century too late to make the French language viable outside their province. They believed that the tug of assimilation in an urban industrialized society would inevitably trump whatever legal rights were written into a constitution.¹⁸ They were also concerned that the price of using a constitution in the quixotic quest for linguistic equality would be reciprocal limitations on the freedom of action of the French inside Quebec.

This issue was not merely symbolic in the 1970's. The Quebecois were alarmed over the incipient decline in the French proportion of the Quebec population, especially in Montreal, the flagship of French Canada.¹⁹ This gloomy trend was attributable

16. See his collected essays in P.E. TRUDEAU, *FEDERALISM AND THE FRENCH CANADIANS* (1968). A position paper of his, *GOVERNMENT OF CANADA, A NATIONAL UNDERSTANDING* (1977), expressed the same point of view.

17. Nevertheless, there remained the ever present possibility of English backlash, as exhibited in the air traffic control dispute of 1976. See S. BORINS, *THE LANGUAGE OF THE SKIES* (1983).

18. See R. Beaugot, *A Demographic View of Canadian Language Policy*, 5 *CAN. PUB. POL'Y* 16 (1979); GUINDON, *The Modernization of Quebec*, in *MODERNIZATION AND THE CANADIAN STATE* 244 (1978); Vaillancourt, *La Charte de la Langue Francaise du Quebec*, 4 *CAN. PUB. POL'Y* 284 (1978). The tug of assimilation became evident in the more elaborate census data of 1971. That year, of 1,421,000 Canadians of French origin living outside of Quebec, 926,000 had the French language as their mother tongue and 676,000 had French as their home language. That meant that more than one-third of the Canadians with French ancestry did not learn French as their first language in their parents' home and, of those who did, more than one-quarter no longer used French in their own home, teaching it to their children. Especially endangered species were those in Western Canada: 11,000 Francophones in British Columbia, 25,000 in Alberta, and 15,000 in Saskatchewan. While there remained 40,000 of French mother tongue in Manitoba, this was only 6.1% of the provincial population, and the same stark process of assimilation had taken place: 8.8% of Manitobans were of French origin, but just 4.0% used it as their home language. See R. LACHAPPELLE & J. HENRIPIN, *supra* note 15.

19. Jacques Henripin, the leading French Canadian demographer, looked at the de-

to the fact that, given the choice between adopting French or English as a family language, at least twice as many non-English-speaking entrants to Quebec were choosing English. This trend was most pronounced in Montreal.²⁰ The economic dominance of the anglophone community in Quebec²¹ and the consequent fact that proficiency in English was more advantageous to one's prospects than was proficiency in French²² made English the preferred language of the newcomers to the province, and their children flocked to the English schools rather than to the French écoles. Thus, although the individual choices were eminently reasonable for each family concerned, cumulatively they posed a profound threat to the continuing existence of French language and culture in what had been considered its sole safe harbor in North America.

From this situation emerged a comprehensive language policy in Quebec which culminated in passage of the Charter of the French Language in 1977.²³ A crucial feature of this provincial law was restriction of freedom of choice in the language of education.²⁴ The established English-language school system is pre-

clining birth rate of the Quebecois and the growing tendency of immigrants to assimilate into the English community in Quebec and projected a drop in the French share of Quebec from 82.5% in 1951 to a range of 71.6%-79.2% by 2001, and in Montreal from 62% in 1961 to a range of 52-62% by 2001. See K. McROBERTS & D. POSGATE, *supra* note 14, at 132-33. Naturally enough, the concerned Quebecois focused on the lower end of this scale. See W. Johnson, *Demographics Fed the Paranoia*, *The Globe and Mail*, Jan. 11, 1984 at 8.

20. Of Quebecers with an Allophone origin (meaning neither French nor English), 27.4% had English as a mother tongue in 1971, while only 15.7% had French. See K. McROBERTS & D. POSGATE, *supra* note 14, at 132. This phenomenon occurred at a time when four out of five allophones would have had to opt for French just to maintain the balance within the province.

21. In 1971, the average male English worker earned 28% more than the male French worker. See S. ARNOPOULOS & D. CLIFT, *THE ENGLISH FACT IN QUEBEC* 239, Table 14 (1980). Even after controlling for human capital variables, there remained a seven percent differential. See Vaillancourt, *supra* note 18, at 293. In any event, for purposes of language attractiveness to newcomers, gross disparities in income and occupation are likely to be influential. As if to add insult to injury, whereas in 1961 French-speaking Quebecers ranked 12th in average income by ethnic group in the province, ahead of only the Italians and native Canadians, see LESLIES, *Ethnic Hierarchies and Minority Consciousness in Quebec*, in *MUST CANADA FAIL?*, *supra* note 14, at 107, 108, by 1971 they had dropped to 13th, now trailing the Italians, see A. Bernard, *supra* note 14, at 159.

22. Taking the 1970 earnings of the unilingual Francophone as 100, being a bilingual Francophone added 40 points to one's income level. Being bilingual, however, added almost nothing to the Anglophone edge. That figure rose only one point, from 167 to 168. See Vaillancourt, *supra* note 18, at 292.

23. QUE. REV. STAT. ch. C-11 (1977). In *GOVERNMENT OF QUEBEC, QUEBEC'S POLICY OF THE FRENCH LANGUAGE* (1977), the Parti Québécois spelled out the rationale of its language policy.

24. Sections 72 and 73 of the Charter of the French language defined the new regime for language of education. Another major feature of the Charter, in my view the more

served for the children of English-speaking Quebecers who were educated in the system themselves; nevertheless, children of newcomers to the province are barred from those schools. The law dictates that anyone who moves permanently to Quebec (i.e., for more than three years) must send his children to French public school, just as he would do if he were settling in France. Unhappily for René Lévesque, this feature of his Charter, which sought to preserve the French language in Quebec, conflicted directly with the aim and content of Trudeau's constitutional Charter,²⁵ which proposed to secure educational rights in Quebec for English Canadians as the price of comparable educational rights for the French in all the other provinces.

Given the experience in the United States of states' rights (especially in the South) cast in opposition to equality for blacks, the notion of provincial autonomy as a strategy for protecting a minority group may seem ludicrous to most Americans. The tactic, however, would appear more plausible if, in the United States, ninety-five percent of blacks lived in one large state, where they constituted eighty percent of the population, and if the national constitution *prevented* the state's government from taking affirmative action to redress what it considered to be the current impact of historic domination by the state's white minority. This hypothetical situation captures the actual situation of Quebec in Canada, giving rise to the major moral ambiguity bedeviling the Canadian quest for a constitutional Charter of Rights.

I shall defer an assessment of the relative merits of the two constitutional visions I have sketched²⁶ until later in this Article. For the moment, let this account of the bitter contest between

important in the longer run, attempts to alter the environment within which individual education choices are made, in particular by requiring that French be the language of work in the province. Elaborate "Francization" programs now require Quebec businesses to make French the normal language of workplace communication, supervision, instruction, manuals, labor-management relations, etc. Supporters of the programs expect that when immigrants to Quebec realize that being French is a necessary condition to getting ahead in their jobs, they will respond by sending their children to French language schools. See E. McWHINNEY, *QUEBEC AND THE CONSTITUTION, 1960-1978*, at 60-61 (1979).

25. See Constitution Act, 1982, § 23. See generally Magnét, *Minority Language Educational Rights*, 4 SUP. CT. L. REV. 195 (1983); Tetley, *Language and Education Rights in Quebec and Canada*, LAW & CONTEMP. PROBS., Autumn 1982, at 177 (1982).

26. I might add that essentially the same contest between the constitutional strategies of individual legal rights and group self-government took place in connection with the native peoples of Canada. See McNeil, *The Constitutional Right of the Aboriginal Peoples of Canada*, 4 SUP. CT. L. REV. 255 (1983); Sanders, *The Indian Lobby*, in AND NO ONE CHEERED, *supra* note 2, at 301. Recently, a Report of the Special Committee of the House of Commons of Canada, INDIAN SELF-GOVERNMENT IN CANADA (1983), has largely endorsed the latter approach.

the two foremost champions of the French Canadian minority serve simply as an illustration of the larger truth: in a country like Canada, the typical "rights" case has no single, obviously correct answer, but rather presents a subtle moral choice between individual claims and community needs.

II. THE OPEN TEXTURE OF CONSTITUTIONAL LANGUAGE

To grant that fundamental rights cases rarely have clear-cut moral solutions is not, of course, to imply that putting these rights in a constitution necessarily means expanding judicial power. An alternative hypothesis is that since the framers of a constitution commit themselves to one side or the other of the moral dilemma—as they seemed to do in adopting the Trudeau position on language—courts need only interpret and apply the judgments that have been made elsewhere.²⁷

American constitutional scholars label this position the "interpretivist thesis."²⁸ In many respects, the Canadian experience provides ample corroboration for their critique.²⁹ As befits a document intended to stand as a national ideal for a century or more, the Canadian Charter is written in broad moral terms. It establishes the right not to be deprived of "life, liberty and security . . . except in accordance with the principles of *fundamental justice*"³⁰ and "the right to the equal protection . . . and benefit of the law without *discrimination*."³¹ The Charter bars "*cruel and unusual . . . punishment*,"³² "*unreasonable search and seizure*,"³³ and *arbitrary* arrest and detention.³⁴ Open-textured language such as this invites—indeed, requires—the court

27. As Judge Skelly Wright put it: "Constitutional choices are in fact different from ordinary [policy] decisions. The reason is simple: the most important value choices have already been made by the framers of the Constitution." Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 784 (1971).

28. The most vigorous exponent of "interpretivism" is Raoul Berger. See R. BERGER *supra* note 1; see also Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

29. The most effective critique of interpretivism is Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-500 (1981). See also J. ELY, *supra* note 1, at 11-41; Brest, *The Misconceived Quest For The Original Understanding*, 60 B.U.L. REV. 204 (1980); Richards, *Constitutional Interpretation, History and the Death Penalty: A Book Review*, 71 CALIF. L. REV. 1372 (1983).

30. The Constitution Act, 1982, § 7 (emphasis added).

31. *Id.*, § 15 (emphasis added).

32. *Id.*, § 12 (emphasis added).

33. *Id.*, § 8 (emphasis added).

34. *Id.*, § 9 (emphasis added).

to confront directly the moral controversies it presents.

The Canadian Charter is, in fact, considerably more candid about this than is the American Bill of Rights. Unlike the American Constitution with its blanket statements of rights such as "freedom of speech," which have allowed some American judges to adopt an absolutist interpretation of their legal force,³⁵ the Canadian Charter opens with the caveat that its guarantees are subject to "such reasonable limits . . . as can be demonstrably justified in a free and democratic society."³⁶ This provision qualifies even rights such as language rights, which are otherwise expressed in fairly specific terms. Canada's broad limitations clause accords with the general approach of postwar constitution writers around the world³⁷ and also accords in principle, if not in detail, with American constitutional jurisprudence. Experience has demonstrated that although in the abstract such fundamental rights as freedom of speech may seem unbridgable, in practice they must be restricted when they conflict with the rights of others or with the needs of the community. In the Canadian context, the evolution of section 1 of the Charter clearly indicates that the judiciary, not Parliament, is the institution responsible for drawing the line.³⁸

35. Notably Justice Hugo Black. See P. BOBBITT, *supra* note 1, at 25-38.

36. Constitution Act, 1982, § 1.

37. Article 10 of the European Convention on Human Rights not only subjects freedom of expression, for instance, to such limitations "as are necessary in a democratic society," but also specifies that such justifications may consist of "national security, territorial integrity or public safety, . . . the prevention of disorder or crime, . . . the protection of health or morals, . . . the protection of the reputation or rights of others, . . . preventing the disclosure of information received in confidence, or . . . maintaining the authority and impartiality of the judiciary." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 221, *reprinted in*, W. TARNOPOLSKY & G. BEAUDOIN, *CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY*, app. 3 (1982). Similarly, Article 19 of the International Covenant on Civil and Political Rights subjects the rights of freedom of conscience and religion to legal limitations "necessary . . . [f]or respect of the rights or reputations of others [and] . . . [f]or the protection of national security or of public order . . . or of public health or morals." Dec. 16, 1966, art. 19, 999 U.N.T.S. 171, *reprinted in* W. TARNOPOLSKY & G. BEAUDOIN, *supra*, at app. 4.

38. Like the international conventions quoted *supra* note 37, the predecessors to § 1 of the Charter, which were proposed in the abortive Victoria Charter of 1971 and in the Constitutional Amendment Act of 1978, contained lists of countervailing interests such as public safety, order, health, morals, peace and security that would justify legislative restriction of fundamental rights. These lists were dropped in the version proposed in October 1980 in favor of a reference to "such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government" (emphasis added). That language produced an outcry from groups such as the Canadian Civil Liberties Association who feared (correctly, I believe) that the Canadian courts would read this as endorsing the acceptability of just about any limitation duly enacted by a Canadian parliament in what was a comparatively free and democratic society. The Liberal

If the bare language of the Charter, then, gives little legal direction, a judge might attempt to go beyond the words of the document to discover what its authors intended when they wrote it. If studying the framer's intent could ever be a fruitful exercise, it would surely be so in the case of the Canadian Charter, which, unlike the centuries-old United States Bill of Rights, is a contemporary document developed by officials who were thoroughly aware of the controversies produced by comparable constitutional language just south of the border.

Unhappily, searching for the framers' intent leads only into another blind alley. Even leaving aside the virtually insoluble questions of whose intentions are to count,³⁹ or what the notion of collective intent means, what a Canadian judge would actually discover on such a quest would be of only limited value. The Canadian debate took place almost entirely on the plane of abstract concepts, such as how to express the notion of equality before the law or what are the reasonable limits appropriate in a free and democratic society. The participants in the debate left little indication of their conceptions of what these were to mean in real life situations. For example, one would search in vain in the debates over the Charter for any serious discussion about how the section 2(b) guarantee of "freedom of the press"⁴⁰ might square with competing values such as the section 11 right to a "fair and public hearing before an independent and impartial tribunal."⁴¹ Accommodation of these two rights in the context of

Government responded with the current language which requires that the limitations be "demonstrably justified" to a judiciary considering the ideals of a "free and democratic society" as such. See P. HOGG, *supra* note 2, at 9-13; Christian, *The Limitation of Liberty: A Consideration of Section 1 of the Charter of Rights and Freedoms*, U. BRIT. COLUM. L. REV. 105 (Charter ed. 1982).

Comparable expansion of judicial authority at the expense of the legislature took place with respect to the police powers of arrest, search, and bail. These powers are now restrained by the Charter not just when they flout grounds and procedures "established by law," but also when they can be labeled "arbitrary" or "unreasonable." See Constitution Act, 1982, §§ 8 (search), 9 (detention), & 11(e) (bail).

39. For example, is it the intention of the Trudeau Government which is to count, or is it that of the all-party Parliamentary Committee, the Canadian Parliament itself, the Federal-Provincial First Ministers Conference, or even the Government of the United Kingdom which finally passed the Canada Act?

40. Constitution Act, 1982, § 2(b).

41. *Id.*, § 11(d). The major exception to that generalization is language, the distinctive Canadian constitutional right whose parameters were thoroughly aired before fairly specific decisions were made about their scope in §§ 16-23 of the Constitution Act, 1982. As I noted above, abortion was also a prominent subject for debate. The framers, however, failed to give any specific guidance as to whose "life, liberty and security" were to be protected by § 7 of the Charter, that of the woman, the fetus, or neither. See Hosek, *Women and Constitutional Change*, in AND NO ONE CHEERED, *supra* note 2, at 280, 287-295; cf. *Borowski v. Attorney-General of Canada and Minister of Fin. of Canada*, 4

pretrial publicity, together with review of the law of libel, obscenity, and sedition, was simply left to the judiciary to work out.

Perhaps Canadian judges could retreat to this final haven of self-restraint. If they were to assume that the current shape of Canadian law reflects the needs and aspirations of a "free and democratic society," this legal pattern would establish a benchmark by which to police future government action, as well as to scrutinize any provincial laws that radically deviated from the basic Canadian consensus. Yet it is fair to say that the authors of the Charter meant to preclude that judicial option, although to say this may not be a decisive argument against it. In fact, it was widely supposed that the Supreme Court of Canada's adoption of precisely this narrow view of the statutory Bill of Rights was largely responsible for that document's lack of influence on the quality of Canadian law.⁴² Proponents of the new Charter sought to alter this attitude of judicial self-abnegation; thus, the drafters carefully removed any language that might support transplanting the so-called "frozen concepts" fallacy of the Bill of Rights into the new constitutional Charter.

D.L.R.4th 112 (Sask. Q.B. 1983).

Actually § 7 itself is a textbook illustration of the spongy quality of constitutional language. Its predecessor, § 1(a) of the old Bill of Rights, proscribed deprivation of "life, liberty, and security of the person" except by "due process of law." The Charter substituted the phrase "except in accordance with the principles of fundamental justice." Apparently the intent of its authors in the Department of Justice was thereby to limit the scope of judicial scrutiny to matters of "fair procedure," as opposed to the "substantive . . . policy of the law in question." See P. HOGG, *supra* note 2, at 29. I daresay that only a constitutional lawyer could suppose that "fundamental justice" means fair procedure while "due process" encompasses substantive policy.

42. The old Bill of Rights referred to rights which "have existed and shall continue to exist" (§ 1) and which are "herein recognized and declared" (§ 2). That led one wing of the Supreme Court to suppose that "the Bill was 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." *Robertson v. The Queen*, 41 D.L.R.2d 485, 491 (Can. 1963). From that perspective it was only natural to conclude, as regards the death penalty, for example, that since the latter was part of Canadian criminal law at the time the Bill of Rights was passed and was reaffirmed by Parliament in Criminal Code Amendments just a year later, it could not have been intended to be "cruel and unusual punishment" within the meaning of the Bill of Rights. *Miller v. The Queen*, [1977] 2 S.C.R. 680 (Can.). See generally Tarnopolsky, *The Historical and Constitutional Context of the Proposed Charter*, *supra* note 3.

III. THE INSTITUTIONAL DILEMMA

A. *The Legitimacy of Judicial Authority in a Democracy*

It was a formidable document that finally emerged in the Parliamentary Resolution of April 1981; a written charter containing such abstract notions as liberty, equality, fundamental justice, and the "restraints appropriate in a free and democratic society" would now govern Canadian political life. Ultimate responsibility for divining the meaning of these essentially moral concepts was passed to a Canadian judiciary and legal profession that had almost no experience in using them and that had in fact shied away from such a role under the statutory Bill of Rights. The debates leading up to the Charter offered the courts almost no guidance for resolving the specific controversies that they would soon confront. The one unmistakable clue in the language and history of the Charter was that the judges in their inquiries should not feel bound by the current state of Canadian law.

Small wonder, then, that the Parliamentary Resolution evoked grave concern among most provincial governments, whose consent was required in order for Trudeau and his government in Ottawa to effect such a major constitutional change.⁴³ Notably, serious objections to the Charter were raised by persons across the Canadian political spectrum: Allen Blakeney, the social democratic leader from Saskatchewan; Sterling Lyon, the conservative premier of Manitoba; René Lévesque, chief spokesman for Quebecois nationalism; and Peter Lougheed, the lightning rod for Western Canadian regionalism.⁴⁴ The concerns expressed by these Canadian political leaders were essentially those which American constitutionalists would anticipate. We shall look closely at these provincial objections, for understanding them is

43. This was the somewhat ambivalent verdict of the Supreme Court of Canada in Reference *re* Amendment of the Constitution of Canada, 125 D.L.R.3d 1 (Can. 1981). One majority of the judges held that as a matter of narrow constitutional law, Ottawa could unilaterally ask the United Kingdom government in Westminster to revise the existing Canadian Constitution. Another majority, however, said that, as a matter of broad constitutional convention, Ottawa needed a "substantial [though not unanimous] measure of provincial consent . . ." *Id.* at 905. See P. RUSSELL, R. DÉCARY, W. LEDERMAN, N. LYON, & D. SOBERMAN, *THE COURT AND THE CONSTITUTION* (1982) for a variety of perspectives on this judgment.

44. See the essays on Federalism and Constitutional Change in Part II of AND NO ONE CHEERED, *supra* note 2, for explanations of these positions, and R. SHEPPARD & M. VALPY, *supra* note 2, for an examination of the personalities involved.

necessary in order to appreciate the solution that was eventually fashioned.⁴⁵

The first of these concerns, usually labeled "parliamentary sovereignty" in Canada, is that judicial supremacy is inconsistent with the ideal of democratic self-rule. The Canadian people select a party to form a government in parliament based on the policy views expressed in its platform and the personal capacity of the party's leadership to carry out this policy. If the electorate is dissatisfied with the government's performance at the end of its term, the voters can (and often do) dismiss the government from office and replace it with another. The ballot box is the people's ultimate mechanism for controlling the shape of government policies on taxation, spending, defense, and foreign affairs. In Canada, voting is also how citizens have traditionally influenced "rights" issues such as abortion, capital punishment, and language.

By contrast, Canadians do not select judges by election. Canadian judges are appointed to tenured positions from which they can be removed only for personal misbehavior, a category which does not include the direction of their judicial rulings. This independence, this absence of accountability to the general public, is at the very heart of the judicial office. Such detachment from popular passions is evidently desirable in a judge adjudicating the fate of an individual under an established legal framework—e.g., "Is a defendant actually guilty of murder?" or "Did a doctor actually perform an illegal abortion?" It is less obvious that the same institutional distance from the populace is appropriate for someone whose task is to decide what the law will be—e.g., "Does Canada's current abortion law deny either the woman or the fetus the right not to be deprived of 'life, liberty or security . . . except in accordance with fundamental principles of justice'?" or "Would restoration of the death penalty be 'cruel and unusual punishment'?"

This populist challenge to the Charter was the most intuitively obvious and widely voiced. This was also the easiest to meet, since ultimately it misses the point about fundamental rights. But a satisfactory response will proceed along three different fronts, because the strength of this objection varies markedly with each.

45. In this next Part of the article, I draw on a line of analysis which I earlier developed in Weiler, *Two Models of Judicial Decisionmaking*, 46 CAN. BAR REV. 406 (1968); Weiler, *The Defender of Civil Liberties*, Ch. 7 of P. WEILER, *IN THE LAST RESORT* (1974); and Weiler, *Of Judges and Rights, Or Should Canada Have a Constitutional Bill of Rights?*, 1980 DALHOUSIE REV. 205.

First, an inescapable fact of democratic self-rule in a vast and complex society is that there are inherent limits to the people's ability to participate directly. They cannot decide by majority rule at town meetings what every detail of their legal policy is to be. Government in modern societies involves an intricate division of labor among many individuals and institutions, in view of the inherent limits of interest, expertise, and time available to the citizenry at large to air the issues.⁴⁶ Although the positions at the apex of this government structure are filled by elected representatives of the people—in Canada, a Prime Minister, Cabinet, and governing party caucus—the vast majority of government slots are filled by professional appointees. The actions taken by these officials under the power of their office generate the greatest share of claims subject to judicial scrutiny under a constitutional Charter.

An apt illustration is to be found in the administration of criminal justice. The fundamental challenge of the system is to find the optimum balance between the need for effective crime control and the claim to personal liberty. Obviously Parliament cannot pass general laws which resolve this tension in particular situations. All the legislature can do is express a mood; for example, it could declare that powers of arrest must be exercised only on reasonable grounds, taking account of the relevant circumstances. Without a Charter, full authority to make the key administrative decisions in each specific instance would rest with officials—police, prosecutors, prison and parole board officers—who operate with little public visibility and who have a bureaucratic perspective inherently tilted against claims of civil liberty infringement. Under the Charter, final decisions about such claims would be made by judges with no institutional commitment to either side and with the benefit of a public hearing in which each side can present its position. Whatever else one might say about the appropriate division of responsibility in this area, giving the authoritative voice to appointed judges instead of, say, to appointed prosecutors should not raise the spectre of erosion of Canadian democracy.

Of course, this argument will not suffice where the legislature has made a clear statement about some important policy issue, in the criminal justice field or elsewhere. Here, a judicial "last word" under a constitution would put the judiciary at odds with the body that is directly accountable to the people. Even then, one must not leap too quickly to the conclusion that a judicial

46. See generally R. DAHL, *AFTER THE REVOLUTION?* (1970).

final say is always incompatible with democratic values. After all, a majority vote in a legislative assembly is not an infallible litmus test for "democracy": it is a procedural device that we find is normally the best instrument for securing the ideal of self-government in a community of political equals. But the practice of representative democracy implies a structural core consisting of periodic elections between parties competing for the vote of a broad-based electorate that has been educated about the issues through vigorous public commentary, especially by an uninhibited press. A government in power may be tempted to pass laws which hamstring the opposition party in an election, or dilute the integrity of the ballot through malapportionment and gerrymander of constituencies, or muzzle the press to still criticism of its policies. Judicial power to strike down measures such as these, to require even elected legislators to adhere to the basic principles of a democratic regime, would seem to enhance rather than detract from the people's self-rule.⁴⁷

Had the domain of the new Charter been confined to this core of so-called "democratic rights," there would have been little opposition to it in Canada. Popular recognition of the primacy of these rights is reflected, in fact, in the favored legal status that they were granted in the final version of the Charter.⁴⁸ The great majority of rights guaranteed by the Charter, those labeled in the document as fundamental, egalitarian, legal, or language rights, cannot, however, be characterized as simply guaranteeing the integrity of democratic procedures. Canadians were well aware that most of the controversial rights jurisprudence in the United States—recent decisions about pornography, school prayer, busing, the death penalty, and abortion and earlier decisions about labor and social legislation—arose from constitutional provisions dealing with substantive rights rather than democratic procedures. Thus it was to this American experience that opponents of the Charter appealed in claiming that the principles of democracy were at odds with a constitutional document that permitted the value judgments of an oligarchic court to prevail over an elected legislature responsible to the strong views of the majority.

Even that objection holds only if one supposes democratic government to mean that whatever policy the majority of the community wants, it is entitled to have, irrespective of the bur-

47. This is the thesis of J. ELY, *supra* note 1, especially Ch. 5, *Clearing the Channels of Political Change*.

48. See *infra* text accompanying note 99.

den this imposes on a dissenting minority. For my own part, I have always thought that democracy is an ideal, a regime deserving of support if, and only if, it incorporates some restraints on the legitimate scope of majority will, limitations on government power that flow from a decent respect for the fundamental rights of the individual. To put it another way, if one wants to justify, rather than simply describe, the democratic as contrasted to the authoritarian form of government, one has to appeal to a notion of the equal worth of each individual, which implies an equal right to political participation. But that same premise will also imply a right to governmental respect for that individual's freedom of conscience, to protection against cruel and degrading punishment, and so on. Thus, when one unravels the case for democratic government, it supports not the pure majoritarian form, but rather a regime limited by a number of constituent moral principles.

This being the case, it is not implausible to spell out these limits in a document designed to be enforced by the courts. It is true that the experience of Canada (and also of the United Kingdom) under a doctrine of parliamentary sovereignty testifies to the possibility of relying on the unwritten self-restraint of the political branch of the government to preserve individual rights.⁴⁹ Canadian history, however, is also marred by unfortunate illustrations of the tendency of overzealous legislatures, spurred on by popular passions, to flout unwritten principles of fairness—especially when they are advanced on behalf of an unpopular minority.⁵⁰ It may be asking too much of human nature to expect the political branch always to police itself and its majority supporters against this temptation. An independent judiciary is the natural candidate to play that role.

Let me add this comparative note. Judicial review seems to fit more comfortably within a congressional system of government, designed to distribute power among separate, independent branches. I suspect that it may be even more necessary in modern parliamentary government, with its concentration of power in a single office.⁵¹

The Canadian parliamentary system exhibits these two important features: first, strict party discipline in the House of Commons to avoid nonconfidence votes which would dislodge the

49. Recall the death penalty issue discussed *supra* note 6.

50. See T. BERGER, *supra* note 11.

51. For a similar view, see E. FRIEDENBERG, *supra* note 4, especially Ch. 4, *Some Structural Obstacles to Liberty under the Canadian System of Government* (an expatriate American critically examining the pre-Charter state of civil liberties in Canada).

government and precipitate an election, and, second, the growth of prime ministerial authority over his cabinet and his caucus, which has gradually eroded independent centers of power inside Ottawa.⁵² That fusion of governmental power is supposed to give the leader and his cabinet the political resources to achieve serious policy innovation, to pursue a sustained and coherent program, and to answer to the electorate for the results. Many observers in the United States look fondly at that form of government, especially in comparison with the political entrepreneurship which is endemic to the American congressional system, with its numerous wielders of power, each of whom is a target for special interest lobbies and all of whom are engaged in continual dealing and logrolling.

But while parliamentary government may look like a more responsible, even a more democratic, instrument when its resources are used for benign purposes, it can be a lot less attractive in actual operation. A governing party with a bare majority in a Canadian legislature can use party discipline and closure to impose its favored policies, even though our electoral system regularly produces governments that are formed exclusively by a party that has polled considerably less than the majority of votes. As the Parti Québécois demonstrated, with the leverage of parliamentary power even such a "plurality" government can swiftly initiate a fundamental transformation in society through an instrument such as the Charter of the French Language, which was enacted almost untouched, in spite of the intense opposition of a sizeable English-speaking minority in Quebec.⁵³

In the United States, on the other hand, the congressional model has historically been celebrated as a barrier to this kind of majority tyranny. There are many independent centers of power in Washington able to deflect the current will of the majority by voicing the intense interest of minority groups who would be adversely affected. Thus any policy that succeeds in navigating its way past all these shoals is highly likely to enjoy widespread support.⁵⁴ Judicial review in the United States is simply another factor in that elaborate system of checks and balances; in the recent activist era of judicial review, it has acted as a lever, giving protection to certain minorities who have not fared so well with the elected branches of American government.

52. See the essays in *APEX OF POWER* (T. Hockin ed. 1977). See also R. PUNNETT, *THE PRIME MINISTER IN CANADIAN GOVERNMENT AND POLITICS* (1977).

53. See *supra* text accompanying notes 18-25.

54. See J. CHOPER, *supra* note 1, at 4-47.

Few such institutional obstacles and protections are available in Canada. That is why I believe, contrary to the conventional wisdom, that the case for external judicial review of the political process is stronger in the context of a parliamentary government.⁵⁵

B. *The Wisdom of Judge-made Rights*

To argue that judicial authority over fundamental rights is legitimate, as I have done here, is not to establish that it is desirable. To illustrate the difference, consider the question whether to entrench in the constitution the right to economic justice—to a reasonable minimum income or perhaps even to a fair distribution of wealth. It would not be difficult to make a stronger case for such a right than for many rights currently guaranteed under American constitutional law, for example, the emerging right of “intimate association.”⁵⁶ Indeed, more equitable distribution of economic resources and assurance of a minimum standard of living is arguably as essential to realization of democratic self-rule as is much of what is categorized as “freedom of speech.”⁵⁷ Yet no mention of these economic rights appears in the Charter,⁵⁸ notwithstanding the fact that during his incarnation as a constitutional law professor, Trudeau promoted the case for recognizing these rights.⁵⁹

The reason for the omission was simply that, however attrac-

55. Of course, this comparative judgment about the repressive potential of the congressional and parliamentary models of governments holds only *ceteris paribus*. A particular country may be lucky enough in its social equilibrium that it can be more protective of fundamental rights even with a parliamentary system. See the discussion about the death penalty in Canada, *supra* note 6.

56. See generally Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

57. See R. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* (1982); C. LINDBLOM, *POLITICS AND MARKETS* (1977); see also Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223, 249-257 (1981).

58. Section 36(2) of the Constitution Act, 1982, actually does write in one aspect of economic justice, the principle of equalization of the revenues available to different provincial governments for the provision of public services. The inclusion of this principle in the Charter represents one of the proud achievements of postwar Canadian federalism. See Davenport, *The Constitution and the Sharing of Wealth in Canada*, LAW & CONTEMP. PROBS., Autumn 1982, at 109 (1982). Nevertheless, the constitutional drafters were careful not to entrench any formula that would create a legal entitlement in this area. The difficulties that Canadian governments had experienced in the 1970's in implementing the principle of intergovernmental equality convinced them that the authority to adjust the equalization scheme to a changing economic universe had to be left with the political rather than judicial branches of government.

59. See Trudeau, *Economic Rights*, 8 MCGILL L.J. 121 (1961).

tive the concept of economic equality might seem in the abstract, to translate that right into more specific terms and then to enforce it in the real world, where it would inevitably conflict with other rights and freedoms, would be a difficult and contentious undertaking. Certainly that task would require not mere technical legal expertise, but broad philosophical vision and fine social sensitivity. Yet essentially the same judgment would be true for most of the rights included in the proposed Charter. Thus, the real dilemma facing Canadians was not whether our parliamentary democracy should honor basic human rights, but whether wiser judgments about the meaning of our political morality would emerge if final say on the subject were given to the courts.

Here, the American experience was most enlightening. The literature on judicial review is strongly in accord that American courts, under the rubric of constitutional law, are articulating the fundamental moral principles of the society; as one scholar observed, the judge "searches for what is true, right or just."⁶⁰ A few commentators lament this departure from fidelity to the intention of the original constitution's writers;⁶¹ others attempt to confine the judicial quest to "participational" values, to enhancing the quality of representative democracy.⁶² But most modern constitutional scholars applaud this judicial role, precisely because they believe courts are more competent at this task than are legislatures.⁶³

Courts do have certain institutional advantages that make this claim plausible. Whereas legislators tend to fob off troublesome moral issues, feeling that they can only lose votes by taking a stand on them, judges are obliged to respond to each claim on its legal merits, no matter how unpopular its exponent may be.⁶⁴ Nor is it enough for the judges just to assert a bare preference for a particular result: the court must also provide a reasoned justification for its decision, extending to the instant case the benefit of principles that underlie analogous cases.⁶⁵ Because they are not compelled by electoral self-preservation simply to reflect existing community moral values and prejudices, judges

60. FISS, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979).

61. Especially Raoul Berger. See R. BERGER, *supra* note 1, at 363-72.

62. This is the thesis of J. ELY, *supra* note 1.

63. Two of the best recent statements of this viewpoint are Dworkin, *supra* note 29, and Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1979).

64. See FISS, *supra* note 60, at 12-14.

65. See C. BLACK, *supra* note 1.

are free to move the law forward to a more enlightened viewpoint on a controversial subject. They can stake out a position that the people may well accept once they see it spelled out, but that an electorally accountable body would have been loathe to risk proposing in the face of current attitudes.⁶⁶ As Ronald Dworkin once put it, judicial review transfers fundamental right issues “from the battleground of power politics to the forum of [moral and legal] principle.”⁶⁷

The contrast between the way that Canadian law and American law treat illegally obtained evidence vividly illustrates the force of that claim. Two decades ago the United States Supreme Court fashioned the doctrine that evidence obtained as a result of unconstitutional police investigation is inadmissible in a criminal prosecution.⁶⁸ The Canadian Supreme Court refused to adopt the same doctrine under our statutory Bill of Rights.⁶⁹ Even in the United States there is a vigorous debate about this evidentiary rule⁷⁰ that focuses on whether the rule effectively deters illegal police action out in the field—the primary justification for the doctrine in the eyes of several Supreme Court justices.

However that argument turns out, from the Canadian perspective, a major virtue of the American rule is the light that it has thrown on the entire array of police and prosecutorial practices. Abuse of power in this area is no longer swept under the political rug. With a rule excluding illegally obtained evidence, United States courts provide both an incentive and a forum for the legal profession to examine such issues as “stop and frisk” or border searches, to weigh the merits of arguments for crime control and due process, and then to develop a principled solution for each situation. No such dialogue has taken place in Canada, not even under the old Bill of Rights, through which the Canadian Supreme Court, in effect, passed the buck back to Parliament, a body institutionally incapable of fashioning a satisfac-

66. See M. PERRY, *supra* note 1, at 111-113.

67. Dworkin, *supra* note 29, at 518.

68. See *Mapp v. Ohio*, 367 U.S. 643 (1960).

69. See *Hogan v. The Queen*, 48 D.L.R.3d 427 (Can. 1975).

70. See the debate between Y. Kamisar and M. Wilkey in Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment*, 62 JUDICATURE 67 (1978); Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than 'An Empty Blessing'*, 62 JUDICATURE 337 (1979); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978); Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979). See also Amsterdam, *Perspectives on The Fourth Amendment*, 58 MINN. L. REV. 349, 429-39 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

tory jurisprudence for these ticklish but low-visibility issues. Now that the Charter provides such an exclusionary rule,⁷¹ a systematic and authoritative appraisal of the Canadian criminal justice system is getting underway.

While the advantages of the judicial forum supported a major role for Canadian courts on rights issues, they did not necessarily dictate that our judges have the last word, as contemplated by the original Charter Resolution. Whatever the fancy claims legal scholars make for judicial reflection about issues of high moral principle, many Canadians had serious qualms about assigning final authority on such issues to a forum reserved exclusively for lawyers.

One concern was with the fact-finding technique employed by lawyers, the presentation of oral testimony under oath, subject to cross-examination by opposing counsel. While this technique constitutes a powerful instrument for getting at the *adjudicative* facts to which a legal rule will be applied—who did what to whom?—it is less than ideal for developing *policy* facts, those patterns and ambiguities in social life relevant to judgments about what the legal rules should be.⁷² Does the death penalty actually reduce the homicide rate to the extent that it should not be labeled wantonly cruel punishment?⁷³ Does mandatory busing to integrate schools improve the educational achievement of black children enough to declare it constitutionally required for equal educational opportunity?⁷⁴ My own experience has convinced me that the legislative or administrative process, certainly by comparison with the current Canadian judicial process, offers the best access to the ingredients of sophisticated policy analysis.⁷⁵ And for the many issues on which the social sciences offer little help, legislators can rely on a broader range of per-

71. The original version of the Charter precluded such a remedy. In line with the general trend in the Joint Parliamentary Committee to expand the force of the Charter, see *supra* note 7, however, a new § 24 provided a broad remedial authority for the courts that included the power to exclude unconstitutionally obtained evidence. See P. HOGG, *supra* note 2, at 66-68. Still such exclusion is not automatic: it should occur only when introduction of the evidence would "bring the administration of justice into disrepute." Constitution Act, 1982, § 24(2). This limitation added another sensitive moral judgment to the responsibilities of Canadian courts under the Charter.

72. The best treatment of this issue is D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977). A provocative treatment in the same vein, but in the context of judicial control of administrative agencies, is J. MASHAW, *BUREAUCRATIC JUSTICE* (1983).

73. J. WILSON, *THINKING ABOUT CRIME* 178-194 (2nd ed. 1983).

74. Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Plans*, 12 J. LEGAL STUD. 69 (1983).

75. See Russell, *The Effect of a Charter of Rights on The Policy-Making Role of Canadian Courts*, 25 CAN. PUB. AD. 1 (1982).

sonal experience and contact with the general public in making commonsense decisions.

I do not mean to overstate the advantages of the political branch. Only too often elected officials find it safer to ignore what they learn and simply to vote according to the prejudices of their constituents. But I do want to underline the occupational vice of courts: in the rarefied atmosphere of their chambers, judges may occasionally spin out the logical implications of an abstract principle without appreciating how awkwardly the doctrine fits with real world concerns.⁷⁶ Even worse, the defective products of that process become embedded in constitutional jurisprudence, immune from the normal process of policy experimentation and change.

This shortcoming is characteristic of the performance of the Canadian judiciary in its traditional constitutional role as umpire of Canadian federalism.⁷⁷ Canadian courts gave much the same treatment to our New Deal era legislation as did the United States Supreme Court, but Canadian judges never made the "switch in time that saved nine." Canadian law still contains much of what the courts called the "watertight compartment" theory of our federal system, which they fashioned early in the twentieth century. Only an ingenious system of intergovernmental negotiations enabled the Canadian political process to escape that constitutional straitjacket and to deal effectively with the problems of the postwar era. Yet in the 1970's, when such federal-provincial diplomacy proved less successful and the courts reemerged as major actors within Canadian federalism, the old doctrines were often woodenly applied with little regard for contemporary socioeconomic facts and needs. Without digressing to substantiate these assertions, I can say that the performance of the Supreme Court of Canada in the federalism arena did not, for many of our governmental leaders, inspire confidence in the Court's competence to fulfill its new role as the oracle of our fundamental rights.

The beginning of wisdom in comparative constitutionalism

76. Growing appreciation of this tendency was a major theme in the evolving position of Alexander Bickel, from his *A. BICKEL, THE LEAST DANGEROUS BRANCH* (1962) to *A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS* (1969) and finally to *A. BICKEL, THE MORALITY OF CONSENT* (1975).

77. I have written in detail about this in Weiler, *The Supreme Court and The Law of Canadian Federalism*, 23 *U. TORONTO L.J.* 307 (1973) and have speculated about the Court's role in *The Umpire of Canadian Federalism*, ch. 6 of my book *IN THE LAST RESORT* (1974). At the moment, I am writing a book titled *THE LASKIN COURT AND CANADIAN FEDERALISM: 1974-84*. I draw on all these sources for the observations made in this paragraph.

consists in the realization that the appropriate division of labor between legislature and judiciary must, to a large extent, be indigenous to each country and must depend on that nation's experience with and faith in the operation of each branch. Americans have more confidence in the wisdom of their judges, and less in their state legislatures, than do Canadians. Over the last quarter century the American judiciary has grown increasingly sophisticated in its approach to legal issues, a development necessary in view of the greater responsibilities that have been entrusted to it. But even in the United States I sense that courts tend to the characteristic weakness I noted earlier. As illustration, let me contrast the treatment of two election rights issues to show how differently the political process in Canada has responded to problems for which, in the United States, the Supreme Court has provided a constitutional formula.

In Canada, although we encourage free and vigorous campaigning by candidates and parties, we have placed strict limits on the amount of money that may be spent on a campaign, specifically, on the amount of television time that may be purchased.⁷⁸ We do not accept the legal logic of the United States Supreme Court that the freedom to speak one's mind on political issues without government censorship implies the freedom to spend as much money as one wants in propagating these views.⁷⁹ Similarly, Canadians believe that each person should have only one vote; and we periodically realign electoral boundaries to preserve a reasonable range in constituency size.⁸⁰ Yet we do not believe that political equality mandates anything near mathematical identity among election districts so as to ignore geographic dispersion within the ridings, natural alignments among voters and legislators concentrated in large urban areas, and so on.⁸¹ Political scientists tell us that it is impossible to

78. There is a comprehensive analysis of the nature and operation of the Canadian system of campaign financing in F. SEIDLE & K. PALTIEL, *Party Finance, The Election Expenses Act, and Campaign Spending in 1979 and 1980*, in CANADA AT THE POLLS, 1979 AND 1980, at 226 (H. Penninan ed. 1981).

79. See *Buckley v. Valeo*, 424 U.S. 1 (1976). For the effects of *Buckley*, see Cox, *Constitutional Issues: The Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395 (1982); Drew, *Politics and Money: Part I*, NEW YORKER, Dec. 6, 1982, at 54; Drew, *Politics and Money: Part II*, NEW YORKER, Dec. 13, 1982, at 57.

80. See Beaudoin, *The Democratic Rights*, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 37, at 213, 229-230.

81. The United States Supreme Court has adopted this interpretation of its Constitution, at least for congressional districts. See *Karcher v. Daggett*, 103 S. Ct. 2653 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wesberry v. Sanders*, 376 U.S. 1 (1964). For a sustained critique of the intellectual underpinning of this conclusion, see W. ELLIOTT, *THE RISE OF GUARDIAN DEMOCRACY* (1974). For an earlier discussion of the contrary Ca-

achieve the ideal of an equal value for each person's vote in a system of single-member constituencies with elections conducted on a first-past-the-post model.⁸² Without expounding here on why I prefer the Canadian approach to these issues, these and other examples⁸³ satisfy me that the pragmatic balance that is likely to emerge from the political process is often as sensitive to the values underlying fundamental rights as is the rigorous elaboration of constitutional principles by a court.

But this is not to recant on the positive case made above for constitutional rights. The availability of a judicial forum in the United States allows issues of moral and political principle—affirmative action, for example—to be aired, producing a sophisticated national dialogue about them. Perhaps such an uninhibited debate is not always an unmixed blessing. The controversy over abortion, for instance, was much more muted in Canada than in the United States. One reason this was so is that in the late 1960's the Canadian Parliament expanded the grounds for legal abortion to include instances where the health of the mother was in danger. Administration of the law was delegated to hospital committees composed of doctors. In most parts of Canada, doctors have brought about *de facto* abortion on demand by expanding the concept of "health," though that evolution has taken place *sub rosa* and, thus, in a rather erratic and

nadian position, see Caron, *Un Homme, Un Vote*, 2 THEMIS 209 (1967).

82. Although pure proportional representation might be taken to embody the ideal of an equal value for each person's vote, it poses serious dangers to the stability and performance of the political regime itself. For an extended treatment of the issue of partial proportional representation which has emerged as *the* constitutional concern with the electoral system in Canada, see W. IRVINE, DOES CANADA NEED A NEW ELECTORAL SYSTEM? (1979).

83. For instance, the claim of French-Catholics to publicly supported "separate but equal" schools for their children, which I treated earlier under its language aspect, see *supra* notes 11-13 and accompanying text, is part of a broader Canadian program of full public funding of denominational schools (with separate school boards and tax rates). Those interested in a comparative treatment of this first amendment issue could journey just north of the border and find a country that not only has none of the "entanglement" of church and state, which has so exercised the United States Supreme Court, but also has a flourishing public school system as well. See Hudon, *Church, State, and Education in Canada and the United States: A Study in Comparative Constitutional Law*, 21 LES CAHIERS DE DROIT 461 (1980).

It would also be interesting to compare the operation of the American solution to the problem of freedom of the press and libel of public figures, a narrow malice-based liability rule with potential million dollar awards, contingency fees for plaintiff's counsel, and no costs for successful defendants, with the Canadian solution, a broad common law doctrine of strict liability with lower awards (five figures or less), rare contingent fees, and costs assessed against the losing plaintiff. For a somewhat dated look at the two systems, see Weiler, *Defamation, Enterprise Liability and Freedom of Speech*, 17 U. TORONTO L.J. 278 (1967).

inequitable fashion.⁸⁴ But at the same time, because abortions are all performed for reasons of "health" in order to be legal, they are automatically paid for by the national health insurance scheme. Now this rather ramshackle product of the process of "muddling through" in the political arena is about to be tested in the forum of high legal principle by constitutional challenges to the current regime from both the pro-choice and the pro-life ends of the spectrum. Perhaps in a few years Canadians will look back fondly upon our age of innocence in the pre-Charter days!⁸⁵

I doubt that this will be the case. Canadian democracy will benefit from the constitutional stimulus provided by the Charter to sustained reflection about moral restraints upon majority rule. Putting fundamental rights in the constitution was a necessary, though not sufficient, means to that end. At the same time, there was reason to be uneasy about taking the fateful step that would give Canadian judges and lawyers—not to mention law professors—the nearly exclusive voice in that dialogue. For those who recognized that there were two sides to the problem, the proposed Charter posed a genuine dilemma. Could we devise a satisfactory solution to the problem of judges and rights in our democracy? From here, my account will unavoidably become more personal.

IV. SOLVING THE DILEMMA

A. *Creating a New Kind of Court*

One possibly fruitful avenue might have been to approach the dilemma from the "judge" side of the ledger. After all, the powerful new role that Canadian courts were being given in our public life should certainly have merited thorough scrutiny of the nature and operation of the judicial process to ensure that it would be up to the challenge. In fact, considerable attention was paid to the role of the Supreme Court of Canada in the constitu-

84. For criticism of the nature and administration of current abortion law of Canada, see REPORT OF THE BADGLEY COMMITTEE ON THE ABORTION LAW (1977); Dickens, *The Morgentaler Case: Criminal Process and Abortion Law*, 14 OSGOODE HALL L.J. 229 (1975); Harris & Tupper, *A Study of Therapeutic Abortion Committees in British Columbia*, 11 U. BRIT. COLUM. L. REV. 81 (1977).

85. The heated post-Charter debate about abortion in Canada is evidenced by the fact that the litigation has produced two cover story reports. See Riley, *The Agony Over Abortion*, MACLEAN'S, July 25, 1983, at 32; *Special Report: Abortion*, MACLEAN'S, Nov. 19, 1984, at 44.

tional debates of the 1970's.⁸⁶ A valuable by-product of this debate was that the notion of a specialized constitutional tribunal, on the European model, was placed on the Canadian agenda. This notion impliedly rejected the nineteenth-century view that the constitution is merely an ordinary law, to be construed and applied by the ordinary courts of the land.⁸⁷

If one were to begin designing a new tribunal whose exclusive responsibility would be interpreting the constitution, novel and intriguing possibilities might emerge about the mode and terms of appointment of its members and about the manner in which the body would proceed to hear and resolve issues.⁸⁸ More pertinent to my inquiry here, one might well want to appoint some nonlawyers to this "court," thus insuring that the body with ultimate authority over fundamental questions of political morality would include members with the perspective of other disciplines and the experience of other vocations.

In the United States, contemporary commentary on modern constitutional jurisprudence starts from the premises that the Supreme Court's role is to expound the nation's fundamental values,⁸⁹ that the Court is engaged in a "search for what is true, right, or just,"⁹⁰ and even that it is a font of "moral prophecy."⁹¹ How, then, could anyone seriously argue that this function must be performed exclusively by lawyers?⁹² Surely one would want to

86. The debate, however, focused on the Court's existing constitutional role as umpire of Canadian federalism. The best review of the numerous proposals and arguments in that debate is MacPherson, *The Potential Implications of Constitutional Reform for the Supreme Court of Canada*, in 1 CANADA AND THE NEW CONSTITUTION 225 (S. Beck & I. Bernier ed. 1983).

87. See generally M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971). Of course, in the United States that simplistic view has long been rejected. Recently, there have been a number of proposals to pare away much of the general appellate jurisdiction of the Supreme Court in order to permit the Court to focus its energies on its burdensome constitutional workload. See Note, *Of High Designs: A Compendium of Proposals to Reduce the Work Load of the Supreme Court*, 97 HARV. L. REV. 307 (1983).

88. An especially illuminating study of the range of options which have proved viable in different countries is M. SHAPIRO, *COURTS* (1981).

89. See *supra* note 63; see also C. BLACK, *supra* note 1; Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982).

90. Fiss, *supra* note 60.

91. M. PERRY, *supra* note 1, at 98.

92. Though, for the reasons stated earlier, see *supra* text accompanying notes 60-71, I think one would want a tribunal with the characteristics of a "court": independence, openness, obligation to come to grips with the issue on its merits, and a commitment to the method of principled reasoning.

include voices from other quarters in this "interpretive community."⁹³ For example, rather than rely on William Brennan's version of the egalitarian liberalism of John Rawls, why not include Rawls himself?⁹⁴ Appointing a sophisticated journalist such as George Will along with a William Rehnquist would certainly add breadth and depth to a constitutional tribunal; so would including a social scientist such as Kenneth Clark along with a Thurgood Marshall.

Attractive as this idea may be, when I suggested it several years ago in a public lecture in Vancouver,⁹⁵ it proved to be a definite nonstarter in Canada. The Canadian public clings to the illusion that constitutional adjudication is entirely a legal skill, and our lawyers—including our lawyer-politicians—are more than happy to foster that view and thereby protect their turf.

B. *Creating a New Kind of Right*

If we cannot change the nature of the court so as to broaden the dialogue about fundamental rights, why not change the nature of the rights themselves, so as to foster a more fruitful exchange between courts and legislatures? The first step in doing so is to enshrine fundamental rights in the constitution rather than leave them as part of ordinary statutory or common law. This will give these rights a legal imprimatur as a signal to our judges that they are to be taken seriously (as they were not under the old Canadian Bill of Rights). At the same time, though, an escape valve permitting the elected legislature to enact a statute that will prevail notwithstanding the Charter of Rights—a statute that explicitly states that it was enacted on such terms—should be incorporated into the Charter itself, modifying the legal force of the rights therein contained.

I launched this notion in another public lecture, this time in

93. See Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

94. Ronald Dworkin made one of the more provocative observations in the debate about constitutional adjudication of the 1970's when he maintained that the constitutional lawyer of the future would have to be well-versed in first-rate moral philosophy, as exemplified by J. Rawls' *A THEORY OF JUSTICE*. See R. DWORKIN, *supra* note 1, at 149. This brings to mind the famous fantasy of Learned Hand: "Hand was in heaven and in the company of a group of intellectual heavyweights who were talking with God about large political-moral issues. And the Lord said: 'Shut up, Plato! I want to hear what Hand has to say!'" Wellington, *Book Review*, 97 HARV. L. REV. 326, 334 n.10 (1983).

95. This was the Ladner Lecture at the University of British Columbia. See P. WEILER, *WHAT THE SUPREME COURT IS DOING TO THE CONSTITUTION AND WHAT CONSTITUTIONAL REFORM MAY DO TO THE COURT* (1980).

Halifax, at the other end of the country.⁹⁶ Initially it attracted as little attention and support as my proposal for nonlawyer judges. But two years later, when the idea was presented to some participants in the provincial-federal negotiations on the eve of the final conference in November 1981, it appeared to be a tolerable compromise to the deadlock over the Charter. The legislative override—or *non obstante* formula, as it is dubbed in legal parlance—found its way into the constitution as the distinctive Canadian solution to the problem of judges and rights in a democracy.⁹⁷

As I noted at the outset, most Canadians, then and now, see *non obstante* as the product of political expediency—a necessary evil, perhaps, but not a formula to be proud of. Obviously, I take quite a different view: for Canada at least, this was an intrinsically sound solution to the dilemma of rights and courts. Now that I have made full disclosure of my personal involvement and inclination, I shall spell out the arguments for and against the *non obstante* formula.⁹⁸

96. This was the Killam Lecture at the University of Dalhousie. See Weiler, *Of Judges and Rights, Or Should Canada Have a Constitutional Bill of Rights?*, 1980 DALHOUSIE REV. 205.

97. I do not mean to imply that the *non obstante* idea was brand-new. Actually, it had been around in Canadian law for about two decades as a feature of the old Bill of Rights (§ 2). But this clause was inserted in the statutory Bill as a *limitation* on Parliament in the “manner and form” through which it could override these protected rights in the face of the long-standing maxim that Parliament could not legally limit its future action. See W. TARNOPOLSKY, *supra* note 3, at 87-116. By the 1970’s, the debate had moved on to the question of whether Canadian legislatures should be restrained by an explicitly constitutional document, and both sides tacitly assumed that the only choice was between full entrenchment or none. In 1979, when I ventured to ask whether Canada should have a constitutional Bill of Rights, see *supra* note 96, it seemed to me that this was a false dichotomy: instead there was a broader menu of options from which we could choose. I proposed that Canadians employ the *non obstante* device as an *outlet* for Parliamentary action under an otherwise constitutionally entrenched Charter. See *infra* note 99 (describing a procedural wrinkle I added to the *non obstante* device). So far as I know, this was the only written brief for such a solution to our constitutional deadlock.

For a time this argument remained in academic obscurity. On September 28, 1981, however, the Supreme Court of Canada delivered its decision in *Reference re Amendment of the Constitution of Canada*, 125 D.L.R.3d 1 (Can. 1981), see *supra* note 43, a complex ruling which put considerable pressure on both sides to return to the bargaining table for one final attempt at settlement. That set a number of governments looking for alternatives to those already on the table. In the next several weeks I spoke personally to senior public officials in British Columbia and Ottawa and just before the Conference to Premier Davis of Ontario. (Sometime earlier I had discussed the paper at length with Premier Blakeney of Saskatchewan.) Equipped with this basic familiarity with the *non obstante* notion within Canadian law, and with one extended scholarly defense of its virtues in the constitutional context, the protagonists reached for this formula for their Accord in the early hours of the morning of November 3, 1981.

98. Though I would not rest my defense on this point, one can make a particularly strong case for the *non obstante* clause as a short-term, transitional feature of a Char-

First, it appears evident that even with the *non obstante* provisions, the new Charter will succeed in large part in securing the protection of fundamental rights that Canadians sought through constitutional entrenchment. The Charter contains a mandate to Canadian judges to restrain all infringements of these rights by executive officials and tribunals, whose intrusions are usually cloaked in broad legal language rather than specific legislative directives.

Furthermore, elected legislatures are now precluded from passing laws that inadvertently or obliquely infringe on constitutional values. Indeed, even if Parliament were deliberately and clearly to express its will to limit a fundamental right, it could not do so under the Charter simply by stating its intention to do so. To make such a law prevail, the government would have to use a formula designed to draw the proposal to the attention of the opposition, the press, and the general public. In a society sufficiently enamored of fundamental rights to enshrine them in

ter. Introducing constitutional rights into Canada posed a serious problem precisely because we live right next door to the United States. Judicial review has been a feature of American law for nearly 200 years. The judicial process in the United States has grown highly sophisticated in handling these questions. American lawyers and judges have been able to learn by doing the skill of constitutional adjudication. Typically, the easier claims come first. The process of resolving them produces an intellectual apparatus which generates new and harder problems, but also provides directions on how to solve them. At any one time, then, there will be something of an equilibrium in the character of the questions posed and the capacity of the legal culture to grapple with them.

That legal learning curve would not have been available in Canada. The proposed Charter contained essentially the same rights, and used much the same language, as the United States Constitution. There were few domestic precedents or analyses, however, that would be helpful in interpreting the new provisions. Commentaries and Annotations were quickly published which included references to the major American cases, often the most recent and controversial decisions. Thus, the accidents of litigation were just as likely to present to Canadian courts the hard cases first, because the Canadian lawyer would look for and be able to find an American precedent to use as a legal lever for his own case.

In that setting, one concern was that Canadian courts might jump in and do the wrong thing because they have not had to traverse each step and test out the logic of the arguments on each side of the question. The judges might apply aspects of American jurisprudence inconsistent with the Canadian experience. The *non obstante* provision allows for legislative corrections of these judicial bloopers while the courts are feeling their way.

The more likely prospect, though, is that the Canadian courts, not seeing a safe legal bridge to a solution to these hard cases, would simply refuse to leap into the problem area at all. The judges would give the provisions of the Charter the same kind of narrow, crabbed construction that the Supreme Court had given to the old Bill of Rights. One must remember that although the authors of the Charter may have intended activist judicial review, their intent would neither guarantee nor even justify that the courts would comply. To my mind, a major virtue of the *non obstante* provision was that it could elicit more vigorous judicial scrutiny of a broad range of civil rights issues, because it would give our judges a sense of security from the presence of a legislative safety net beneath them.

its constitution, invocation of the *non obstante* phrase is guaranteed to produce a lot of political flak. A government would risk taking such a step only if it were certain of widespread public backing for its position on the matter in question. Thus, in spite of this legal escape hatch, Canadian politicians and commentators concede almost unanimously that the rights contained in the Charter enjoy a greatly enhanced status by comparison with those that are not.

Was it not dangerous, though, not to take the final legal step and fully guarantee these rights against an oppressive government tempted on occasion to deny them? To some extent this was done. As insurance against the remote possibility of a government's attempting to perpetuate itself in power by denying basic rights of participation, the core of "democratic" rights—the rights to vote and run for an elected parliament which is required to meet at least once a year and to face the people for reelection at least every five years—were fully entrenched in the Constitution. But the "fundamental" right of free speech, the "legal" right to be free of arbitrary arrest, and the "egalitarian" right to protection against discrimination were each made subject to legislative restriction enacted in the proper manner. While Canadian judges had the initial authority to determine whether a particular law was a "reasonable limit [of a right] . . . demonstrably justified in a free and democratic society," Canadian legislators were given the final say if they disagreed with the courts with enough conviction to take the political risks of challenging the symbolic force of the popular Charter.⁹⁹

Some may balk at the prospect of entrusting the legislature with even such a carefully circumscribed authority. After all, the very reason for a constitutional Charter was our desire to protect the fundamental rights of an unpopular individual or a dissident minority against popular emotion and prejudice expressed through a legislature responsive to the majority. Only constitu-

99. In my original Article, I suggested an additional buffer. To trump a Supreme Court decision, a legislature would first have to enact the law with a *non obstante* clause. An election must then take place (though the election need not have been called on this issue), after which the legislature must reenact the law for it to become effective.

This "sober second thought" procedure would give the people ample time and opportunity to decide whether they preferred the views of their judges or their legislators. In the actual *Charter* version, a different procedural device was used: a law enacted with a *non obstante* clause becomes valid at once, but to remain effective it has to be reenacted every five years with that same formula. This "sunset" procedure gives the people their say after the fact but requires the legislature, the electorate, and also, one hopes, the judges to think the problem through again and again.

tional entrenchment in the strong sense is up to that task.

In one respect, this argument might take us too far. It would rule out even objectionable constitutional amendments pushed through by a dominant majority using this vehicle to trample on the rights of the individual.¹⁰⁰ The immediate rejoinder, of course, is to require the concurrence of a supermajority for constitutional revisions so that the people will rarely encroach on the judicial plan.¹⁰¹ The problem with the argument in this form is that it assumes the point at issue: it implies that the legislative override rather than the judicial construction is likely to be wrong on the merits. In those cases where the judiciary has mis-carried, to permit popular change only through formal amendment means that a tiny minority¹⁰² could hold the nation in a constitutional vise from which, as the American people have found, it might take even a war to break loose.

One cannot choose, then, between formal amendment and legislative override as the preferred method for revising judge-made constitutional policy simply by a priori reasoning about rights and democracy. One must make a practical judgment about the relative competence of two imperfect institutions in the context

100. Indeed, it has been seriously argued that the United States Supreme Court should *ignore* a formal amendment which it considered an invidious denial of the moral principles expressed in the rest of the Constitution. See Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754-57 (1980). But see Brest, *Accommodation of Majoritarianism and Rights of Human Dignity*, 53 S. CAL. L. REV. 761, 763-64 (1980).

101. In the United States, both houses of Congress, the President, and three-fourths of the states must approve a constitutional amendment, and, in two centuries, only four decisions of the Supreme Court have been overridden in this way. Under the British North America Act, the concurrence of Ottawa and "substantially" all of the provinces was conventionally necessary to amend the federal division of authority (Canada's traditional preserve of constitutional review), see *supra* note 43, and only three reversals of the judicial construction of Canadian federalism were secured in the first century of its existence. Under the new Constitution Act, 1982, amendments will require the concurrence of Ottawa and any seven provinces that comprise at least 50% of the population. This means that either Ontario or Quebec must agree. See generally Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, LAW & CONTEMP. PROBS., Autumn 1982, at 283.

Steep political hurdles as well as technical difficulties face any formal amendment to a constitution. That procedure is best suited for major revision of general concepts or principles. If there is popular objection to a specific application of an existing provision (e.g., due process), it is difficult to draft language which focuses only on this specific issue without attracting the opposition of those who worry about its implications elsewhere. In this respect, the legislative override is more of a surgical instrument than is formal amendment, and thus its use is much easier to entertain. Whether this is good or bad depends on one's view of the arguments discussed in the text.

102. In the United States, 13 states with as few as nine million people, see C. BLACK, *supra* note 1, at 38, and in Canada, four provinces with just over two million people. See the population of the four smallest Canadian provinces in R. LACHAPPELLE & J. HENRIPIN, *supra* note 15, at 352.

of a particular nation. The premise of the Charter is that the optimal arrangement for Canada is a new partnership between court and legislature. Under this approach judges will be on the front lines; they will possess both the responsibility and the legal clout necessary to tackle "rights" issues as they regularly arise. At the same time, however, the Charter reserves for the legislature a final say to be used sparingly in the exceptional case where the judiciary has gone awry. This institutional division of labor rests on the assumption that the chief threat to rights in Canada comes from legislative thoughtlessness about particular intrusions, a fault that can be cured by thoroughly airing the issues of principle in a judicial forum. The Charter contemplates no serious danger of outright legislative oppression; certainly none sufficient to concede ultimate authority to Canadian judges and lawyers.

I suspect that this arrangement would not be unthinkable in the United States (even to people who would vigorously oppose the use of this power in particular cases, like the proposed human life bill) if it were translated into a *congressional* override of the Supreme Court.¹⁰³ Any measure that could be navigated through all the branches of the national legislative process, each reflecting a variety of constituencies and points of view, might well be considered a more sensible approach to the problem than would a verdict from a bare majority of five on the Court.¹⁰⁴ But almost all American scholars would have grave

103. See Levinson, *The Turn Toward Functionalism in Constitutional Theory*, 8 U. DAYTON L. REV. 567, 575-78 (1983); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1185-89 (1977). In fact, Felix Frankfurter favored this option as a means to deal with the constitutional crisis of the New Deal. See P. IRONS, *THE NEW DEAL LAWYERS* 274-75 (1982).

104. Indeed, there is reason to believe that Congress's existing authority to carve out exceptions to the jurisdiction of the federal courts implies an analogous power. Some scholars appeal to this congressional power as the linchpin of their justification of the Supreme Court's far-reaching authority over American life. Their theory maintains that by failing to deny the Court the authority to rule on certain issues, the people consent to the results. See C. BLACK, *supra* note 1, at 18-19, 37-39, 77-79; M. PERRY, *supra* note 1, at 128-35.

Regardless of the legal logic of this position, it does not square with the case I have been making. My major reason for giving the legislature the final say is not that legislators are electorally accountable to a majority which has the right to have its own way. Rather, it is that when the legislature is driven to address, deliberately and squarely, an issue of constitutional policy, the judgment which the legislators make is likely to be sounder than the contrary view of the judges. From that perspective, the jurisdictional technique is an even cruder and less suitable instrument than formal amendment. See Lupu, *Constitutional Theory and The Search for the Workable Premise*, 8 U. DAYTON L. REV. 579, 609-18 (1983); Sager, *The Supreme Court, 1982 Term—Foreword: Constitutional Limits on Congress' Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17, 39-42 (1981). Simply because the Congress is thoroughly persuaded

qualms about conferring any such power on the state legislatures, both from general disenchantment with the deliberative capacities of state governments and because of the fear that certain state legislatures would respond to majorities who do not necessarily adhere to the values spelled out in the national constitution. For many people, reflection on what might have happened after *Brown v. Board of Education*¹⁰⁵ had Mississippi had a legislative override on fourteenth amendment issues is sobering enough to discredit the entire notion.

The fact that the prospect of a legislative override did not evoke comparable disquiet in Canada is a testimonial to the great difference between the Canadian and American conceptions of federalism. Canadians did not see the *non obstante* power as one that could safely be entrusted to the government in Ottawa, yet not to the governments in Quebec City, Victoria, or other provincial capitals. Our experience with provincial governments has been different from the United States' experience with state governments in the last thirty years: provincial governments have much broader responsibilities, and they tend to institute more progressive policies relative to their state counterparts in the United States. Even if this were not the case, as a practical political matter the *non obstante* power had to be given to the provinces, because the objections to full entrenchment that had to be dealt with came from the provincial governments.

The fear persists, however, that a particular province could abuse this power. Canadian history contains several unhappy examples of local majorities' willingness to use their provincial governments to invade the rights of minorities, where they would not likely have been successful with the national government, which responds to a broader, more heterogeneous constituency.¹⁰⁶ This, however, does not imply that we should never al-

that the Court has gone awry on a certain point is no reason why it should silence the judges in the entire legal area, depriving itself of the federal judicial branch as the instrument for administration of this part of the law and leaving the subject to the vagaries of 50 state courts. Those who believe that Congress, not the Court, should have the last word on the Bill of Rights, would prefer a *non obstante* power which allows an authoritative pronouncement on a specific issue that has bothered Congress. As it has come to be interpreted, the commerce clause of the United States Constitution appears to give Congress such a role. See P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 145-48 (2nd ed. 1983).

105. 347 U.S. 483 (1954).

106. I have already referred to the treatment of the French-Catholics in Manitoba. While Prime Minister Laurier refused to intervene because of his commitment to the principle of provincial autonomy, certainly he would not have countenanced such a substantive policy emanating from the national government. Similar blots on Canadian his-

low the political process of any province to override what it deems misguided judicial policy. An alternative safeguard would be to allow the national political branch of government to overturn the provincial exercise of the *non obstante* power in those rare cases in which the provincial initiative is egregiously offensive. Serendipitously, that political option is actually available under the current Canadian Constitution.¹⁰⁷ While it would raise local hackles, Ottawa should be prepared to scrutinize the use by provincial legislatures of their *non obstante* authority and to disallow any instances of flagrant denial of basic human rights to "discrete and insular minorities" within their boundaries.

EPILOGUE

For better or for worse, Canada did stumble on this distinctive constitutional partnership between court and legislature for the protection of fundamental rights. While its merits are appraised here from the point of view of constitutional theory, the acid test will be not logic but experience. How will the rights of Canadians actually fare under the new Charter? It is much too

tory include the treatment of the Chinese by the province of British Columbia and of the Jehovah Witnesses by the Province of Quebec. See generally T. BERGER, *supra* note 11. Nevertheless, the criminal justice system, a perennial sore spot in states' rights over civil rights issues in the United States, does not pose a comparable problem in Canada because, under § 91(27) of the British North America Act, the national government has exclusive law-making authority in relation to criminal law and procedure.

107. Our original highly centralized federal system gave the national government in Ottawa a general authority under § 90 of the British North America Act to "reserve and disallow" any provincial law of which it disapproved. Historically, the major use of this power was to control provincial economic initiatives which conflicted with Ottawa's commercial policies and the influential businesses which benefited from them (e.g., disallowance of Manitoba's railroad legislation in the 19th century and Alberta's "social credit" response to the depression of the thirties). See J. MALLORY, *SOCIAL CREDIT AND THE FEDERAL POWER IN CANADA*, 8-24, 169-80 (1954). As our federal system matured and provincial governments grew in stature, disallowance of their laws was seen to be illegitimate, and this federal power has fallen into near desuetude since World War II. See P. HOGG, *CONSTITUTIONAL LAW OF CANADA*, 39, 142-143, 151 (1977).

The power, however, was not forgotten. While historically Ottawa rarely used this power to protect the fundamental rights of provincial minorities, in 1978 the Trudeau Government offered to delete the provision from a proposed new Canadian Constitution if, but only if, the provinces agreed to accept *judicial* restraints under a constitutionally entrenched Bill of Rights. See Constitutional Amendment Bill, 1978, § 131(3). That offer was not taken up. Section 33 of the new Charter of 1982 preserves the ultimate sovereignty of provincial legislatures vis-a-vis the courts. This history makes a plausible case for the revival of the disallowance power in the special context of human rights. In this context one could not apply the usual criticism that the provinces are kept in a state of tutelage to the national government, whereas the appropriate source of control over their policies should be the provincial electorate.

early to tell. Our lower courts have heard hundreds of Charter claims in the last year and a half, upholding a significant proportion of them. One of the most intriguing suits brought to date is a challenge to the testing of the Cruise missile, on the grounds that this will deprive Canadians of "life, liberty, or security" without regard to the "principles of fundamental justice."¹⁰⁸ When that litigation produced front page headlines in the fall of 1983,¹⁰⁹ many Canadians realized for the first time what a major transformation was taking place in our political landscape.

As yet, however, we have not heard from the Supreme Court of Canada, whose views about the actual force of the new constitution will ultimately carry at least as much weight as did the views of the government leaders who wrote it.¹¹⁰ In any event,

108. See *Operation Dismantle, Inc. v. The Queen*, [1983] 1 F.C. 429 (Trial Div.), *rev'd*, 3 D.L.R.4th 193 (Fed. Ct. App.), *leave to appeal granted*, [1983] 2 S.C.R., at x (Can.).

109. See *Ottawa Appeal Ruling on Cruise*, *The Globe and Mail*, Sept. 20, 1983, at 1.

Another notable decision was *Re Service Employees' Int'l Union, Local 204*, 4 D.L.R.4th 231 (Ont. High Ct. J. Div. Ct. 1983), which held that "freedom of association" under § (2)(d) of the Constitution Act included the right to join a trade union, to engage in collective bargaining, and even to strike. In this case the Divisional Court merely found that the Ontario program to limit compensation increases for Ontario public employees under the Inflation Restraint Act, 1982, did not provide sufficient justification under § 1 of the Charter for the blanket denial of the right to bargain collectively (and either to strike or to arbitrate) about noneconomic employment conditions. Some broad language in the judges' reasoning, however, led a few unions to speculate about challenges to general laws restricting public employees' right to strike, politicians to respond that they would use their authority under § 33 of the Charter to override any such judicial verdict, and civil liberties lawyers, in turn, to deplore any intrusion upon the judicial prerogative to define the scope and limits of rights in Canada. See Bayefsky, *A Catch In The Charter That Could Erode Rights*, *The Globe and Mail*, Dec. 19, 1983, at 7.

It is doubtful whether Canadian courts are prepared to second-guess a government's public sector labor policy in that fashion, see *Dolphin Delivery Ltd. v. Retail, Wholesale and Dep't Store Union, Local 580*, [1984] 3 W.W.R. 481 (B.C. Ct. App.); *Public Serv. Alliance of Can. v. Government of Can.* (Fed. Ct. App. June 26, 1984); but if one did, this is precisely the kind of situation in which a popularly elected legislature should legitimately be able to use this Charter escape valve (assuming the legislature disagrees with the Court on the merits of the issue). In my view, this form of political safeguard against provincial abuse of the *non obstante* power is much better than a final say for Canadian judges, which even now some lawyers are trying to implant in § 33 of the Charter. See Note, 61 CAN. BAR REV. 391 (1983).

110. I should emphasize that neither the words of the document nor the intentions of its authors can dictate the stand which the judges take about the Constitution, because these interpretive directions are themselves part of the original materials whose legal force is at issue. This fundamental jurisprudential stance must ultimately rest on a political theory about why we think certain rights *should* have a preferred status and why the courts *should* have a special role in nurturing them. See Dworkin, *supra* note 29, at 493-97. That is why it is terribly important that Canadians understand the reasons why they have a Charter, and why it took the specific form that it did, in deciding how they should exercise their respective responsibilities under the new regime, whether as judge, legislator, lawyer, or citizen. (Since this was written, the Supreme Court has issued its first major decision indicating that it will read the Charter provisions in a generous, purposive

Americans interested in how a different kind of constitutional formula might work should find Canada a fruitful area for comparative study in the next decade and beyond.

Unfortunately, a black cloud is visible on the Canadian horizon, casting a shadow that I have so far omitted from this rather sunny account. It developed in the area of the intractable language problem. In negotiating the final terms of the Charter, Pierre Trudeau adamantly refused to extend the *non obstante* provision to minority language rights, especially with regard to the language of education in the provinces. With his lifelong dream of harmonious relations between French and English Canada now so close to constitutional fruition, the Prime Minister would not allow these rights to be exposed to the vagaries of the political process, especially since he knew that the Parti Québécois—newly elected with a solid legislative majority in Quebec—would be swift in using this power to protect its quite different views about language policy.¹¹¹

Although it was understandable, Trudeau's stance was unfortunate. For one thing, it became the primary reason for the Parti Québécois' rejecting the constitutional Accord of November, 1981—the only one of eleven provincial governments to do so. As Premier Lévesque phrased it in the Quebec National Assembly, "no self-respecting Quebec government could ever abandon the smallest fraction of this absolutely fundamental right to protect the only French island in the English-speaking sea of the North American continent."¹¹² Thus, when the Queen finally brought the Canadian constitution to Canadian shores on April 17, 1982, Ottawa celebrated; in Quebec City, however, the flags were flown at half-mast. On the heels of this event came the most highly publicized judgment so far rendered under the

way. See *Hunter v. Southam Inc.* (Can. Sept. 17, 1984.)

111. Actually, Trudeau did relent to the extent that Quebec was given the power (under § 59 of the Constitution Act, 1982) to decide when to entrench the right (under § 23(1)(a)) of English-speaking Quebecers to send their children to English schools. This constitutional right, however, was not of great moment because most of its beneficiaries already had such a statutory right under the Quebec Charter of the French language. Nevertheless, Trudeau stubbornly refused to permit the province to use § 33 to override the new constitutional right of Canadian citizens moving to Quebec to send their children to English schools, which § 23(1)(b) had provided in its grant to the Quebecois of the corollary right to have French-language education when they moved elsewhere in Canada. I might add that Trudeau's willingness to concede a provincial veto relating to freedom of speech and equal protection, and his adoption of the same legal escape hatch for Ottawa (something the dissenting provinces were not insisting upon as part of the November 1981 Accord), indicate that the entrenchment of language rights had always been Trudeau's real constitutional priority.

112. 26 JOURNAL DES DÉBATS 4 (Nov. 9, 1981).

Charter which struck down the crucial "Quebec clause" in the Charter of the French Language, on the ground that it could not be "justified in a free and democratic society."¹¹³ All in all, this was hardly an auspicious debut for a constitutional project originally aimed at strengthening the bond between Quebec and Canada.

An immediate rejoinder, of course, is that one cannot justify overriding the fundamental rights of the individual, even in the pursuit of national unity. That stance ignores the depressing fate of the rest of the Charter rights in Quebec. Because it was

113. See *Quebec Ass'n of Protestant School Bds. v. Attorney-General of Quebec* (No. 2), 140 D.L.R.3d 33 (Que. Super. Ct. 1982), *aff'd*, 1 D.L.R.4th 573 (Que. 1983). The decision in this case will not ease the minds of those who are concerned about the quality of judicial evaluation of public policy issues under the Charter. The court had before it all the information available: the parties to the litigation called as expert witnesses a number of prominent scholars in the field. Furthermore, the opinion was written by Chief Justice Deschênes, who, having delivered a series of key judgments on this issue in the last decades, is deeply versed in the subject of language rights. Unfortunately, the final product did not live up to its potential. In a long and elegantly worded judgment, the Chief Justice spent ten pages summarizing the broad range of demographic, educational, and other points made by each side. *Id.* at 79-88. Then he took, literally, just a couple of sentences to reach his conclusion that Quebec did not really need to limit this language right in the Canadian Charter because English Canadians moving to Quebec would produce only a negligible influx into English-language schools, just slightly braking the steady decline in the size of that system. *Id.* at 89. From that bare assertion, the Chief Justice moved quickly to strike down this key symbolic feature of the Parti Québécois' language policy.

Worse, there was a wealth of material that could have been marshalled in support of his conclusion. Right now, experts project that the French share of the Quebec population will become possibly as high as 86.5% by the year 2001, and in Montreal as high as 79%. See R. LACHAPPELLE & J. HENRIPIN, *supra* note 15, at 301, Table 8-2. Meanwhile, the economic handicap of being French is quickly being erased: the earnings advantage of the unilingual Anglophone male over the unilingual Francophone in Montreal dropped from 1.93 in 1961 to 1.59 in 1970 to 1.20 in 1977, of the bilingual Anglophone from 1.99 to 1.63 to 1.46, and even of the bilingual Francophone from 1.41 to 1.36 to 1.32. See J.A. BOULET, LANGUAGE AND EARNINGS IN MONTREAL 23-28 (1980). In Quebec as a whole, the English-French income differential among male workers dropped from 28% in 1971 to 20% in 1978. See S. ARNOPOULOS & D. CLIFT, *supra* note 21, at 239, Table 14. It is also clear from the timing of this data that the new language law had little to do with these favorable trends (which have continued since then. The English-French differential among male workers dropped to 14% in Montreal in 1980, to 4% in the rest of Quebec, and the gap for women has effectively been closed as well. See J.A. BOULET & L. LAVALLEE, L'ÉVOLUTION DES DISPARITÉS LINGUISTIQUES DE REVENU DE TRAVAIL AU CANADA DE 1970-1980, at 10, 21 (1983)). Thus Bill 101 could safely be relaxed under the Charter of Rights without any threat to the integrity of Quebec's overall language policies. My qualms, then, about the judgment concern not its result but rather the process by which the Chief Justice got there, particularly because this is one of the best, most sophisticated Charter decisions that I have thus far read. (Since this was written, the Supreme Court has upheld the Deschênes ruling, see 54 National Reporter 196 (1984), but on a narrower "interpretivist" ground, see *supra* text accompanying notes 27-42, which the Court felt was appropriate for the carefully drafted and detailed wording of the language-of-education provision in the Charter.)

able to portray the Canadian Charter as merely the latest in a long series of alien regimes imposed on Quebec by *les Anglais*, the Parti Québécois found it politically easy to pass a blanket *non obstante* provision applicable to all existing Quebec legislation.¹¹⁴ Since 1982, the Parti Québécois has included a similar override in every statute it has enacted, beginning with Bill 63, an Act dealing with sugar refineries.¹¹⁵ By taking the initiative immediately, before the Charter had time to put down roots in Quebec political life, and by making use of the *non obstante* formula a matter of legislative routine, the Parti Québécois was able to remove all the political hazard of invoking the formula for particular laws, thus frustrating the entire scheme of the Charter. The unfortunate by-product, then, of the battle between Pierre Trudeau and René Lévesque about language rights is that the judicial-legislative dialogue about all other fundamental rights now getting underway in the rest of Canada has been effectively denied to Quebecers—French and English alike. Ottawa, unfortunately, has done nothing to repair this damage.¹¹⁶

114. Bill 62, An Act Respecting the Constitution Act, 1982, was introduced in the Quebec National Assembly in May 1982, and in June it passed the Assembly and received royal assent. See Scott, *Entrenchment By Executive Action: A Partial Solution To "Legislative Over-Ride,"* 4 SUP. CT. L. REV. 303, 309-10 (1982). This Bill purported to reenact every law then on the statute books with an added "notwithstanding the Charter" clause. A fair argument can be made that this is legally insufficient, because both the wording and the spirit of § 33 of the Charter seem to require a specific judgment by the legislature about each law which it wishes to override. Compare *Malartic Hygrade Gold Mines Ltd. v. The Queen in Right of Quebec*, 142 D.L.R.3d 512 (Que. 1983) with *Alliance Des Professeurs du Montreal v. Attorney-General of Quebec*, 5 D.L.R.4th 157 (Que. 1983). Nevertheless, even if the judges insist on this hurdle, it will simply add to the time and paperwork required of a government that is politically determined upon this result.

115. See Scott, *supra* note 114, at 310.

116. I argued earlier, see *supra* notes 51-55 and accompanying text, that a Charter of Rights is especially necessary within a parliamentary system of government because strict party discipline creates the risk that the party in power might quickly push through a massive invasion of fundamental rights without having to overcome the checks and balances of a congressional system. One could read this argument in support of the proposition that one should not run the risk of abuse of a *non obstante* authority within a parliamentary system, and the recent Quebec experience might seem to confirm that concern.

In principle, I agree that a *non obstante* power poses greater problems within the parliamentary model. In practice, though, I believe the risks are quite small in Canada, because of the political obstacles to overriding a very popular Charter. Quebec is the exception which proves the rule. The problem there was not the content of the Charter of Rights, but rather the fact that the Parti Québécois was able to paint it as an alien constitutional document imposed on Quebec by *les Anglais* and that Quebecers were assured that they could continue to rely on their own provincial Charter of Human Rights and Freedoms.

Be that as it may, my own defense of the *non obstante* idea assumed that it should not

Sadly, this contretemps was all unnecessary: if the new language rights had only been left to Quebec to adopt voluntarily or to reject through the override, it is unlikely that the Parti Québécois would have eviscerated the rest of the Charter as it did. Although such a concession would have denied some Canadians moving to Quebec the kind of educational choice for their children that I, for one, think they should have,¹¹⁷ that situation was not inevitably permanent. The Parti Québécois government appears now to be in grave political difficulty. Its likely successor, the Quebec provincial Liberals, will almost certainly accept this feature of the Charter once elected.

Some observers will conclude from this episode that a government cannot be trusted with the *non obstante* power. I draw a

be exercisable in normal parliamentary fashion; rather, I would have preferred a "sober second thought" procedure under which § 33 would have to be invoked twice, before and after an election. See *supra* note 99. Instead, the drafters added § 33(3), a "sunset" feature under which *non obstante* provisions lapse every 5 years. Because the Parti Québécois is now far behind in the political polls, see *A Dream Fades in Quebec*, MACLEAN'S, Feb. 6, 1984, at 10-11, and the new leader of the front-running Quebec Liberal Party is not opposed to the Charter, even its language provisions, see Lewis, *Return from the Depths*, MACLEAN'S, Oct. 24, 1983, at 12-13, there is reason to hope that the Quebec National Assembly will not renew Bill 62 *et al* in 1987.

117. I need not belabor the reasons why individual families want freedom of choice about the language of education for their children, especially the right to choose English if they are living in North America. On the other side, exercise of this right by Canadian citizens poses no practical threat to the future of the French language in Quebec. The evidence in *Quebec Ass'n of Protestant School Bds. v. Attorney-General of Quebec* (No. 2), 140 D.L.R.3d 33 (Que. Super. Ct. 1982), *aff'd*, 1 D.L.R.4th 573 (Que. 1983), see *supra* note 113, indicated that without the benefit of the "Canada clause" in the Charter, the English language school population in Quebec would range from 4.8 to 9.4% of the total by 2001, while even with that institutional support, the range would be only 9.4 to 12.9%. See R. LACHAPELLE & J. HENRIPIN, *supra* note 15, at 81. That roughly four percent difference in the level towards which the English school population will be declining in the next two decades could hardly be said to be of major concern in the province's language policy.

Nor could one assert that this is really a matter of principle to the effect that if a family moved to French-speaking Quebec, it should expect that its children would go to the French public schools (just as they would in France). Actually, the Parti Québécois has always been prepared to grant freedom of access to its English schools to Canadians moving from other provinces but has preferred to use this as a bargaining chip to force the provision of comparable facilities for Quebecois who move to these other provinces. See Magnet, *supra* note 25, at 200-01. Now the Charter settles that reciprocity issue by requiring all Canadian provinces to provide minority language education in either French or English where the number of children warrant it. See Constitution Act, 1982, § 23(3). Moreover, while the Supreme Court of Canada decision in the appeal of *Quebec Ass'n of Protestant School Bds.* was pending, the Parti Québécois amended its own language laws to provide such access as a matter of statutory, if not constitutional, right. See Wilson-Smith, *Lévesque's Unfulfilled Promises*, MACLEAN'S, Nov. 28, 1983, at 34-35. All in all, my own qualms about this entire episode are *not* about the substantive intrusion of the Charter on Quebec language policy, but rather about the process through which this was accomplished.

rather different lesson. When a nation confronts the grand question of how best to protect fundamental rights in a democracy, what it needs even more than moral purity is political artistry. By that standard, the new Canadian version as yet deserves only mixed reviews.