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I. Introduction

A limited form of judicial review has always been a prominent feature of Canadian federalism. Immediately after confederation, Canadian Courts assumed the jurisdiction to declare a statute to be beyond the legislative competence of the enacting body.[1] Until comparatively recently, Courts have also assumed that a totality of unrestricted legislative power resides in Parliament and the Provincial legislatures, i.e., as long as legislative jurisdiction exists, there is no limitation on the nature of legislation which may be passed. As far back as 1887, the Privy Council, in *Bank of Toronto* v. *Lambe,*[2] described the B.N.A. Act[3] as follows:

> Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament.

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1. See B.L. Strayer, *Judicial Review of Legislation in Canada,* U. of Tor. Press, 1968, pp. 19-22.
2. [1887] 12 A.C. 575.
3. Imp., 30 Vict., c. 3 (1867).

> And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament.[4]

This view was reiterated by the Privy Council in *A.G. Ont.* v. *A.G. Canada:*[5]

> Again, if the text says nothing expressly then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and obviously bestowed by the British North America Act. Indeed it might ensue from the breach of almost any power.[6]

This doctrine of the totality of legislative power is a natural federal adaptation of the English doctrine of parliamentary supremacy, described by Holt C.J. many years ago in the following terms: "An act of Parliament can do no wrong, though it may do several things that look pretty odd."[7]

Beginning with the *Alberta Press* case,[8] individual Judges occasionally have made references to implied limitations of legislative power inherent in the B.N.A. Act. In that case, Duff C.J., by way of obiter, denied the right of a Province to

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4. 12 A.C. 575, at pp. 587, 588.
5. [1912] A.C. 622.
6. *Ibid.*, pp. 634-5.
7. *City of London* v. *Wood* (1701) 12 Mod. 669, at pp. 687-8.
8. [1938] S.C.R. 100, (1938) 2 D.L.R. 81.

"interfere with the working of the parliamentary institutions of Canada".[9] He stated that Parliament had authority "to legislate for the protection" of public discussion,[10] but did not state whether Parliament could take away this right. In *Saumur* v. *City of Quebec and A.G. Quebec,*[11] Rand, Kellock and Estey JJ., in holding that provincial legislatures did not have jurisdiction over religious freedom, suggested that section 93 of the B.N.A. Act, protecting denominational education, implicitly protected religious freedom. In *Murphy* v. *C.P.R.,*[12] Rand J. restated the totality doctrine as follows: It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself.[13] There has been only one suggestion in the Supreme Court of Canada that constitutionally implied limitations of legislative power apply to Parliament as well as to the provincial legislatures. In *Switzman* v. *Elbling and A.G. Quebec,*[14] Abbott J., after holding that the Province of Quebec did not have the power to pass the Communistic Propaganda Act, stated:

> Although it is not necessary, of course, to determine this question for the purpose of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good Government of the nation.[15]

This is the sole assertion that Parliament might be prevented from legislating on a matter within its legislative competence

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9. [1938] S.C.R. 100, at p. 134.
10. *Ibid.,* p. 133.
11. [1953] 2 S.C.R. 299, (1953) 4 D.L.R. 641.
12. [1958] S.C.R. 626, 15 D.L.R. (2d) 145.
13. [1958] S.C.R. 626, at p. 643.
14. [1957] S.C.R. 285, 7 D.L.R. (2d) 337.
15. [1957] S.C.R. 285, at p. 328.

because of a basic right implied; in the constitution. In summary, the implied limitation theory has never been the basis of any constitutional decision, and can muster only occasional dicta in its support.

Proposals to entrench a Canadian Bill of Rights constitute a radical departure from our traditional constitutional practice. Entrenchment means that Parliament and the provincial legislatures no longer would be supreme in their respective spheres. In addition to determining what those respective spheres are, courts would have the power to declare legislation unconstitutional on the ground that in their view the legislation offended certain constitutional protections. In such instances, the courts would be imposing their will, often on policy matters, over that of Parliament or the legislatures, and the latter bodies would have no choice but to obey, barring a constitutional amendment.

At first glance, entrenchment of fundamental rights appears to be a forward step. What can be wrong, it may be asked, with setting out in our constitution those principles and techniques which we consider necessary for a free and democratic society? Arguably, entrenchment would protect the people against oppressive and ill-conceived action on the part of government, federal as well as provincial, and this seems desirable.

When the matter is examined more closely, however, many difficulties in this extended use of judicial review become apparent, and these difficulties will be examined below. If we entrench a Bill of Rights, we are, in effect, adopting the American practice of judicial review. Thus an evaluation of the American experience under its Bill of Rights will assist us in understanding the implications of entrenchment in Canada. It is suggested that even a cursory glance at the American scene indicates that entrenchment is not a panacea to problems of human rights. Rather, it is suggested that an examination of American material indicates that entrenchment and the consequent practice of judicial review have not only failed to solve, but have contributed to, some current American social problems, and further indicates that entrenchment of fundamental rights in Canada might be harmful to Canadian public life.

At the present time many Canadians have a favourable view of an entrenched Bill of Rights because the American Supreme Court in recent times has used the American Bill to improve the plight of the American Negro. These Canadians tend to forget that until 1954 the American Supreme Court took the opposite view on segregation, and that racial problems are still acute. They tend to forget that much of the progress made in solving the problems of Negro rights has been the result not of decisions of the Supreme Court, but of civil rights legislation enacted by Congress since 1957. They tend to forget that only a very few cases come before the Supreme Court, and that, in any event, many of the decisions of the lower courts as well as some of the Supreme Court itself are totally unacceptable to Canadian society.

II. Summary of Difficulties Involved in Entrenchment

1. Political Nature of Judicial Decisions

The most basic difficulty with the operation of judicial review of laws concerning fundamental rights is that general constitutional phrases are words of uncertain and varying content. Interpretations of such phrases are inherently political decisions, not typically legal decisions, and Judges are not as competent as legislators to make them. Basic policy decisions should be made by legislatures because of their superior powers with respect to fact-finding, awareness of public needs and opinion, formulation of national goals, compromise, timing, and economic resources. The adversary system of judicial proceedings, limited to the facts of a particular case and restricted by rules of evidence and procedure, is ill-equipped to deal with complex social problems. There is no historical or democratic warrant for Judges to act as super-legislators or philosopher kings. The problem is aptly stated by Professor Henry Steele Commager:

> The real question, of course, is not that of blind or malicious majorities striking down constitutional barriers, but of differing interpretations of the meaning of the constitution. The crucial question is not so much whether an act does or does not conform to the constitution (for everyone agrees that it should), but who shall judge as to conformity?. . .

> Judicial review leads inevitably to judicial legislation. . .
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> * * *
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> Indeed, if we turn – for simplicity – to the federal scene, we will find that acts which have encountered judicial invalidation have in every instance required the interpretation of vague and ambiguous clauses of the constitution – clauses whose meaning is not to be determined by legal research but by "consideration of policy."[16]

Charles Grove Haines in an extensive study of judicial review came to a similar conclusion:

> Though it is not unusual for judges to differ in the interpretation and application of legal terms and principles the persistence of dissents in the cases arising under the "due process" and "equal protection" phrases of the Fourteenth Amendment and under the commerce clause indicates that, as President Roosevelt insisted, the judges are acting in a quasi-legislative capacity. The determination of economic and social policies whether by judges or legislators is certain to bring differences of opinion and to result in frequent reversals or modification of former judgments. Persistent dissents during the past few decades bear witness to the fact that judges in the exercise of their broad powers through the application of the doctrine of judicial supremacy are acting to a limited extent, as Justice Brandeis suggests, in the role of super-legislators.[17]

The political nature of judicial review has bothered some of the most renowned Judges in American history, including Oliver Wendell Holmes, Jr., Learned Hand, and Felix Frankfurter. This concern has expressed itself in an attitude of judicial restraint as

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16. "Judicial Review and Democracy", (1943) 19 Virginia Quarterly Review 417, quoted in Leonard W. Levy, *Judicial Review and the Supreme Court*, 1967, p. 64, at pp. 66-7.

17. *The American Doctrine of Judicial Supremacy*, 2nd ed., 1959, pp. 448-9.

contrasted with one of judicial activism. Edward McWhinney has referred to the approach of Judge Frankfurter as follows:

> The main doctrinal justification of judicial self-restraint at the present day proceed from judicial acknowledgement of major limitations to the effectiveness of the Court's assuming any activist role. First is a limitation of expertise, stemming from judicial awareness that judicial review is not always a very efficient form of policy-making; judges, because of the highly specialized and concentrated education in law and the training in professional practice that they have undergone, are in this view manifestly not the best equipped persons for translating community values into constitutional policies, and the concept of judicial notice, anyway it is said, is hardly an adequate tool for the fact-finding necessary to an informed policy choice.[18]

1a. Decisions Based on Purely Personal Values

Since most of the decisions involving fundamental rights disputes involve policy choices, Judges exercising a power of judicial review are imposing their personal values and biases on the legislatures, often frustrating the will of the people expressed through their elected representatives. Many of the American decisions declaring unconstitutional the social welfare and humanitarian legislation of modern society can only be explained on the basis of the prejudices and lack of understanding of conservative-minded and establishment-oriented Judges. In the words of President Theodore Roosevelt, "The decisions of the Courts on economic and social questions depend upon their economic and social philosophy."[19] There is no reason to assume that this phenomenon does not continue to exist today.

A graphic illustration of judicial bias is the case of *Lochner* v. *New York*,[20] where the Supreme Court of the United States invalidated a statute restricting hours of work in a bakery to

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18. *Judicial Review*, 4th ed., U. of Tor., 1969, p. 180.
19. Message to Congress, Dec. 8th, 1908.
20. 198 U.S. 45 (1905).

sixty hours a week or an average of ten hours a day. Peckham J., in delivering the judgment of the Court, stated:

> The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual.[21]

Holmes J. in dissent put the matter in a much different perspective:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfer with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and

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21. *Ibid.*, p. 61.

> even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.
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> General propositions do not decide concrete cases. The decisions will depend on a judgment of intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health.[22]

The result of this similar cases was not reversed until 1937,[23] so that the Court effectively blocked social reform in this area for a substantial period of time.

Legal writers have often commented on the lack of objectivity of American Courts. Commager has stated:

> The question of judicial objectively is too large to examine here in any detail, but it may not be irrelevant to observe that almost every leader of American democracy — Jefferson, Jackson, Lincoln, Bryan, Theodore Roosevelt, Franklin Roosevelt — has charged the courts with bias, and that from members of the Supreme Court itself have come accusations that the court indulges in "judicial legislation," warnings that the "fear of socialism" has influenced judicial action, protests against a "tortured construction" of the Constitution. And it is difficult to read such opinions as those of Story in the Charles River

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22. *Ibid.*, pp. 75-6.
23. *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937).

> Bridge Company case, Taney in the Dred Scott case, Field in the Income Tax case, McReynolds in the gold clause cases – to take only a few of the most notorious – and to avoid the conclusion that judges are sometimes swayed by considerations other than those of constitutional logic.[24]

Miller and Howell came to a similar conclusion in a study of judicial neutrality:

> Throughout the history of American constitutional development may be found recurring evidence of the fact that Supreme Court Justices have been motivated by value preferences in reaching decisions. At no time have they resorted to neutrality or impersonality of principle in making choices between competing alternatives.[25]

1b. Bad Judicial Decisions

Since judicial review requires policy choices, and since Judges are imposing their personal biases on the legislatures, one should expect that Courts will be wrong more often than they are right when they invalidate legislation. The American Supreme Court cases until 1943 nullifying Congressional action have been summarized by Commager, and it is remarkable that in almost all instances the decisions subsequently were reversed. Commager's assessment of the record of the Supreme Court is as follows:

> It reveals, on the contrary, that the Court has effectively intervened, again and again, to defeat Congressional attempts to free the slave, to guarantee civil rights to Negroes, to protect workingmen, to outlaw child labor, to assist hardpressed farmers, and to democratize the tax system. From this analysis the Congress, and not the courts, emerges as the instrument for the realization of the guarantee of the Bill of Rights.

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24. *Op. cit.* fn. 16, p. 67.

25. "The Myth of Neutrality in Constitutional Adjudication", Arthur S. Miller and Ronald F. Howell (1960), 27 U. of Chi. L.R. 661, quoted in Levy, *Judicial Review and the Supreme Court,* at p. 213.

> What is perhaps most impressive about this record is that it tends to support the Jeffersonian allegation that the court is neither more learned nor more objective than the political branches of the government. Almost every instance of judicial nullification of Congressional acts appears, now, to have been a mistaken one. In many – perhaps in most – instances the mistake has been (after a decent interval) conceded and corrected by the Court itself. In other instances it has been recified by the operation of public opinion. The conclusion is almost inescapable that judicial review has been a drag upon democracy and – what we may conceive to be the same thing – upon good government.[26]

Since 1943, the American Supreme Court has been far more active in the area of civil rights, and its judgments in some areas have been of high quality. One does not require much of a sense of history, however, to realize that many of the more current decisions of the Court will subsequently be reversed, particularly the ones dealing with freedom of expression, freedom of religion, and criminal procedure. As a distinguished American Judge has aptly stated: "Judges who have voted against the constitutionality of national legislation have not usually been vindicated by the passage of time."[27]

2. Undemocratic Nature of Judicial Review

Judicial review is inherently an undemocratic procedure because it gives Judges the power to substitute their personal opinions for those of the electorate. The democratic issue can be stated simply: should policy decisions be made by legislators who are accountable to the people, or by Judges who are not so accountable? Should five men on the Supreme Court of Canada have the right to overrule the wishes of the elected representatives of the people?

Until now, Canada has operated under principles of responsible government and the sovereignty of the people. As Rand J. described our system:

26. *Op. cit.* fn. 16, pp. 72-3.

27. *Whereas – A Judge's Premises,* Charles E. Wyzanski, Jr., 1965, Little, Brown and Co., p. 160.

> Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.[28]

Judicial review subjects the operation of self-government to the opinion of the Courts – in fact the system was instituted to avoid the dangers of capricious majorities. Unfortunately, the system does not avoid the dangers of capricious Courts. Mr. Justice Frankfurter has pointed out:

> In his First Inaugural Jefferson spoke of the "sacred principle" that "the will of the majority is in all cases to prevail." Jefferson himself hardly meant all by "all." . . . In any event, one need not give full adherence to his view to be deeply mindful of the fact that judicial review is a deliberate check upon democracy through an organ of government not subject to popular control.[29]

McWhinney has noted an unfortunate, but inevitable, by-product of this system:

> The situation tends to arise inevitably, then, as indeed was the case up to the Court Revolution of 1937, that those who are no longer able to control the legislature look to the courts to preserve their special interests.[30]

If Canadian democracy had been a failure, and if legislative majorities had been arbitrarily and capriciously oppressing minority groups, then there would be some justification for compromising our democracy in favour of a broader judicial review power. It is submitted, however, that this has not been the case, and that the Canadian people should not relinquish

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28. *Switzman* v. *Elbling and A.G. Quebec* [1957] S.C.R. 285, at p. 306.

29. "John Marshall and the Judicial Function", quoted in *John Marshall,* Kurland Series ed., Phoenix Books, 1967, 135 at p. 155.

30. *Op. cit.* fn. 18, p. 182.

part of their sovereignty to the potential despotism of the Judiciary.

2a. Shifting of Responsibility and Destruction of Popular Responsibility

Where final responsibility for political decisions is taken from the elected representatives of the people and is given to the Courts, an erosion of democratic responsibility tends to develop. Final responsibility is a sobering obligation; a politician will be very careful before supporting legislation which allegedly violates fundamental rights. If, however, the politician knows that a Court will review the propriety of his legislation, he will be more careless about his legislative product, and may rely on the Courts to correct his errors. Thus he can avoid responsibility for difficult decisions, passing off that responsibility to the Courts, and hiding his own preferences by ostensible concern about the constitutionality of legislation rather than its propriety. Mr. Justice Frankfurter has pungently criticized this tendency:

> . . . But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law.[31]

James Bradley Thayer came to the same conclusion:

> The people of the States, when making new constitutions, have long been adding more and more

31. *West Virginia Board of Education* v. *Barnette* 319 U.S. 624, at pp. 670-1 (1943, dissenting).

> prohibitions and restraints upon their legislatures. The courts, meantime, in many places, enter into the harvest thus provided for them with a light heart, and too promptly and easily proceed to set aside legislative acts. The legislatures are growing accustomed to this distrust, and more and more readily incline to justify it, and to shed the consideration of constitutional restraints, — certainly as concerning the exact extent of these restrictions, — turning that subject over to the court; and, what is worse, they insensibly fall into a habit of assuming that whatever they can constitutionally do they may do — as if honor and fair dealing and common honesty were not relevant to their inquiries.[32]

It is not unfair to suggest that some American politicians have come to welcome the intervention of the Supreme Court because the court can be the justification, or the whipping-boy, for their own action or lack of action. If the courts uphold legislation, this is twisted into an endorsement of its wisdom; if the courts invalidate legislation, this is an ideal excuse for subsequent inaction. A politician can champion a popular cause which he knows to be unconstitutional, and he can refuse to support good causes by expressing a belief in their unconstitutionality.

These same tendencies will affect the electorate as well. The people will find it difficult to assess the performance of their representatives because of the constitutional arguments, and because of the equation of constitutionality with rightness. They can no longer assume responsibility for social changes, because of a realization that their decisions are subject to judicial review and because they will look to the Courts to exercise an affirmative legislative function. Public issues no longer will be resolved effectively by the usual political processes because of the cumbersome and tortuous legal channels which must be followed before effective action can result. Good examples are the desegregation and poverty programs in the United States. In the end result, the people can no longer change policies and correct abuses by elective

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32. *John Marshall, op. cit.* fn. 29, pp. 83-4.

processes. Thus they have lost both the responsibilities and the privileges of self-government.

2b. Undemocratic Nature of Judicial Appointments

Another manifestly undemocratic aspect of judicial review is that the persons who wield the enormous power of review are appointed by the executive, are not responsible to the people, and are protected from removal by tenure.

The Canadian record in judicial appointments has not been a complimentary one, for the main qualification has always been political. If the jurisdiction of the Courts were extended to fundamental policy issues, the tendency would be to examine even more closely the political and social views of the appointees. The uproar concerning Mr. Justice Fortas of the United States Supreme Court, and the difficulties experienced in the attempted appointment by President Nixon of Judge Clement Haynsworth Jr. to the Supreme Court are instructive in this regard. The fact that all appointments are made by the federal government will also work to the disadvantage of the Provinces, since the appointees will tend to be federally oriented, and since certain provincial views will not be represented on the Court.

Tenure presents another problem, since superior Court Judges hold office during good behaviour until the age of seventy-five years, and can be removed only in the event of gross misconduct. Our society has not concerned itself with the problem of the incompetent Judge or the Judge out of touch with reality. It is a worrying prospect that five old men, a bare majority on the Supreme Court, could rule on the great social and political issues of the nation contrary to and regardless of the wishes of the populace. A striking example of this occurred in the early years of Franklin Roosevelt's administration during the Great Depression. A substantial majority of the population has voted for a "New Deal" to rescue themselves from the Depression. The newly elected Congress passed numerous statutes during the early years of its office, only to have them declared unconstitutional by a Court that espoused the myths of a by-gone era. Only when President Roosevelt threatened to appoint Judges with more compatible social views to the court was his legislative programme upheld.

The key issue is whether Canada should also create a Court which can thwart the public will. There certainly is no democratic or pressing warrant for doing so.

2c. Learning Experience for People to Correct Own Mistakes

In the exercise of governmental functions, democratic majorities will on occasion make mistakes. In order for democracy to flourish it is necessary for the people to correct their own mistakes, and to profit by them. Democracy requires that people continue to be concerned about their legislation even after it is enacted. The effect of resolving fundamental rights problems in the Courts rather than in the legislatures is to make the people apathetic about democratic responsibilities, and to deny them a great learning experience. Thayer has stated:

> Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence, — the power of the judiciary to disregard unconstitutional legislation, — it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political stimulus that comes from fighting the question out in the ordinary war, and correcting their own errors . . . (After referring to some American decisions where the Courts had refused to intervene, he continued:) But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and t growth of political experience that came out of it all, — that all this far more than outweighed any evil which ever flowed from the refusal of the Court to interfere with the work of the legislature.[33]

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33. *John Marshall, ibid.*, pp. 85-6.

2d. The Importance of Symbols

People tend to respond to the expectations of others and to their goals. In order to maintain a free society it is necessary to foster among the people and among their representatives a sense of responsibility for freedom. If the people appreciate that they are the primary guardians of freedom, they will be conscious of, and watchful for, violations of freedom. They also will be more conscious of the caliber of the representatives which they elect. If the people feel that final responsibility for preserving freedom rests with the Courts, they will be less concerned about their own role and with the performance of their representatives. In the English tradition, Parliament has been regarded as the champion of liberty, and it has responded amply to that image. In the American tradition, the Courts are regarded as the champions of liberty, with the result that insufficient care has been given to the content of many enactments. Obviously both the legislatures and the Courts can play an important role in the maintenance of freedom, but it is better if representatives of the people regard themselves as primarily responsible.

3. Loss of Independence and Prestige by Court

For a court system to operate effectively, litigants must believe that the Judges are fair and impartial, and that they (the litigants) will receive equal justice under the law. That feeling vanishes when courts become involved in political controversies, and Judges lose their mantle of integrity and independence. This is painfully apparent in the American scene, where public criticism of the courts is a common pastime, where for many the phrase "the Warren Court" is a term of derision, and where the present Chief Justice, W. E. Burger, was specifically chosen to change the orientation of the Court. To again quote Commager:

> It may not be irrelevant to observe that almost every leader of American democracy – Jefferson, Jackson, Lincoln, Bryan, Theodore Roosevelt, Franklin Roosevelt – has charged the courts with bias. . .[34]

Once such prominent allegations of bias appear, particularly

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34. Levy, *Judicial Review and the Supreme Court, op. cit.*, p. 67.

when they appear to be justified, the people begin to lose confidence in the Courts, and their work is undermined. McWhinney has also noted:

> A [further] limitation may be labeled a limitation of prestige. If the court essays an activist role it cannot avoid taking sides in the political conflicts of the age. The end product of this must be to embroil the Court in undignified partisan controversy, and there may be a risk too, as happened with the Old Court majority before 1937, of the Court itself going down with a lost political cause. "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies."[35]

The statute of individual Judges also suffers heavily with judicial review. Since Judges are usually influenced in fundamental rights cases by their personality, character, predilections, and experience, a liberal outlook will be reflected in liberal judgments, and a conservative outlook will be reflected in conservative judgments. A particular Judge need render only a few decisions, and he will be dubbed a "liberal" or a "conservative", or, sometimes, a "radical" or a "reactionary". As Haines has pointed out:

> It is the failure to understand how five Judges can agree that an act of Congress is unconstitutional "beyond rational doubt," when four of their associates who have heard the same arguments declare that the validity seems "absolutely free from doubt" that has tended to weaken the respect for the decisions to the Supreme Court on constitutional issues.[36]

Thus the impartiality of individual Judges will be suspect, and undesirable pressures in judicial appointments will arise, if the courts are involved in political controversies.

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35. *Judicial Review, op. cit.* fn. 18, p. 182. The quotation is from Mr. Justice Frankfurter, who gave the opinion of the Court in *Tenney* v. *Brandhove* 341 U.S. 367, at p. 378 (1951).

36. *The American Doctrine of Judicial Supremacy, op. cit.* fn. 17, p. 449.

3a. Strife Within Courts

When courts deal with controversial political matters, conflicts and public disagreement develop within the court itself, leading to a loss of public prestige. American Judges occasionally have engaged in a form of backbiting and baiting of their dissenting brethren, and Canada would do well without this development. A humorous but pointed example is the dissenting judgment of Roberts J. in *Smith* v. *Allwright:*[37]

> The reason for my concern is that the instant decision overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject. In the present term the Court has overruled three cases.

3b. Judicial Errors

A legal system does not work well unless litigants believe that courts will come to proper and just decisions. At the very minimum a court must be right, in the judgment of history, more often than it is wrong. Yet even this minimal claim cannot be made for the work of the American Supreme Court in the Bill of Rights cases, for as Judge Wyzanski has pointed out, "Most of the cases in which the judiciary has declared national legislation invalid have been subsequently overturned by constitutional amendment or by a reversal of judicial decisions."[38] Obviously our courts also have made errors in the exercise of their traditional role, but judicial review substantially increases the margin of error. When constant claims are made of judicial errors, and when some of these claims are supported by later decisions of the Courts themselves, judicial prestige diminishes, and people become unwilling to accept the

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37. 321 U.S. 649, at p. 669 (1944). For a general discussion of the problems, see *McWhinney, op. cit.*, p. 177.

38. *Op. cit.* fn. 27, p. 158.

decisions of the Courts. Respect for law and order is thus undermined.

4. Sacrosanct Nature of Enumerated Rights; Future Development Prevented

Another problem with entrenchment is that the specific rights listed assume a sacrosanct character, and as society changes development and reform is blocked. For example, the property provisions of the American Bill were an adoption of eighteenth century economic liberalism, and were used by the Courts in the twentieth century to block humanitarian welfare legislation. The Second Amendment preserving the "the right of the people to keep and bear arms" is an anachronism in a modern civilized society, and is making effective gun control legislation difficult. The Seventh Amendment preserving the right to a jury trial in actions involving more than twenty dollars today blocks procedural reforms in the federal Courts, and, despite overloaded court dockets, discourages experimentation in non-jury techniques in the state Courts.

Even rights which are commonly accepted by today's society may become the millstones of future society. The Canadian Bill of Rights includes the right against self-incrimination. This right grew up as a reaction to improper practices by the Court of Star Chamber when executive practices were much more primitive than they are today and when legal remedies were ineffective. Many "civilized" Continental countries do not accept the existence of, or justification for, this "right", contending that it unreasonably protects criminal elements. It may be that our future society will take a similar view, and may wish to make an accused person a compellable witness or to draw inferences from his silence. It is suggested that a future society should be entitled to fashion its own rules of criminal procedure, and should not be restricted by the notions of the past.

The sacrosanct nature of enumerated rights often exerts a negative influence on newly-developing rights which are equally valid and deserving of public support. The right of privacy, to a decent standard of living, fair employment, free education, hospitalization and medical care are more important than many of the rights listed in the American Bill of Rights, but they are

never given as much prominence or support because the focal-point of all consideration of fundamental rights is the Bill itself. As society develops, new and competing claims will encroach on the listed rights, and courts will support the old rather than the new, to the detriment of reform.

An enumerated Bill of Rights often leads to an exaggerated emphasis on rights, and to an insufficient consideration of the responsibilities required for rights to exist. If constant attention is focussed on entrenched rights, the general public begins to think of them in absolute terms. They assume that much of their questionable conduct will be protected, irrespective of time, place or other circumstance. In the United States the claim of constitutional right has almost become a comedian's theme, mirroring a public sentiment that the notion of constitutional rights has gone too far. It is obvious that the freedom of one person conflicts with the freedom of another, and that even freedoms themselves conflict with each other. This obvious truth, and the importance of responsibility, can be lost in the emphasis on entrenchment.

4a. Judicial Sanctification

Once a Supreme Court supports the existence of a particular right, or rejects the claim of a competing right, subsequent change becomes difficult. The possibilities are judicial reversal or constitutional amendment, and both require substantial time and effort, resulting in a lag in social reform.

5. Silly and Frivolous Litigation

There is no doubt that constitutional entrenchment will benefit the legal profession, because judicial review unduly fosters litigation, much of which is frivolous as well as expensive. Every statute affects someone's right to do something, and there can never be an end to possible constitutional challenge of important legislation. The rich man or zealot will always challenge the validity of legislation affecting his essential interests, and social reform is again impeded while these cases work their way to the Supreme Court.

In the United States literally thousands of cases containing frivolous allegations of constitutional invalidity have come before the Courts, and in some instances the claims have been upheld. Many examples can be found in any constitutional text

or book on fundamental freedoms, and for present purposes reference will be made to a few instances. In *Tinker* v. *Des Moines Independent Community School District,*[39] the Supreme Court recently upheld the right of school-children to wear black armbands to school as a form of protest against the Viet Nam War. It is submitted that this decision is unfortunate from a number of points of view. For one thing, public authorities should be able to regulate the conduct of children in school, and should not be required to cater to the whims of children. For another, the Supreme Court should have more important matters to deal with than such problems.

Another example of the trivial litigation which ensues under entrenchment is *Protestants and Other Americans United for Separation of Church and State* v. *O'Brien.*[40] In that case, it was held that the Postmaster General would not be acting unconstitutionally in issuing a stamp bearing a picture of the Madonna. A Court recently also dealt with the constitutionality of a school recitation of a pledge of allegiance which contained the "offensive" words "under God".[41]

One means of illustrating the nature and extent of the litigation that will result from constitutional entrenchment is to enumerate legislative provisions that will be attacked in Canada after entrenchment because of their alleged violation of fundamental human rights, or have already been attacked under the Canadian Bill of Rights. The following are obvious targets:

a. the Canadian Bill of Rights,[42] which refers to "the supremacy of God", and "spiritual values", allegedly infringing the religious rights of those who do not believe;

b. the Lord's Day Act,[43] as violating religious freedom;

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39. 89 S. Ct. 733 (1969).

40. 272 F. Supp. 712 (D.C. D.C., 1967).

41. *Smith* v. *Denny* 280 F. Supp. 651 (D.C. Cal., 1968).

42. St. Can. 1960, c. 44, now found in R.S.C. 1970, Appendix III.

43. R.S.C. 1970, c. L-13. Despite the decision of the Supreme Court of Canada in *Robertson and Rosetanni* v. *(1963) S.C.R. 651, 41 D.L.R. (2d)* 485, upholding the Lord's Day Act, Riley J. of the Alberta Supreme Court held in *Boardwalk Merchandise Mart Ltd.* v. *R.* (1972) 6 W.W.R. 1 that the Lord's Day Act was unconstitutional, but this has now been reversed by the Alberta Court of Appeals: (1973) 1 W.W.R. 190.

c. the Juvenile Delinquents Act,[44] as violating the right to a fair trial, and of due process;
d. the Indian Act,[45] as violating freedom of property, equality before the law, and due process;
e. the capital punishment sections of the Criminal Code, as constituting cruel and unusual punishment and violating due process;[46]
f. practically all substantive offences described in the Criminal Code as being unconstitutionally vague and a violation of due process;[47]
g. reverse onus clauses, as violating the presumption of innocence;[48]
h. the offence of blasphemous libel, as violating freedom of religion;
i. the offences of treason, sedition, obscenity, spreading false news, and defamatory libel, as violating freedom of speech, assembly and association, and of the press;
j. the criminal contempt power as violating freedom of speech and of the press, and due process;
k. the prohibition of publication of evidence taken at

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44. R.S.C. 1970, c. J-3. See also *R.* v. *Gratton* (1971) 17 C.R.N.S. 256 (N.B. C.A.).

45. R.S.C. 1970, c. I-6. This is the effect of the judgment of the Manitoba Court of Appeal in *Canard* v. *A.G. Can. and Rees* (1972) 5 W.W.R. 678, declaring inoperative section 43 of the Indian Act which gives to the Minister of Indian Affairs and Northern Development jurisdiction over testamentary matters of Indians. The classic decision is *R.* v. *Drybones* (1970) S.C.R. 282, (1970) 3 C.C.C. 355, 10 C.R.N.S. 334, 71 W.W.R. 161, 9 D.L.R. (3d) 473 (S.C.C.), invalidating the special liquor prohibitions contained in the Indian Act.

46. See sections 47, 75, 218, 669-681, Criminal Code. The American constitutional position concerning capital punishment is discussed in *McGautha* v. *California, Crampton* v. *Ohio* 402 U.S. 183, 28 L. Ed. 2d. 711, 91 S. Ct. 1454 (1971); *Moore* v. *Illinois* 92 S. Ct. 2562 (1972); *Furman* v. *Georgia, Jackson* v. *Georgia, Branch* v. *Texas* 92 S. Ct. 2726 (1972).

47. See, for example, the decisions of the American Supreme Court in *Roe* v. *Wade* 93 S. Ct. 705, 755, 756, 762 (1973); *Doe* v. *Bolton* 93 S. Ct. 739, 755, 756, 762 (1973), invalidating state abortion provisions.

48. This contention was rejected in *R.* v. *Appleby* [1972] S.C.R. 303, 21 D.L.R. (3d) 325 (S.C.C.).

a preliminary inquiry, as violating freedom of the press;

l. the breathalyzer provisions of the Criminal Code (ss. 235, 237) requiring breath samples and providing that an inference adverse to an accused charged with impaired driving may be drawn from his failure to give a breath sample, as violating the right against self-incrimination;[49]

m. certain Criminal Code provisions which appear to discriminate on the basis of sex;[50]

n. public drunkenness statutes, as constituting cruel and unusual punishment, or violating due process or equal protection;[51]

o. the admissibility of illegally obtained evidence;

p. state aid to denominational schools, violating religious freedom;[52]

q. a denial of state aid to denominational schools, as violating religious freedom;

r. the presence of denominational and affiliated colleges at public universities, as violating religious freedom;

s. all provisions in provincial educational statutes dealing with religious instruction, prayers, language, ceremonies, etc., as violating religious freedom;

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49. The argument has finally been rejected by the Supreme Court of Canada in *Curr* v. *R.* (1972) 26 D.L.R. (3d) 603, 7 C.C.C. (2d) 181, 18 C.R.N.S. 281, following numerous cases in lower Courts. See also *Duke* v. *R.* (1972) 28 D.L.R. (3d) 129, 7 C.C.C. (2d) 474, 18 C.R.N.S. 302 (S.C.C.), holding that the failure of the police to provide the accused with a sample of the breath taken from him was not a deprivation of a fair trial.

50. See, for example, sections 23 (accessories after the fact), 143-154 (sexual offences), 195 (procuring), 197 (providing necessaries), and the now-repealed vagrancy provision concerning prostitutes (formerly section 175 (1) (c).

51. In *Powell* v. *Texas* 392 U.S. 514, 88 S. Ct. 2145, 20 L. Ed. (2d) 1254 (1967), the United States Supreme Court, by a five-four split, held that conviction for public drunkenness of a chronic alcoholic did not constitute cruel and unusual punishment where it did not appear that the accused was unable to stay off the streets on the occasion in question.

52. See fn. 76, *infra.*

t. tax exemptions for church property or the clergy, as violating religious freedom;[53]
u. provincial censorship of movies, as violating freedom of speech;
v. many rules of criminal procedure, as violating due process;[54]
w. all provincial statutes dealing with professional societies, as violating equality before the law;
x. many prohibitory and procedural sections in statutes such as the Income Tax Act, Immigration Act, Opium and Narcotic Drug Act, Canada Evidence Act, etc., as violating due process;
y. all expropriation legislation, federal or provincial, as violating freedom of property and due process;
z. the effect of the denial of the right of, or the absence of, counsel at various proceedings;[55]
aa. compulsory school attendance laws as violating religious freedom.[56]

The list is endless; these references are merely obvious examples of the legal chaos that can arise or is already arising from the notion of entrenched rights. Under entrenchment the final word in all of these problems must come from the Courts.

This transfer of authority has many detrimental side-effects. Legal certainty is always a difficult but desirable goal, so that people will know what their rights and obligations are. With the adoption of entrenchment, all legal rights will be more unsettled, and the validity of new legislation will be doubtful until ruled on by the Supreme Court. Governments launching into new programs in sensitive areas will be unsure of legislative

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53. See *Walz* v. *New York Tax Commission* 90 S. Ct. 1409 (1970), rejecting this contention.

54. A good example is *R.* v. *Smythe* [1971] S.C.R. 690, 19 D.L.R. (3d) 480 (S.C.C.) where an unsuccessful challenge was made to the discretion of a prosecutor to proceed either by indictment or by summary conviction.

55. Illustrative cases are *R.* v. *Steeves* [1963] 42 C.R. 234, 42 D.L.R. (2d) 335, [1964] 1 C.C.C. 266 (N.S. C.A.); *R.* v. *Piper* [1965] 3 C.C.C. 135, 51 D.L.R. (2d) 534 (Man. C.A.); *R.* v. *O'Connor* [1966] S.C.R. 619, 57 D.L.R. (2d) 123 (S.C.C.); . . .; *Brownridge* v. *R.* (1972) 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1, 18 C.R.N.S. 308 (S.C.C.).

56. See *Wisconsin* v. *Yoder* 92 S. Ct. 1526 (1972).

validity for a number of years, and legislative momentum inevitably will be lost. Although most of the legislative attacks under the Canadian Bill of Rights have been unsuccessful, there is no assurance that future Courts will not adopt different approaches to these problems.

6. Litigation Syndrome

Another aspect of the increased litigation resulting from judicial review deserves special comment. Judicial review has made American society preoccupied with litigation, and the courts are regarded as an integral part of the political process. Litigation is viewed as a respectable, and in some instances the only available, instrument of political reform. It is suggested, however, that a legal system works best when it is invoked least, and that increased litigation is not a desirable social activity.

A legislator should be concerned primarily with the rightness of his legislation, not with its constitutionality, and the people should have a similar concern. In a democracy, decisions should be made through a process of reasoned debate, co-operation, and compromise. The general legal goal should be a system where individual conflict is minimized, and where resort to the courts is reduced. Under judicial review the barometer of legislative wisdom becomes its constitutionality, and the legislator is distracted from his proper goal. Thayer has written:

> No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.[57]

57. *Judicial Review and the Supreme Court, op. cit.* fn. 16, p. 63.

Entrenchment enables a legislator on occasion to avoid the moral implications of certain legislation. For example, Senator Barry Goldwater, while a Presidential candidate, was able to criticize the Civil Rights Act of 1964 on the basis that it was unconstitutional, thereby avoiding any public stand on the merits of the Act.

Citizens may succumb to a similar preoccupation with constitutionality, and choose an adversary proceeding to enforce their views on others, regarding themselves as champions of liberty in the process. Again, they may assume that constitutionality is wisdom, that if their conduct is constitutional it is good, and that if the conduct of others is unconstitutional it is bad. Good citizens would better devote their energy to the legislative process to ensure good laws, and to so conduct themselves as to avoid conflict and litigation with other persons. Mr. Justice Frankfurter has written:

> No matter how often the Court insists that it is not passing on policy when determing constitutionality, the emphasis on constitutionality and its fascination for the American public seriously confound problems of constitutionality with the merits of a policy. Industrial relations are not alone in presenting problems that suffer in their solution from having public opinion too readily assume that because some measure is found to be constitutional it is wise and right, and contrariwise, because it is found unconstitutional it is intrinsically wrong. That such miseducation of public opinion, with its effect upon action, has been an important consequence of committing to the Court the enforcement of "the mood" represented by . . . Vague constitutional provisions, can hardly be gainsaid by any student of their history.[58]

7. Judicial Review Destructive of the Federal Principles

The preamble to the B.N.A. Act refers to the desire of the incorporating Provinces to be "federally united". This expresses the continuing wish of the Provinces to be free to adopt

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58. *John Marshall, op. cit.* fn. 29, pp. 162-3.

different laws and procedures concerning the sensitive areas of personal relationships found in section 92 of the Act. The people of Canada have never wanted a governmental system with identical laws in all parts of Canada; if they did, they would press for the establishment of a unitary state. One of the great advantages of the federal system is that people have the right to differ, to experiment, to seek new ideas and solutions, and to profit from the experiences of other Provinces. The entire federal system thus becomes a working social laboratory, resulting in benefit to all segments of society.

The practice of judicial review tends to destroy this practical advantage of federalism because courts conservatively tend to disallow radical and imaginative solutions to social ills, and because a single, ultimate federal Court necessarily expresses a uniform social philosophy, and inevitably prefers consistency in its own decisions to provincial variety. Under the guise of constitutionalism, the Courts will create and impose uniform rules and procedures on the country as a whole, and prevent the Provinces from fulfilling their legislative responsibilities in an original fashion. There are numerous American cases where legitimate legislative proposals were scuttled by the Courts in the exercise of the judicial review power. In *Tyson and Bro.* v. *Banton*[59] the Supreme Court declared unconstitutional a New York law restricting the scalping of theatre tickets as an unreasonable interference with business. Mr. Justice Holmes said in dissent:

> The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. . . . I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

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59. 273 U.S. 418, at pp. 446-7 (1927).

Mr. Justice Harlan specifically referred to the social laboratory concept in *Roth* v. *U.S.*:[60]

> It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation [Hart, "The Relations Between State and Federal Law," 54 Col. L. Rev. 489, 493]." Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book and so long as other States are free to experiment with the same or bolder books.

One cannot help but wonder how such provincial legislative schemes as compulsory automobile insurance, universal hospitalization, and medicare would have fared under judicial review. If the American experience is any guide, these schemes would have been immediately challenged by the courts, and their development impeded.

Together with a tendency towards uniformity under judicial review runs a tendency towards centralization of authority and power. Federal power should be increased only if people are in agreement that national uniformity is desirable. Conversely, if centralization works against an effective federalism, then an extension of judicial review should be rejected. The American experience clearly indicates that provincial legislation will be much less sympathetically treated by the Courts than federal legislation, even where the legislation primarily is of local concern. The attack will be made primarily

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60. 354 U.S. 476, at pp. 505-6 (1957).

against its constitutionality, not against its wisdom, and provincial legislative capacity will be curbed. This tendency is promoted by the federal orientation of Supreme Court Judges. Mr. Justice Frankfurter has noticed the centralization tendency under American practice:

> The veto power of the Supreme Court over the social-economic legislation of the states, when exercised by a narrow conception of the due process and equal protection of the law clauses, presents undue centralization in its most destructive and least responsible form. The most destructive, because it stops experiment at its source, preventing an increase of social knowledge by the only scientific method available; namely the tests of trial and error. The least responsible, because it so often turns on the fortuitous circumstances which determine a majority decision, and shelters the fallible judgment of individual Justices, in matters of fact and opinion not peculiarly within the special competence of judges, behind the impersonal authority of the Constitution.[61]

Accordingly, the Provinces will be restricted much more by judicial review than will the federal government.

8. Judicial Review and the Bicultural Nature of Canada

The reality of Canadian biculturalism militates against a harmonious operation of judicial review. Judicial review often requires the Courts to ascertain a national consensus on key issues, and to impose common standards against regional dissent. It is doubtful, however, whether a Canadian consensus actually exists in many important areas, and large segments of the population would resent the culture of others being imposed on them. Obvious examples are the areas of education, language, and family relations, where substantial differences of opinion exist across Canada.

The existence of two legal systems in Canada accentuates the possibility of conflict. Some fundamental concepts are

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61. *Law and Politics*, 1939, Harcourt, Brace and Co., p. 119.

approached differently by the two systems, and Supreme Court Judges are often called upon to rule on matters arising within a culture and under a legal system different than their own. On occasion the Supreme Court Judges have split along civil law-common law lines,[62] and many people have questioned the propriety of a system which makes that possible. To now extend the areas where social values may be imposed upon different cultures would be to invite greater disunity than already exists in the country.[63]

9. Constitutional Development Depending Upon Arbitrary, Casual Factors

The American experience suggests that if Canadians adopt the extended practice of judicial review, future constitutional development will be based almost exclusively on court decisions. Unfortunately, the adjudicative process is subject not only to the political and philosophical biases of the Judges, but to the limitations of the adversary system as well. Courts are ordinarily restricted to a consideration of the issues raised before them, and are not able to deal with the broader issues which may be more important but irrelevant to the case at hand. As a result, constitutional law becomes dependent "on the whims of private litigants (and) turns on rather arbitrary, casual factors of time and circumstances."[64] Problems cannot be dealt with adequately or comprehensively, because only restricted issues are placed before a court during the process of litigation. It may be suggested that this process is too accidental, too confining, and too unrealistic to evolve the fundamental law of a nation. Mr. Justice Frankfurter stated in one of his judgments:

> To attempt to shape policy so as to avoid disharmonies in our divorce laws was not a power entrusted to us, nor is the judiciary competent to exercise it. Courts are not equipped to pursue the paths for

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62. See for example, *Roncarelli* v. *Duplessis* [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (partial split); and *Lamb* v. *Benoit* [1959] S.C.R. 321, 17 D.L.R. (2d) 369 (complete split).

63. For a general discussion of the dilemma of judicial review in a bicultural society, see McWhinney, op. cit. fn. 18, pp. 243-262.

64. *McWhinney, op. cit.* fn. 18, p. 181.

> discovering wise policy. A Court is confined within the bounds of particular record, and it cannot even shape the record. Only fragments of a social problem are seen through the narrow windows of a litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution. . . . We cannot draw on the available power for social invention afforded by the Constitution for dealing adequately with the problem, because the power belongs to the Congress and not to the Court.[65]

In the process of constitutional adjudication, conflicts between private litigants result in the establishment of public law for an entire nation. Often public law and private law become confused. A decision concerning what might be the private grievance of a single litigant, based on a unique factual situation, can be translated into a national rule of law, binding on persons, and applicable to situations, uncontemplated by the original court. The common law attitude to precedent tends to enshrine constitutional decisions, and makes future change difficult.

10. Judicial Review and the Doctrine of Precedent

If Canada adopted the extended practice of judicial review, our Courts would immediately have to reject the existing application of stare dicisis or the binding nature of precedent. As indicated earlier, judicial review necessarily involves policy decisions. Situations inevitably will arise where courts are convinced that previous policy choices were wrong, or where circumstances and conditions have so changed that different policy approaches are required. In such situations, the courts will be forced to reject previous decisions, and to substitute a more flexible approach to precedent than the prevailing theory.

The leading Canadian authority on stare decisis is *Stuart* v. *Bank of Montreal*,[66] where the Supreme Court stated that it would reverse itself only "in very exceptional circumstances".

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65. *Sherrer* v. *Sherrer* 334 U.S. 343 at pp. 364-6 (1948, Dissenting).
66. [1909] 41 S.C.R. 516.

What those circumstances might be is unclear, for there are no reported decisions where the Supreme Court has specifically reversed itself. The attitude of the Privy Council has been similar – although not bound by its previous decisions, the Court has stated:

> But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects.[67]

It is noteworthy that the American view of stare decisis in constitutional adjudication[68] has been exactly the opposite of that expressed by the Privy Council, and it is submitted that our courts will be forced to adopt the American position if they exercise similar functions. This will run counter to our democratic notion that changes in settled rules should be effected through the will of the majority expressed in Parliament.

11. Ineffectiveness of Judicial Protection

The basic rationalization of judicial review is that it will enable the courts to protect the people against oppressive government action. In the final analysis, however, the courts cannot save the people if a majority of people do not want freedom. Freedom can only be maintained by the dedication of the majority of citizens to that goal, and once that dedication is gone, judicial review is meaningless. Judge Learned Hand has stated this proposition in elegant fashion:

> [T]his much I think I do know – that a society so riven that the spirit of moderation is gone, no Court can save; that a society where that spirit flourishes no Court need save; that in a society which evades its responsibility by thrusting upon the Courts the

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67. *A.G. for Ont.* v. *Canada Temperance Federation* [1946] A.C. 193, at p. 206.

68. See *Burnet* v. *Coronado Oil & Gas Co.* 285 U.S. 393, at pp. 405-8 (1932); *St. Joseph Stockyard Co.* v. *U.S.* 298 U.S. 38, at p. 94 (1936).

> nurture of that spirit, that spirit in the end will perish.[69]

One appropriately can compare the English and Canadian experience in fundamental rights with the American experience. It is obvious that, at the very least, freedom is as highly prized in England and Canada, without judicial review, as it is in the United States, with it, Also, one legitimately can point out that some of the finest constitutional bills of rights are found in some of the most oppressive countries. The conclusion is inescapable that the enjoyment of civil liberties is consequent not upon the existence of an entrenched Bill of Rights, but upon more fundamental conditions and attitudes. Indeed, there is good reason to fear that an entrenched Bill may be destructive of the vigilance required for the maintenance of a free society.

12. Judicial Review Raising False Hopes

One of the great dangers of entrenching fundamental rights is that entrenchment will lull the Canadian people into the false belief that their rights will be effectively protected in the future. Most people do not realize that abstract declarations of rights are not effective for people who require help unless publicly supported institutions and procedures are established to promote and to enforce those rights. The Province of Saskatchewan has had a Bill of Rights since 1947,[70] and it was rarely been invoked. The Canadian Bill of Rights has been in force for twelve years, and it has not had significant effect in promoting human rights. Granted, the Bill was poorly drafted, but it is evident that most of the cases in which the Bill was invoked would have been decided the same way with an entrenched Bill of Rights. It is also unfortunate that few violations of human rights come under judicial scrutiny, because it is usually the poor, the weak, and the submissive who are discriminated against. Such persons rarely invoke court procedures to enforce their rights.

If one wishes to promote human rights in Canada, there are better approaches which can be taken. We can establish

69. *The Spirit of Liberty,* Papers and Addresses of Learned Hand, collected by Irving Dilliard, Knopf Inc., 1952, p. 181.

70. Presently found in R.S.S. 1965, c. 345.

federal and provincial human rights commissions to reduce discrimination between various citizens. We can establish federal and provincial Ombudsmen to settle disputes between citizens and government. We can establish permanent, well-organized law reform commissions to constantly scrutinize our laws to ensure that they are consonant with our ideals of freedom and justice. The difficulty with entrenchment is that the public will be misled into believing that entrenchment will significantly provide redress for oppressed people, and thus it can be used as an excuse for failure to take meaningful action.

13. The Search for a Canadian Identity

The adoption of constitutional entrenchment of fundamental rights will create an irresistible tendency to adopt American policies and solutions in civil liberties issues. Lawyers arguing civil rights cases inevitably will tend to cite American decisions in support of their contentions, and Judges will refer to those decisions in arriving at their conclusions. This tendency has already become apparent in cases dealing with the Canadian Bill of Rights. The volume of American cases alone, dealing with an endless variety of possible problems, will militate against an original Canadian approach to Canadian problems. With the constant bombardment of American ideas through the mass media, and with powerful American economic pressures, it is difficult enough at the present time to develop a distinctive Canadian identity without compounding the difficulty by adopting American legal and political practices.

14. A Comparision of Results

Some of the contentious above have been based in part on the value judgment that Canadian society is a better society than American society, that it is freer, more humanitarian, and more just. It is submitted that this judgment is accurate, and that we have achieved much more without judicial review than American society has achieved with it. There are numerous American practices that most Canadians would regard as unfortunate. Examples are the treatment of minority groups;

police practices;[71] pervading military influences; the persecution of Viet Nam War dissenters, including the prosecution of such symbolic offences as draft card burning[72] and flag burning;[73] the loyalty oaths programme;[74] denial of passports for political reasons;[75] and school prayer, religious instruction, and separate school decisions.[76] Many Canadians are also disturbed by the widespread lack of respect for the rights of others, by the absence of law and order, and by the inability of the government to control rampant crime.

Accordingly, if Canadians entrench fundamental rights they will be rejecting a system which has worked reasonably well in Canada in favour of a system that is working badly in the United States. Surely this should not be done until it is established clearly that such a change would be for the better. It is doubtful whether such a case can be made.

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71. A notorious example was the conduct of Chicago Police outside the Democratic National Convention in 1968.

72. *U.S.* v. *O'Brien* 88 S. Ct. 1673 (1968).

73. *Street* v. *New York* 394 U.S. 576, 22 L. Ed. 2d. 572, 89 S. Ct. 1354 (1969); Annotation, 22 L. Ed. 2d. 972.

74. See *Communist Party of America* v. *Subversive Activities Control Board* 367 U.S. 1 (1961); *Whitehill* v. *Elkins* 88 S. Ct. 184 (1967); *Law Students Civil Rights Research Council* v. *Wadmond* 401 U.S. 154, 27 L. Ed. 2d 749, 91 S. Ct. 720 (1971); *Cole* v. *Richardson* 92 S. Ct. 1332 (1972).

75. See *Zemel* v. *Rusk* 381 U.S. 1 (1965), reh. den. 382 U.S. 873 (1966).

76. See *McCollum* v. *Board of Education* 333 U.S. 203 (1948); *Engel* v. *Vitale* 370 U.S. 421 (1962); *Schood Dist. of Abington Township* v. *Schempp* 374 U.S. 203 (1963); *Horace Mann League of U.S. of America Inc.* v. *Bd. of Public Works* 242 Md. 645, 220 A. 2d 51, app. dismissed in part, cert. den. in part 385 U.S. 97 (1966); *Board of Education of Central School District* v. *Allen* 392 U.S. 236, 20 L. Ed. 2d. 1060, 88 S. Ct. 1923 (1968); *Lemon* v. *Kurtzman* 403 U.S. 602, 29 L. Ed. 2d. 745, 91 S. Ct. 2105 (1971), reh. den. 404 U.S. 876, 30 L. Ed. 2d. 123, 92 S. Ct. 24.