ABORTION JUDICIAL ACTIVISM AND CONSTITUTIONAL CROSSROADS

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1. Introduction

In 1984 Bruce A. Ackerman and Robert E. Charney maintained Canada was still "at the constitutional crossroads."[1] Describing the issue as one of parliamentary versus popular sovereignty, they urged us to follow the lead of our American neighbours by adopting the latter. Appearances to the contrary notwithstanding, since Ackerman and Charney had already acknowledged Canada's status as a federal state, theirs was not a metaphor asking whether we accepted the division of powers. Rather their "constitutional crossroads" questioned our commitment to the separation of powers.

The Supreme Court of Canada's abortion jurisprudence provides a unique opportunity for determining whether we remain "at the constitutional crossroads" that Ackerman and Charney identified. Since 1984 the Court has decided four abortion cases, striking down the impugned abortion laws in two of these cases by invoking the *Canadian Charter of Rights and Freedoms*[2] in one[3] and federalism in the other.[4] Scholars have subjected the *Charter* decision known as the 1988 Morgentaler case to considerable comment. Not only have conservative political scientists criticized the outcome, feminist law professors have also challenged the judges' reasoning. The distinctiveness of their concerns suggests conservatives and feminists may differ more about the identity than about the existence of any "constitutional crossroads" that confront Canada.

Conservatives contend the 1988 Morgentaler decision exemplifies the Court taking the wrong side in the controversy over judicial activism versus deference. They claim the judges should have chosen the latter. Comparing their depiction with that of Ackerman and Charney, it

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[1] Bruce A. Ackerman and Robert E. Charney, "Canada at the Constitutional Crossroads" (1984), 34 *U of T L.J.* 117.

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

[3] *R. v. Morgentaler, Smoling and Scott*, [1988] 1 S.C.R. 30 [1988 Morgentaler].

[4] *R. v. Morgentaler*, [1993] 3 S.C.R. 463 [1993 Morgentaler].

is easy to explain the consistency between the conservative preference for judicial deference and parliamentary sovereignty. However, Ackerman and Charney's preference for popular sovereignty does not make it consistent with judicial activism. Popular sovereignty differs from judicial activism just as feminist critiques of the 1988 Morgentaler decision differ from those of conservatives. More specifically, feminists acknowledge this decision was principled, which suggests Ackerman and Charney could prefer popular sovereignty precisely because it is principled, whereas no one - least of all conservatives - would construe judicial activism as principled. Conservatives deploy the term judicial activism to signify decisions about public policy. In other words their "crossroads" represents not constitutional but rather political controversy. Thus conservatives do not require a metaphor for the separation of powers.

In contrast, feminists share Ackerman and Charney's preference for the separation of powers. Nevertheless feminists have serious reservations about the security of the person or liberty principle that informed the majority opinions in the 1988 Morgentaler decision; they contend the equality principle should provide better protection for women. In other words feminists maintain liberty and equality serve different purposes, their roots in human dignity notwithstanding. The reality is that these two principles derive from very different legal traditions. Liberty is mainly an artifact of the common law, or the custom of the people; whereas equality's legal origins are largely statutory, the product of legislators. This distinction has implications for the "constitutional crossroads" that Ackerman and Charney identified. It suggests that preferring liberty, as the Morgentaler Court did, is consistent with preferring popular sovereignty given Ackerman and Charney's definition of it. Popular sovereignty focuses on mobilizing "We the People", which is virtually indistinguishable from liberty's manifestation as the mobilized customary or common law of the people. The corollary is that preferring equality, as feminists do, is not at all consistent with popular sovereignty's task of mobilizing the People. Rather, equality's statutory origins suggest it is oriented more to legislators, inviting them to mobilize to suppress inequality and to promote equality. Thus we need a new term to distinguish sovereignty as feminists understand it from popular sovereignty as Ackerman and Charney defined it.

Its roots in the equality principle suggest naming this new term "substantive sovereignty." Informed by the equality principle, substantive sovereignty differs not only from parliamentary sovereignty or deference but also from judicial activism. Moreover, its focus on mobilizing legislators, not the People, distinguishes substantive from popular sovereignty; in other words they describe competing approaches to the separation of powers or judicial review. However, the controversy that these two approaches represent - popular versus substantive sovereignty - is not the same as the one that Ackerman and Charney identified. Perhaps their controversy - parliamentary versus popular sovereignty - was resolved during the intervening two decades. Alternatively, perhaps their American-oriented We the People analysis simply does not fit with our constitutional tradition. Either way I conclude that the feminists who challenged the Supreme Court of Canada's abortion jurisprudence more accurately identified our contemporary constitutional controversy. In sum, that jurisprudence located Canada "at the constitutional crossroads" between popular versus substantive sovereignty.

2. The "constitutional crossroads"

The content that Ackerman and Charney attributed to their metaphor rendered it ambiguous, although perhaps not intentionally so. They described the "constitutional crossroads" as the controversy about parliamentary versus popular sovereignty, creating uncertainty over whether the issue was accepting the division or the separation of powers. Nor was this ambiguity resolved when they embedded their description in contested nationalisms, casting parliamentary sovereignty as British and popular sovereignty as American. Since Britain is a unitary state and America subscribes to federalism, the difference could have referred to the division of powers. Alternatively, since Britain (at least pre-EU Britain) imposed no limits on legislative powers while America subscribes to the judicial review of legislation, Ackerman and Charney could have been invoking the separation of powers. Fortunately, they did not leave us guessing; they turned to Canadian history and jurisprudence to explain their metaphor.

Ackerman and Charney introduced their "constitutional crossroads" by reaching back to comments made by A.V. Dicey in the 19th century. Concerned about the preamble to the *British North America Act, 1867* Dicey challenged the accuracy of its reference to "a constitution similar

in principle to that of the United Kingdom." In his view, the truth demanded substitution of "States" for "Kingdom" to reflect Canada's commitment to the American federal, rather than to the British unitary, system of government.[5] After traversing the century following Dicey's comments, Ackerman and Charney arrived at the 1981 patriation process wherein, as they observed, Prime Minister Trudeau reaffirmed Westminster's approach to parliamentary sovereignty instead of calling for a populist referendum in the American We the People tradition. In other words, their history consisted of moments of federal-provincial controversy. Despite their fixation on issues of federalism, Ackerman and Charney conceded that somewhere in the course of the interval between Dicey's complaint and patriation, Canada became a federal state.[6] This concession makes it difficult to understand how their metaphor could signify a controversy over acceptance of the division of powers.

Similarly when they examined our jurisprudence, Ackerman and Charney limited their analysis to federalism cases. They relied heavily on the Patriation Reference, using it to advance two criticisms. First they criticized Prime Minister Trudeau for not derailing the Patriation Reference by calling an extraordinary national referendum. In their view, our Prime Minister did not conform to their conception of popular sovereignty by mobilizing We the People. Ackerman and Charney contended that in the United States such mobilization would have been necessary because "the very nerve of American constitutional law is its insistence that no body of regularly elected representatives speaks unproblematically for the People all of the time."[7] Since the executive failed to mobilize the People in Canada, they directed their second criticism to the judiciary. According to Ackerman and Charney, in deciding the Patriation Reference the Canadian Supreme Court should not have ruled that Parliament and the provincial legislatures "could enact constitutional law on the basis of 'substantial' agreement."[8] Obviously both criticisms were directed, not to deficiencies of federalism, but rather to an absence of limits on legislative powers. Irrespective of whether responsibility for the flawed process devolved on the Court or on the Prime Minister (or even on the first ministers), it conveyed to Ackerman and

[5] Ackerman and Charney, *supra* note 1 at 117.
[6] *Ibid.* at 123.
[7] *Ibid.* at 117.
[8] *Ibid.* at 131.

Charney that we did not accept the separation of powers. Our patriation process was, in sum, very un-American.

However, Ackerman and Charney saw this outcome not as a defeat but as a challenge, concluding that "Canada is still in the agony of constitutional creation."[9] In effect we could yet decide to abandon British parliamentary sovereignty and adopt American popular sovereignty in order to reconcile our deep cultural differences. To assess the contemporary relevance of their metaphor, in what follows I examine some of the constitutional jurisprudence decided in the intervening decades. Insofar as their metaphor evoked the separation and not the division of powers, there is no reason to limit my selection of this jurisprudence to the geographically-based cultural differences that Ackerman and Charney identified as quintessentially Canadian. Instead, I intend to analyze the Canadian Supreme Court's abortion jurisprudence, situating it in the cultural controversy it spawned between conservatives and feminists. Ultimately I conclude this jurisprudence does reveal Canada to be at a "constitutional crossroads", albeit one that is quite distinctive from the "constitutional crossroads" described by Ackerman and Charney.

3. Abortion jurisprudence

The *Constitution Act, 1867* assigns jurisdiction over the general criminal law power to the Parliament of Canada.[10] In 1869 Parliament used this criminal law power to prohibit abortion, punishing it with the penalty of life imprisonment. One hundred years passed before Parliament was persuaded to exempt from criminal liability a doctor who met five conditions. The exemption required that the abortion be performed (i) by a qualified medical practitioner, (ii) in an accredited hospital, (iii) after three other doctors constituted by the hospital as a therapeutic abortion committee, (iv) had stated the continuation of the pregnancy would or would be likely to endanger the woman's life or health, (v) in a written certificate that could be requisitioned by the Minister of Health either from the therapeutic abortion committee or from the doctor who had performed the abortion, along with other information pertaining to the circumstances of the

[9] *Ibid.* at 134.
[10] *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 reprinted in R.S.C. 1985, App II, No. 5, s. 91(27).

abortion. Known collectively as the therapeutic abortion exception, these conditions were enacted in 1969 as part of the prohibition on abortion in section 251 of the *Criminal Code*.[11]

The Supreme Court of Canada has decided six cases directly or indirectly implicating section 251. Despite the subject matter of section 251, women were not parties to five of these six cases. Three of the cases involved medical doctors who were accused of violating the criminal prohibition on abortion. Dr. Henry Morgentaler was charged in all three cases, while Dr. Leslie Frank Smoling and Dr. Robert Scott were also named in one case.[12] Two of the remaining cases were initiated by one man, pro-life lobbyist Joseph Borowski, who first sought standing to attack and thereafter attacked the validity of section 251 on the ground that it contravened the life, security, and equality rights of the fetus.[13] The sixth case was brought by Jean-Guy Tremblay who sought an injunction to prevent his former girlfriend Chantal Daigle from having an abortion.[14] Since each of these cases raised different questions what follows is a brief chronological account of their constitutional issues.

In 1975 Dr. Morgentaler challenged the constitutionality of section 251 using the federal principle. He advanced two federalism arguments. First he submitted that whatever the basis for prohibiting abortion when the first law was enacted in England in 1803, the evil aimed at had substantially abated because of improvements in surgical procedures terminating pregnancy. More specifically he cited the recently decided American cases of *Roe* v. *Wade* and *Doe* v. *Bolton*[15] as indicative of his contention that section 251 could no longer be supported as legislation for the protection of a pregnant woman's health, undercutting that rationale's justification for criminalizing abortion. The Court disagreed; even the dissenting opinion held Parliament had decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception was socially undesirable conduct. Nor did the Court agree with Dr. Morgentaler's second federalism argument wherein he had contended that section 251, and especially the therapeutic abortion provision, encroached on the provinces' exclusive

[11] *Criminal Code*, R.S.C. 1970, c. C-34.
[12] *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *1988 Morgentaler*, *supra* note 3; *1993 Morgentaler*, *supra* note 4.
[13] *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575; and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.
[14] *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.
[15] *Roe v. Wade* (1973), 410 U.S. 113; and *Doe v. Bolton* (1973), 410 U.S. 179.

jurisdiction over the practice and profession of medicine and hospitals. Furthermore, the Court refused to accept Dr. Morgentaler's contention about the therapeutic provision in section 251 violating both the cruel and unusual punishment and the equality before the law provisions in the Canadian Bill of Rights.

Although he failed to get the criminal prohibition on abortion struck down in 1975, twelve years later Dr. Morgentaler successfully challenged section 251. During the interval Canada had adopted the *Charter* including section 7, which gives "everyone ... the right to life, liberty and security of the person", rights that we cannot be deprived of "except in accordance with the principles of fundamental justice." Five of the seven Supreme Court of Canada judges who heard the 1988 *Morgentaler* case not only decided section 251 violated the pregnant woman's right to security of the person and was not in accordance with the principles of fundamental justice, they also rejected the Attorney General's claim that section 251 could be justified under section 1 of the *Charter*. These five majority judges did not write as one. Chief Justice Dickson, with Justice Lamer concurring, wrote one opinion; Justice Beetz, with Justice Estey concurring, wrote a second; and Madame Justice Wilson, the only woman to hear the case, wrote a third. Under these circumstances an analysis of how these three concurring opinions differed seems preliminary to explaining the dissenting opinion, authored by Justice McIntyre with Justice La Forest concurring.

One reason for so many majority concurrences was simply that the Court was just beginning to give meaning to the rights guaranteed by section 7. While the 1988 *Morgentaler* decision was certainly not the first case requiring the Court to interpret section 7, nevertheless it was among the earliest. At the time the Court was struggling to resolve three questions about the section 7 right to security of the person: was it limited to protecting physical integrity; could it be invoked only in the context of criminal law; and did it include controlling one's own body? Chief Justice Dickson's answer to the first question - that section 7 rights protected psychological as well as physical integrity - resolved this issue because it was accepted by the other majority judges, albeit not by the dissenters. In contrast, the two concurring majority opinions did not echo Justice Beetz's answer to the second question wherein he portrayed section 251 as forcing a pregnant woman to choose between committing a crime and receiving inadequate or no medical

treatment, leaving this issue controversial until 1999.[16] Finally, Madame Justice Wilson alone responded to the third question, affirming that the right to security of the person extended to protecting a pregnant woman's control over her own capacity to reproduce. Moreover, she held that section 251 violated the right to liberty. As she put it, "the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives." Thus she concluded that the right to liberty protected the decision of a woman to terminate her pregnancy.

Madame Justice Wilson's approach raised a further question, namely why did she attribute the same meaning to both section 7 rights? Why did she not only define the right to liberty as guaranteeing "a woman the right to decide for herself whether or not to terminate her pregnancy" but also expand the right to security of the person beyond protecting physical and psychological integrity to include the right to control our bodies? Partly the answer is that she had no way of knowing a subsequent Court would adopt her definition of liberty in 1995.[17] Mostly, it was because she found it easy to imagine Parliament responding to the 1988 *Morgentaler* decision by re-criminalizing abortion. She was concerned that "the ideal legislative scheme, assuming that it is one which poses no threat to the physical and psychological security of the person of the pregnant woman, would be valid under s.7," even though it made a woman's capacity to reproduce subject to the control of the state. In fact, this objective underlay the House of Commons' passage of Bill C-43[18] by a vote of 140 to 131 on 29 May 1990.[19] Bill C-43 would have amended the Criminal Code to ban abortion unless performed by a medical practitioner who had decided the pregnancy threatened the life or health of the woman. "In essence," Madame Justice Wilson had presciently written two and a half years earlier, "what it does is assert that the woman's capacity to reproduce is not to be subject to her own control." Bill C-43 was defeated in the Senate on 31 January 1991 in a tie vote: 43-43, an extraordinary outcome given there had never been a tied vote in the history of the Senate, nor had that body defeated a

[16] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 65, Lamer C.J. confirming "that s. 7 is not limited solely to purely criminal or penal matters."
[17] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.
[18] House of Commons of Canada Bill C-43, 2nd Session, 34th Parliament, 38 Elizabeth II, 1989.
[19] Janine Brodie, "Choice and No Choice in the House" in Janine Brodie, Shelley A.M. Gavigan, and Jane Jenson, *The Politics of Abortion* (Toronto: Oxford University Press, 1992), 57 at 109-10.

government bill in 30 years.[20] Thus the Supreme Court of Canada was never asked to decide whether the definition she gave to the right to liberty could also inform the right to security of the person, although recently in a different context that Court appeared to treat these two section 7 rights as fungible.[21]

A second reason for three concurring opinions in the 1988 *Morgentaler* decision was to afford the majority judges the opportunity to agree that section 251 did not comply with the principles of fundamental justice while differing over which principles were not met. For instance, Chief Justice Dickson and Justice Beetz differed over the principles (or basic tenets of the legal system) that were offended even though they restricted their explanations to the therapeutic abortion provision. On the one hand, the Chief Justice held the basic tenet that a defence to a criminal charge must not be illusory, or so difficult to attain as to be practically illusory, was not met given the practical operation of the procedural requirements combined with the absence of a standard for "health". On the other hand, Justice Beetz decided the principle of fairness was violated because some of the procedural rules were unnecessary, although he denied that the expression of the standard ("health") and the requirement for some independent medical opinion (he reduced that requirement from three to one) were inconsistent with the principles of fundamental justice. Rather than take sides, Madame Justice Wilson agreed with both of their reasons for finding the deprivation was not consistent with procedural fairness; unlike her brethren, she also held section 251 deprived pregnant women of their *Charter* section 2(a) right to freedom of conscience. She concluded that being deprived of another *Charter* right constituted a further deprivation, albeit of a substantive rather than procedural component, of the principles of fundamental justice.

Although the Court concluded that section 251 was not in accordance with three different tenets of the legal system (or principles of fundamental justice), this conclusion offered little direction to future litigants because none of the concurring opinions garnered majority support. For instance had Bill C-43 passed the Senate and become law, the likelihood is that Justice Beetz would have found it complied with the principle of procedural fairness. While it is also likely

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[20] *Ibid.* at 115.

[21] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 83 (Bastarache J.)

that Bill C-43 would have violated Madame Justice Wilson's principle of freedom of conscience, to date there is little indication of the Court's willingness to accept her substantive approach to the principles of fundamental justice. Finally since the Bill went part way to meeting Chief Justice Dickson's concerns by delineating a standard for "health", the likelihood of it being perceived as providing an illusory defence would have depended on how the Court construed the withdrawal of services by doctors who feared criminal prosecution. The reality of widespread withdrawals became very evident during the interval between the Bill's passage in the House and its defeat in the Senate.[22] Before this reality could be taken into account, the Court would have to decide what counts as a deprivation of the principles of fundamental justice. In other words, is the practical operation of a rule sufficient to constitute evidence of a deprivation as the Chief Justice held; or must a deprivation result from and only from the rule itself (that is, not from its effect) as Justice Beetz ruled? Moreover, while on one reading Justice McIntyre found the evidence of an illusory defence lacking, on another his dissent simply echoed Justice Beetz' emphasis on the statutory rules. Absent an effects-based resolution of this issue therefore Parliament could re-criminalize abortion with therapeutic abortion requirements that conform to the principles of fundamental justice, even though in reality pregnant women would be denied access to abortion.

Finally, despite agreeing that section 251 could not be justified under the section 1 *Oakes* test, the Justices who authored the three concurring opinions each applied this test differently. Initially, they disagreed over the objective of section 251, with Chief Justice Dickson identifying it as balancing the competing interests of the pregnant woman and her fetus, while Justice Beetz adopted Madame Justice Wilson's characterization of it as protecting the fetus. Justice Beetz actually criticized the Chief Justice's approach as incorrect, claiming it confused the narrow aim of the therapeutic abortion provision with the primary objective of section 251 as a whole. Still they all agreed that section 251 had a valid legislative objective and hence met the first branch of the *Oakes* test. It was the second, or proportionality, branch of that test that section 251 failed. Proportionality has three prongs which the Justices emphasized differentially. Chief Justice Dickson found that the therapeutic abortion procedures did not satisfy any of the prongs because they were often arbitrary and unfair (failing the first or rational connection prong), practically

[22] Brodie, *supra* note 19 at 110-4.

unavailable (failing the second or minimal impairment), and so cumbersome as to cause a pregnant woman great trauma, expense and inconvenience (failing the third or deleterious effects prong). Justice Beetz, who also focused on the therapeutic abortion procedures, held that since unnecessary rules could not be said to be rationally connected to Parliament's objective, they failed the first prong of the proportionality test. Since both Justices used the therapeutic abortion provision to sustain their conclusions about section 251 not meeting the proportionality test, their analysis could apply to legislation that contained similar procedures. Their approaches would therefore have little to say about Bill C-43 which, had it passed, would not have replicated the complex procedural rules of section 251.

In contrast, Madame Justice Wilson would doubtless decide Bill C-43 could not meet the second prong of the proportionality test for the same reason that section 251 failed to meet it. Her approach was quite distinctive from her brethren because she not only examined the therapeutic abortion provision but also contextualized it, asking "at what point in the pregnancy does the protection of the fetus become such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the fetus to term?" Like the approach taken several years earlier by the American Supreme Court in *Roe* v. *Wade*, her response was to adopt a developmental view of the fetus. This developmental approach, which is also known as the trimester approach, respects a woman's autonomy as absolute in the early stages of her pregnancy, while at the later stages it justifies the state's interest in prescribing conditions to protect the fetus. In the absence of a developmental (or trimester) approach however, section 251 had to be seen as a complete denial of a woman's right to control the decision to terminate her pregnancy. Madame Justice Wilson concluded this section was not merely a limitation on the pregnant woman's right. Section 251 did not impair the pregnant woman's right as little as possible, hence failing the second prong of the proportionality branch of the *Oakes* test. Moreover, had it passed Bill C-43 would have qualified for the same fate since it contained no reference to the developmental (or trimester) approach.

There are two reasons why the dissenting opinion would have made it easier for Bill C-43 to survive than did the opinions of the male majority, albeit no more likely. Firstly, Justice McIntyre denied that section 251 violated section 7. He ruled the language of section 7 did not

support the right to abortion, a proposition he attributed not only to Madame Justice Wilson but also to Chief Justice Dickson. Nor did our history, tradition or underlying philosophy sustain an implied right to abortion. Further Justice McIntyre held that infringing the section 7 right of security of the person required more than state interference with bodily integrity or serious state-imposed psychological stress. There would also have to be the infringement of another right, freedom or interest that warranted constitutional protection. Having already explained why the right to have an abortion did not qualify as such an interest, he concluded that section 251 did not violate section 7. Secondly, Justice McIntyre disagreed, obiter, with the male majority's approach to the principles of fundamental justice. He was less critical about their choices than with their application. The therapeutic abortion provision did not create an illusory defence, nor were its procedures unfair. Rather, Parliament was entitled to adopt a policy that carefully tailored and limited this defence to special circumstances. In his opinion any pregnant woman who had difficulty accessing an abortion should blame forces external to the statute. Accordingly it is impossible to find any reason for challenging the constitutionality of Bill C-43 in Justice McIntyre's dissent.

The 1988 *Morgentaler* decision was book-ended by the two *Borowski* cases. In 1978 Borowski, a former Manitoba cabinet minister turned anti-abortion crusader, initiated a lawsuit in which he claimed the therapeutic abortion provision violated the fetus' rights to due process of law and equality before the law under the *Canadian Bill of Rights*. Before he could pursue these claims the Crown challenged his standing (or status to litigate the case) on the ground that being neither a doctor who had performed an abortion nor a pregnant woman who had terminated her pregnancy Borowski could not be charged with an offence under section 251. In the 1981 majority decision authored by Justice Martland the Supreme Court of Canada ruled "that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court". Chief Justice Laskin with Justice Lamer concurring dissented, observing "that there were others, such as doctors and hospitals, who might be so affected." With his standing ascertained, Borowski returned to the trial court to pursue his original action on behalf of the fetus, although he amended it to argue that the therapeutic abortion provision violated sections 7 and 15 of the *Charter*. In effect the *Charter* had provided the basis for alleging the fetus had rights to life, liberty, and security of the

person, as well as equality rights. His claim was dismissed by the Saskatchewan Court of Queen's Bench, the Saskatchewan Court of Appeal and the Supreme Court of Canada, albeit for different reasons. The trial and appeal courts ruled against giving the fetus rights under sections 7 and 15. In 1989 the Supreme Court of Canada dismissed the appeal as moot. In other words there no longer was a live controversy or concrete dispute since section 251 had been struck down a year earlier in Dr. Morgentaler's case. Thus the Court expressed "no opinion as to fetal rights", adding somewhat ominously "it is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation."

Five months later Tremblay was before the Court seeking an injunction to restrain his former fiancé from having an abortion. Unlike Borowski, Tremblay did not challenge the constitutional validity of any legislation. His was a private action in which he alleged that two Quebec laws, the *Charter of Human Rights and Freedoms* and the *Civil Code*, recognized the fetus as a human being with the right to life. The Court ruled against both claims. However, when Tremblay argued that a fetus is included in the term "everyone" as used in section 7 of the Canadian *Charter* and thereby entitled to the right to life, liberty and security of the person, the Court held it was unnecessary to decide this issue. That is, not only was no state action (or law) impugned, but also "no issue as to whether section 7 could be used to ground an affirmative claim to protection by the state was ... raised." Thus the Court has neither used nor foreclosed using section 7 of the *Charter* to recognize that fetuses have constitutional rights, whether negatively or affirmatively construed.[23]

The issue of fetal rights was not addressed in the Court's last and most recent abortion case. Instead of *Charter* analysis, the Court relied on the federal principle to decide the 1993 *Morgentaler* case. At issue was not the federal *Criminal Code* but rather Nova Scotia legislation - the *Medical Services Act* and *Medical Services Designation Regulation*[24] - which prohibited performing abortions outside of hospitals. Like the 1989 *Borowski* and *Tremblay* decisions, the Justices were unanimous. Nevertheless unlike those cases they declared the legislation *ultra vires*

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[23] In *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925, at para. 11 (McLachlin J.) which was a pregnancy intervention and not abortion case the Court relied on tort, not constitutional, law to hold that "the law of Canada does not recognize the unborn child as a legal or juridical person."

[24] *Medical Services Act*, R.S.N.S. 1989, c. 281; *Medical Services Designation Regulation*, N.S. Reg. 152/89.

the province, ruling it was blatantly directed at preventing Dr. Morgentaler from opening his free-standing abortion clinic and hence in pith and substance criminal law. However, as Justice Sopinka put it, "if the central concern of the present legislation were medical treatment of unwanted pregnancies and the safety and security of the pregnant woman, not the restriction of abortion services with a view to safeguarding the public interest or interdicting a public harm, the legislation would arguably be valid health law enacted pursuant to the province's general health jurisdiction." More emphatically he warned "there is no dispute that the heads of section 92 invoked by the appellant confer on the provinces jurisdiction over health care in the province generally, including matters of cost and efficiency, the nature of the health care delivery system, and privatization of medical services." Thus, the medical control of abortion was entrenched in provincial hands, prompting one law professor to remark "it may be that we have been released for the moment from the 'criminal' frying pan only to be burned by the 'health-care' fire."[25]

To summarize, the Supreme Court of Canada's jurisprudence resolved three major issues. First, though the Constitution is silent about abortion, the Court was prepared to recognize that it fell under the provincial health as well as the federal criminal legislative power. Second, the Court was willing to grant standing not just to a former boyfriend, but also to a pro life lobbyist who had no direct interest in the outcome of abortion litigation. Third, the fact that pregnant women were not parties did not preclude the Court from invoking their *Charter* right to security of the person to sustain the argument that the abortion law was unconstitutional. However, the abortion jurisprudence also left some important questions unresolved, two of which will be examined in what follows. First, what constitutional significance should the Court attach to the conservative criticism about deferring to Parliament? Second, what are the constitutional implications of the feminist challenge to the Court's reliance on section 7 rather than section 15 of the *Charter*? Answering these questions should reveal the constitutional crossroads, if any, to which the existing abortion jurisprudence directs us.

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[25] Shelley A.M. Gavigan, "Beyond *Morgentaler*: The Legal Regulation of Reproduction" in Brodie, Gavigan and Jenson, *supra* note 19, 117 at 145.

4. Judicial activism

The Canadian Constitution is silent about the right to abortion. This lacuna fuels the conservative criticism of the 1988 *Morgentaler* decision. These critics, virtually all of whom are political scientists, include Rainer Knopff, Christopher P. Manfredi, F.L. Morton and Bradley C.S. Watson.[26] Essentially they take the American originalist or interpretivist approach to *Charter* rights, maintaining that the Court had no basis for declaring section 251 unconstitutional given the *Charter* does not contain an explicit or a strong implicit right to abortion. Clearly there are other political scientists - for instance Janine Brodie, Jane Jenson, and Janet L. Hiebert[27] - who do not share their views. Unlike their brethren they recognized that the Court's reliance on the rights to security of the person and liberty was consistent with the interpretivist approach. Still the conservative criticism was not unprecedented; it had appeared in its entirety in Justice McIntyre's dissent when he first described *Charter* interpretation as purposive, meaning the "court is not entitled to define a right in a manner unrelated to the interest which the right in question was meant to protect." Qualifying this approach, he added it "does not mean that judges may not make policy choices when confronted with competing conceptions of the extent of rights or freedoms." That said, he was unable to find the requisite contest. As he put it, "save for the provisions of the *Criminal Code* ... no right of abortion can be found in Canadian law, custom or tradition, and that the *Charter*, including section 7, creates no further right." Thus Justice McIntyre concluded: "Parliamentary action on this matter is subject to judicial review but, in my view, nothing in the *Canadian Charter of Rights and Freedoms* gives the court the power or duty to displace Parliament in this matter involving, as it does, general matters of public policy."

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[26] F.L. Morton, *Morgentaler v. Borowski: Abortion, the Charter and the Courts* (Toronto: McClelland & Stewart Inc., 1992); F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills: Oxford University Press, 2001), 2d; and Bradley C.S. Watson, "The Language of Rights and the Crisis of Liberal Imagination" in Anthony A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Don Mills: Oxford University Press, 1996), 88-102.

[27] Brodie, *supra* note 19; Jane Jenson, "Getting to *Morgentaler*: From One Representation to Another" in Brodie, Gavigan, and Jenson, *supra* note 19, 15; and Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal & Kingston: McGill-Queen's University Press, 1996).

While his dissenting opinion provides a basis for attributing the label "judicial activism" to the 1988 *Morgentaler* decision something more is required to understand what the conservative critics meant by this term. Morton and Knopff defined it as "the judicial 'readiness to veto the policies of other branches of government' that, after 1982, replaced the contrary inclination to defer to the other branches."[28] Equating the term with "non-interpretivism," Manfredi explained theories about the latter "encourage judges to 'enforce norms that cannot be discovered within the four corners' of a constitution, and view constitutional adjudication as a creative task of identifying and applying novel rights, or novel interpretations of existing rights, to determine the validity of legislation."[29] For his part Watson said "that judicial activism itself is not, strictly speaking, the heart of the problem."[30] It is, rather, "merely one of the primary vehicles by which the new moral philosophy [late-twentieth-century self-expressive liberalism] insinuates itself into Canadian life."[31] As a concept, however, judicial activism originated neither in the twentieth century nor in Canada. As American law professor William P. Marshall observed, it has existed "in the lexicon of judicial critique throughout the past one hundred years" in the United States.[32] Given their more extensive experience therefore it is instructive to consider how Americans have conceptualized judicial activism.

Although some Americans believe it is a waste of time or misguided to ask if a decision is activist, Marshall disagreed. "The legitimacy of a particular decision cannot be completely appraised without evaluating the deciding court's methodology", and "[a]ctivism is a part of that inquiry."[33] Categorically rejecting the view that "[j]udicial activism means a decision one does not like,"[34] he proceeded to argue "there are indices of activism that can be applied to judicial decisions, which are sufficiently independent of result to support assertions that certain decisions are, or are not, activist."[35] In fact he identified seven such indices: counter-majoritarian activism, non-originalist activism, precedential activism, jurisdictional activism, judicial creativity,

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[28] Morton and Knopff, *supra* note 26 at 15 quoting Peter Russell, Rainer Knopff, and Ted Morton, *Federalism and the Charter: Leading Constitutional Decisions, A New Edition* (Ottawa: Carleton University Press, 1989) 19.
[29] Manfredi, *supra* note 26 at 25.
[30] Watson, *supra* note 26 at 98.
[31] *Ibid.*
[32] William P. Marshall, "Conservatives and the Seven Sins of Judicial Activism" [2002] 73 U.C.L.R. 1217.
[33] *Ibid.* at footnote 3 at 1217.
[34] *Ibid.*
[35] *Ibid.*

remedial activism, and partisan activism.[36] After separating out partisan activism by which he meant "allegiance to a political party" in cases like *Bush v. Gore*,[37] Marshall applied the first six indices to the jurisprudence rendered by the United States Supreme Court's conservative wing.[38] While he found that conservative Justices were activists on five of the first six indices (except remedial activism) what troubled him was not their unbridled activism but rather their unbridled hypocrisy. "The conservatives have loudly portrayed themselves," he reported "as the true constitutionalists."[39]

Arguably his analysis is equally applicable to the conservatives who criticize the 1988 *Morgentaler* decision. For instance Marshall explained the American abortion cases served to illustrate the conservative judiciary's adherence to precedential activism. "Deference to precedent has not been a conservative hallmark,"[40] he observed, pointing to the conservatives' explicit announcement that they would directly overrule *Roe* v. *Wade* if given the opportunity.[41] The Canadian parallels are the *Borowski* and *Tremblay* decisions which led conservatives to criticize the Court for not overturning the precedent set by the 1988 *Morgentaler* decision. Moreover, from the perspective of the conservative criticism of judicial activism, the *Borowski* decision is particularly hypocritical since it was Borowski who argued against mootness. Confronting a Court deciding whether to render a decision, Borowski, who spoke on behalf of the pro-life lobby, argued vehemently against leaving the matter to be decided by Parliament.

Overall, the lesson that Canadians can take from Marshall's analysis of judicial activism is not so much about conservative activism, or even about conservative hypocrisy. Rather his analysis clarifies two of the major controversies surrounding judicial activism. First, he made it possible to distinguish the determination of activism from that of merit by depicting only partisan activism as "an indefensible exercise of judicial power."[42] Second, and perhaps more

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[36] *Ibid.* at 1220.
[37] *Ibid.* at 1247.
[38] *Ibid.* at Footnote 23 at 1221 including "Justices Scalia, Thomas, Chief Justice Rehnquist and, at various times, Justices Kennedy and O'Connor."
[39] *Ibid.* at 1244, continuing: "While liberals purportedly manipulate doctrine, text, history, and precedent to achieve specific results, the conservatives are the self-proclaimed strict constructionists, guided only by fealty to timeless principles and strict allegiance to judicial restraint."
[40] *Ibid.* at 1232.
[41] *Ibid.* at 1233.
[42] *Ibid.* at 1254.

importantly, by defining judicial activism as more than the absence of judicial deference Marshall kept open the possibility of limits on legislative authority. Indeed only two of his indices - counter-majoritarian activism and non-originalist activism - portrayed judicial activism as the absence of legislative deference. The remaining four indices - precedential activism, jurisdictional activism, judicial creativity, and remedial activism - respectively imported reliance on precedent, respect for jurisdiction, creative application, and remedial inevitability. They are the main components of the process of legal reasoning that common law courts invoke to interpret and apply statutes. As such, they are vulnerable to ordinary legislative change, or even removal, just like any other common law rule. Marshall's generous interpretation notwithstanding, judicial activism never amounts to a significant, or constitutional, limitation on legislative authority. Thus the conservative critics' claim that the 1988 *Morgentaler* decision revealed the Court's preference for judicial activism may be indicative of a political (or even politico-legal), not a constitutional, crossroads.

Judicial activism aside, the conservative critics do not deny that we have a Constitution. For instance Manfredi accepts constitutions "must be limiting in the sense that they provide a structural and institutional framework that constrains government power without enervating it."[43] More particularly, they "set the rules that establish decision-making bodies, the procedures that govern their operation, and the boundaries that define the scope of their legitimate decision-making authority."[44] Acknowledging constitutions "often include declarations of substantive rights," Manfredi eschewed the idea of "'guaranteeing' those rights" contending that constitutions also "must be limited in the sense that they give the widest possible latitude of operation to the deliberative process."[45] His approach is consistent with John Hart Ely's earlier moderate form of non-interpretivism which "permits judicial creativity in reviewing the formal process of democratic decision-making, but not the substantive policy choices that emanate from that process."[46] Furthermore Manfredi's position is quite similar to Justice McIntyre's dissenting opinion in the 1988 *Morgentaler* decision, save only that the latter did not confine his reach to procedural matters. In other words, these three men advocated a form of constrained

[43] Manfredi, *supra* note 26 at 199.
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.* at 28.

constitutionalism wherein the only judicial review they were prepared to recognize was procedural (Ely/Manfredi) or originalist-interpretive (Justice McIntyre). Under these circumstances, their respective constraints limited their commitment to the separation of powers.

Yet their constrained approaches to the separation of powers bear only a nominal resemblance to the new separation of powers model that Ackerman recently proposed for countries that do not aspire to an American-style separation of powers.[47] He named Canada along with Germany, Italy, Japan, India and South Africa as among the countries that had effectively constrained the lawmaking powers of parliament without creating an independently elected presidency. Instead, these countries had dealt with the separation of powers by granting independence to a variety of other checking institutions, including a supreme or constitutional court. However, the label Ackerman attached to his new model, "constrained parliamentarianism," is an infelicitous choice of phrase. Even though its commitment to the separation of powers differentiates it from what the conservative critics revile as judicial activism, the term "parliamentarianism" evokes their preference for deference, or what Ackerman and Charney knew as parliamentary sovereignty. Further, Ackerman's use of "constrained" is qualitatively, and not simply quantitatively, distinguishable from the constrained approaches of Ely, Manfredi, and Justice McIntyre. While they constrained constitutionalism, Ackerman treated it as synonymous with constraint. In other words "constrained parliamentarianism" imports unnecessary baggage. From the Canadian perspective, therefore, Ackerman should not only consider renaming his new model but also resist conceptualizing it as consistent with popular sovereignty,[48] reserving the latter designation for the American-style separation of powers model.

5. Feminist challenge

Unlike conservatives, feminists have no quarrel with the outcomes of the Supreme Court of Canada's post-*Charter* abortion jurisprudence. Nor do feminists believe the 1988 *Morgentaler* decision was the result of judicial activism; rather, they assert that the majority opinions were

[47] Bruce Ackerman, "The New Separation of Powers" [2000] 113 Harv.L.Rev. 633.
[48] *Ibid.* at 729.

principled. However, they do not advert to the principle of human dignity, considering that principle somewhat overworked insofar as the Court has long held that it underlies the whole *Charter*,[49] as well as relying on it more recently to explain section 15 equality rights.[50] Instead they capture the uniqueness of section 7 by invoking the principles of liberty, autonomy or privacy. Since these principles all share the same basic negativity about state interference with individual lives, they tend to be used interchangeably to explain section 7. Accordingly I propose to adopt one - liberty - as representative, without suggesting that the principle of liberty is co-extensive with the right to liberty. The liberty principle underlies all of the rights - life, liberty and security of the person - that section 7 guarantees. As well, it encompasses that section's exception for the principles of fundamental justice. Thus feminists who share this understanding of the liberty principle believe it explains why section 251 of the *Criminal Code* was declared unconstitutional in the 1988 *Morgentaler* decision.

Nevertheless, they have serious reservations about relying on the liberty principle in future abortion litigation. Indeed, judges may share these concerns insofar as they did not invoke this principle to decide the five cases that arose after the 1988 *Morgentaler* decision when provincial governments - British Columbia, Manitoba, New Brunswick, Nova Scotia and Prince Edward Island - reacted to the de-criminalization of abortion by "erecting local barriers to access."[51] In each case the government used the provincial health insurance plan to limit funding to abortions performed within hospitals. The Supreme Court of Canada relied on the federal principle to strike down Nova Scotia's statute;[52] while lower courts struck down British Columbia and Manitoba's regulations and New Brunswick's policy by holding these exercises of delegated power were not authorized by their respective enabling statutes.[53] However, neither the federal principle nor the *vires* of subordinate legislation sufficed in the fifth and most recent case which involved a challenge to the validity of Prince Edward Island's Health Services Act

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[49] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136 (Dickson C.J.C.); *Blencoe, supra* note 21 at para. 76: "Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter*."

[50] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51 (Iacobucci J.).

[51] Gavigan, *supra* note 25 at 140-1.

[52] 1993 Morgentaler, *supra* note 4; see *Morgentaler v. New Brunswick (Attorney General)*, [1995] N.B.J. No. 40 (CA) also relying on the federal principle to strike down legislation that defined professional misconduct to include performing an abortion outside a hospital.

[53] *British Columbia Civil Liberties Association v. British Columbia (Attorney General)*, [1988] 24 B.C.L.R. (2d) 189 (SC); *Lexogest Inc. v. Manitoba (Attorney General)* (1993), 85 Man.R. (2d) 8 (CA); *Morgentaler v. New Brunswick (Attorney General)* (1989), 98 N.B.R. (2d) 45 (QB).

Regulation.[54] This Regulation was not struck down even though it defines "basic health services" to preclude payment for therapeutic abortion under the provincial health care plan unless in the Health and Community Services Agency's opinion the patient medically requires the abortion and it is performed in a hospital. Nor did the appellate court, unlike the trial court, advert to the fact that the Agency sought the advice of a Medical Advisory Committee of five physicians before deciding whether a pregnant woman medically required an abortion.[55] Thus we are left with two questions: why was the liberty principle not used to decide these five cases; and what does the Prince Edward Island decision portend?

The answer to the first question was provided by the dissenting opinion in the Manitoba case, the only opinion in all five of these cases to advert to section 7. Chief Justice Scott held the Regulation did not interfere with the right to security of the person. "It merely deals with payment", the Chief Justice wrote, it "does not prohibit or restrict abortions or mandate where they are performed." Similarly with respect to the second question there is no indication that the liberty principle would have changed the outcome of the Prince Edward Island decision even though the facts were different. "There are no hospitals in Prince Edward Island which perform abortions" asserted the dissent. While this fact might have forced the judges to acknowledge the Regulation infringed the right to security of the person it would not have precluded them from echoing the Manitoba dissent about access to abortion not being synonymous with payment for it. In other words, as long as a province treats access to abortion as a health or medical service that may be sufficient to comply with the principles of fundamental justice.[56] Effectively the liberty principle, particularly as manifested in the principles of fundamental justice, is very forgiving. Thus the answer to the second question is that the Prince Edward Island decision portends access to abortion in law without promising access in reality.

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[54] *Morgentaler v. Prince Edward Island (Minister of Health and Social Services)*, [1996] P.E.I.J. No. 75 (SCAD).
[55] *Morgentaler v. Prince Edward Island (Minister of Health and Social Services)*, [1995] P.E.I.J. No. 20 (SC).
[56] Martha Jackman, "Constitutional jurisdiction over health in Canada" (2000), 8 Health L.J. 95 at 114 concluded: "The requirement imposed by Justice Sopinka in the [1993] Morgentaler case, that provincial legislation be designed first and foremost to protect and promote individual and public health, rather than to deal with questions of crime or morality, is the only significant restriction on the provinces' health jurisdiction."

In 2003 the Canadian Abortion Rights Action League (CARAL) released a study on access to hospital-based abortion services in Canada.[57] In a previous research project CARAL had reported that in 1998 two-thirds of all abortions conducted in Canada (110,223) were performed in hospitals. While this statistic emphasized the significance of access to hospital abortion services, the 2003 study painted a bleak picture of those services. CARAL's research revealed that only 17.8% of all general hospitals in Canada perform abortions. Some provinces - Prince Edward Island and Nunavut - offer no hospital abortion services at all. Quebec has the highest percent of hospitals (34.8% or 112) offering abortion services; 23.4% (or 44) of Ontario hospitals provide them. In most other provinces only two or three hospitals provide abortion services. Even hospitals that provide abortions may have barriers to access involving gestational limits, physician referral requirements, physician approval requirements (New Brunswick requires two physicians), parental consent requirements (Saskatchewan), and waiting periods. Moreover, a telephone survey of hospitals revealed many cases where hospital employees were not able to provide useful information about their hospital's abortion services. There were other cases in which physicians and hospital employees refused information and referrals. Perhaps even worse, 15 of the hospitals surveyed referred women to anti-choice agencies. Finally the research revealed four provinces - Manitoba, Quebec, Nova Scotia and New Brunswick - that refuse to provide provincial health plan coverage for abortions performed in private clinics, while some other provinces use their health plans to cap the number of clinic abortions allowed or restrict the number of abortions performed in hospitals. "As a result of these restrictions," the CARAL study concluded, "there is no other medical procedure in Canada today that remains open to such state interference and has to be negotiated by women in need of medical treatment."

Irrespective of whether the future includes a federally reincarnated Bill C-43, the contemporary reality is that "provinces clearly play a large role in determining how accessible abortion services will be for Canadian women."[58] While they may play this role through hospital restructuring policies (e.g. the amalgamation of Catholic and non-Catholic hospitals could result in decreased access to abortion) or through limits on the development or expansion of private

[57] Canadian Abortion Rights Action League, *Protecting Abortion Rights in Canada* (2003) found at CARAL website: http://www.caral.ca/uploads/caralreporti.pdf (accessed 02/23/04).
[58] Claire Farid, "Access to Abortion in Ontario: From Morgentaler 1988 to the Savings and Restructuring Act" (1997), 5 Health L.J. 119 at 145.

clinics, the role of provincial health insurance plans looms very large since they define which medically services will be insured. In effect provincial Cabinet ministers or their delegates, not physicians and hospitals, may control the designation of which services are medically required. These politicians must comply with the provisions of the *Canada Health Act*[59] because the federal government can withhold transfer payments from a province that fails to comply.[60] However there are a number of reasons why "it would be a mistake to assume that the *Canada Health Act* can easily protect access to insured abortion services."[61] Nevertheless, some litigants, including Dr. Morgentaler, have initiated actions against three provincial governments - Manitoba, New Brunswick and Nova Scotia - for contravening the *Canada Health Act* by forcing women to pay for abortions in private clinics.

Inevitably this litigation will generate arguments about *Charter* section 15 equality rights. Most Canadian feminist legal theorists who have written about abortion - including Rebecca J. Cook, Shelagh Day, Claire Farid, Shelley A.M. Gavigan, Donna Greschner, Martha Jackman, Hester Lessard, Sheilah L. Martin, Moira McConnell and Sanda Rodgers[62] - have argued the Court should have invoked section 15 to decide the 1988 Morgentaler case. Similarly Catharine MacKinnon argued the American Supreme Court should have used equality to decide *Roe* v.

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[59] *Canada Health Act*, R.S.C. 1985, c. C-6; as complemented by the Canada Health and Social Transfer block grant set out in the *Budget Implementation Act*, S.C. 1995, c. 17.

[60] In 1995 the federal health minister withheld transfer payments from Alberta until it agreed to pay the full cost of an abortion regardless of where it is performed; and since 1995 the federal government has withheld a portion of its transfer payments to Nova Scotia because it refuses to pay facility fees in the province's only private clinic.

[61] Farid, *supra* note 58 at 141-2, citing S. Choudry, "The Enforcement of the *Canada Health Act*" (1996), 41 McGill L.J. 461. See also Melissa Haussman, *Abortion Politics in North America* (Boulder: Lynne Rienner Press, forthcoming 2004) ch. 3, describing shifting responsibilities under Canadian federalism and their effects on women's access to abortion services.

[62] Rebecca J. Cook and Bernard M. Dickens, "Human Rights Dynamics of Abortion Law Reform" (2003) 25 Hum.Rts.Q. 1; Shelagh Day and Stan Persky, eds., *The Supreme Court of Canada Decision on Abortion* (Vancouver: New Star Books Ltd., 1988); Farid, *supra* note 58; Gavigan, *supra* note 25; Donna Greschner, "Abortion and Democracy for Women: a Critique of *Tremblay* v. *Daigle*" (1990) 35 McGill L.J. 633; Martha Jackman, "The Application of the Canadian Charter in the Health Care Context" (2000) Health L.R; Hester Lessard, "Relationship, Particularity, and Change: Reflections on *R.* v. *Morgentaler* and Feminist Approaches to Liberty" (1991) 36 McGill L.J. 263; Hester Lessard, "The Construction of Health Care and the Ideology of the Private in Canadian Constitutional Law" (1993) 2 Ann. Health L. 121; Hester Lessard, "Siberian Tigers and Exotic Birds: Ronald Dworkin's Map of the Sacred" (1994) 17 Dalhousie L.J. 222; Sheilah L. Martin, "*Morgentaler* v. *The Queen* in the Supreme Court of Canada" (1987-8) 2 C.J.W.L. 422; Sheilah L. Martin, "Abortion Litigation" in Radha Jhappan, ed., *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 335; Moira McConnell, "Abortion and Human Rights: An Important Canadian Decision" (1989) 38 Int.& Comp. L.Q. 905; Moira McConnell, "'Even by Commonsense Morality': *Morgentaler, Borowski* and the Constitution of Canada" (1989) 68 C.B.R. 765; Sanda Rodgers, "The Legal Regulation of Women's Reproductive Capacity in Canada" in Jocelyn Downie, Timothy Caulfield and Colleen Flood, eds., *Canadian Health Law and Policy* (Markham: Butterworths, 2002) 2d., 331.

Wade instead of relying on privacy which "presumes that government nonintervention into the private sphere promotes a woman's freedom of choice."[63] Relegated to the private sphere, women do not control reproduction. "Virtually every ounce of control that women won" in *Roe* v. *Wade*, MacKinnon explained, "has gone directly into the hands of men - husbands, doctors, or fathers - or is now in the process of attempts to reclaim it through regulation."[64] Since the law of privacy exists to protect the "existing distribution of power and resources within the private sphere"[65] that includes prevailing gender inequalities. Thus women must invoke equality not privacy to challenge the sexual and reproductive inequalities that exist in the private sphere, including those caused by limits on access to abortion.

MacKinnon is not especially optimistic about the outcome of equality arguments given "the pervasive assumption that conditions that pertain among men on the basis of gender apply to women as well - that is, the assumption that sex inequality does not really exist in society."[66] Perhaps the Supreme Court of Canada might adopt the contrary assumption in light of the warning delivered by Madame Justice Wilson in her 1988 *Morgentaler* opinion that: "It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heat of the dilemma."[67] After all, when it comes to applying *Charter* section 15 equality rights to provinces that do not cover the cost of abortion, as Professor Martha Jackman has argued, the legal analysis is straightforward.[68] "You have a service that is required by women, and because of minority opposition to reproductive choice, you have no access. And that is unconstitutional."[69]

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[63] Catharine A. MacKinnon, "Privacy v. Equality: Beyond *Roe v. Wade* (1983)" in Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) 100.
[64] *Ibid.* at 101.
[65] *Ibid.*
[66] Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) 163.
[67] 1988 Morgentaler, *supra* note 3 at171.
[68] Laura Eggertson, "Abortion services in Canada: a patchwork quilt with many holes" (2001) 164 (6) Cdn. Med. Assn. J. 847 at 849 reporting an interview with Professor Jackman.
[69] *Ibid.*

Effectively what these feminist legal theorists challenge the Justices to explain is their silence about equality rights in abortion jurisprudence. By invoking both sections 7 and 15 litigants like Dr Morgentaler invited the Court either to use both or to make a choice. When the Court opted for section 7 while remaining silent about section 15, the result was a hierarchy of rights that disavowal elsewhere failed to obscure. However the feminist challenge is not only to the Court's preference for section 7. Feminists also challenge the Justices to articulate the distinctive principles that underlie sections 7 and 15. Feminists do not need to deny that both sections are rooted in the principle of human dignity to maintain that principle does not explain their distinctiveness. Nor do feminists dispute the assumption that the liberty principle underlies section 7 while the equality principle underlies section 15. Rather, feminists seek an explanation of the differences between the liberty and equality principles. Accordingly, were the Justices to respond, they would have to begin by acknowledging this feminist-identified controversy is a constitutional issue.

As such, the most likely starting point for identifying differences between the liberty and equality principles are the distinctive legal traditions from which they each derive. Liberty is an ancient common law principle honoured for as long as liberalism has been the prevailing legal regime. It can be traced back through Great Britain to times when the custom of the people often served as the basis for legal decision making. In contrast, equality is often known as a second generation right or principle, one whose appearance on the world stage began at or after the middle of the twentieth century with the creation of international instruments and domestic legislation prohibiting discrimination. Indeed, the United States Bill of Rights has protected some equality rights for several centuries, as has constitutional legislation in France. However, the significant feature that distinguishes the equality principle is less its durability, which tends to be relatively recent, but rather its formulation in written formats such as ordinary legislation, constitutional laws and international instruments. Primarily, in other words, equality emanates from legislators' decisions, whereas liberty comes to us from the people via the judiciary. Therefore, from one perspective the controversy posed by the equality and liberty principles is simply the longstanding legal issue about the relationship between statutory and common law.

From another perspective, namely that of Ackerman and Charney, the feminist-identified contest between liberty and equality implicates a different controversy from the one between parliamentary and popular sovereignty. Preferring liberty may well be consistent with preferring popular sovereignty, given the latter's focus on mobilizing We the People seems virtually indistinguishable from liberty's manifestation as the mobilized customary or common law of the people. However preferring equality is not consistent with popular sovereignty's task of mobilizing We the People because equality's statutory origins suggest it is oriented more to legislators. Also, preferring equality is not synonymous with parliamentary sovereignty, or with deference, because feminists and others invoke equality to achieve substantive results. They urge the Justices to invoke substantive and not formal equality to mobilize legislators to promote equality in addition to suppressing discrimination. Moreover, since there is nothing remotely deferential about mobilization, irrespective of whether its target group is legislators or We the People, I propose to name this new equality-inspired approach as "substantive sovereignty." Thus, I argue that the feminists who challenged the Court's failure to use the equality principle to decide abortion jurisprudence have identified a constitutional controversy about popular versus substantive sovereignty.

6. Conclusion

The feminist-identified constitutional controversy differs not only from the one propounded by conservative political scientists but also from the one that Ackerman and Charney described as parliamentary versus popular sovereignty. On the one hand, the feminist law professors espoused a principled approach which has absolutely nothing in common with the conservatives' unprincipled controversy about judicial activism versus deference. On the other hand, while they share Ackerman and Charney's concern for the separation of powers, only the feminist controversy about liberty versus equality evokes two distinct separation of powers approaches. Accepting judicial review as given and focusing on the competing *Charter* principles that inform the Supreme Court of Canada's abortion jurisprudence, the feminist legal scholars who prefer the equality principle contend that the judiciary must justify their preference for the liberty principle. This justification must address the only remaining separation of powers controversy, namely to whom are judicial decisions addressed. Their choices are twofold: preferring liberty is consistent

with judicial decisions that mobilize We the People (or popular sovereignty), while judicial decisions that prefer equality seek to mobilize legislators (or substantive sovereignty).

From the separation of powers perspective the controversy between popular and substantive sovereignty arguably represents the only constitutional crossroads that confront contemporary Canadians. Perhaps it displaced the controversy between parliamentary and popular sovereignty that Ackerman and Charney identified two decades ago. Alternatively perhaps their American-inspired preference for We the People simply will not transfer to and take root in Canadian constitutional soil. Either way, the feminists who challenged the Canadian Supreme Court's abortion jurisprudence more accurately evoked our current constitutional controversy. Sooner or later the Court will have to explain the difference between the liberty and equality principles, and the constitutionally component of this explanation will evoke what remains of the separation of powers controversy, namely which target group – We the People or legislators – the judges propose to mobilize. Following in the footsteps of the feminist legal scholars who analyzed the Court's abortion jurisprudence, therefore, I conclude that the judges should aspire to mobilize legislatures in support of equality of access to abortion for women.