ARTICLE III, SECTION 2, EXCEPTIONS CLAUSE CANADIAN CONSTITUTIONAL PARALLELS: CANADA TEACHES THE UNITED STATES AN AMERICAN HISTORY LESSON

GEORGE STEVEN SWAN*

Congress has recently considered implementing restrictions on the jurisdiction of the federal judiciary, including the Supreme Court, under the Exceptions Clause[1] of article III, section 2. The following discussion will delineate the misgivings of prominent American legal critics concerning the proposed restrictions, which they believe may result in a checkerboard or patchwork quilt constitution or bill of rights. Three issues will be raised in perspective of these misgivings: (1) whether a checkerboard constitution (or bill of rights) contradicts the basic premises of federalism; (2) whether the framers and ratifiers of article III actually envisioned such a checkerboard constitution; and, (3) whether such an envisioning thereof on their part actually attracted them to the Exceptions Clause.

It will be shown that during the evolution of Canada (also a primarily common law, federal nation-state), a similar prospect for a Canadian checkerboard Constitution through 1981 and 1982 was exemplified. It will be demonstrated that the newly patriated Canadian Constitution embraces new guarantees of freedoms analagous to such guarantees in the United States Bill of Rights and fourteenth amendment. Also, it will be seen that this newly patriated Canadian instrument embraces a Notwithstanding Clause

* B.A., Ohio State University; J.D., University of Notre Dame School of Law; LL.M., S.J.D. candidate, University of Toronto Faculty of Law; Member, Ohio Bar; Assistant Professor, The Delaware Law School of Widener University.

1. The Exceptions Clause provides that "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. Analyses of the proposed restrictions mentioned in the text are found in *Oversight Hearings to Define the Scope of the Senate's Authority under Article III of the Constitution to Regulate the Jurisdiction of the Federal Courts Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong., 1st Sess. (1982). For further discussion on "court stripping" see generally *Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893-1076 (1982).

which is not dissimilar to the Exceptions Clause of article III, section 2.

These Canadian current events are measured against the period of the framing of the United States Constitution and Bill of Rights to reveal that both eras embraced a "go-it-alone" option seriously weighed by one or more major units in the federal system. Also, both eras embraced an enunciated constitutional unit veto over the two new constitutional instruments in 1787 America and 1982 Canada respectively. This enunciation was more clear in the American instance. United States lawyers can easily comprehend (given interprovincial and provincial-federal tensions) the 1982 inclusion of the Notwithstanding Clause in the Canadian Constitution, not despite, but because of the prospect of a checkerboard constitution. Therefore, American attorneys can more readily accept that the 1787 inclusion in article III, section 2 of the Exceptions Clause was actually desired by framers who (given interstate and anticipated state-federal tensions) welcomed the option of a checkerboard constitution, to be chosen if necessary.

I. AN AMERICAN CHECKERBOARD CONSTITUTION

The perceived danger of a congressional restriction of the jurisdiction of the Supreme Court producing a checkerboard constitution interpreted differently from state to state has alarmed numerous legal commentators. Many have quoted the words of Alexander Hamilton in Number 80 of *The Federalist* papers:[2]

> The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.[3]

As the former president of the American Bar Association (ABA), Robert W. Meserve, argued during 1982:

> Despite all the efforts of state judges to apply federal law accurately, having fifty different judicial systems determine these questions will result in a broad lack of uniformity of decision in cases in which basic rights should be protected. The final consequence of the delay and lack of uniformity will be that the public

2. THE FEDERALIST No. 80 (A. Hamilton).

3. THE FEDERALIST No. 80, at 406 (A. Hamilton) (M. Beloff ed. 1948). Applying this passage to article III, § 2, "checkerboard constitution" disputes is to invoke it slightly off-point. Hamilton is arguing generally "the propriety of the judicial power of a government being coextensive with its legislative" power. *Id.*

> will lose confidence in the administration of justice and will no longer feel able to rely on the Constitution as a rational source of protection for basic rights.[4]

The current president of the ABA, David R. Brink, during 1982, agreed with Meserve: "At best, we would have fifty federal constitutions—one for each state";[5] and again: "I cannot believe that any American today really wants a league of states rather than a nation."[6]

ABA Young Lawyers Division Chairperson C. Edward Dobbs, during 1982, joined in the Meserve and Brink worries over jurisdictional restrictions upon the federal judiciary, including the Supreme Court, primarily due to Dobbs' fears of a checkerboard constitution:

> [B]y stripping the Supreme Court of its authority to pass upon constitutional issues, the Constitution would be reduced to a hodgepodge of inconsistent interpretations by the state courts, and the scope and extent of constitutional rights would vary depending upon one's place of residence. As Chief Justice John Marshall noted in 1821, "The necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all

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4. Meserve, *Limiting Jurisdiction and Remedies of Federal Courts*, 68 A.B.A.J. 159, 161 (1982).

5. Brink, *Necessity Must Yield to the Constitution*, 21 JUDGES' J., Winter 1982, at 12, 15. "This has become one of the most significant issues of Mr. Brink's presidency, one on which he has focused a great deal of attention." Correspondence with ABA Assistant Staff Director Nancy Cowger Slonim (Apr. 30, 1982).

6. Brink, *supra* note 5, at 15. Brink wrote:

> Abraham Lincoln strongly disagreed with the *Dred Scott* decision of the United States Supreme Court. Yet he said of the Court: "We think its decisions on constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution."

Id. Brink quotes but does not cite A. LINCOLN, *Speech at Springfield, Illinois* (June 26, 1858), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 398, 401 (R. Basler ed. 1953). Meserve had quoted the same Lincoln paragraph more fully. Meserve, *supra* note 4, at 161. Brink and Meserve's readers would believe Lincoln felt that the *Dred Scott* opinion was "fully settled" and should therefore be obeyed; yet on the same page Lincoln asserts that because *Dred Scott* is wanting in "claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful to treat it as not having yet quite established a settled doctrine for the country." *Id.* Lincoln exactly two weeks later would say: "If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, *in spite of that Dred Scott decision, I would vote that it should*." A. LINCOLN, *Speech at Chicago, Illinois* (July 10, 1858), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 495 (R. Basler ed. 1953) (emphasis added).

cases in which they are involved."[7]

In 1982, John Shattuck and David Landau, both of the American Civil Liberties Union, concurred in these ABA fears:

> The judicial crisis created by this legislation would be compounded, not reduced, by the fact that state courts would remain open to hear cases involving constitutional issues removed by Congress from the federal courts. Instead of one "law of the land," there would be fifty different interpretations of what the national Constitution requires. State and local judges and officials will see this as a signal that they need not follow the rules and principles developed by the federal judiciary to give nationwide meaning to the Constitution and the Bill of Rights.[8]

These 1982 concerns of the official legal establishment and legal practitioners merely echo those long since expressed by legal scholars. William W. Van Alstyne, in 1973, averred that:

> [T]he general inexpediency of a headless inferior federal judiciary or an array of final state courts—brought about by lopping off the means of reconciling conflicting interpretations of national law and of the Constitution short of the Supreme Court—must not be discounted as a major restraining influence upon the practical use of the exceptions clause.[9]

Irving Brandt during that same year admitted that the Exceptions Clause of article III, section 2:

> appears to confer unlimited power upon Congress to take away the appellate jurisdiction of the Supreme Court. Under that interpretation it would be possible to deny litigants Supreme Court review in cases involving bills of attainder, *ex post facto* laws, freedom of speech, press and religion, unreasonable search and seizure, equal protection of the laws, right to counsel, and compulsory self-incrimination. In short, Congress could blot out the entire Bill of Rights, so far as the establishment of nationwide judicial standards is concerned. Could the framers of the Constitution have intended to vest Congress with such power of wholesale destruction?[10]

During 1965, the widely-respected Professor Herbert Wechsler

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7. Dobbs, *Don't Strip Court of Authority to Pass Upon Constitutional Issues*, 9 BARRISTER, Winter 1982, at 2.

8. Shattuck & Landau, *Court-Stripping: A New Way to Rewrite the Constitution*, 21 JUDGES' J., Winter 1982, at 16, 18.

9. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 269 (1973).

10. Brandt, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 ORE. L. REV. 3, 5 (1973).

of Columbia University School of Law expressed his misgivings over the checkerboard resolution of issues if all federal jurisdiction is withdrawn, inasmuch as "the resolution is perforce left to the courts of fifty states, with . . . greater probability of contrariety in their decisions. How long would you expect such inconsistency in the interpretation of the law of the United States to be regarded as a tolerable situation?"[11]

Limitations on the appellate jurisdiction of the Supreme Court had already been protested, relative to the possibility of checkerboard federal constitutional rights:

> If the federal courts were not open to protect these rights, federal constitutional guarantees would be at the mercy of the states, with the result that a constitutional right might be recognized in one state and not in another. Then the action on the part of Congress, rendering the federal courts powerless to protect these rights and secure uniform treatment for the parties seeking to assert them, would seem to offend due process.[12]

With myriad warnings in the legal literature against the supposed menace of a checkerboard constitution, it is little wonder that even the general public could read in the mass circulation press by 1982:

> Should Congress prevail, cases involving social issues would be left to state courts. That is hardly comforting, least of all to the state courts; the chief judges of all fifty have urged Congress to reject the court-stripping bills. The results could be a whittling away of individual rights as well as a judicial hodgepodge. The Constitution, warns Senator Dale Bumpers of Arkansas, "will mean one thing in Maine and another in Arkansas."[13]

The foregoing lengthy chain of cautions against a checkerboard constitution is presented to highlight dramatically the fears hitherto expressed within the profession over this point. Is a checkerboard constitution (or at least, a checkerboard bill of rights) so absurd as to be inconsistent with the logic of democratic federalism? Could an article III, section 2 provision for a checkerboard constitution have been in the front of the minds of the framers and ratifiers of our Constitution of 1787? If so, could that article III, section 2 provision for a checkerboard constitution unequivocably

11. Wechsler, *The Courts and the Constitution,* 65 COLUM. L. REV. 1001, 1006 (1965).

12. Note, *Limitations on the Appellate Jurisdiction of the Supreme Court,* 20 U. PITT. L. REV. 99, 114 (1958).

13. Press, *Congress's Court Strippers*, NEWSWEEK, Apr. 19, 1982, at 67.

have proved an actual asset thereof in the appraisal of its framers and ratifiers?

II. A CANADIAN CHECKERBOARD CONSTITUTION

Canadian Prime Minister Pierre Elliott Trudeau, in early November 1981, confronted various provincial governments opposing his own federal government's efforts to patriate the Canadian Constitution from the United Kingdom to Canada.[14] One critical issue in the years-long friction over patriating a new constitution for Canada had been the proposed post-patriation amendment processes, including the problem of whether a province would be allowed to "opt out" from application of any of those subsequent, post-patriation amendments.

Prime Minister Trudeau was reported in a prominent sector of the Canadian press to object to any prospective checkerboard constitution for his nation:

> There is an . . . important principle at stake. As the country's made-in-Canada constitution (assuming it is brought home) evolves in the years ahead to meet new challenges and changing circumstances, should the document embody a single set of national values for all citizens or should it be a constitution that varies from province to province?
>
> Trudeau's answer has always been unequivocal. He does not want a "checkerboard Canada."
>
> The provinces have been equally firm. They don't want a constitution so inflexible that it doesn't respond to each region's special needs and values.[15]

As it transpired, Prime Minister Trudeau would ultimately accept a patriated Canadian Constitution which, in American terms,

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14. "One of Trudeau's chief goals in seeking a home-grown constitution was to strengthen Canada's relatively weak central government. That was precisely why he faced stubborn opposition from the country's ten provincial premiers, who retain primary control over natural resources, education and health." *A Symbol of Sovereignty*, TIME, Apr. 26, 1982, at 41.

15. Goar, *Vancouver plan returns to haunt Trudeau*, Toronto Star, Nov. 4, 1981, at A16, col. 6. In the event that the Notwithstanding Clause ultimately was added to Canada's new Charter of Rights and Freedoms:

> It raised the possibility that Prime Minister Trudeau had always dreaded in public, of a "checkerboard quilt" of human rights throughout Canada in which some rights might be in force, at any one time, in one province but not in another. The legal spectre thus emerged of the condition described by Voltaire in his depiction of eighteenth-century France: one changed one's law every time one changed one's horse in traveling from one part of the country to another.

E. MCWHINNEY, CANADA AND THE CONSTITUTION 1979-1982: PATRIATION AND THE CHARTER OF RIGHTS 97 (1982).

expressly allows for a state-by-state checkerboard bill of rights.[16] As to this point the Prime Minister would recognize: "Some things were given up in order to constitutionalize the amending process. The things that I gave up—some of them made me sad."[17]

III. PARALLEL UNITED STATES/CANADIAN CONSTITUTIONAL LIBERTIES

The signature of Queen Elizabeth II to the Constitution Act, 1982 (this in her capacity as Queen of the United Kingdom),[18] and her proclamation that brought into force the Constitution Act, 1982 (this in her capacity as Queen of Canada)[19] on April 17, 1982, was

16. This is true not only of the document as currently written, but relative also to subsequent amendments:

> Among whereases and notwithstandings in the rest of the 60-section act, there are seeds for flowers—and for weeds. An amending formula that eluded politicians nine times since 1927 now permits constitutional changes in Canada with the approval of Parliament and seven provinces, representing 50 per cent of the population. But up to three legislatures can opt out, producing a scenario for the checkerboard Canada that Trudeau once lamented.

Lewis, *Rebirth of a Nation*, MACLEANS, Apr. 26, 1982, at 30.

The New Constitutional resolution encompasses these main elements:

> Essentially the same Charter of Rights that was hammered out by the special joint parliamentary committee last winter but it now has been made subject to a legislative override clause that allows Parliament and provincial assemblies to pass legislation contradicting the charter on fundamental, legal and equality rights.
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> An amending formula worked out by eight provinces (including Quebec) last spring through which seven provinces representing 50 per cent of the population and the federal Government could bring about constitutional change. Under this formula as many as three provinces could opt out of future changes that affected their rights, boundaries or powers.

Sheppard, *Won't abandon Quebec, PM says of constitution,* Globe and Mail (Toronto), Nov. 19, 1981, at 1, 2, col. 5.

17. Gray, *Resolution is unveiled, but Trudeau is bitter at compromises*, Globe and Mail (Toronto), Nov. 19, 1981, at 1, col. 5.

> The compromise deal allows the Trudeau government to set up a new constitution, including a controversial bill of rights and an amending formula for making future changes to the constitution. But it also allows the provinces to nullify the bill of rights provisions within their own boundaries if they so want.
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> The arrangement was a stunning compromise for Mr. Trudeau, who in the past has rejected these so-called opting out provisions as likely to create a "checkerboard Canada" where fundamental civil and democratic rights are guaranteed in some provinces but not in others.
>
> Even so, winning a deal at this conference is seen as a great triumph for Mr. Trudeau, who precipitated the current crisis last fall by saying he would write a new Canadian constitution without the help of the 10 provinces.

Milne, *Trudeau gets go-ahead to write a new constitution*, CHRISTIAN SCI. MON., Nov. 6, 1981, at 4, col. 2.

18. CAN. EMBASSY PUB. AFFAIRS DIV., THE ROLE OF THE MONARCHY AND THE CANADIAN CONSTITUTION (Apr. 1, 1982).

19. *Id.* Nonetheless, a British legal scholar's characterization of the Queen might not be fully in accord with the characterization of her by the Canadian Embassy:

> To say that the Queen is Queen of Canada is not quite correct. She is Queen of all

almost simultaneous with the April 1982 American popular reports about the weighing by Congress of the proposed article III initiatives.[20] This newly Canadianized federal constitution embraces salient features familiar in outline to United States attorneys.

The Constitution Act, 1982, encompasses, *inter alia*, the new Canadian Charter of Rights and Freedoms.[21] An American lawyer might style section 2 of this justiciable[22] Canadian Charter of Rights and Freedoms [23] the Canadian first amendment:

> Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and, (d) freedom of association.[24]

An American lawyer might denominate section 7 of the Canadian Charter of Rights and Freedoms the Canadian Due Process Clause: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[25]

A United States attorney might characterize section 10 of the Canadian Charter of Rights and Freedoms as the *Miranda*[26]

> the territories that admit allegiance to her; she is one Queen and not a score of queens. This may read like metaphysics, but in fact metaphysics has been avoided. The Queen is a person and not an institution, and so she is one Queen. She has a score or more of governments, governing in her name.

I. JENNINGS, THE QUEEN'S GOVERNMENT 37 (rev. ed. 1967).

20. Press, *supra* note 13, at 67.

21. "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONSTITUTION ACT, 1982, § 1. The Charter has been called the "carta canadiana." Beaudoin, The "Patriation" of the Canadian Constitution 6 (Feb. 21, 1982)(unpublished manuscript).

> 22. The Charter—with its lofty and often inspiring litany of high principles and protections—will soon be required reading for generations of proud schoolchildren. But, in the short haul, since the perplexed courts must spell out what those general rights mean in practical terms, the document has also spawned a thriving cottage industry for the legal profession. Litigation will spread like wildfire. Legal proceedings may balloon with intricate arguments and novel cases may mushroom.

Janigan, *For this is the law and the profits*, MACLEANS, Apr. 26, 1982, at 34.

> 23. The Charter will enable the courts to determine whether a federal or provincial law is commensurate with it and to declare inoperative any legislative measures that contravene it. The criterion is that which "can be demonstrably justified in a free and democratic society." The rights and freedoms can be limited only by rule of law, within limits that are reasonable and that can be justified in the context of a free and democratic society. The Bill applies to all legislation past, present or future.

Id., *quoting* CAN. CONSTITUTION ACT, 1982, § 1.

24. CAN. CONSTITUTION ACT, 1982, § 2.

25. *Id.* at § 7.

26. Miranda v. Arizona, 384 U.S. 436 (1966). An exclusionary rule is afforded in Con-

Amendment:

> Everyone has the right on arrest or detention: (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and, (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.[27]

An American lawyer might style section 15(1) of the Canadian Charter of Rights and Freedoms the Canadian Equal Protection Clause, plus a touch of *Frontiero v. Richardson*:[28]

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[29]

An American attorney might denominate section 15(2) of the Canadian Charter of Rights and Freedoms the Canadian *Bakke*[30] Amendment:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvan-

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stitution Act, 1982, § 24(2). Healy, *Police interrogation and the charter of rights*, Globe and Mail (Toronto), Nov. 27, 1981, at 7, col. 1, 2.

27. CAN. CONSTITUTION ACT, 1982, § 10.

28. Four Justices of the United States Supreme Court (Brennan, Douglas, Marshall and White) in *Frontiero v. Richardson*, 411 U.S. 677, 682-91 (1973), supported fourteenth amendment strict scrutiny of sex discrimination cases, which scrutiny supposedly would have had the effect of enacting the Equal Rights Amendment. For the purportedly inside story of the Supreme Court's *Frontiero* decision, see B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 253-55 (1979). The fourteenth amendment, of course, explicitly anticipates gender discrimination, even on the most sensitive matters in a republic, referring relative to the ballot to "male inhabitants" and (repeatedly) "male citizens." U.S. CONST. amend. XIV, § 2.

29. CAN. CONSTITUTION ACT, 1982, § 15(1). What an American attorney would style the Canadian Equal Rights Amendment is § 28: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." The sex discrimination features of Canada's patriated Constitution triggered last-minute controversy. Toronto Star, Nov. 4, 1981, at A17, col. 1; Sheppard, *supra* note 16, at 1, col. 2. The abortive twenty-sixth amendment to the United States Constitution, in controversy between its March 22, 1972, Senate passage and its June 30, 1982, extended ratification deadline, read:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
> Section 3. The amendment shall take effect two years after the date of ratification.

S.J. Res. 8, 92nd Cong., 1st Sess. (1971); S.J. Res. 9, 92nd Cong., 1st Sess. (1971); H.R.J. Res. 208, 92nd Cong., 1st Sess. (1971).

30. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

taged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[31]

Other portions of the Canadian Charter of Rights and Freedoms an American lawyer can easily identify with either specific provisions of the United States Bill of Rights or with the type of liberty generally guaranteed Americans via the Bill of Rights or the fourteenth amendment:

8. Everyone has the right to be secure against unreasonable search and seizure.
9. Everyone has the right not to be arbitrarily detained or imprisoned.

. . . .

11. Any person charged with an offence has the right
(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incrim-

31. CAN. CONSTITUTION ACT, 1982, § 15(2).

inate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.[32]

It is not remarkable that the new Canadian Charter of Rights and Freedoms should appear to be substantially derived from the American Bill of Rights,[33] just as the latter derived in large part from George Mason's Virginia Bill of Rights of June 12, 1776,[34] and even as the Virginia Bill of Rights appeared to be derived in part from the English Bill of Rights of 1689.[35] But of what relevance is the close resemblance between the new Canadian Charter of Rights and Freedoms on the one hand and the American Bill of Rights and fourteenth amendment on the other?

IV. THOSE PARALLEL EXCEPTIONS CLAUSE/NOTWITHSTANDING CLAUSES

Just as the Canadian Charter of Rights and Freedoms parallels the United States Bill of Rights, the Notwithstanding Clause in this new Canadian instrument parallels the Exceptions Clause of article III, section 2. The Charter's section 33(1) provides:

> Parliament or *the legislature of a province may expressly declare in an Act* of Parliament *or of the legislature*, as the case may

32. *Id.* §§ 8, 9, 11-14. An American lawyer might style § 26 of the Canadian Charter of Rights and Freedoms the Canadian ninth amendment: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." *Id.* at § 26.

33. "When the Constitution Act, 1982, is implemented, Canada will have a charter of rights and freedoms that will be an integral part of its Constitution, like the Bill of Rights in the United States. A constitutional amendment will be required to change it." Beaudoin, *supra* note 21, at 5. On the other hand, the text thereof suggests that the new Canadian Charter of Rights and Freedoms directly derives from the strictly statutory 1960 Canadian Bill of Rights. Bill of Rights, 8 & 9 Eliz. 2, ch. 44 (1960); Hudon, *The British North America Act and the Protection of Individual Rights: The Canadian Bill of Rights*, 9 VAL. U. L. REV. 273 (1975). (This former student of Professor Abel notes that Hudon styles the late, great Dr. Albert Abel of the University of Toronto Faculty of Law "a Canadian." *Id.* at 300 n.137. But Abel then always had been an American, embracing Canadian citizenship only years later.)

34. Polin, *George Mason: Father of the Bill of Rights*, THE FREEMAN, Dec. 1981, at 734, 736-37; B. MITCHELL & L. MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES: ITS ORIGIN, FORMATION, ADOPTION AND INTERPRETATION 190-91 (1964).

35. SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 223 (L. Perry ed. 1972).

be, *that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15* of this Charter.[36]

Should Congress choose to remove the relevant jurisdiction from the federal judiciary, including the United States Supreme Court, under the Exceptions Clause of article III, section 2, a state supreme court becomes the ultimate arbiter therein of the still-binding federal Constitution. Under the new Canadian Charter's Notwithstanding Clause (section 33) each province, through a simple legislative enactment, can curtail the reach of the Charter of Rights and Freedoms. No time-consuming litigation through the provincial judicial system is required. Nor, for that matter, is any preliminary enactment required of the federal legislature in Ottawa corresponding to the article III, section 2, Exceptions Clause restriction of jurisdiction by the Congress. The Notwithstanding Clause of the Canadian Constitution's new Charter allows, even more obviously than does the Exceptions Clause, for a checkerboard constitutional protection of human rights.[37] The very week

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36. CAN. CONSTITUTION ACT, 1982, § 33(1) (emphasis added). Section 33 continues:

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Not dissimilarly, § 38(3) provides for opting out relative to subsequent constitutional amendments:

An amendment . . . shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Id. at § 38(3).

37. However—and this is an innovation—the Canadian *Charter of Rights and Freedoms*, or the "carta canadiana," has what is known as a "notwithstanding" clause applied to quite a few of its parts. These parts refer to fundamental rights, legal guarantees and equality rights, except for women, where the "notwithstanding" clause does not apply. Parliament and the legislatures, each acting in their jurisdictions, can derogate from this Charter, provided that they expressly state in their laws that they are doing so. Such derogation is valid only for five years. To extend its duration, it is necessary to repeat the express declaration required by section 33.

. . . .

The fundamental freedoms, such as freedom of conscience and religion, freedom of the press and freedom of assembly are guaranteed, but there is a clause under which it is possible to derogate from them. The same is true for the legal rights.

Beaudoin, *supra* note 21, at 6.

that Queen Elizabeth signed the Constitution Act, 1982, the government of Quebec was preparing legislation to exempt Quebeckers from some provisions of the Charter of Rights and Freedoms.[38]

V. PARALLEL "GO-IT-ALONE" ALTERNATIVES

A. 1981-1983 Canada

Interprovincial tensions indeed obtained in Canada immediately prior to the Constitution Act, 1982, just as interstate tensions obtained in the United States immediately prior to the adoption of the Constitution. It was reported on October 21, 1981, that Prime Minister Trudeau had agreed to meet with the provincial premiers in early November for "one final attempt"[39] to reach an agreement on constitutional reforms. This offer to meet was part of a blunt ultimatum from the Prime Minister to the provinces,[40] Trudeau warning that "it is evident to all of us, and to the Canadian people, that the time has come when this issue must be settled once and for all."[41]

The resulting conference of November 2, 1981, in the words of

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38. Beirne, *The few who stayed out in the cold*, MACLEANS, Apr. 26, 1982, at 36. But as the University of Toronto Department of Political Economy's renowned Professor Peter H. Russell has pointed out:

> The effect of the legislative override in diminishing judicial power should not be overestimated. Legislators who contemplate recourse to the notwithstanding clause will face some powerful political disincentives. Experience with judicial interpretation of statutes and judicial development of the common law demonstrates how difficult it may be for a legislature to counter the policy fall-out of judicial decisions. Access to the crowded agenda of modern legislatures is never easy and may be especially difficult when influential groups have a vested interest in a position adopted by the judiciary. In proposing a legislative override, [a] government will be committing itself to a policy position which is almost bound to be labelled by the media as "subverting civil liberties." This is bad politics, even for a government with a clear legislative majority.

Russell, *The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts*, 25 CAN. PUB. AD., Spring 1982, at 1, 19.

This Russell view is shared by Canada's Simon Fraser University Professor of Law Edward McWhinney:

> The possibilities of any premier's risking being characterized as a political "redneck" by moving to opt out of the charter, or parts of it, seemed exaggerated and worth the prime minister's gamble. This part of the constitutional deal might also operate affirmatively and educationally in terms of participatory democracy, by encouraging individuals and political action groups to get into the provincial political process to make sure that their province should not bear the public shame of being the only province to reject a Charter of Rights and human rights for its citizens.

E. MCWHINNEY, *supra* note 15, at 97.

39. Gray, *PM agrees to meet premiers on Nov. 2*, Globe and Mail (Toronto), Oct. 21, 1981, at 1, col. 1.

40. *Id.* at col. 2.

41. *Id.* at col. 3.

University of Ottawa law professor Gerald A. Beaudoin, "was unlike any other."[42] At this conference, Prime Minister Trudeau agreed that a provincial assembly could, via the Notwithstanding Clause, derogate from the Charter of Rights and Freedoms.[43] The provinces accepted a charter which they had initially rejected.[44]

Nonetheless, friction continued, as indicated by the above-referenced plan of the Quebec government to invoke the Notwithstanding Clause at once. Quebec Premier Rene Levesque boycotted the April 1982 ceremonies with the Queen.[45] An anticonstitution demonstration in Montreal, organized by Premier Levesque's Parti Quebecois, attracted some 25,000 marchers.[46]

Three hours before Queen Elizabeth arrived, the Quebec Premier had appeared on television to label the new Canadian Constitution "the most soporific, legalistic document in the world."[47] He renewed his call for Quebec independence: "It's time for us to decide that this Quebec should belong to us . . . as a country, a real country"[48]; a country "where we'll really be at home."[49] Nor was this reaction idiosyncratic; alluding to the Constitution Act, 1982, process, climaxing with Her Royal Highness' signature in Ottawa, Quebec Vice-Premier Jacques Yvan Morin announced that "we are

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42. Beaudoin, *supra* note 21, at 3.

43. "He also agreed that a legislator [sic: legislature] could derogate from the Charter of Rights and Freedoms on the basis of a specific clause to be known henceforth as the 'notwithstanding clause.' This clause could apply to a number of sections in the Charter." *Id.* at 3, 4.

44. *Id.* at 4.

> To make a complex story short, Trudeau got the constitution patriated complete with a bill of rights. But to do so he had to agree to permit the individual provinces to nullify objectionable provisions. It would warm the heart of the late John C. Calhoun: a provincial legislature can simply enact a measure providing that Articles One, Four, Seven and Nine have no legal force in its jurisdiction.

Roche, *Canada's Future*, NAT'L REV., June 25, 1982, at 787.

45. Brecher, *A Constitution—At Last*, NEWSWEEK, Apr. 26, 1982, at 51.

46. *A Symbol of Sovereignty*, TIME, Apr. 26, 1982, at 41. "About 20,000 Quebeckers, chanting (in English) 'Elizabeth go home,' answered nationalist calls to protest against the patriation of the constitution." Beirne, *supra* note 38, at 36.

47. Brecher, *supra* note 45, at 51.

48. *Id.*

49. Beirne, *supra* note 38, at 36.

> The Premier spat out English words to reinforce his contention that French-speaking Quebeckers are isolated in Canada. He spouted phrases such as "le Canada Bill," "le BNA Act" and the PQ favorite "Pierre Elliott" with an innuendo-laden pause before the more acceptable French "Trudeau" was added. The appeal for racial solidarity included a dark warning that Trudeau would not be around forever, but the "anglophone technocracy" that runs Canada is here to stay.

Id. Premier Levesque refers to the Canadian Constitution first affording her self-government, this being a statute passed by the Parliament of the United Kingdom. British North America Act of 1867, 30 & 31 Vict., ch. 3.

being royally screwed."[50]

It was not only the leadership of Francophone Quebec which remained both unenthusiastic about the Canadian Constitution and profoundly suspicious of Prime Minister Trudeau. Prince Edward Island Premier Angus MacLean, during the week immediately following the crucial conference of November 1981, styled the accord as "mostly negative for Prince Edward Island and not very advantageous for average Canadians."[51] Premier MacLean declared that over the years he had learned of Prime Minister Trudeau: "He's just the opposite of most men who achieve considerable power. He'll kick a man when he's down."[52]

B. 1787-1791 America

Americans of the 1980s viewing the cleavages in Canada might find the Notwithstanding Clause of the Charter of Rights and Freedoms wholly comprehensible. Provinces so suspicious of centralization might, naturally, refuse to accept a Charter unless allowed to "opt out." But did the United States constitutional adoption era include any similar serious prospect of the thirteen states dividing into two countries as today's ten-province Canada imaginably could divide into a Dominion of Canada and a Republic of Quebec?

American lawyers who deny the analogy of 1787 America to 1982 Canada overlook article VII of the United States Constitution, which provides in full: "The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution *between the States so ratifying* the same."[53] The plain language

50. Lewis, *supra* note 16, at 30. On the other hand:

> According to a Gallup poll released today, 49 percent of Quebecers think the new Constitution is "a good thing" compared to only 16 percent who believe it is "not a good thing." The remaining 35 percent don't have an opinion one way or the other.
>
> The new Constitution was proclaimed April 17, after nearly two years of heated debate and steady opposition from Levesque.
>
> On the date of proclamation, Levesque led a protest march through the streets of Montreal.
>
> Levesque opposes the new Constitution because it guarantees minority language education rights and it deprives Quebec of a veto over future amendments.
>
> But today's poll indicates Quebecers are siding with Prime Minister Pierre Trudeau, the chief architect of the new Constitution.

49 percent of Quebecers like our Constitution: Poll, Toronto Star, June 19, 1982, at A2, col. 1.

51. *MacLean still worries about constitution*, Globe and Mail (Toronto), Nov. 9, 1981, at 10, col. 5.

52. *Id.*

53. U.S. CONST. art. VII.

of the United States Constitution anticipates the thirteen American states dividing into a bloc of at least nine states under the 1787 Constitution and the remainder bloc continuing under the Articles of Confederation. The foes of the 1787 Constitution, like George Mason and Patrick Henry, did not need television to posit a political destiny independent of the new federal Constitution; article VII did this for them.

James Madison admitted in Number 43 of *The Federalist* papers that "no political relation can subsist between the assenting and dissenting states."[54] It could be suggested that Mason and Henry's Virginia, with a fifth of the American population[55] (Quebec contains a quarter of the Canadian population, and Canada's largest city, Montreal), did not need the nation. Antifederalists commanded a minimum of 60 percent of the Virginia popular vote.[56] (Quebeckers certainly disliked patriation of the constitution without her consent.)[57]

During the period for approval, the ninth state to ratify (New Hampshire) did so on June 21, 1788,[58] and the thirteenth state to ratify (Rhode Island) failed to do so until May, 1790.[59] The new United States government had already commenced in March, 1789.[60]

To be sure, at least some sort of association may have obtained between the initial nine ratifying states and the remainder sovereign states during the June 1788-May 1790 interval. This would extend the analogy between the desires of some portions of contemporary Canada and the reality of early America. The Quebec-nationalist Parti Quebecois, which was voted into power on November 15, 1976, appealed to its populace (by a May 20, 1980, referendum) to give the party a mandate to negotiate with the federal government in Ottawa. The negotiations would concern the independence of Quebec, combined with a joint currency and common market relationship with Canada, styled "sovereignty-

54. THE FEDERALIST No. 43, at 226 (J. Madison)(M. Beloff ed. 1948).

55. B. MITCHELL & L. MITCHELL, *supra* note 34, at 146-47.

56. J. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788, at 285-86 app. B (1961).

57. "Quebeckers clearly do not like the fact that the Constitution has been brought home without their province's consent." Beirne, *supra* note 38, at 36.

58. SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 419 (L. Perry ed. 1972).

59. *Id.* at 420.

60. Owings v. Speed, 18 U.S. (5 Wheat.) 420 (1820).

association."[61]

VI. CONSTITUTIONAL UNIT-VETO PARALLELS

Disputation in Canada over the Constitution Act, 1982, resembled 1787-1791 controversy on another important matter as well: The issue of one or another given unit's veto over adoption of the new instrument. Post-1867 amendment of the Canadian Constitution by the British Parliament of the constitutional provisions dealing with the provinces had in effect, although never formally, been subject to veto by each of the Canadian provinces concerned.[62] This helped shield Francophone Quebec from amendments disfavoring Canada's French-Canadian minority to the advantage of her Anglophone majority.[63]

After the signing of the Constitution Act, 1982, Quebec asserted that the unanimous consent of the provinces was required before there could be patriation or amendment of the Canadian Constitution. Quebec claimed by convention the right of veto over constitutional amendment.[64] Inasmuch as Prime Minister Trudeau

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61. Beaudoin, *supra* note 21, at 2.

62. R. CHEFFINS, THE CONSTITUTIONAL PROCESS IN CANADA 12 (1976). Consistent with the Cheffins view is *Reference Re Amendment of Const. of Can.* (Nos. 1, 2 & 3), 125 D.L.R. 3d 1 (Can. 1981). "A divided Supreme Court of Canada has confirmed the Trudeau government's legal right to proceed with its plan to bring Canada's constitution home." Fox, *Judges throw constitutional problem back to politicians*, Toronto Star, Sept. 29, 1981, at 1, col. 4. "Prime Minister Pierre Trudeau, armed with a Supreme Court ruling upholding the legality of his actions, says his government will press on with its plan to bring home Canada's constitution." Fox, *Each side says its a winner—Trudeau vows to press on*, Toronto Star, Sept. 29, 1981, at 1, col. 2-3.

63. Apprehend the thinking attributed to John C. Calhoun:

> What the federal system does is to refine democracy by requiring a *concurrent* majority. The majority will in each of its constituent parts, whenever the degree of sovereignty assured those parts by the Constitution is called in question. To assert this is not to support secession, but merely the essential principle of federal union.

F. MORLEY, FREEDOM AND FEDERALISM 65-66 (1959)(Morley's emphasis). As one Canadian historical analyst discerns: "If John C. Calhoun's theory of concurrent majorities did not succeed in the United States, it has worked in Canada even if few Canadians have heard of it." Hutchison, *Canada's Time of Troubles*, 56 FOREIGN AFF., Oct. 1977, at 175, 183.

64. Beaudoin, *supra* note 21, at 6.

> Quebec Liberal Leader Claude Ryan, . . . was among those who did not attend either the ceremonies in Ottawa or the protests in Montreal, although half of his 43-member caucus did go to see the Queen. Ryan blames Trudeau for his role in isolating Quebec, and the two men differ fundamentally over Ottawa's centralist policies. But Ryan is also disappointed with Levesque, who, he says "badly defended" Quebec's interests and ignored "unpardonably lightly" the province's right to a veto. When Quebec signed a solidarity agreement with seven other provincial premiers last April, the province's traditionally proclaimed—though legally questionable—right of veto was dropped. When the other provinces ganged up against Quebec last November to accept Trudeau's package secretly, the province found

denied that any single province wielded such a veto,[65] the nine justices of the Supreme Court of Canada had to miss the royal proclamation on April 17 in Ottowa because they were scheduled to hear Quebec's challenge thereto during June 1982.[66]

On November 25, 1981, Premier Levesque tabled an order in council in the National Assembly (i.e., Quebec Legislature), whereby the Quebec Cabinet attempted to veto the Trudeau government's constitution efforts.[67] In a cover letter to the Prime Minister, Premier Levesque wrote that "[We] retain our traditional right to a veto."[68] Measure this supposed constitutional amendment veto of Quebec with this plain language from article XIII of the Articles of Confederation:

> Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; *nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in Congress of the United States, and be afterwards confirmed*

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itself alone and at least psychologically weaker than ever before. Levesque was widely blamed for bartering away the veto in the first place.

Beirne, *supra* note 38, at 36. "Quebec claimed a veto power, but the other provinces demurred, believing that Rene Levesque was practicing separatism, not bargaining in good faith." Coxe, *Beyond the Constitution*, NAT'L REV., May 14, 1982, at 536.

65. Beaudoin, *supra* note 21, at 6.

> The latest dispute inherent in a dual society must be set against the background of one of the world's oldest written constitutions. It is a statute of the British Parliament, the British North America Act, which established Canadian self-government in 1867 (and, incidentally, foreshadowed the Commonwealth of the twentieth century). Though Canada has long been totally independent of Britain, with its own separate monarch who happens to reside in London, only the British Parliament can amend the constitution—and does so automatically, on the formal request of the Canadian Parliament.
>
> Over and over again Canadian governments, federal and provincial, have sought to remove this fictitious but humiliating relic of colonialism and shift the constitution from London to Ottawa. They have never succeeded because they could never agree on a method of future amendment. Twice in the present generation an amending formula was drafted, accepted by all the English-speaking provinces and, at the last moment, vetoed by Quebec.

Hutchison, *supra* note 63, at 183.

66. Lewis, *supra* note 16, at 32. On December 6, 1982, the Supreme Court of Canada, which includes three Quebec justices, ruled unanimously that Quebec enjoys no veto upon constitutional amendment. *Quebec loses attempt to scuttle constitution*, Evening J., (Wilmington, Del.), Dec. 7, 1982, at A2, col. 5.

67. Johnson, *Levesque 'veto' may be no laughing matter*, Globe and Mail (Toronto), Nov. 27, 1981, at 8, col. 2.

68. *Id.* "[Federal] Justice Minister Jean Chretien burst out laughing when he heard of the 'veto.'" *Id.* Said Justice Minister Chretien: "He [Quebec Premier Rene Levesque] can pass a decree if he wants that there will be no snow in Quebec this winter and it will have the same effect." *Ottawa laughs off Quebec 'veto,'* Toronto Star, Nov. 26, 1981, at 1, col. 5.

by the legislatures of every state.[69]

Article XIII presented what Madison in Number 43 of *The Federalist* papers conceded to be a question "of a very delicate nature"[70]: "On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superceded without the unanimous consent of the parties to it?"[71] Madison's embarrassed reply may have been less than irrefutable.[72]

VII. CONCLUSION

University of Ottawa political scientist W. Andrew Axline, a decade and a half ago at The Ohio State University, pronounced of the study of international relations that "history is our laboratory."[73] We unfortunately cannot, however, in Axline's example, replay the Second World War with Italy omitted to learn the result.[74] Yet in comparative constitutional law, where history also is our laboratory, the United States 1787-1791 experiment of federalism, complete with a Bill of Rights and Exceptions Clause, is being replicated in 1981-1983 Canada; complete with a Charter of Rights and Freedoms and a Notwithstanding Clause. It is for American constitutional lawyers to learn therefrom.

A potentially vigorous congressional exercise of the Exceptions Clause not only comports with the abstract imperatives of federalism, but proves virtually to be one of the earmarks of federalism in its real-world North American strain. The various framers of the American and Canadian Constitutions seem to have allowed knowingly for such an eventuality as a checkerboard constitution should the federal power (especially judicial power) be abused. As Hamilton discerned of the several powers of the federal judiciary in Number 80 of *The Federalist* papers:

> The amount of the observations hitherto made on the authority of the judicial department is this: That it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been reserved to the Supreme Court and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an

69. ARTICLES OF CONFEDERATION, art. XIII (emphasis added).
70. THE FEDERALIST No. 43, at 225 (J. Madison) (M. Beloff ed. 1948).
71. *Id.*
72. *Id.*
73. Address by W. Andrew Axline, The Ohio State University (Spring, 1968).
74. *Id.*

> appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable; that this appellate jurisdiction does, in no case, *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary without exposing us to any of the inconveniences which have been predicted from that source.[75]

Hamilton recognized the need for a Supreme Court to preclude a federalist hydraheaded monster, but Hamilton also realized that the Exceptions Clause need spawn no such creature. Under the Exceptions Clause, the American people as one acting through its Congress *identifies* jurisdictional exceptions one by one. These exceptions may be recalled if the state courts, like the Supreme Court before them, run amok.

Absent an Exceptions Clause, the Supreme Court could check the other two branches of the federal government while remaining unchecked itself, thereby upsetting the balance between the three.[76] The Exceptions Clause does not render Congress the supreme federal branch of the three, but merely ensures that no federal branch can go astray. The Exceptions Clause unremarkably allows Congress to return the primary judicial role of protector of American liberties from the Supreme Court, not to Congress, but to the state judicial authorities. The framers could have found this a reassuring and common sense policy; in 1787, the latter was, after all, the unthreatening status quo.

A vigorous congressional exercise of the Exceptions Clause, productive of a checkerboard constitution, need not lead to the erosion of American liberties. Many United States attorneys may be

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75. THE FEDERALIST No. 81, at 420 (A. Hamilton)(M. Beloff ed. 1948).

76. In the enthusiastic post-*United States v. Nixon*, 418 U.S. 683 (1974), recounting of Professor Frank R. Strong: "In its function as official constitutional interpreter the judiciary is not coequal with the other two branches but more than equal." Strong, *Courts, Congress, Judiciary: One Is More Equal Than the Others*, 60 A.B.A.J. 1203, 1206 (1974).

> [T]he Supreme Court of the United States not only possesses the traditional judicial function assigned it under the tripartite division of governmental authority but, as well, the awesome power to sit in judgement on the constitutionality of the acts of itself, the executive branch, and the legislative branch. The source of this power cannot, therefore, be found in separation of powers theory, grounded as this is on the concept of equality. In the exercise of this distinctive function, the Court is not coequal with the President and the Congress but more than equal.

Strong, *President, Congress, Judiciary: One Is More Equal Than the Others*, 60 A.B.A.J. 1050, 1051 (1974). But Professor Strong forgets that article III establishes the Supreme Court as a supreme *court*; it is not a supreme *branch* of the federal government, grounded as separation of powers theory is in the concept of equality.

astonished to learn that until her 1982 Charter of Rights and Freedoms, Canada's Constitution had *no bill of rights whatsoever*, as the Trudeau government pointed out to its populace.[77] Nonetheless, Canada then, as now, has avoided tyranny. Americans frightened of 1983 utilization of their Exceptions Clause need only turn their eyes northward to find not a hydraheaded monster of federalist chaos, but peace, order and good government.[78]

77. PUBLICATIONS CANADA, THE CANADIAN CONSTITUTION 1981: HIGHLIGHTS 2 (1981). The Trudeau government's public relations personnel had been long at work on selling what would become the Constitution Act. Heller, *Ad blitz on Constitution may be launched soon*, Toronto Star, Sept. 29, 1981, at A12, col. 1.

78. Toronto journalist Robert Sheppard reported the Notwithstanding Clause as "peculiarly Canadian . . . . To the best of anyone's knowledge [it does] not appear in the bill of rights of any other country." Globe and Mail (Toronto), Nov. 7, 1981, at 12, *quoted in* Friedenberg, *Un-Canadian Activities*, N.Y. REV. BOOKS 37, 38 (Nov. 4, 1982) (ellipsis Friedenberg's). America's Exceptions Clause assuredly differs from Canada's Notwithstanding Clause because the former allows legislative responses to a runaway federal Supreme Court only through the federal legislature, with the resulting state-by-state checkerboard of constitutional protections deriving merely from varied state supreme court interpretations of yet-binding constitutional rights guarantees; the latter allows legislative responses to a runaway federal Supreme Court through both federal and provincial legislatures, with the resulting province-by-province checkerboard of constitutional protections deriving directly from various legislative annulments of constitutional rights. Yet Sheppard misses the overriding point: both federal countries with central governments of divided powers afford appeal by the people to political branches of their government for defense against a federal Supreme Court run amok, this defense effectively resulting in a checkerboard constitution. Canada's Notwithstanding Clause long was prefigured by America's Exceptions Clause.