The Judicial Function uuder the *Canadian Charter of Rights and Freedoms*

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The author surveys the various American theories of judicial review in an attempt to suggest approaches to a Canadian theory of the role of the judiciary under the *Canadian Charter of Rights and Freedoms*. A detailed examination of the legislative histories of sections 1, 52 and 33 of the *Charter* reveals that the drafters intended to move beyond the *Canadian Bill of Rights* and away from the principle of parliamentary sovereignty. This intention was not fully incorporated into the *Charter*, with the result that, properly speaking, Canada's constitutional bill of rights is not "entrenched". The author concludes by emphasizing the establishment of a "continuing colloquy" involving the courts, the political institutions, the legal profession and society at large, in the hope that the legitimacy of the judicial protection of *Charter* rights will turn on the consent of the governed and the perceived justice of the courts' decisions.

L'auteur résume les différentes théories américaines du contrôle judiciaire dans le but de suggérer une théorie canadienne du rôle des juges sous la *Charte canadienne des droits et libertés*. Notamment, une étude détaillée de l'histoire législative des articles 1, 52 et 33 de la *Charte* démontre que les rédacteurs ont voulu aller au-delà de la *Déclaration canadienne des droits* et éliminer le principe de la souveraineté parlementaire. Cette intention ne se trouvant pas incorporée dans toute sa force au texte de la *Charte*, la protection des droits et libertés au Canada n'est pas, à proprement parler, « enchâssée » dans la constitution. En conclusion, l'auteur met l'accent sur l'instauration d'un « colloque continu » auxquels participeraient les tribunaux, les institutions politiques, la profession juridique et le grand public ; la légitimité de la protection judiciaire des droits garantis par la *Charte* serait alors fondée sur la volonté des constituants et la perception populaire de la justice des décisions des tribunaux.

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Synopsis

Introduction

The judicial definition of a constitutional right depends on the answers to a number of general questions which now must be asked in Canada. What is the appropriate judicial function and relation to the legislature required by our constitutional bill of rights? What does that overall posture mean for the degree to which the judge ought to be guided by the constitutional text? for the problem of ensuring the flexibility of a fundamental document? for a search for the drafters' intention?

The definition of rights set out in the *Canadian Charter of Rights and Freedoms*[1] is complex. But outcomes in individual cases will ultimately depend on the over-arching attitude of the Canadian judiciary toward the task of protecting constitutional rights. The preoccupation with this concern on the part of American constitutionalists is not an American prerogative simply because a constitutional bill of rights decades old makes the judicial/legislative divide more difficult to locate. It is now a Canadian concern, and undoubtedly will become a Canadian constitutionalists' preoccupation.

The role of the judiciary in protecting individual rights had, in the pre-*Charter* era, revolved around the issue of entrenchment. The question was asked: has the doctrine of parliamentary supremacy or sovereignty, which leaves ultimate authority over the fate of individual rights with the Parliament or legislature of the day, served us well? Or are individuals and mi-

[1]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

norities in Canada better served by limiting legislative authority and increasing judicial authority to protect rights? On the one hand, it was argued that reliance for the security of human rights is best put on the political sovereign, or the people, or the possibility of civil disobedience, or the conviction ingrained in the average Canadian that he or she has a moral obligation to act in a manner that is compatible with the freedom of everyone.[2] Reliance on the political sovereign corresponds to a distrust of the judicial function, a belief that the judicial method is inadequate to define and to order human rights and therefore, in this context, ought to be peripheral. This inadequacy is a result of a number of factors. Judicial review is interstitial. The courts in coming to decisions take explicit account of only a limited range of facts and values. The judiciary themselves are insufficient in terms of background and experience for this new function, since they are unrepresentative of the population (namely, male, of middle-to-old age, conservative, Christian, of anglo-saxon or francophone origin).[3] Furthermore, it was argued, entrenchment of rights imposes the scope and priority of human rights of a particular time on future citizens; it allows a minority to obstruct change; it tends to bind the people to court decisions which depart from general community expectations.

On the other side of the debate, it was argued that at least some deficiencies of the judicial system could be altered by reform of judicial selection, practices, and procedures.[4] But in particular, a potent judicial role offers individuals and minorities protection from majorities unsympathetic to the promotion of human rights; it raises a significant impediment to the implementation of transitory prejudices.

This controversy, at bottom, turns on the response given to the question of whether a substantive limitation on legislators by the entrenchment of rights creates a sufficient impediment to the pressures of a hostile or prejudiced majority, in view of the insufficiencies of the judicial system, to justify its introduction.

At first glance, it would appear that with the *Charter* we have put this debate, and the issue of the centrality of the judicial role in protecting

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[2]See I. Kant, *The Metaphysical Elements of Justice*, trans. J. Ladd (New York: Bobbs-Merrill, 1965) at 35; A.L. Goodhart, *English Law and the Moral Law* (London: Stevens & Sons, 1953) at 62.

[3]See D. Smiley, "The Case against the Canadian Charter of Human Rights" (1969) 2 Can. J. Pol. Sci. 277 at 283-85; Ontario, *Royal Commission Inquiry into Civil Rights* (Report No. 2), vol. 4 (Toronto: Queen's Printer, 1968) (Commissioner: J.C. McRuer) at 1581-82; D.A. Schmeiser, "Disadvantages of an Entrenched Canadian Bill of Rights" (1968) 33 Sask. L. Rev. 249 at 250.

[4]Examples of such practices and procedures are the practice of allowing intervention by informed and interested third parties, and the reception of economic and sociological evidence of the impact of judicial decisions.

individual and minority rights, behind us. By placing a bill of rights in the Canadian constitution we have given our lily-livered judiciary a blood transfusion.

Now the definition of constitutional rights will turn on a different dispute concerning the judicial function. This dispute will be of a less fundamental order. It is the American dilemma of constructing a judicial function — accepted as entailing the capacity to invalidate legislation violating the constitutional Bill of Rights[5] — which is reconcilable with democracy or, in other words, is consistent with the underlying political principle that laws bind by virtue of their having been made with the consent of the governed. How such a reconciliation can be achieved will determine the place of legal arguments about the use of "the passive virtues"[6] (the judicial techniques of deflecting a problem in an initial case and "letting it simmer"), the significance of the textual language, the susceptibility of the document to interpretative change, and the role of the drafters' intentions.

To put it in American constitutional terminology, the manner in which "electorally accountable policy-making"[7] is reconciled with judicial review will determine whether judges should be interpretivists (or originalists) and decide constitutional issues by confining "themselves to enforcing norms that are stated or clearly implicit in the written Constitution",[8] or non-

[5]This capacity is widely accepted. Not even Raoul Berger advocates overruling *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 49 (1803).

[6]A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York: Bobbs-Merrill, 1962) at 176 [hereinafter *Least Dangerous Branch*].

[7]M.J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven: Yale University Press, 1982) at 9 [hereinafter *The Constitution, the Courts*].

[8]J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980) at 1 [hereinafter *Democracy and Distrust*]. Ely generally uses this term to mean more particularly "clause-bound interpretivism", *i.e.*, (at 88) "treating constitutional clauses as self-contained units." In *The Constitution, the Courts, ibid.* at 10, Perry defines "interpretive review" similarly as constitutional decision-making "by reference to one of the value judgments of which the Constitution consists . . .". P. Brest, "The Misconceived Quest for The Original Understanding" (1980) 60 B.U.L. Rev. 204 at 204, defines a similar term, "originalism", as the "familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters." Quoting *Home Building and Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 at 453 (1934), Sutherland J., dissenting, Brest adds that originalists can be either textualists or intentionalists:

> A strict textualist purports to construe words and phrases very narrowly and precisely. For the strict intentionalist, "the whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent of its framers and the people who adopted it."

Brest further clarifies the meaning of originalism (or Ely's interpretivism) by distinguishing (at 205) "moderate originalism" from "non-originalism". In the former, "[t]he text of the Constitution is authoritative, but many of its provisions are treated as inherently open-textured.

interpretivists (non-originalists)and "enforce norms that cannot be discovered within the four corners of the document",[9] the latter "disregard[ing] neither the text of the Constitution nor the motives of those who made it; [but] seek[ing] to place these arguments in the proper context."[10] Such positions decide cases. Historic and basic rights decisions such as *Brown* v. *Board of Education*,[11] which decided that separate but allegedly equal facilities were unconstitutional, and *Roe* v. *Wade*,[12] which determined that women have a constitutional right to an abortion, were not made by interpretivists or originalists.

In other words, having a bill of rights in a constitution means judges have been given a mandate to participate in the protection of individual and minority rights. Gone is the influence of the chilling words of the Privy Council in *Cunningham* v. *Tomey Homma*: "[T]he policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider."[13] But the scope and texture of that mandate have yet to be elucidated. And that elucidation will depend on the resolution which can be achieved between the mandate

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The original understanding is also important, but judges are more concerned with the adopters' general purposes than with their intentions in a very precise sense", whereas non-originalists "accord the text and original history presumptive weight, but do not treat them as authoritative or binding. The presumption is defeasible over time in the light of changing experiences and perceptions."

[9]*Democracy and Distrust*, *ibid.* at 1. Similarly, in *The Constitution, the Courts*, *ibid.* at 11, Perry defines non-interpretive review as constitutional decision-making "by reference to a value judgment other than one constitutionalized by the framers."

[10]This is Ronald Dworkin's well-taken point, in "The Forum of Principle" (1981) 56 N.Y.U. L. Rev. 469 at 472 — that the distinction between interpretivism and non-interpretivism is misnamed:

> Any recognizable theory of judicial review is interpretive in the sense that it aims to provide an interpretation of the Constitution as an original, foundational legal document . . . . No one proposes judicial review as if on a clean slate.
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> The theories that are generally classed as "non-interpretive" . . . disregard neither the text of the Constitution nor the motives of those who made it; rather they seek to place these in the proper context. "Noninterpretive" theorists argue that the commitment of our legal community to this particular document, with these provisions enacted by people with those motives, presupposes a *prior* commitment to certain principles of political justice which, if we are to act responsibly, must therefore be reflected in the way the Constitution is read and enforced.

Dworkin also goes further and says the distinction between constitutional theories is not based on whether the intention of the Framers is taken to be decisive or not. For he argues generally that all constitutional theories rely to some extent on an original intention, and (at 499-500) "[t]he important question for constitutional theory is not whether the intention of those who made the Constitution should count, but rather what should count as that intention."

[11]347 U.S. 483 (1954).

[12]410 U.S. 113 (1973).

[13](1902), [1903] A.C. 151 at 156.

for judicial review under a constitutional bill of rights, and the legislative function in a free and democratic society.

I. The American Dilemma

A. American Answers

Various American responses have been fashioned to meet the conflicting demands of judicial review and the democratic principle that legal obligation depends upon the consent of the governed.

For Raoul Berger, the terms of the people's consent are spelled out in the Constitution.[14] Hence, judicial review is legitimate only in so far as it is confined to giving the Constitution the meaning it had at the time it was written.[15]

John Hart Ely suggests that where constitutional provisions are open-ended and their interpretation therefore potentially inconsistent with the need for the consent of the governed, judicial review should be confined to "questions of participation, and not with the substantive merits of the political choice under attack."[16] Judicial review is reconcilable with, and indeed reinforces, representative democracy by confining itself to protecting processes, or the channels of political change, or ensuring "discrete and insular minorities"[17] "the protection afforded other groups by the representative system."[18]

Michael Perry, on the other hand, argues that judicial review is a necessary anti-majoritarian feature of American society, because the people have two different needs: to express their interests through electorally accountable law-makers, and to struggle to be better human beings than present laws and democratic institutions may allow or reflect. Judicial review does and ought to provide moral guidance, which legislators often cannot

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[14]R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Mass., Harvard University, 1977) at 295.

[15]*Ibid.* at 363.

[16]*Democracy and Distrust*, *supra*, note 8 at 181.

[17]*Ibid.* at 76, quoting *United States* v. *Caroline Products Co.*, 304 U.S. 144 (1938).

[18]*Democracy and Distrust*, *ibid.* at 103. Similarly, H.A. Linde, "Due Process of Lawmaking" (1976) 55 Neb. L. Rev. 197 at 254, writes: "As a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes . . .".

give.[19] Thus, non-interpretive review is a necessary and desirable feature of the judicial function.[20]

For Alexander Bickel, the legitimacy of judicial review under a constitutional bill of rights is established by putting the court under an "obligation to succeed".[21] In other words, "the Court should declare as laws only such principles as will — in time, but in a rather immediate foreseeable future — gain general assent."[22] This is accomplished by the court engaging the people and their representatives through various judicial techniques in a conversation,[23] a "continuing colloquy" wherein the issue is shaped and reduced.[24] In particular, although the Court's constitutional function is "to define values and proclaim principles",[25] in appropriate circumstances it should neither strike down legislation nor validate it.[26] Problems in initial cases should be deflected and allowed to simmer "so that a mounting number of incidents exemplifying it may have a cumulative effect on the judicial mind as well as on public and professional opinion."[27]

Criticisms of these suggestions abound. Berger's search for the framers' intention and insistence that the meaning of the Constitution be fixed at the time it was adopted has been subjected to considerable criticism. Is intention to be gleaned by applying the plain-meaning rule to the text, or by looking to the surrounding circumstances? Is one also searching for "the interpretive intent", that is, the intent of the framers about how language is to be interpreted?[28] Whose intention counts? the actual framers? the members of Congress who proposed it? the state legislators who ratified or agreed to it?[29] And besides, was not the intention of the framers to write a document

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[19]*The Constitution, the Courts, supra*, note 7 at 101-2.

[20]Similarly, R.B. Sapphire, "The Search for Legitimacy in Constitutional Theory: What Price Purity?" (1981) 42 Ohio St. L.J. 335 at 381, writes: "If however, we deny the role of morality in the judicial process, if we continue to insist on the structuring of constitutional theories that are designed to amoralize that process, we will have gone a long way toward rendering the Constitution useless to perform its most important role."

[21]See *Least Dangerous Branch, supra*, note 6 at 239: "The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and — the short of it is — it labors under the obligation to succeed."

[22]*Ibid.*

[23]A.M. Bickel, *The Supreme Court and the Idea of Progress*, 2d ed. (New Haven, Conn.: Yale University Press, 1978) at 91.

[24]*Least Dangerous Branch, supra*, note 6 at 240.

[25]*Ibid.* at 68.

[26]*Ibid.* at 69. For the declaration by the Court that legislation is constitutional, or that (at 129) "it is not inconsistent with the principles whose integrity the Court is charged with maintaining" is a "significant intervention in the political process" of the same kind (though not degree) as a declaration of unconstitutionality."

[27]*Ibid.* at 176.

[28]Brest, *supra*, note 8 at 212.

[29]*Ibid.* at 214-15.

"to endure for ages to come"[30] and hence a Constitution capable of adaptation and growth? A search for the framers' intention ignores the fact that while some applications of constitutional rules might have been envisioned, the drafters would not have intended those particular outcomes to be exhaustive; "the meaning of a rule" is to be distinguished from "the instances of its application".[31] Perhaps the people have in fact consented to the Court's creativity or non-originalism by acquiescing in its decisions or by failing to invoke the amendment procedures for which the Constitution provides. Furthermore, why should the consent of the framers bind those who came after them?[32]

Ely's admonition to judges to confine their non-interpretivist activism to legislation which interferes with democratic processes or with access to democratic change, has been challenged by asking how one distinguishes interferences with processes from interferences with substantive outcomes. The rights expressed in the Bill of Rights do not indicate a dominant constitutional concern with process rather than substance.[33] What is the difference between minority interests simply being overridden in democratic fora, and those interests being ignored[34] and in need of constitutional protection? Any attempt to identify the latter situation, or to identify "discrete and insular minorities", is bound to rely on conclusions about substantive values and rights. Moreover, procedural fairness itself is a substantive value.[35] And furthermore, it simply is not true, as the 1969 *Royal Commission Inquiry into Civil Rights* (McRuer Report) claimed, that "[g]ood statutory definitions of substantive rights and duties result from fair and effective procedures in the enactment of statutes by representative parliamentary bodies."[36]

Perry, on the other hand, offered a *functional* justification for judicial review, whose proper functioning depended on its undemocratic or "coer-

[30]*McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 at 407 (1819), Marshall, C.J. ("we must never forget, that is a *constitution* we are expounding").

[31]F. Schauer, "An Essay on Constitutional Language" (1982) 29 U.C.L.A. L. Rev. 797 at 806.

[32]See Brest, *supra*, note 8 at 225.

[33]See L.H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 Yale L.J. 1063 at 1067.

[34]See L.G. Sager, "Rights Skepticism and Process-Based Responses" (1981) 56 N.Y.U. L. Rev. 417 at 428; T. Sandalow, "Judicial Protection of Minorities" (1977) 75 Mich. L. Rev. 1162 at 1174-75.

[35]Tribe, *supra*, note 33 at 1070. For example, Tribe states at 1071: "[W]ho votes, it turns out, is a profoundly substantive question."

[36]*Supra*, note 3 at 1533.

cive" character.[37] At the very least there remains a conflict between the consent to any given legislative act and the long-term consent to be prodded towards salvation.

Bickel is criticized by Hans Linde for having succumbed to the realist's error of deriving a view of what courts ought to do from what they in fact do.[38] Proper judicial decisions should not be judged by effectiveness or public acceptance,[39] but by the accuracy of their exposition of the Constitution.[40] Moreover, "[p]reoccupation with the odds of effective compliance may undervalue the social importance of an announced principle for its own sake...".[41]

What advice is left for the judiciary interpreting a constitutional bill of rights? Is their function legitimate only to the extent that it is confined to a narrow construction of the text or the drafters' intentions — with all the problems of application associated with the latter — because the text and its meaning at the time of adoption are the only rules to which the people have consented? Is activism required only in situations where the democratic process is threatened or process rights are infringed — with all the attendant difficulties of isolating procedural from substantive rights — because clearing the democratic channels through the constitution reinforces the consensual value rather than detracting from it? Should judges be urged to search within the constitutional framework for the right answers — with all the concerns over judicial capacity to find right answers, and despite the majority's lack of consent — because a constitutional bill of rights embodies another commitment to moral evolution or betterment? Or is the judiciary to be urged to come to those conclusions about constitutional rights to which the people will consent or want to conform, with the correlative problem that concern over effectiveness may sacrifice the moral leadership which the constitutional bill of rights was intended to provide?

The answer would appear to be none of the above. All of these proposed solutions for the judicial function under a constitutional bill of rights tend to rely, albeit without acknowledgment, on one side or the other of a pro-

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[37]See *The Constitution, the Courts, supra,* note 7 at 125. Perry suggests (at 128) a notion of "tolerable accomodation" with the principle of electorally accountable policy-making through Congress' theoretical power to withdraw the Court's jurisdiction over certain classes, not used in over 100 years. But the inference that judicial decisions are really electorally sanctioned or approved through non-use of Congress' power, assuming it to be a realistic option, is at odds with his justification of judicial review precisely in terms of its undemocratic character.

[38]H.A. Linde, "Judges, Critics, and the Realist Tradition" (1972) 82 Yale L.J. 227 at 252.

[39]*Ibid.* at 238.

[40]More particularly, Linde says, *ibid.* at 254: "[T]he judicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text . . . ".

[41]*Ibid.* at 229.

found controversy over the proper foundations of authority in the state. On the surface, the conflict is between those who claim the judicial function must be very narrowly confined because the judicial role by nature is undemocratic, and those who argue that the judicial function is to protect rights actively, an activity which their undemocratic character allows or promotes. More deeply, the division appears to be between those who claim the source of legitimate authority or obligation in the state is the consent of the people or the majority's will, and those who assert that the source of legitimate political authority is the protection of rights or the rationality or justice of the rules.

B. Political Theory Enters the Fray

A complete exegesis of the controversy surrounding consent and rights theories of political and legal obligation and related theories in jurisprudence, is beyond the scope of this paper. No attempt, therefore, will be made to attribute positions to particular authors, whose complete corpora require considerable attention in order to justify assignment to a particular position in the history of ideas. What is intended is to present the outlines of a dichotomy in political theory that carries over into the controversy concerning the characterization of judicial review under a constitutional bill of rights. The carrying over, or the subsequent tendencies to one-sidedness in constitutional theory, are normally undisclosed, but when articulated they suggest an accommodation which ought to take place in the context of the judicial role under the *Charter*. In general, it is suggested that there is a connection between issues of political theory concerning the foundations of authority, obligation or sovereignty, and the nature of the judicial function and constitutional interpretation.

The guiding principle of a consent theory of political obligation is the view that persons are naturally free and equal; they are autonomous agents. And autonomous agents can have their freedom restricted by being placed under an obligation only if the obligation is self-assumed or self-imposed.[42] In other words, political obligation must derive from the consent of the governed. Consent may be given to any arrangement; the content of the consent or the obligation assumed is arbitrary. Obligation is grounded on voluntary acceptance itself, independent of aims or consequences. In so far as the fact of consent or what is actually consented to is distinguished from

[42]Kant, *supra*, note 2 at 78: "There are three juridical attributes inseparably bound up with the nature of a citizen as such: first, the lawful freedom to obey no other law than one to which he has given his consent." See also J.J. Rousscau, *The Social Contract* [1762], trans. M. Cranston (Hammondsworth: Penguin, 1968) at 65: "[F]reedom is obedience to a law one prescribes to oneself".

what ought to be consented to or what is deserving of consent, the legitimacy of authority does not depend on the content of one's consent.

This is the political obligation of individuals who live in a "civil society", which is based on contractual agreement among self-subsistent individuals who are engaged in the pursuit of individual ends; its essence is the protection and guarantee of the life and property of the members of the public as individuals. It is a community of individuals who pursue their particular interests and who view the union as an optional state of affairs to be participated in only as a means of achieving those interests.

The consent of the individual as a free agent in this theory of political obligation must be actual and *not* hypothetical. Hypothetical consent refers to what individuals ought to consent to. According to this standard, the relevant consent is that imputed hypothetically to rational persons. When consent is made hypothetical, the basis of obligation or political authority is no longer consent. The argument that one is obligated by the consent rational persons would give in a hypothetical state of nature or original position implies that obligation arises from the objective characteristics of government, not from consent.[43]

Such a consent theory of political obligation exhibits a number of inherent difficulties. Firstly, the view that obligation is derived from the consent of the governed appears to be incompatible with the necessity in civil society for a coercive sovereign power. External coercion plays a necessary part in binding civil society together.[44] The state, as an optional community of independent individuals, stands opposed to the individual. It is a coercive power which serves to prevent the individual from unduly inhibiting the freedom of others. It is a hindering of hindrances to freedom. But self-assumed obligation of essentially free persons appears to be inconsistent

[43]It might be objected that hypothetical consent is not what people ought to consent to, but only what persons with a certain set of actual, and not necessarily rational, beliefs would consent to or be deemed to have consented to. If hypothetical consent is redefined this way, then the move to "hypothetical" consent cannot accomplish a bridge to limited sovereignty or the protection of rights since actual beliefs are not necessarily good beliefs. On the other hand, if such a bridge is sought to be denied, then this "hypothetical" consent encounters the same difficulties as the consent theory generally.

[44]For example, for Hobbes the sovereign power served as an external enforcer of the law; through the use of force the sovereign protected individuals from each other. For Rousseau the sovereign forces people to be free. For Kant the state through coercion realizes the right of others to compel individuals to act in accordance with the freedom of all.

with a coercive sovereign power.[45] Civil society or the social contract is an optional state of affairs. Consent may be given to any arrangement. Coercion by an external sovereign even to provide security of person and property seems to be inconsistent with freedom of choice. Consent as the sole foundation of political obligation must admit of individuals who might consciously act contrary to their own interest.[46]

Secondly, most persons do not explicitly agree or consent to the subjection of government, at least not by some manifest act of permission.[47] Consent or voluntariness does not appear to be satisfied by the mere recognition of the rationality of the dictates of a sovereign power, in the absence of determining, or participating in the making of, the content of one's obligation. Furthermore, the rationality of the exercise of the sovereign power will not even always be recognized in a society of independent and asocial individuals — whose particular interests will not always be satisfied through the satisfaction of common interests. Individuals who find their interests incompatible with the general will seem to have no reason for obedienee.[48]

Thirdly, the illegitimacy of coercion, and the foundation of obligation on consent, implies that individuals do act as they should. Self-assumed obligation appears to be no obligation at all.[49]

In contrast to a consent theory of political obligation stands what might be called a protection of rights theory of political obligation. Under the latter, obligation is derived from the government protecting certain rights of the individual. Obligation requires a state whose constitution conforms to the principles of justice or a sovereign whose acts are in the rational individual's interests. Obligation rests on characteristics of government and

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[45]The problem is not solved by moving from present consent to past consent, or in other words by suggesting that an individual can simply consent now to a coercive apparatus that will operate in the future. As Pitkin puts it, consent to a corrupt government now should not mean consent to enslavement in the future: see H. Pitkin, "Obligation and Consent" in P. Laslett, W.G. Runciman & Q. Skinner, eds, *Philosophy, Politics and Society* (Oxford: Basil Blackwell, 1972) 45 at 52.

[46]So it becomes legitimate to ask, as Pitkin does, *ibid.* at 73, "[w]hy must I do what a rational man would do, what if I don't want to be rational?"

[47]Lesser acts, such as voting, imply, as Singer describes, participation in a system where a decision will be taken whether or not the individual votes, so the individual may participate only for the purposes of trying to realize a better decision, not from consent: see P. Singer, *Democracy and Disobedience* (New York: Oxford University Press, 1974) at 25-26. Going about the business of life or following the customs of the land does not generate consent since people are not realistically able to simply pursue their lives in another state.

[48]This problem is not solved by shifting from a requirement of the consent of all to that of the majority, either in regards to the original contractors only or for subsequent governmental acts: see A.J. Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979) at 72-73; Pitkin, *supra*, note 45 at 52-53.

[49]See also *supra*, note 45.

law rather than consent. Sometimes it is stated that obligation is derived from what rational persons would consent to, or that a legitimate government is one to which subjects ought to consent. This ideal state embodies the demands of reason or justice. Persons have natural rights: that is, rights which are not created by the legislative authority. The function of the state is to protect those rights, and in so far as the state effectively carries out that function, citizens have an obligation to obey it.

However, founding obligation on the objective characteristics of government or the institution of the rational in government and law, minimizes the role of consent; it tends to ignore the demand of free individuals that obligation be self-assumed. It avoids the fact that rational political institutions and laws must be products of an act of will and, hence, fails to account for the positivity necessarily associated with law. Actual, political institutions, which may or may not yield rational decisions, are seemingly left without authority or obligatory force.

The presentation of this dichotomy is an oversimplification as it does not purport to describe theories of obligation which attempt to occupy a middle ground.[50] What this outline is intended to illustrate is that the failures of one-sided explanations of political obligation ought not to be carried over into theories of the judicial function under a constitutional bill of rights. Just as a satisfactory theory of political obligation is bound to account for both the values of consent and justice or the protection of rights, so must judicial institutions endeavour to accommodate both these values. This, however, is a result which American depictions of judicial review tend to overlook.

American accounts of the appropriate judicial function under a bill of rights are inclined to align themselves with one theoretical strand of accounting for political obligation as opposed to the other.[51] To confine judicial review under a constitutional bill of rights to circumstances and decisions which definitively can be said to have had the requisite consent (for example, that of the framers), and hence to determine legal obligation by an appeal

[50]There are of course consent theories of obligation, such as Locke's, which attempt to modify the requirement of consent or to delimit the content of any consent by relating it to the protection of certain individual rights by the sovereign authority or the state. Whether or not such theories are successful, the claim here is that acceptance of the necessity of relating the requirement of consent to consideration of the substance of consent or the protection of rights has implications for the judicial function under a constitutional bill of rights.

[51]This is not to say that some American constitutional theorists come to some conclusions about the appropriate nature of judicial review which rely on one set of assumptions and other conclusions which rely on the contradictory set of assumptions; still their stance at any given moment is one-sided for the contradictions are left unresolved, no acknowledgement having been made of the need to reconcile the two strands of political theory.

to the facts which can establish the existence of such consent, involves an assumption that obligation derives from consent. A similar assumption is made where judicial review is permitted only to nullify legislative acts which are not genuine products of consent, and consent refers to that of the framers (where the constitution is clear) or that of an existing, true and unencumbered majority (where constitutional provisions are open-ended).[52] On the other hand, the claim that judicial review under a constitutional bill of rights constitutes a search for right answers or a call to moral leadership, implies that the source of obligation is a law's moral character or rightness. Or if in the end the claim is made that judicial review should proclaim only those values which will gain general assent, ultimate reliance has been placed on consent as the foundation of obligation.

But such one-dimensional characterizations of the judicial function encounter the inconsistencies of the background premises. Avoiding these inconsistencies suggests that a constitutional bill of rights should be understood as part of an effort to combine the consent and right-based theories of political obligation. On the one hand, it suggests a vision of the state as a union of autonomous individuals whose freedom is legitimately restricted only by obligations they have imposed on themselves. Having consented to the law or participated in its making, the outcome of the democratic process is binding. On the other hand, it suggests that there are certain rights which no democratic government, or no ordinary legislative majority, is permitted to deny. Certain substantive outcomes of the democratic or majoritarian process are illegitimate.[53] In this framework, judicial institutions have a responsibility to balance concerns about consent and justice.

This proposition is spawned in the environment of a non-ideal state, namely, one in which the sovereign's will is not always just and the judicial or law-applying function cannot be mechanical. It does not entail the conclusion that judicial review under a constitutional bill of rights is a necessary state structure by which the judiciary must carry out its responsibilities under non-ideal conditions. But it does involve the recognition that insti-

[52]And recall that the genuineness of consent on this view was supposed to be determined without a judicial decision about substantive or fundamental values.

[53]One might have reference to various indications that American constitutional history reflects natural law origins to establish the latter anti-majoritarian underpinnings of a constitutional bill of rights: see T.C. Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought" (1977-78) 30 Stan. L. Rev. 843 at 869, 891; Sager, *supra*, note 34 at 443-44. Or one could refer to the British legal tradition cast off in entrenching a bill of rights — namely, Dicey's view that there are no legal substantive limits on legislation or that Parliament has the right to make or unmake any law whatever "however much it may restrict the freedom of individuals": see E.C.S. Wade, "Introduction" in A.V. Dicey, *Introduction to the Study of the Constitution*, 10th ed. (London: MacMillan, 1960) xix at cxev-cxcvi.

tuting such judicial review represents a conclusion that a given state's political and judicial institutions are such that judicial review under a constitutional bill of rights is likely to effect more just laws, without an unacceptable level of harm being done to the capacity of more popular institutions to produce just results.

This endeavour to let neither element of political theory dominate the definition of the judicial function under a constitutional bill of rights must now be directly related to the Canadian constitutional rights framework and translated into concrete principles of interpretation.

II. The Canadian Dilemma

Consideration of the American dilemma of constructing a judicial function, involving the invalidation of legislation violating the bill of rights and reconciliation with democracy, began on the assumption that this was now a Canadian problem. It is not — quite.

A. The Similarities

There are certain similarities between the problem of articulating an appropriate Canadian judicial function under the *Charter* and the American dilemma. Both judiciaries have the duty to engage in judicial review. Although judicial review was not a necessary element in the American constitutional scheme and the implementation of the Bill of Rights, the judiciary appropriated the responsibility in 1803[54] and has retained it ever since. The Canadian *Charter* does not introduce the concept of judicial review to Canada; the courts have always engaged in judicial review for the purpose of policing the boundaries between the federal and provincial governments.[55] But judicial review in the context of overriding or setting aside legislation on the grounds that it is inconsistent with human rights provisions has had a much different history. The 1960 *Canadian Bill of Rights*,[56] which applied

[54]See *Marbury* v. *Madison*, *supra*, note 5.

[55]See, for the rationale, B.L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 2d ed. (Toronto: Butterworths, 1983) at 38ff. and 43; J. Smith, "The Origins of Judicial Review in Canada" (1983) 16 Can. J. Pol. Sci. 115, (1983) 16 Can. J. Pol. Sci. 587.

[56]Part I of *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III [hereinafter *Bill of Rights*].

only in the federal sphere, and which was not a constitutional instrument, did not clearly state what effect it was to have on inconsistent legislation.[57]

Although the Supreme Court determined in *R.* v. *Drybones* that it could render inconsistent legislation inoperative,[58] its reluctance to carry out this mandate was reflected in the fact that this was the only case in the twenty-two years before the adoption of a constitutional charter of rights in which the Supreme Court reached this result.[59] It was the reluctance of the Court to review the impact of legislation on human rights which led the federal government to urge that a bill of rights be placed in the Constitution. The first concrete beginning of such a constitutional bill of rights appeared in the 1968 federal paper entitled *A Canadian Charter of Human Rights.*[60]

For its proponents, a constitutional guarantee of rights, a guarantee which would constrain acts of government, encompassed a particular func-

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[57]The opening paragraph of *Bill of Rights, ibid.*, s. 2, says:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringment of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to . . .".

The major issue of interpretation concerued whether the words "construed and applied" in s. 2 directed the courts to apply legislation even though it did "abrogate, abridge or infringe" the rights and freedoms set out in the *Bill of Rights*, or whether these words directed the courts to refuse to apply such a law.

[58](1969), [1970] S.C.R. 282 at 294, 9 D.L.R. (3d) 473, Ritchie J. [hereinafter *Drybones* cited to S.C.R.]:

> [Section] 2 is intended to mean and does mean that if a law of Canada cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognised and declared by the Bill, then such law is inoperative "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights.*"

[59]Generally, the Court's attitude to the *Bill of Rights* is reflected by the words of Laskin C.J.C. in *Curr* v. *R.* (1972), [1972] S.C.R. 889 at 899, 26 D.L.R. (3d) 603:

> [C]ompelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government . . . .

[60]Canada, Ministry of Justice, *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968) at 14:

> [A] constitutionally entrenched Bill of Rights is required which will declare invalid any existing or future statute in conflict with it. Language in this form would possess a degree of permanency and would override even unambiguous legislation purporting to violate protected rights.

See also, Canada, *The Constitution and the People of Canada* (Ottawa: Queen's Printer, 1969) at 16.

tion of the courts. Specifically, in the words of the 1969 federal paper entitled *The Constitution and the People of Canada*:

> The supremacy of the Constitution implies the existence of some agency which is capable of deciding what the Constitution means and when it has been infringed. If the people are to rest assured of the maintenance of the principles of the Constitution, they must rely on some agency to enforce its provisions. It is our tradition — one which the Government of Canada would expect to see preserved — that the courts perform this important function.[61]

This intention was reflected in the various drafts of what eventually became section 52 of the *Charter*.[62]

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[61] *The Constitution and the People of Canada, ibid.* at 38.

[62] The drafting history of what became s. 52 of the *Charter* is as follows:

The Constitution and the People of Canada, ibid., App. at 58, proposition 5:

> 5. It should be provided that, without restricting the generality of any right or freedom referred to in the Charter, neither Canada nor any province shall abrogate or abridge any such right or freedom, and any law whether enacted in the past or future should be invalid to the extent that it interferes with these rights and freedoms.

Seventh Constitutional Conference of First Ministers, Victoria, 14-16 June 1971:

> Art. 1: It is hereby recognized and declared that in Canada every person has the following fundamental freedoms . . . and all laws shall be construed and applied so as not to abrogate or abridge any such freedom.
>
> Art. 2: No law of the Parliament of Canada or of the legislatures of the Provinces shall abrogate or abridge any of the fundamental freedoms herein recognized and declared.

Bill C-60, first reading on 20 June 1978, as *The Constitution Amendment Act (1978)*, which died on the order paper [hereinafter Bill C-60]:

> s. 23: To the end that full effect may be given to the individual rights and freedoms declared by this Charter, it is hereby further proclaimed that, in Canada, no law shall apply or have effect so as to abrogate, abridge or derogate from any such right or freedom.

Subsequent adoption of the Canadian Charter of Rights and Freedoms, set out in Part I of Bill C-60, by all of the provinces would have also brought s. 35 into effect (see s. 125(e), Bill C-60). S. 35 stated:

> The Constitution of Canada shall be the supreme law of the Canadian federation, and all of the institutions of the Canadian federation shall be governed by it and by the conventions, customs and usages hallowed by it, as shall all of the people of Canada.

Bill C-60 also contained the following clause relating to the status of the *Charter* (set out in Part I):

> s. 127: In the event of a conflict or inconsistency between
> (a) the provisions of Part I other than any designated provisions set out therein, or
> (b) after such time as effect has been given by law to any designated provision set out in Part I, the provisions of Part I to which effect has been given,
> and the provisions of the Act of 1867 or any subsequent constitutional enactment, the provisions of Part I described in paragraphs (a) or (b), as the case may be, shall prevail to the extent of such conflict or inconsistency.

Canada, Senate and House of Commons, Special Joint Committee on the Constitution of Canada, "Report to Parliament" in *Minutes of Proceedings and Evidence*, No. 20, Recom-

Throughout the drafting process the aim of the drafters remained the same: to limit the powers of Parliament and the legislatures in relation to fundamental rights and freedoms;[63] to entrench a bill of rights in the constitution which would ensure that those rights and freedoms could not be changed by governments or legislatures without going through the constitutional amendment process;[64] to give the individual the capacity to test

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mendation 4 at 20:11 (10 October 1978):

> the remedial provision in [section] 23 is still too weak to remove all doubt that Parliament intends the Charter to be an overriding statute. While it improves upon section 2 of the *Bill of Rights* by dropping the implication that the only recourse for the court is to construe any offending laws consistently with the Bill, we insist upon a provision that insofar as any law is inconsistent with the Charter it shall be *pro tanto* invalid or inoperative.

Meeting of Officials on the Constitution, 11-12 January 1979, Ottawa, 8 January 1979, *Canadian Charter of Rights and Freedoms, Federal Draft*, Doc. No. 840-153/004:

> 24. To the end that the paramountcy of this Charter be recognized and that full effect be given to the rights and freedoms herein declared, any law and any administrative act that is inconsistent with any provision of the Charter is, except as specifically otherwise provided, inoperative and of no force or effect to the extent of the inconsistency.

Federal-Provincial Conference of First Ministers on the Constitution, 5-6 February 1979, Ottawa, *Federal Draft Proposals Discussed by First Ministers*, Doc. No. 800-010/037:

> I(1) Charter provisions to render inoperative any law or administrative act which is in conflict with its provisions.

Meeting of the Continuing Committee of Ministers on the Constitution, 22-23 October 1979, Halifax, *Federal Draft, October 17, 1979*; and Continuing Committee of Officials on the Constitution, 15-16 November 1979, Toronto, *Federal Draft, November 5, 1979, "Rights and Freedoms within the Canadian Federation"*, Doc. No. 840-177/005:

> 18. To the end that the paramountcy of this Charter be recognized and that full effect be given to the rights and freedoms herein declared, any law and any administrative act that is inconsistent with any provision of the Charter is, except as specifically otherwise provided in or as authorized by this Charter, inoperative and of no force or effect to the extent of the inconsistency.

Meeting of the Continuing Committee of Ministers on the Constitution, 8-11 July 1980, Ottawa, *Federal Discussion Draft, July 4, 1980, "Rights and Freedoms Within the Canadian Federation"*, Doc. No. 830-81/027:

> 18: To the end that the paramountcy of this Charter be recognized and that full effect be given to the rights and freedoms herein declared, any law and any administrative act that is inconsistent with any provision of the Charter is, except as specifically otherwise provided in or as authorized by this Charter, inoperative and of no force or effect to the extent of the inconsistency.

Meeting of the Continuing Committee of Ministers on the Constitution, 26-29 August 1980, Ottawa, *Federal Draft, August 22, 1980, "The Canadian Charter of Rights and Freedoms"*, Doc. No. 830-84/004:

> 26: Any law, order, regulation or rule that authorizes, forbids or regulates any activity or conduct in a manner inconsistent with this Charter is, to the extent of such inconsisteney, inoperative and of no force or effect.

Meeting of the Continuing Committee of Ministers on the Constitution, 26-29 August 1980, Ottawa, *Provincial Proposal (In the Event that there is Going To Be Entrenchment), August 28,*

legislation for consistency with those rights and freedoms, and the power to the courts to determine that consistency.[65] The language of section 52 was selected specifically to correct the ambiguity associated with the *Ca-*

1980, Annex to Doc. No. 830-84/031:

> 22(a): Any law, order, regulation or rule that authorizes, forbids or regulates any activity or conduct in a manner inconsistent with this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

Federal-Provincial Conference of First Ministers on the Constitution, 8-13 September 1980, *Revised Federal Discussion Draft of September 3, 1980, The Canadian Charter of Rights and Freedoms*, Doc. No. 800-14/004:

> 24: Any law, order, regulation or rule that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

Proposed Resolution respecting the Constitution of Canada, tabled in the House of Commons and the Senate, 6 October 1980:

> 25: Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

Consolidation of Proposed Resolution and Possible Amendments as Placed Before the Special Joint Committee by the Minister of Justice, 12 January 1981, together with Explanatory Notes:

> 58(1): The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[63]Federal-Provincial Conference of First Ministers on the Constitution, *Communique of the Conference*, Doc. No. 800-8/063 at 1 (Ottawa, 1 November 1980): "Constitutional entrenchment . . . would entail a common agreement to restrict the powers of both orders of government to interfere improperly with the basic rights of the people." See also Canada, Senate and House of Commons, Special Joint Committee on the Constitution of Canada, *Minutes of Proceedings and Evidence*, No. 4 at 4:84 (13 November 1980) [hereinafter Hays-Joyal Committee] where Jean Chrétien later testified, "We want to entrench this Charter of Rights in the constitution so that those rights are confirmed, cannot be withdrawn at the whim of any level of government"; and on another occasion, No. 38 at 38:42 (15 January 1981), he said, "The intention of a Charter is to limit the scope of the legislature and Parliament in relation to the fundamental rights of Canadian citizens . . .".

[64]Doc. No. 800-8/063, *ibid.* at 1:

> There are some matters which should be beyond the power of the government of the day, whether federal or provincial, to change by a simple majority vote in the legislature. They should have the protection of being changeable only be a process of constitutional amendment involving both federal and provincial governments. That is why the federal government views as essential to a renewed Constitution the inclusion in it of an entrenched charter of rights . . . . With an entrenched charter, the basic values of Canadians would have a permanence, being placed beyond the reach of ordinary legislative and administrative processes.

See also Meeting of the Continuing Committee of Ministers on the Constitution, Background Notes, Charter of Rights and Freedoms, Doc. No. 830-81/028 at 2 (5 July 1980).

[65]In Hays-Joyal Committee, *supra*, note 63, No. 4 at 4:85-4:86 (13 November 1980), R. Tassé, Deputy Minister of Justice stated:

> [I]n effect the big change that will occur is that with a charter of rights like this, a citizen could challenge in court the application of federal and provincial legislation . . . . He could challenge the authority of Parliament for having made that restriction on his rights . . . and what the court will have to establish is whether the restrictions or limitations that are imposed by parliament . . . are strictly reasonable . . . .

nadian Bill of Rights' provision concerning its effect on inconsistent legislation and the judicial reluctance to apply it. Section 52 was intended to make clear that legislation inconsistent with the *Charter* is "of no force or effect", and to give the judiciary an indisputable mandate to apply that proscription. In fact, within a few years of the *Charter* coming into force, the Supreme Court has already assumed the capacity to apply section 52 to render legislation which is inconsistent with the *Charter*'s provisions of no force or effect.[66]

Put negatively, a constitutional bill of rights was intended to oust the doctrine of parliamentary sovereignty. The doctrine of parliamentary sovereignty, prior to the coming into force of the *Constitution Act, 1982*, was applicable to the federal and provincial legislatures of Canada (within their respective spheres).[67] The legislative history of what became section 1 of the *Charter* makes the drafters' intention to end the regime of parliamentary sovereignty clear. For example, during the course of the Hays-Joyal Committee's deliberations in the fall of 1980, many groups presenting briefs strongly criticized section 1 of the *Charter*, as it was proposed in October 1980, on the ground that it was drafted in such a way as to retain the doctrine of parliamentary sovereignty.[68] Section 1 then read: "The Canadian Charter

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[66]*Hunter* v. *Southam Inc.* (1984), [1984] 2 S.C.R. 145 at 169, 11 D.L.R. (4th) 641, 41 C.R. (3d) 97, Dickson, C.J.C. [hereinafter *Hunter* cited to S.C.R.]; *Singh* v. *Minister of Employment and Immigration* (1985), [1985] 1 S.C.R. 177 at 221 and 223, 58 N.R. 1, Wilson J. [hereinafter *Singh* cited to S.C.R.]; *R.* v. *Big M Drug Mart Ltd* (1985), [1985] 1 S.C.R. 295 at 353, 18 D.L.R. (4th) 321, [1985] 3 W.W.R. 481, Dickson C.J.C. [hereinafter *Big M Drug Mart* cited to S.C.R.]. In addition, s. 24(1) of the *Charter* gives the Court the power to order "such remedy as the court considers appropriate and just in the circumstances" where the *Charter* rights or freedoms have been infringed or denied. Refusing to apply an offending law or rendering it of no force or effect would be one of the possible judicial remedies under this rubric. In view of *Hunter*, *supra*, reference to s. 24 appears to be unnecessary for recognition of this judicial authority.

[67]As the Privy Council stated in *A.G. Ontario* v. *A.G. Canada* (1912), [1912] A.C. 571 at 584: "Whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act." See also *Murphy* v. *Canadian Pacific Railway Co.* (1958), [1958] S.C.R. 626 at 643, 15 D.L.R. (2d) 145, Rand J.: "It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself...". In *Hodge* v. *R.* (1883), 9 A.C. 117 at 132, concerning the provinces and s. 92 of the *Constitution Act, 1867*, the Court said: "Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament of the Dominion ...".

[68]In Hays-Joyal Committee, *supra*, note 63, No. 7 at 7:85, 7:86 and 7:102 (18 November 1980), Professor Maxwell Cohen, speaking for the Canadian Jewish Congress, noted:

> I have a feeling that the draftsmen, when they drafted section one, were torn between two conflicting pressures on them ... how to maintain the theory of parliamentary supremacy when introducing a theory of Charter regime.
>
> ....
>
> You must accept the fact, that once you introduce a Charter regime, parliamentary sovereignty is modified forever to that extent. That is a plain legal and political

of Rights and Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government."

In response to such criticism the federal government amended section 1, dropping the words referring to a parliamentary system of government. It also reformulated the limitation provision to refer to limits which "can be demonstrably justified in a free and democratic society" believing this to suggest that the rights in the Charter are not absolute but subject to reasonable limitations.[69]

Thus the alteration of the section was a direct effort to ensure that the doctrine of parliamentary sovereignty would not be invoked by the courts in the future, but that on the contrary legislative authority would be limited as to substance in relation to human rights and the courts should review the content of legislation for its consistency with constitutional rights, and override or set aside legislation which is inconsistent with those rights.

It is important to note that section 52, with the corresponding expansion in the human rights context of judicial review, and the form of section 1 were the product of a thorough, long and public debate over the pros and cons of entrenchment, and its converse, the retention of parliamentary sovereignty. Throughout this debate, entrenchment meant, to its advocates, placing authority over certain individual rights and freedoms beyond the reach of ordinary legislatures by placing them in a constitution which could only be amended by special majorities of Parliament and the legislatures. As the federal government said in February of 1969 in *The Constitution and the People of Canada*, and repeated many times over the next twelve years:

> fact, and you cannot have the best of both worlds, except in an emergency.
>
> ....
>
> [I]t is simply not possible to say in the same breath, let us have a doctrine of supremacy of Parliament, let us have a supremacy of Charter regime. You cannot have two supremacies.

See also the Canadian Human Rights Commission's presentation to the Hays-Joyal Committee, November 1980; Professor Sussman, speaking for the Canadian Association for the Prevention of Crime, *supra*, No. 24 at 24:43 (11 December 1980).

[69]Hays-Joyal Committee, *ibid.*, No. 36 at 36:11 and No. 38 at 38:43. Mr. Chrétien, Minister of Justice, introduced the amendments with the following remarks:

> [E]ven if the law were passed — it was a danger before that it was almost impossible for the court to go behind a decision of a Parliament or a legislative assembly; but here, even if the law is passed, there is another test, namely that it can be demonstrably justified in relation to this Charter.
>
> ....
>
> The intention of a Charter is to limit the scope of the legislature and Parliament in relation to the fundamental rights of Canadian citizens.

> Our proposal is for an "entrenched" charter, which implies that it would be part of the Constitution ... . *As part of the Constitution it could be changed only by the procedures for constitutional amendment* ... this part of the Constitution containing *the charter will not be subject to change by a simple legislative majority* — the procedure employed for the making of ordinary laws. *This is the essential meaning of entrenchment* — that a constitutional charter by its overriding effect and its relative stability will preserve fundamental principles, *providing a check on the exercise of power by governments of the day.*[70]

Up to this point, the American dilemma described above was apparently going to become a Canadian problem. Here, however, the similarity with the American constitutional context ends and the flavour of a constitution made only in Canada begins.

B. The Differences

From the outset, most of the provinces were not favourably disposed to the entrenchment of a charter of rights and the ousting of parliamentary sovereignty. Only in 1971[71] did a clear majority — the governments of eight of the provinces[72] — in addition to the government of Canada, approve of the principle of an entrenched charter which would bind the provinces as well as the federal government, and of the entrenchment of a limited number of rights, fundamental freedoms, democratic rights and language rights.[73] These were set out in what became known as the Victoria Charter.[74] Continuing and substantial provincial opposition meant the haphazard but ongoing consideration of various methods of reducing the circumstances or the number of governments which would actually be bound by a constitutional bill of rights. This search for a sheep in wolf's clothing was not very far from the federal drafters' minds, not nearly as far as the federal political rhetoric would have suggested. The idea that a bill of rights in the constitution might not actually be binding on both the federal government and the provinces, and might give way to a checkerboard scheme of rights

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[70]*Supra*, note 60 at 18 (emphasis added).

[71]There is some suggestion of a very limited endorsement of entrenchment by most of the provinces at the First Minister's Conference of February 1979: see R. Romanow, J. Whyte & H. Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 45.

[72]The exceptions were Quebec and Saskatchewan.

[73]Those rights were freedom of thought, conscience, religion, opinion, expression, peaceful assembly, and association (Art. 1),the principles of universal suffrage and free democratic elections every five years (Arts 4, 6, 7), the right to vote without discrimination on the basis of race, ethnic or national origin, colour, religion or sex (Art. 5), a session of Parliament and the Legislatures at least once a year (Art. 8), and a limited number of "language rights" (Art. 10-19).

[74]This was the subject of the seventh Constitutional Conference held in Victoria, 14-16 June 1971.

protection across the country, manifested itself in a variety of forms in charter drafts since 1978.[75]

In Bill C-60, a fairly extensive list of rights and freedoms was followed by the caveat that the "Canadian Charter of Rights and Freedoms" would initially apply only to matters within the legislative authority of Parliament,[76] and subsequently only to the provinces as they individually chose to opt in or to extend the provisions of the Charter to matters coming within their legislative authority.[77] The section proclaiming the Constitution of Canada to be the supreme law[78] would be in effect only when all the provinces had in fact opted in.[79]

A subsequent federal draft, dated 8 January 1979 and discussed at the Meeting of Officials on the Constitution in Ottawa, 11-12 January 1979,[80] similarly provided that the Charter of Rights and Freedoms would initially apply only to matters within the legislative authority of Parliament.[81] However, it also admitted of two avenues for a province which wished to opt in or to extend the Charter to matters coming within its legislative authority. A legislature could provide for such an extension either without qualification[82] or with only the following qualification:

> Section 24 of the *Canadian Charter of Rights and Freedoms* does not apply in respect of the rights declared by sections 10 and 11 thereof where it is expressly declared by an Act of the Legislature that such Act or a specified provision or provisions thereof operate and have force and effect notwithstanding the provisions of the *Canadian Charter of Rights and Freedoms*.[83]

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[75]The first "notwithstanding" clause, albeit quite limited in scope, and not effecting a patchwork scheme of rights protection, in a draft of a *constitutional* bill of rights is to be found in the propositions of the 1969 federal paper, *The Constitution and the People of Canada, supra*, note 60 at 60 (proposition 7):

> It should be provided that where Parliament has declared a state of war, invasion or insurrection, real or apprehended, to exist, legislation enacted by Parliament which expressly provides therein that it shall operate notwithstanding this Charter, and any acts authorized by that legislation, shall not be invalid by reason only of conflict with the guarantees of rights and freedoms expressed Charter [sic].

[76]Bill C-60, *supra*, note 62, s. 131(1).

[77]*Ibid.*, s. 131(3). Alternatively, under s. 131(4), the *Charter* would extend to the provinces earlier if agreement were reached to amend the provision by which the reach of the Charter had initially been limited to matters within the authority of Parliament.

[78]*Ibid.*, s. 35.

[79]*Ibid.*, s. 125. S. 35 could have been brought into force by agreement to amend the Constitution of Canada so as to give effect to this designated provision (s. 125).

[80]Doc. No. 840-153/004.

[81]Bill C-60, *supra*, note 62, s. 131(2).

[82]*Ibid.*, s. 131(5)(a).

[83]*Ibid.*, s. 131(5)(b).

The section 24 referred to in this quotation is the general paramountcy clause of the Charter, and sections 10 and 11 refer to "legal rights" and "non-discrimination rights" respectively. This January 1979 federal draft added that the provisions of *The British North America Act, 1867* respecting reservation and disallowance as they apply to the provinces, would in general cease to apply to those provinces choosing to opt into the Charter of Rights.[84] They would, however, continue to apply to any provincial provision which made use of the qualification or notwithstanding clause when opting in.[85] This suggestion of an ability on the part of the provinces to avoid certain rights and freedoms while remaining bound by the Charter's general authority, was the first time that an "override", "notwithstanding" or *non obstante* provision appeared in a draft of the constitutional bill of rights.[86]

The Pépin-Robarts report (Task Force on Canadian Unity), released in January 1979 and considered at the First Ministers Conference in February 1979, commented on Bill C-60 and suggested an alternative to this provision of the Bill. Although they expressed a preference for limiting entrenched rights "to those on which both central and provincial governments can agree now",[87] they suggested that another possibility would be "including a clause in the constitution which would permit a legislature to circumvent a right (and incurring the odium of so doing), by expressly excepting the statute from respecting that right. Such a clause ... is sometimes described as an exculpatory clause."[88]

In the Federal-Provincial Conference of First Ministers on the Constitution which took place 5-6 February 1979, another federal draft proposal was discussed[89] and it again specifically included a kind of notwithstanding provision, here referred to as an "override clause". "Override clauses", under which "provinces could opt in with general override power", were to be introduced with respect to "legal rights" and "non-discrimination rights", but not permitted with respect to "fundamental freedoms", and "democratic rights", "mobility rights", "property rights", and "language rights". The provinces therefore had the capacity both to opt into a constitutional bill of rights, and to override rights and freedoms within the bill at the time of opting in.

Although thereafter the federal position was to avoid mentioning these opting-in or override concepts and to adopt the position that a Charter

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[84]*Ibid.*, s. 131(6).

[85]*Ibid.*, s. 131(7).

[86]For a limited exception see note 75, *supra.*

[87]Canada, Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Hull: Supply and Services Canada, 1979) at 109 (Co-chair: J. Pépin, J. Robarts).

[88]*Ibid.* at 108.

[89]Doc. No. 800-010/037.

should be binding on both levels of government, the possibility continued actively to be discussed with the provinces. A Sub-Committee of Officials (chaired by Roger Tassé, federal Deputy Minister of Justice) was established at the Continuing Committee of Ministers on the Constitution, 15-19 July 1980, and given the mandate *inter alia*, "to review the practicalities of including an override clause in the Charter." This Sub-Committee reported to the Continuing Committee on this subject on 29 August 1980. Regarding "an override clause whereby a legislative body could expressly provide that a law would operate notwithstanding a Charter right", the Sub-Committee found that there was general agreement that this matter should be considered further.[90] The Sub-Committee report included some detailed suggestions with respect to such a clause:

> One mechanism that was discussed, in the event it is decided that an override clause is necessary (and this could depend on the ultimate scope and wording of an entrenched Charter), is a requirement that any law enacted under an override provision be adopted by a 60% majority of the legislative body and that any such law would expire after a specified time period, eg. five years unless repealed earlier. There was no discussion of the particular categories of rights to which any override clause might apply.[91]

Finally, the Sub-Committee set out for the consideration and determination of the Continuing Committee the following question: "Should inclusion of an override clause along the lines described above be contemplated?"[92]

Having received this report, the Continuing Committee decided not to canvass the positions of governments on this (and other issues) in light of a generally negative response by the provinces to a poll taken only on the principle of entrenchment. The Continuing Committee deliberately passed on to the First Ministers' meeting in September 1980 the resolution of the issue: "If there is to be an entrenched Charter, should an override clause be included to enable enactment of laws expressly overriding entrenched rights, and if so, to what categories of rights might an override apply?"[93]

With the failure of the First Ministers to reach agreement at their Conference in September of 1980, the federal government tabled in the House of Commons a proposed resolution respecting the Constitution of Canada which contained no such override or *non obstante* provision. This revised Charter was sent to the Hays-Joyal Joint Committee in October 1980. As

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[90]Meeting of the Continuing Committee of Ministers on the Constitution, *Report of the Sub-Committee of Officials*, Doc. No. 830-84/031 (29 August 1980): "While some doubt was voiced about the desirability of including such a provision, there was general agreement that further consideration should be given this matter."

[91]*Ibid.*

[92]*Ibid.*

[93]*Ibid.*

a result, discussion in the Joint Committee was not specifically directed to the acceptability of such a provision in principle or to an examination of its terms. Consideration was limited to the merits of entrenchment generally (then section 25, now section 52), and to the strengths and weaknesses of a general limitation clause (section 1). In the result, as set out above, section 1 was widely criticized as undermining the principle of entrenchment and restoring parliamentary sovereignty, and such criticism led to its amendment, which was intended to ensure that the doctrine of parliamentary sovereignty would be laid to rest.

The Charter was amended again in the course of being considered by the House of Commons and the Senate in the winter of 1981, but no override provision was debated or adopted. Following the final votes on amendments on 23 April 1981, in the House of Commons, and 24 April 1981 in the Senate, the resolution requesting an amendment to the Constitution of Canada that included the Charter of Rights and Freedoms was placed before the Supreme Court of Canada.[94] The Court was asked by way of a constitutional reference to consider whether an amendment of (what came to be entitled) the *Constitution Acts, 1867-1975* which would affect provincial powers (specifically, the insertion in the Constitution of an amending formula and a Charter of Rights), required provincial agreement, either by law or by convention. On 28 September 1981 the Supreme Court found that provincial agreement to such amendments was not required by law, but that their substantial agreement was required by convention.[95] Subsequently, federal and provincial authorities resumed negotiations and, with the consent of all of the provinces except Quebec, agreed on 5 November 1981 to an amended version of the resolution of April 1981. In the November accord, the federal and provincial governments, except Quebec, agreed to the introduction of an override or *non obstante* clause. Specifically, they agreed to:

> A "notwithstanding" clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. Each "notwithstanding" provision would require reenactment not less frequently than once every five years.

The revised resolution, redrafted to reflect the terms of this agreement, contained a new section 33. The initial version of this section was tabled on 19 November 1981. It applied not only to those rights specifically men-

[94]An all party accord reached on 7 April 1981 provided that the final votes on proposed amendments would be called on 23 April 1981; the resolution would be in abeyance until the first sitting day following the Supreme Court of Canada decision; the Government would then designate two days to conclude debate on the resolution and at the end of the day the question would be put.

[95]*Reference Re Amendment of the Constitution of Canada* (1981), [1981] 1 S.C. R. 753, 125 D.L.R. (3d) 1.

tioned in the 5 November accord, but also to section 28.[96] The 19 November 1981 version of section 33(1) stated:

> Parliament or the Legislature of a province may expressly declare in an Act of Parliament or of the Legislature, as the case may 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, or Section 28 of this Charter in its application to discrimination based on sex referred to in Section 15.

Considerable and swift public pressure, especially from Canadian women, was applied to both federal and provincial governments, resulting in the removal of the reference to section 28. The final text of the *Charter* was therefore amended to include the following provisions, adopted by the House of Commons on 2 December 1980 and the Senate on 8 December 1981:

> 33. (1) Parliament or the Legislature of a province may expressly declare in an Act of Parliament or of a Legislature as the case may 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.
>
> (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 sub-section (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 sub-section (1).
>
> (5) Sub-section (3) applics in respect of a rc-enactment made under sub-section (4).

This section gives both Parliament and the provincial legislatures the power to override most of the *Charter*'s rights and freedoms, specifically, "fundamental rights", "legal rights" and "equality rights". They can be overridden by inserting in ordinary legislation, not requiring any supermajority, a clause stating that the legislation is to operate notwithstanding a provision in the *Charter*. The only rights which cannot be overridden are the "democratic rights",[97] "mobility rights",[98] "minority language educational rights",[99] rights associated with the equal status of French and English

[96]Added by the House of Commons by resolution: see Canada, *Journals of the House of Commons* at 1741ff. (23 April 1981).

[97]Ss 3-5.

[98]S. 6

[99]S. 23.

in some parts of Canada,[100] and an interpretation clause providing that rights in the *Charter* are guaranteed equally to male and female persons.[101]

A constitution made only in Canada is one which includes a bill of rights the majority of whose terms can be avoided by ordinary legislative means; a constitutional bill of rights for which constitutional amendment is unnecessary in order to circumvent most of its provisions; a "supreme law"[102] whose protection of individual rights can usually be bypassed by simple majority vote in the legislature,[103] or withdrawn at the whim of any level of government;[104] a constitutional charter whose rights and freedoms can be limited only by reasonable limitations as are demonstrably justified in a free and democratic society[105] — provided, that is, that they are not simply ignored or overridden altogether by a notwithstanding clause in the potentially offensive legislation.

The *Canadian Charter of Rights and Freedoms* is therefore not an entrenched bill of rights.[106] "Entrenchment" is a term which in the long Canadian debate was consistently used to mean placing individual rights and freedoms beyond the reach of ordinary legislatures by putting them in a constitution whose provisions could only be avoided by constitutional amendment. If "entrenched" is used to mean simply making amendment more difficult than it is ordinarily, for example by stipulating the necessity of manner and form requirements — such as requiring a notwithstanding clause be placed in legislation before it is capable of having a particular effect — then the *Charter* is entrenched. But so, in this sense, is the *Canadian Bill of Rights.*[107] The effort in Canada to move beyond the *Canadian Bill of Rights*, to decide for entrenchment and against parliamentary sovereignty did not, however, use "entrenchment" in this sense.[108] In Canada we have a constitutional charter of rights, but not an entrenched one. The question which remains is whether the similarities with the American constitutional context — as one which encompasses a limitation on legislative authority in relation to human rights and a judicial mandate to review the content

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[100]Ss 16-20.

[101]S. 28.

[102]S. 52.

[103]See passage reproduced *supra*, note 64.

[104]See passage reproduced *supra*, note 63.

[105]*Charter, supra*, note 1, s. 1.

[106]This is so despite misuse of the term by the Supreme Court of Canada in the context of the *Charter*. See, *e.g., Big M Drug Mart, supra*, note 66 at 349, Dickson C.J.C., and 359, Wilson J. concurring; *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979* (1985), [1985] 2 S.C.R 486 at 497-98, 46 D.L.R. (4th) 536, 63 N.R. 266, Lamer J. writing for the majority.

[107]With respect to legislation passed before 1960, see *Drybones, supra*, note 58. With respect to legislation passed after 1960, see *Singh, supra*, note 66 at 239, Beetz J.

[108]See *supra*, note 62.

of legislation for its consistency with constitutional rights and to override or set aside legislation found wanting — are ephemeral or even simply nonexistent. Do the differences in the Canadian constitutional bill of rights make the advice offered for the judiciary engaged in judicial review under a constitutional bill of rights irrelevant to the Canadian judiciary?

C. A Canadian Solution

Determining the appropriate function for the judiciary and its relation to the legislature required by the *Charter* entails the recognition that the *Charter* embodies two *inconsistent* themes. On the one hand, section 52 (together with the legislative history of section 1) gives to the judiciary a mandate to review the substance of legislation for its conformity to human rights standards and to render legislation inconsistent with those standards of no force or effect. The framers' intention in drafting both section 52 and section 1, which were never altered after the introduction of section 33, was clearly to end the reign of the doctrine of parliamentary sovereignty. Firstly, they intended to limit legislative authority in relation to human rights by stipulating that legislators could only avoid the proscriptions of the bill of rights by bringing about constitutional amendment. Secondly, they intended to give the courts the power to set aside legislation they found to be inconsistent with those rights. On the other hand, section 33 was just as clearly intended to ensure the retention of the doctrine of parliamentary sovereignty, namely to provide that legislators of the day could avoid the proscriptions of a constitutional bill of rights without constitutional amendment, by ordinary legislative majorities.[109]

We have not, however, thereby achieved the impossible of having two supremacies. We have instead created in Canada a new form of the doctrine of parliamentary sovereignty, what may be called a "weak form of parliamentary sovereignty", or a "modified doctrine of parliamentary sovereignty". Dicey defined the strong form of the doctrine of parliamentary sovereignty as having two parts: "Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and ... no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[110] In Canada, subject to limitations imposed by the division of powers, we have retained the first part

[109]See concluding statements 5 November 1981 of W. Davis, Premier of Ontario, at 11, G.W.J. Mercier, A.-G. of Manitoba, at 115, and P. Lougheed, Premier of Alberta, at 128 in Federal-Provincial Conference of First Ministers on the Constitution, *Verbatim Transcript* (Ottawa, 2-5 November 1981) (unofficial).

[110]*Supra*, note 53 at 40.

of the doctrine of parliamentary sovereignty,[111] but in general have jettisoned the second part. The substance of legislation in respect of most human rights is unlimited, within reach of the ordinary legislative process. But courts can and must review the content of legislation for its human rights implications and set aside legislation which is inconsistent with the *Charter*'s

[111]The areas of legislative competence that are now withheld from both Parliament and the provincial legislatures are not much greater than the exceptions to the exhaustive distribution which existed under the *Constitution Act, 1867*. The gaps are scattered, infrequent, and incoherent. In particular, the explicit gaps in the distribution of legislative power (*i.e.*, which are allocated neither to the federal Parliament nor to the provincial legislatures) are as follows:
—certain rights or privileges of denominational schools (*Constitution Act, 1867*, s. 93, protected by *Constitution Act, 1982*, s. 29);
—provision for the federal appointment of Superior, District and County Court judges (*Constitution Act, 1867*, ss 96-98);
—guarantee of the free movement of goods between provinces (*Constitution Act, 1867*, s. 121);
—exemption of the lands or property of Canada or any province from taxation (*Constitution Act, 1867*, s. 125);
—tenure of Superior Court judges (*Constitution Act, 1960*, s. 99);
—most amendments to the Constitution Act (*Constitution Act 1982*, ss 38-40, 43, 46-48);
—The Office of the Queen, the Governor General, and the Lieutenant Governor of a province, the right of a province to a certain number of members in the House of Commons, the composition of the Supreme Court (*Constitution Act, 1982*, s. 41);
—the principle of proportionate representation of the provinces in the House of Commons, the powers of the Senate and the method of selecting Senators, the number of members to which the provinces are entitled and the residence qualifications of Senators, any factors other than composition relating to the Supreme Court of Canada, the extension of existing provinces into the territories, the establishment of new provinces (*Constitution Act, 1982*, s. 42);
—the requirement that there be federal and provincial elections every five years except in time of war, invasion or insurrection (*Constitution Act, 1982*, s. 4); note *Constitution Act, 1867*, s. 50, is now subject to unilateral federal amendment by *Constitution Act, 1982*, s. 44;
—the right to vote (*Constitution Act, 1982*, s. 3);
—the requirement that there be a sitting of the federal Parliament and provincial legislatures every year (*Constitution Act, 1982*, s. 5);
—the right of citizens to enter, remain and leave Canada (*Constitution Act, 1982*, s. 6(1));
—the right of citizens and permanent residents to take up residence and pursue a livelihood in any province subject to certain qualifications (ss 6(2), 6(3), 6(4) *Constitution Act, 1982*);
—the right of citizens whose first language learned and still understood is English or French, or who received their primary school instruction in Canada in English or French in Canada, to have (all) their children educated in that language where numbers warrant (*Constitution Act, 1982*, ss 23, 59);
—certain rights associated with the equal status of French and English in all institutions of the Parliament and Government of Canada, and the legislature and Government of New Brunswick (*Constitution Act, 1982*, ss 16-20);
—existing aboriginal and treaty rights of the aboriginal peoples of Canada (*Constitution Act, 1982*, s. 35);
—guarantee of the rights in the Charter applying equally to male and female persons (*Constitution Act, 1982*, s. 28);
—guarantee of a constitutional conference to be held within one year of [17 April 1982] that must include in its agenda aboriginal rights and involve the participation of aboriginal peoples and representatives of the Yukon and Northwest Territories (*Constitution Act, 1982*, s. 37).

norms.[112]

The distinguishing feature of judicial review with respect to human rights under the Canadian constitution is that the scope of this judicial power is dependent upon the majority or the democratic process itself. Still, the majority cannot expel this judicial authority altogether: some rights cannot be affected by a notwithstanding clause at all;[113] the rest require periodic re-expulsion of judicial review.[114]

What then is the appropriate Canadian judicial function under the *Charter*? The question has both an abstract and an operative answer.

In theory, legislative supremacy has prevailed. Priority has been given to consent as opposed to the protection of rights, to autonomy as opposed to justice. This suggests continuing reliance on the sovereign or the people for the security of human rights, and a distrust of the judicial function as a protector of those rights. It points to a recurrence of the effect which parliamentary sovereignty has always had in Canada, namely, judicial reticence actively to use human rights standards in order to review the substance of legislation for its impact on human rights, and reluctance to set aside legislation which is inconsistent with those standards.[115] Such reticence would be manifested if, for example, any of the following general principles of interpretation with respect to the *Charter* were to be espoused:

1.— giving constitutional rights narrow, technical or literal interpretations, or adopting originalism or interpretivism, by construing the words of the *Charter* strictly;[116]

2.— confining the meaning of the *Charter* to interpretations which either were actually intended by the drafters, or can be imputed hypothetically to them, and giving the constitution only those meanings which it had at the time it was written;[117]

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[112]The *Charter* here is read as including s. 33, so that if a notwithstanding clause had been placed in legislation in a manner consistent with the terms of the *Charter*, the legislation would not be "inconsistent" with the *Charter* and s. 52 would not render the law of no force or effect.

[113]S. 33, *e.g.*, democratic rights.

[114]S. 33(3).

[115]See A.F. Bayefsky, "Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms" (1983) 31 Pol. Studies 239 and errata, (1984) 32 Pol. Studies 171.

[116]See *supra*, note 8 and accompanying text; for contrasting assertion, see *infra*, note 142 and accompanying text.

[117]*A.G. Canada* v. *Lavell* (1973), [1974] S.C.R. 1349 at 1365, 38 D.L.R. (3d) 481, Ritchie J.: "[T]he meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that the phrase "equality before the law" is to be construed in the light of the law existing in Canada at the time." For contrasting assertion with respect to the *Charter*, see *infra*, notes 144-46 and accompanying text.

3.— judicial preoccupation with protecting procedures or the channels of political change;

4.— demanding little or no evidence from the government defendant in order to satisfy the requirement of section 1 that infringements be reasonable and demonstrably justified;[118]

5.— applying a presumption of constitutionality in the context of the *Charter*;[119] and

6.— suggesting that proposed limitations under section 1 must merely be reasonable or demonstrably justified in the defendant's view, in other words, that the test of reasonableness and justifiability is subjective.[120]

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[118]*E.g.*, see the comment of Dickson C.J.C. speaking for the Court in *R.* v. *Oakes* (1986), [1986] 1 S.C.R. 103 at 138, 65 N.R. 87 [hereinafter *Oakes* cited to S.C.R.]: "Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, ... there may be cases where certain elements of the s. 1 analysis are obvious or self-evident." These words have found application in *Jones* v. *R.* (1986), [1986] 2 S.C.R. 284 at 299, 69 N.R. 241 [hereinafter *Jones* cited to S.C.R.], where La Forest J., commenting on the issue of the need for evidence in a s. 1 inquiry, stated:

> I do not think such evidence is required here.
>
> ....
>
> No proof is required to show the importance of education in our society or its significance to government. ... Nor is evidence necessary to establish the difficulty of administering a general provincial educational scheme if the onus lies on the educational authorities to enforce compliance.

They have also been applied in *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd* (1986), [1986] 2 S.C.R. 573 at 590, 33 D.L.R. (4th) 174, McIntyre, J. [hereinafter *Dolphin Delivery* cited to S.C.R.]. See also *Edwards Books and Art Ltd* v. *R.* (1986), [1986] 2 S.C.R. 713 at 768-69, 35 D.L.R. (4th) 1, Dickson C.J.C. [hereinafter *Edwards Books* cited to S.C.R.]. On the other hand, for cases commenting on the need for evidence with which to evaluate a s. 1 claim, see *infra*, note 149 and accompanying text.

[119]For contrasting assertion, see *infra*, note 151 and accompanying text.

[120]This approach is sometimes suggested by the European Commission and Court of Human Rights concept of a margin of appreciation. The European Court of Human Rights has put it this way: international machinery for protecting fundamental rights is subsidiary to national systems of safeguarding rights; the national authorities are in a better position than the international judge to determine the appropriateness of limitations; therefore, the *European Convention on Human Rights* leaves to State Parties a margin of appreciation or area of discretion. See *Handyside* v. *United Kingdom* (1976), Ser. A, No. 24, par. 48, 19 Y.B. E.C.H.R. 506, 1 E.H.R.R. 737; *Dudgeon* v. *United Kingdom* (1981), Ser. A, No. 45, par. 52, 24 Y.B. E.C.H.R. 444, 4 E.H.R.R. 149; *Sunday Times* v. *United Kingdom* (1979), Ser. A, No. 30, par. 59, 22 Y.B. E.C.H.R. 402, 2 E.H.R.R. 245.

The European Court has then stated that the discretion of national authorities, or the margin of appreciation, is not unlimited and the court's role is to review the decisions of national bodies. See *Sporrong* v. *Sweden* (1982), Ser. A, No. 52, par. 69, 25 Y.B. E.C.H.R. 18, 5 E.H.R.R. 35; *Winterwerp* v. *The Netherlands* (1979), Ser. A, No. 33, par. 40, 22 Y.B. E.C.H.R. 426, 2 E.H.R.R. 387; *Sunday Times* v. *United Kingdom*, *supra*, par. 59; *Ireland* v. *United Kingdom* (1978), Ser. A, No. 25, par. 207, 21 Y.B. E.C.H.R. 602, 2 E.H.R.R. 25; *Handyside* v. *United*

From the perspective of the *Charter* in operation, however, a shift is possible in the foundation of political and legal authority and the corresponding judicial role. Such a shift is dependent upon how eager governments will be to use section 33.Desuetude would result in a constitutional convention militating against its use, such as is the case with respect to the powers of reservation and disallowance.[121] In these circumstances the Canadian constitutional framework would exhibit the same tension between the capacity for judicial review under a constitutional bill of rights and the democratic principle that legal obligation depends upon consent, as is true of the American constitutional framework. On the other hand, if section 33 is readily invoked, such a tension will never emerge.

In the first five years of the *Charter*'s existence, section 33 has been used in five legislative acts: four from Quebec and one from Saskatchewan. Quebec first used section 33 in *An Act Respecting the Constitution Act, 1982.*[122] The Act purported to insert a notwithstanding clause in every Quebec statute adopted prior to 17 April 1982, and in respect of each of sections 2 and 7 to 15 of the *Charter.* The Act was a consequence of Quebec's general dissatisfaction with the substance and process of the passage of the *Constitution Act, 1982.* The effect of *An Act Respecting the Constitution Act, 1982* was to minimize the reduction of the sphere of provincial legislative authority otherwise imposed by the *Charter.* The Act has been subject to constitutional challenge on the ground that such a generalized mechanism for invoking section 33 is not permitted by the section and the overall spirit of the *Charter.* To date, this argument has been successful in two cases in

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Kingdom, supra, par. 49.

This idea of a margin of appreciation which is left to national authorities is ambiguous; its use has changed over time. Sometimes it seems that the margin of appreciation is really like a margin of error within which the national authorities are totally free from the court's scrutiny. At other times it indicates an area within which a government will have to show that an interference is necessary only in the sense that the government "had sufficient reason to believe that it was necessary". See *DeWilde, Ooms and Versyp* v. *Belgium* (No. 1) (1971), Ser. A, No. 12, par. 93, 14 Y.B. E.C.H.R. 788, 1 E.H.R.R. 373. At still other times it appears to mean that it is sufficient if the state has "exercised its discretion reasonably, carefully and in good faith". *Sunday Times* v. *United Kingdom, supra,* par. 59, explicitly rejected this idea as sufficient.

The catch phrases of such an approach are statements like the following: the government has a measure of discretion; the government has shown reasonable grounds for believing that the limitation was appropriate; the government has not behaved in an unreasonable manner. In all these cases (although varying in scope) the *European Convention on Human Rights* test for the acceptability of restrictions on rights is subjective. It represents the European Court's failure to make an independent assessment of the merits or reasons advanced by a government for imposing restrictions on rights.

[121]See P. Hogg, *Constitutional Law of Canada,* 2d ed. (Toronto: Carswell, 1985) at 38 and 90.

[122]S.Q. 1982, c. 21.

the Quebec Court of Appeal,[123] and the issue is presently before the Supreme Court. The Parti Québécois government, which passed *An Act Respecting the Constitution Act, 1982*, also habitually placed similar notwithstanding clauses in all acts passed after 17 April 1982. The subsequent Liberal government announced that it would not continue this latter practice and has allowed the Act to lapse after the five year renewal deadline (imposed by section 33) passed in June of 1987. The special circumstances of this use of section 33 might suggest, therefore, that there is not a general willingness to invoke its provisions.

However, the Liberal government of Quebec has made use of section 33 in a quite different context. It has placed more specific notwithstanding clauses in *An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic Sectors,*[124] *An Act to Amend the Act to Promote the Development of Agricultural Operations,*[125] and in *An Act to Again Amend the Education Act and the Act Respecting the Conseil Supérieur de l'Éducation and to Amend the Act Respecting the Ministère de l'Éducation.*[126] Similarly, in the province of Saskatchewan, section 33 was inserted in *An Act to Provide for Settlement of a Certain Labour-Management Dispute between the Government of Saskatchewan and the Saskatchewan Government Employees Union.*[127] In each case, section 33 was used in a preemptive fashion to avoid considcration by the courts of the consistency of the legislative act with the

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[123]*Alliance des professeurs de Montréal* v. *A.G. Quebec* (1985), [1985] C.A. 376 [leave granted to S.C.C., 30 September 1985]; *Irwin Toy Ltd* v. *A.G. Quebec* (1986), [1986] R.J.Q. 2441 (C.A.) [leave granted to S.C.C., 6 November 1986].

[124]S.Q. 1986, c. 54. S. 62 states:

> The provisions of this Act apply notwithstanding the provisions of section 10 of the Charter of human rights and freedoms ... and of section 15 of the Canadian Charter of Rights and Freedoms ... .

[125]S.Q. 1986, c. 54. S. 16 states:

> The distinction based on age provided for in the provisions enacted by sections 3 and 5 of this Act shall operate notwithstanding the provisions of section 15 of the Constitution Act, 1982 ... .

[126]S.Q. 1986, c. 101. S. 9 states:

> Section 31 of the Act respecting the Conseil supérieur de l'éducation ... is replaced by the following sections:
>
> ....
>
> 32. This Act, so far as it grants rights and privileges to a religious confession, shall operate notwithstanding the provisions of paragraph a of section 2 and section 15 of the Constitution Act, 1982 ... .

Ss 10 and 11 makc identical provisions in regard to s. 720 of the *Education Act* and s. 17 of the *Act respecting the Ministère de l'Éducation.*

[127]S.S. 1984-85-86, c. 3. S. 9(1) states:

> Pursuant to subsection 33(1) of the *Canadian Charter of Rights and Freedoms*, this Act is declared to operate notwithstanding the freedom of association in paragraph 2(d) of the *Canadian Charter of Rights and Freedoms.*

Charter, rather than as a reaction to unfavourable judicial decisions. The manner in which the section was invoked in these four cases suggests that desuetude in relation to section 33 is unlikely, at least in the near future, and that governments have begun to consider it as a serious legislative option. At the same time, however, this limited use of section 33 and the present narrow range of Supreme Court decisions, means it is too early to identify any definite trend towards tension between judicial review under the *Charter* and the democratic principle.

If there is general legislative reluctance to invoke the override clause, it is appropriate to return to the issue of the judicial role which has arisen in the American context. Non-use of section 33 should not be taken to mean an opting for protection of rights as opposed to consent, or a choice for justice as opposed to autonomy. The emergence of a tension should be understood as part of an attempt to embrace at one and the same time both the consent and the right-based theories of political obligation. Thus the judicial function in the course of judicial review under a constitutional bill of rights should combine a respect for both the fundamental principles of consent and the moral, rational or normative character of obligation.

In so doing, the judicial function will reflect the Canadian political will. That will embraces dichotomous ends: the preservation of a form of parliamentary sovereignty that reaffirms the value of consent and maintains the primacy of democratic channels, and at the same time the desire to institute judicial guardians who are granted the capacity to consider the impact of governmental acts on rights and to strive to realize just results. The judicial role should then correspond to these contemporaneous aspirations.

It might be suggested that the judicial function under the *Charter* should align itself with the realization of justice and the search for right answers alone. The consensual value of the democratic principle will be preserved by section 33, and this is an interest which the judiciary can afford to neglect. This argument ignores the obvious political ramifications of such judicial imprudence, namely, a greatly increased use of section 33, a popular diminution of respect for judicial decisions, and a likely conservative backlash in the courts in order to restore their credibility or stature. Under these circumstances the tension between judicial review under the *Charter* and the democratic principle would simply be destroyed.

The dilemma created by the need to reflect the Canadian political will is rather the articulation of a judicial function in the context of a fragile, but stable, tension. In these circumstances the judicial function should be structured in such a way as to maximize the participation of the people in

judicial decision-making, and at the same time to maximize the likelihood that courts will issue just decisions when applying the *Charter*.

Lessons on how to be philosopher kings and queens would inhibit the former. Making the judiciary over to look like another legislative body (for example, electing it, following opinion polls, or otherwise requiring it to reflect existing national consensus) would prevent the latter. Rather, the first task of maximizing consent can be accomplished in a manner suggested by Alexander Bickel. The judiciary should engage in a colloquy with the political institutions, the legal profession, and society at large. It should control the timing and the circumstances of the moment of ultimate judgment.[128] In Bickel's words:

> Over time, as a problem is lived with, the Court does not work in isolation to divine the answer that is right. It has the means to elicit partial answers and reactions from the other institutions, and to try tentative answers itself.[129] A sound judicial instinct will generally favor deflecting the problem in one or more initial cases, for there is much to be gained from letting it simmer, so that a mounting number of incidents exemplifying it may have a cumulative effect on the judicial mind as well as on public and professional opinion.[130] When at last the Court decides that "judgment cannot be escaped ...," the answer is likely to be a proposition "to which widespread acceptance may fairly be attributed", because in the course of a continuing colloquy with the political institutions and with society at large, the Court has shaped and reduced the question, and perhaps because it has rendered the answer familiar if not obvious.[131]

Bickel himself suggests various methods, many unique to American law, for engaging in such a continuing colloquy. Applied to the Canadian context one can point to the following tools available to the judiciary for conducting such a dialogue:

1.— floating "trial balloons" in the context of *obiter dicta*, concurring opinions, dissents that reach the merits;[132]

2.— avoiding making decisions on the basis of the *Charter*, by deciding cases instead on a division of powers basis;[133]

3.— putting the *Charter* question off by ensuring the case is argued in a real context by imposing strict standing requirements;[134]

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[128]*Least Dangerous Branch*, *supra*, note 6 at 240.

[129]*Ibid.*

[130]*Ibid.* at 176.

[131]*Ibid.* at 240.

[132]See *ibid.* at 176.

[133]See, *e.g.*, *Westendorp* v. *R.* (1983), [1983] 1 S.C.R. 43, 144 D.L.R. (3d) 259.

[134]*Least Dangerous Branch*, *supra*, note 6 at 115. This would entail tightening the precedent established by *Minister of Justice of Canada* v. *Borowski* (1981), 130 D.L.R. (3d) 588.

4.— avoiding substantive decisions on the *Charter* by strictly construing legislative delegations so as to require them to be especially clear if they are to bestow discretion or authority to limit the rights and freedoms of individuals;[135] and

5.— using the "prescribed law" requirement of section 1 to invalidate vague rules, without deciding whether more specific limitations in the given context would be constitutional.[136]

All of these "passive virtues" are techniques of "not doing", devices for disposing of a case while avoiding judgment on the constitutional issue it raises.[137] It is important to appreciate that "not doing" does not mean deciding that the legislation is constitutional. For as Bickel points out, declaring legislation constitutional, deciding that it is "not inconsistent with the principles whose integrity the Court is charged with maintaining" is also a "significant intervention in the political process".[138]

Another kind of "passive virtue" is necessary for a judiciary which "labors under the obligation to succeed"[139] or which wishes to engage in a colloquy with society at large, and that is the character of its members, their representative nature. In Canada the courts' unrepresentative character in a number of important respects, gender being the most obvious, has so far been tolerated. This is a state of affairs which will undermine all efforts to "gain general assent" for the fundamental moral decisions made

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[135]This would be analogous to the administrative law principle stated in *City of Montreal* v. *Arcade Amusements Inc.* (1985), [1985] 1 S.C.R. 368 at 413, 18 D.L.R. (4th) 161 (S.C.C.). Here the Court found a municipal by-law which contained discriminatory provisions to be *ultra vires* the enabling statute on the ground that "in the absence of express provisions to the contrary or implicit delegation by necessary inference, the sovereign legislator has reserved to itself the important power of limiting the rights and freedoms of individuals in accordance with such fine distinctions." Support for extending the use of this doctrine might be gathered from the Court's subsequent language to the effect that (at 195) "[t]he principle transcends the limits of administrative and municipal law. It is a principle of fundamental freedom." Bickel would go further. He advocated in the American context using the doctrine of delegation to dissallow altogether bestowing certain kinds of discretion on officials, or to recall the legislature to its own policy-making function: see *Least Dangerous Branch, ibid* at 161. In Canada this would be inconsistent with *Hodge* v. *R.* (1883), 9 App. Cas. 117, affirmed in the federal sphere in *Re Gray* (1918) 57 S.C.R. 150, although it might suggest more creative use of *In re The Initiative and Referendum Act Reference* (1919), [1919] A.C. 935.

[136]As in *Re Ontario Film and Video appreciation Society and Ontario Board of Censors* (1984), 45 O.R. (2d) 80, 147 D.L.R. (3d) 58 (C.A.) [leave to appeal to S.C.C. granted, 4 April 1984, but case discontinued]. See also *Malone* v. *United Kingdom* (1984), Ser. A, No. 82, par. 81-88, 7 E.H.R.R. 14.

[137]*Least Dangerous Branch, supra,* note 6 at 169.

[138]*Ibid.* at 129.

[139]See *supra,* note 21.

inevitable[140] by a constitutional bill of rights.[141] Reform of procedures of judicial selection to permit greater popular participation in the selection process and increased representativeness of successful candidates will be a necessary element in satisfying the principle that autonomous individuals can only be under obligations which they give to themselves.

At the same time, the task is to structure the judicial institution in such a way as to maximize the likelihood that it will issue just decisions: that in applying the *Charter* it will arrive at moral, right answers. The most important element necessary for this to be accomplished is acknowledging that the court is engaged in a search for the right answer — that answering a question such as "what does equal benefit of the law mean?" will require answering what should it mean. Acknowledging that *Charter* rights and freedoms were intended to be moral standards by which to measure governmental acts will set the orientation of the judiciary in many concrete ways. It will suggest a number of general principles of interpretation of a constitutional bill of rights, some of which have already been enunciated by the Supreme Court.

1.— Specific provisions of the *Charter* should be given a large and liberal construction "in the light of its larger objects", namely, "to guarantee and to protect ... the enjoyment of the rights and freedoms it enshrines".[142]

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[140]This inevitability will of course vary in degree depending on the use of s. 33.

[141]For example, a court of seven or eight men and one or two woman sets out to decide whether a woman's liberty in accordance with the principles of fundamental justice, or her equal protection and benefit of the law, or her freedom of conscience, is unreasonably restricted by her (and only her) forcible confinement, and labour, (to say nothing of mandated subsequent emotional and legal bonds) as a result of an act of sexual intercourse. Such a court is at grave risk of profoundly alienating 50% of the population on the ground that such judges are simply unqualified to decide for them. In this context it is interesting to note the candid remarks of the Molgat-MacGuigan Committee; see Canada, Senate and House of Commons, Special Joint Committee on the Constitution of Canada, *Final Report* at 18 (7 March 1972) [MacGuigan later became the federal Minister of Justice and was responsible for the appointment of the judges of Canada's highest courts]:

> It is true that an entrenched Bill of Rights must be interpreted by courts. But in reality courts in a democratic society always eventually accept what the majority wants, if only because the political representatives of the majority will ensure that judicial appointees share their philosophy.

Those political representatives (almost exclusively male) and their philosophy have meant, and continue to mean, an almost exclusively male senior judiciary in Canada. A constitutional bill of rights both admits the politically sensitive character of the judiciary and necessitates a change in that shared philosophy.

[142]*Hunter, supra*, note 66 at 156. See also *Re Southam and The Queen (No. 1)* (1983), 3 C.C.C. (3d) 515 at 524 (Ont. C.A.): "The Charter as part of a constitutional document should be given a large and liberal construction. The spirit of this new "living tree' planted in friendly Canadian soil should not be stultified by narrow technical, literal interpretations without regard to its background and purpose; capability for growth must be recognized."

Judges should therefore admit to being non-interpretivists, at least in the sense described by Ronald Dworkin: "[t]he commitment of our legal community to this particular document, with these provisions enacted by people with these motives, presupposes a *prior* commitment to certain principles of political justice which, if we are to act responsibly, must therefore be reflected in the way the Constitution is read and enforced."[143]

2.— The *Charter* should be understood as a "living tree capable of growth and expansion within its natural limits."[144] Or, in the words of the Supreme Court of Canada, "[i]t must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[145] Or similarly, in the words of the United States Supreme Court, "we must never forget, that it is a *constitution* we are expounding."[146] This is not to deny the relevance of legislative history in interpreting a constitutional document, including a bill of rights.[147] It is simply to point out its limited significance in giving final interpretations.

3.— The judiciary is similarly not confined, in the case of "open-ended" constitutional provisions, to Ely's "questions of participation", to protecting processes or the channels of political change or ensuring "discrete and insular minorities" the protection "afforded other groups by the representative

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[143] Dworkin, *supra*, note 10 at 472. It can be added that such a liberal construction would entail that "[a]ll limitation clauses shall be interpreted strictly and in favour of the rights at issue": see U.N., E.S.C., Commission on Human Rights, "Status of the International Covenants on Human Rights", U.N. Doc. E/CN.4/1985/4, Annex at 3. This conclusion is taken from "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Part I.A. 3" which were developed and articulated in a conference of international law experts from thirty-one states in Siracusa, Sicily in April and May 1984, and which (at 2) "are considered by the participants to reflect the present state of international law."

[144] *Edwards* v. *A.G. Canada* (1929), [1930] A.C. 124 at 136, [1930] 1 D.L.R. 98 (P.C.), already applied to the *Charter* by the Supreme Court of Canada in *Law Society of Upper Canada* v. *Skapinker* (1984), [1984] 1 S.C.R. 357 at 365, 11 C.C.C. (3d) 481 [hereinafter *Skapinker* cited to S.C.R.], and *Hunter*, *supra*, note 66 at 155-56.

[145] *Hunter*, *ibid.* at 155. See also *Big M. Drug Mart*, *supra*, note 66 at 343, Dickson C.J.C.:

> [T]he *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter's* entrenchment . . . . Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*.

See also *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979*, *supra*, note 106 at 280, Lamer J.

[146] *McCulloch* v. *State of Maryland*, 17 U.S. (4 Wheat.) 316 at 407 (1819), quoted with approval by the Supreme Court of Canada in *Skapinker*, *supra*, note 144 at 368.

[147] The admissibility, without according significant weight, of legislative history in the form of the Minutes of the Proceedings of the Special Joint Committee of 1980-81 in the case of the *Charter*, was accepted in *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979*, *supra*, note 106 at 279-80, Lamer J.

system."[148] The *Charter* is concerned with ensuring legitimate outcomes, not just prescribing legitimate processes.

4.— A court is entitled to consider, in interpreting a *Charter* right or freedom and possible governmental limitations, evidence such as the sociological impact of proposed interpretations of rights and freedoms or proposed limitations,[149] and philosophical arguments about the requirements of justice.[150]

5.— A presumption of constitutionality in the context of the *Charter* is inappropriate in a search for the right answer as to whether any given legislation unconstitutionally infringes a constitutional right or freedom.[151]

6.— The test as to whether the provisions of the *Charter* are met, or a proposed limit on a right or freedom is constitutionally acceptable, or, in the words of section 1, whether it is a "reasonable limit ... prescribed by law as can be demonstrably justified in a free and democratic society", must

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[148]See *supra*, text accompanying notes 71-81. In any event, this would assume procedural or process rights could be isolated from substantive rights, which they cannot, and that the constitution indicated a dominant concern with process and not with substance, which the *Charter* does not.

[149]See, *e.g.*, the evidence considered by Wilson J. in *Singh*, *supra*, note 66 at 219-20. The conclusion that evidence of the reasonableness of a limit in a free and democratic society is indeed nccessary for a government (and hence, a court) to rely on s. 1 of the *Charter* was suggested by the Supreme Court of Canada in *Skapinker*, *supra*, note 144 at 384; *Hunter*, *supra*, note 66 at 169; *R.* v. *Therens* (1985), [1985] 1 S.C.R. 613 at 625, Lamer J.; *Jones*, *supra*, note 118 at 314 and 322, Wilson J., dissenting. Note, however, that having placed the onus of proof concerning s. 1 on those seeking to impose the limit, the Court is tending towards relaxing the evidentiary burden necessary to discharge that onus. In *Edwards Books*, *supra*, note 118 at 768-69, Dickson C.J.C. stated with respect to the onus of proof of s. 1: "Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards."

[150]See, *e.g.*, Wilson J.'s dissent in *MacDonald* v. *City of Montreal* (1986), [1986] 1 S.C.R. 460 at 515-21 and 541-43; *Jones*, *ibid.* at 278-79, Wilson J., dissenting; *Edwards Books*, *ibid.* at 715-16, Wilson J., dissenting.

[151]This is reinforced by recalling Bickel's comment that declaring legislation constitutional or deciding that it is "not inconsistent with the principles whose integrity the Court is charged with maintaining" is also a "significant intervention in the political process": see *Least Dangerous Branch*, *supra*, note 6 at 129. The courts have refused to apply a presumption of constitutionality once a litigant is able to bring himself or herself within the context of s. 1 of the *Charter*. They have held in *Oakes*, *supra*, note 118 at 136-37:

> The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation ... . The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited.

be objective: it is not a requirement for justification in the view of the enacting body.[152]

These two sets of general principles of interpretation appear, however, to pull the court in conflicting and irreconcilable directions. At what point will it be true that "judgement cannot be escaped" and the judge be required to decide the right answer to a constitutional dilemma? If one adopts Bickel's answer, namely, when "the answer is likely to be a proposition to which widespread acceptance may fairly be attributed", then the description of judicial review under a constitutional bill of rights as a search for right answers seems false. The judge is not engaged in a search for right answers, but only for the majoritarian solution to constitutional questions. On the other hand, if the court is genuinely bound to search for right answers (or at the end of the day is supposed to provide right answers) then the dialogue with extra-judicial individuals or the public appears illusory or deceitful. Judgement can no longer be escaped when the judge thinks he or she knows the right answer.

This objection, however, suggests the following response. Bickel's answer standing alone is ultimately a capitulation to the view that concern for consent must dominate. On the other hand, it could be argued that ultimately the judge must opt for what he or she believes to be the right or just answer without undercutting the demand for dialogue. For it could be claimed that the best way of arriving at right answers or choosing between competing moral theories is to engage in a colloquy with persons beyond the bench.

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[152]This conclusion has been expressed for instance, in *Re Southam and the Queen (No. 1)*, *supra*, note 142 at 531: "In determining the reasonableness of the limit in each particular case, the court must examine objectively its argued rational basis in light of what the court understands to be reasonable in a free and democratic society ..."; and in *Re Service Employees International Union, Local 204 & Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392 at 471 (H.C.), Smith J., aff'd for different reasons, 13 D.L.R. (4th) 220 (Ont. C.A.):

> Alternatively [the Attorney-General] adopted the theory of "a margin of appreciation" or discretion to a government's judgment of the existence of a crisis and of the types of measures required to deal with it. This in effect is tantamount to saying that the Government has decided to infringe a freedom and therefore it must be right and justified in doing so.

In addition, this conclusion is set out as a principle of international law in the "Siracusa Principles, Part I.A. 10", *supra*, note 143: "Any assessment as to the necessity of a limitation shall be made on objective considerations." Note, however, that if the words of Dickson C.J.C., in *Edwards Books*, *supra*, note 118 at 781-82, are not carefully circumscribed they could permit a slide towards requiring a subjective justification (*i.e.*, in the view of the enacting body) of a proposed s. 1 limit: "A "reasonable limit' is one which, having regard to the principles enunciated in *Oakes*, it was reasonable to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line." Similar concerns are expressed by Wilson J. concurring in *Dolphin Delivery*, *supra*, note 118 at 574-75.

The claim that judges should seek and determine the requirements of justice will alarm many. Perhaps such fears may be allayed by pointing out that according to the process of decision-making urged above:

1.— decisions should be made only when a mounting number of incidents exemplifying a problem have a cumulative effect on the judicial mind, as well as on public and professional opinion,[153] and account has been taken of whether a conclusion will be a proposition "to which widespread acceptance may fairly be attributed";

2.— reform of procedures of judicial selection and training, and the training of counsel, must be contemporaneous with the assumption of judicial responsibilities under the *Charter*; and

3.— the general language of the *Charter* and the terms of section 1 plunge the judiciary into the realm of "values" or "politics", regardless of one's views about the propriety of the prior political judgment to constitutionalize a bill of rights, and hence it is preferable to be able to observe the ruminations of the court.[154]

At the same time, many will also be alarmed by the claim that the judiciary should engage in a colloquy with the political institutions, the legal profession and society at large before rendering decisions, and that it should take into account acceptance of judicial opinions by the public. Such fears might be allayed by noting that judges already concern themselves with the acceptance of prospective decisions; they are concerned to convince the reader of the rightness of a given conclusion. Furthermore, they take account (whether openly or not) of the possibility of widespread disobedience of their judgments and the harm to overall respect for the judicial institution which would follow.

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[153]See *supra*, note 6 at 176.

[154]For example, Lamer J., speaking for a majority of the Court, remarks in *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979*, *supra*, note 106 at 272-73 and 276:

> In neither case, be it before or after the *Charter*, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments .... The words of Dickson, J. ... in *Amax Potash* ... continue to govern: "The Courts will not question the wisdom of enactments"....
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> ....
>
> The principles of fundamental justice are to be found in the basic tenets of our legal system .... Such an approach to the interpretation of "principles of fundamental justice" ... provides meaningful content for the section 7 guarantee all the while avoiding adjudication of policy matters.

The claim that in the context of the *Charter* the court can distinguish law from policy, the constitutionality from the wisdom of enactments, is unsupported and inaccurate. Defining the content of rights and engaging in the balancing process required by s. 1 will inevitably mean a consideration of the "wisdom" of legislative choices.

In conclusion, therefore, if failure in practice to use section 33 leaves judges with the active responsibility of protecting rights, the legitimacy of their judgments will turn on the courts' ability to claim for its decisions both the consent of the governed and that those decisions are just. If judicial wisdom is informed by popular understanding, just solutions may be within our grasp.