THE SUPREME COURT AND THE BILL OF RIGHTS—THE LESSONS OF COMPARATIVE JURISPRUDENCE

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I. *Fundamental Law and the "Sovereignty of Parliament"*

In an article completed for publication in July of last year and published in the McGill Law Journal a short time ago,[1] I believe that I correctly anticipated the main substantive provisions, and also the actual machinery to be used for formal "adoption" as part of Canadian constitutional law, of the new Bill of Rights that was introduced by the Prime Minister in Parliament last September. Of course no special claims to constitutional clairvoyance are being made, here, merely because these advance opinions happened so closely to correspond to the Government's actual project. Indeed it might be suggested that any professional observer (whether professor or practitioner) viewing the situation dispassionately and uncoloured by partisan attitudes, ought to have been able to have anticipated the general form that the Bill of Rights would take: if the art of constitution-making be taken as the art of reconciling the philosophically ideal with the politically practicable, then the actual content and structure that the Canadian Bill of Rights finally assumed was probably largely inevitable.[2]

I am not, on the whole, sold on the notion of Bills of Rights as

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[1] A Bill of Rights and Fundamental Law. Illusion and Reality (1958), 5 McGill L.J. 36. I shall try, insofar as possible, not to cover here the ground already treated in this earlier article.

[2] Granting the argument that some mode of "entrenchment", going beyond the present enactment as simple declaratory legislation, would give the Bill of Rights some greater formal efficacy against any later inconsistent legislation of Parliament, the massive political problems that have stalemated all attempts, since 1950, to devise self-operating amending machinery for the Canadian constitution, might well make the government pause before attempting any such action. See, for example, Clokie, Basic Problems of the Canadian Constitution (1942), 20 Can. Bar Rev. 395, at p. 429; Scott, Note (1950), 8 U. Tor. L.J. 201, at p. 202; Gérin-Lajoie, Constitutional Amendment in Canada (1950); Gérin-Lajoie, Du pouvoir d'amendement constitutionnel au Canada (1951), 29 Can. Bar Rev. 1136, at p. 1156.

a universal panacea for assorted political ills. Comparative constitutional law literature is littered with the wreckage of Bills of Rights and similar sounding declarations of rights of man, professed at their inception to be perpetually immutable. The history, over the last decade, of the largely abortive attempts to follow up the airy generalities of the United Nations-sponsored Universal Declaration of Human Rights with some sort of detailed covenants that will be binding and enforceable against the individual nation-states, is merely a more dramatic illustration than usual of the proposition that words alone are frail packages for human hopes. The spirit of a constitution,—the popular attitudes and aspirations on which it rests—are, it is clear, the vital element in its day-by-day efficacy, not its verbal formulae.[3] I have elsewhere examined the extent to which, despite the absence of a written constitution and a formal Bill of Rights, the courts in England have been able to essay a civil liberties jurisprudence, in contrast at times to the timidity of the United States Supreme Court and of other tribunals which have the advantage of a written and rigid constitution and Bill of Rights to enforce.[4] In this regard, it may be that some critics of the current draft Canadian Bill of Rights have given too much emphasis to the fact that it is a simple declaratory Act, and not a formal amendment to the British North America Act. To strain at this particular issue and to assert that, unless the Bill be made part of the British North America Act, there can be no Canadian civil liberties jurisprudence built around it, is both to ignore the marked achievements of the Canadian Supreme Court in the political and civil rights area in recent years in the absence of any express bill of rights,[5] and also to give a nineteenth century quality of absolutism to Dicey's lapidarian generalities.[6] (It may be doubted that

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[3] The late Boris Mirkine-Guetzévitch, *doyen* of Continental European comparative constitutionalists, gave this particular proposition classic enunciation: "Les textes ne créent pas les démocraties. Les hommes et les idées, les partis et les principes, les mystiques et les affirmations, les moeurs et les traditions sont les facteurs déterminants d'un régime." Mirkine-Guetzévitch, Propos de méthode (1951), 1 & 2 Revue internationale d'histoire politique et constitutionnelle 137, at p. 145.

[4] Judicial Review in the English-Speaking World (1956), p. 31 *et seqq.*

[5] See, especially, *Re Alberta Statutes*, [1938] 2 D.L.R. 81, per Duff C.J.C., at pp. 107-8, and per Cannon J., at p. 119; *Winner* v. *S.M.T. (Eastern) Ltd.*, [1951] 4 D.L.R. 529, per Rand J., at p. 558; *Saumur* v. *Quebec*, [1953] 4 D.L.R. 641, per Rand J., at pp. 670-1; *Henry Birks & Sons (Montreal) Ltd.* v. *Montreal*, [1955] 5 D.L.R. (2d.) 321, per Rand J., at p. 322; *Switzman* v. *Elbling* (1957), 7 D.L.R. (2d.) 337, per Rand J., at pp. 357-8, and per Abbott J., at p. 371.

[6] Dicey, The Law of the Constitution (9th ed., (E.C.S. Wade) 1939), p. 39 *et seqq.*; and see generally Gough, Fundamental Law in English Constitutional History (1955); Marshall, Parliamentary Sovereignty and

he himself intended them as, in all circumstances, an enshrinement of the principle of majority rule,[7] and in any case present generations need certainly feel under no compulsion to accept them in a literal, unqualified sense.[8]) As the argument of these particular critics goes, the Dominion Parliament in Canada is, in Dicey's terms, sovereign; the new Canadian Bill of Rights is, in consequence, subject to amendment or repeal by any latter inconsistent Act of the Dominion Parliament; and the Bill must be, therefore, a rather trifling, worthless thing. By the same argument, of course, the British Parliament could today, legally, abolish Magna Carta, and even repeal the provisions of the English Bill of Rights and the Act of Settlement.[9] The point is, of course, that while the British Parlia-

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the Commonwealth (1957); Arndt, The Origins of Dicey's Concept of the "Rule of Law" (1957), 31 Aust. L.J. 117.

[7] Thus Dicey himself set practical limits to the extent to which legislative majorities might interfere with long-recognised claims of political minorities, in joining with Sir William Anson and the ex-Lord Chancellor, Lord Halsbury, in the heat of the Ulster crisis of 1914, in urging the revival of the Royal prerogative power, (defunct since 1707), to refuse assent to a Bill passed by Parliament,—in this case the Government of Ireland Bill. Laski, Parliamentary Government in England (1947), p. 344. And compare Donaldson, Some Comparative Aspects of Irish Law (1957), p. 62 *et seqq.* Hanbury, The Vinerian Chair and Legal Education (1958), pp. 100, 133-4. Strictly speaking, of course, the sovereignty of Parliament, as defined by Dicey in text-book terms, implied, formally, the "King-in-Parliament". Dicey, *ibid*, p. 39.

[8] See, for example, Keeton, The Passing of Parliament (1952); Gray, The Sovereignty of Parliament Today (1953), 10 U. Tor. L.J. 54.

[9] Compare Dicey, *op. cit., supra*, footnote 6, p. 88. The assumption, through Dicey, that the United Kingdom Parliament could, in exercise of its sovereignty, validly amend or even abolish the terms of the Union of 1707 between England and Scotland, has recently been authoritatively challenged. *MacCormick* v. *Lord Advocate*, [1953] S.C. 396; *cf.* Dicey and Rait, Thoughts on the Scottish Union (1920), pp. 242-3. The opinions of the court, and especially of Lord President Cooper, going beyond the necessities of the case, demonstrate very strikingly both the particular space-time dimensions in which Dicey's generalisation was first formulated, and also the constitutional inelegance of assuming, without more, that the new Parliament of Great Britain, after 1707, must inherit solely English notions as to the validity of legislative claims to omnipotence without regard to distinctive Scottish attitudes: "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his *Law of the Constitution.* Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England." at p. 411. See generally Smith, Two Scots Cases (1953), 69 L.Q. Rev. 512; Smith, The United Kingdom. The Development of its Laws and Constitution: Scotland (1955), pp. 641-651; Mitchell, (Book Review, Smith), [1956] Public Law 294; Smith, The Union of 1707 as Fundamental

ment *might* do these things it *normally does not*.[10] If the new Canadian Bill of Rights happens to correspond to deeply-felt popular sentiments, no legislative majorities in the future are likely to interfere with it: if it does not so correspond, then no amount of "entrenchment" or any other type of constitutional concretisation can save it and put teeth into its paper guarantees.[11] In the latter case, like cardinal provisions of the American Bill of Rights over significant time periods,[12] it will remain no more than a pious affirmation ignored or openly flouted by those who do not choose to agree with its principles.

II. *Natural Law and the Dilemmas of Codification*

We live in an era ripe for natural law. The disturbance of the settled patterns of an ordered Western society wrought by the two World Wars; the shattering of the brief, post-1945, pipe dream of one world with the inception of the cold war struggle;—these factors have destroyed the easy optimism of former years as to the continuing expansion of the frontiers of civilisation with the expansion of scientific knowledge, and have brought with them instead a new public anxiety and uncertainty that border on occasion on hysteria. We are looking for new orthodoxies to replace old, shattered faiths; positivism might serve as a philosophy of law in an age of serenity but it is clearly wanting in a crisis age. We are agreed as to the need for a value-oriented jurisprudence—hence, *inter alia*, the revival of natural law thinking, in non-Catholic quite as much as in Catholic circles. The real problem—the cardinal problem of all natural

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Law, [1957] Public Law 99. And see also, as to Dicey, Arndt, *op. cit.*, *supra*, footnote 6.

[10] See the comments in this regard by the late Mr. Justice Jackson of the United States Supreme Court: "I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the government is picked up in Parliament, not merely by the opposition but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it. In this country, on the contrary, we rarely have a political issue made of any kind of invasion of civil liberty . . . . In Great Britain, to observe civil liberties is good politics and to transgress the rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so." Jackson, The Supreme Court in the American System of Government (1955), pp. 81-82.

[11] "Self discipline and the voters must be the ultimate reliance for discouraging or correcting . . . abuses." *Tenney* v. *Brandhove* (1951), 341 U.S. 367, at p. 378, per Frankfurter J. (Opinion of the court).

[12] See, for example, the guarantee of "equal protection of the laws" in the 14th Amendment to the United States constitution; and the prohibition against denial or abridgment of the right to vote "on account of race, colour, or previous condition of servitude", contained in the 15th Amendment.

law thinking unless one happens to live in a society that is essentially homogeneous, politically and economically, and so has a real agreement on fundamentals—is one of definition of the contents of the new absolutes. An age in which natural law thinking is dominant may supply the political impulse and impetus necessary for the undertaking of codification, but it is not necessarily an age ripe for successful codification.[13] To produce a viable code, whether of the private law, or for that matter of political and civil rights as in a Bill of Rights, one needs a conjunction of the political impulse for codification and also certain other factors. Since the act of codification requires a certain element of precision and definiteness and also implies a certain element of finality, we need agreement upon the political, social, and economic, fundamentals of the particular society among the codifiers themselves, or more desirably among the people they purport to represent;[14] and we also need to be satisfied that the main lines and direction of future development of the society are fixed in advance. Otherwise the code, instead of assisting societal growth in the future, will fetter and confine it.[15] The magic conjunction of the popular impusle to codify and the necessary political agreement as to community goals and purposes to implement that impulse is rarely present, hence so many abortive projects of codification, in both the private and public law areas. The few really successful political codifications—the Code Napoléon, the German Civil Code of 1900, the United States constitution—have been assisted, undoubtedly, by the large element of generality in their drafting, which has blurred over the process of compromise among competing interest groups and facilitated their adjustment

[13] See, for example, the famous dispute between Thibaut and von Savigny over whether the civil law in Germany was ready for codification —in the first quarter of the 19th century. Thibaut, *Uber die Notwendigkeit eines allgemein bürgerlichen Rechts für Deutschland* (1814); and see von Savigny's spirited reply, published in the same year as Thibaut's proposal for codification—*Vom Beruf unsrer Zeit fur Gesetzgebung und Rechtswissenschaft* (1814). As a result of von Savigny's attack, all moves for codification were delayed in Germany until after political unification in 1871, and the actual drafting of the code was not completed until 1896, the Civil Code (B.G.B.) itself not coming into force until 1900. And see generally Stone, The Province and Function of Law (1946), p. 421 *et seqq.*; A General Survey of Continental Legal History, Continental Legal History Series, (Vol. I, 1912) pp. 441-451; Von Mehren, The Civil Law System (1957).

[14] Lawson, A Common Lawyer looks at the Civil Law (1953), pp. 32-41, 47-56; Von Mehren, *op cit., ibid,* p. 31 *et seqq.* (1957).

[15] This was one of von Savigny's strongest objections to Thibaut's codification proposal; and the same argument was made, also, in the United States, by James Coolidge Carter in the course of his great debate with David Dudley Field. See generally, Field, Codification (1886), 20 Am. L. Rev. 1; Carter, The Province of the Written and the Unwritten Law (1890), 24 Am. L. Rev. 1; Field (1890), 24 Am. L. Rev. 255.

and reconciliation, through the course of judicial interpretation, to changing conditions and demands.[16] The assorted criticisms concerning the element of generality in the drafting of the new Canadian Bill of Rights seem misplaced, as also do the criticisms of the omission of the new Bill to attempt a catalogue of social and economic rights. The present era, in Canada, is one of extraordinarily rapid growth and change, and this has its effects in the realm of values quite as much as in anything else: too many specifics now, in the new Bill, would make it inevitable that the Bill would soon become dated, quite apart from the risk, always present with a lengthy or prolix Bill, that it might fall under its own weight.[17] And considering the way in which the battle lines are drawn in North America in the economic and industrial arenas, and the strong public pressures for restriction and restraint both against monopolistic tendencies in corporate organisation and even more perhaps against burgeoning trade union power, any government might well be commended to exercise caution as to jelling contemporary pressure group demands in this area as timeless absolutes of constitutional law.[18]

III. "*Dignitaries*"[19] *of the Law. The New Respectability of Judicial Power*

That the judiciary, and here I mean especially the Supreme Court

[16] See, for example, the transformation effected in the course of the *jurisprudence* on the delict sections of the Code Napoléon, (Arts. 1382-6), towards the close of the 19th century: where liability, formerly, had tended to be predicated upon the existence of fault and only upon the existence of fault, new notions of a general liability inhering in the industrial entrepreneur vis-à-vis his own employees independently of fault, appeared in both *jurisprudence* and *doctrine*. As to *jurisprudence*, see the decision of the Cour de Cassation of June 16th 1896, (D. 1897. I. 433; S. 1897. I. 17); and as to *doctrine*, see, for example, Saleilles, Les accidents de travail et la responsabilité civile — Essai d'une théorie objective de la responsabilité délictuelle (1897); Josserand, De la responsabilité du fait des choses inanimées (1897); and see generally Von Mehren, *op. cit., supra*, footnote 13, at pp. 374-382.

[17] The alternative seems to be that a system of "shading" of the various provisions of the Bill would soon develop, with a few, more generally drafted sections being given an over-riding weight for purposes of interpretation and application, and the low-level, more detailed sections conveniently forgotten or consigned to the limbo. Note the tendency, in code interpretation to develop "super-eminent principles", for example Art. 242 of the B.G.B., Gutteridge, Comparative Law (2nd ed., 1949), pp. 94-100; Lawson, *op. cit., supra*, footnote 14, p. 57.

[18] One might, indeed, take a leaf from the book of the Federal Constitutional Court of West Germany, which only recently resisted the temptations to spell out from the general provisions of the constitution of 1949 any eternal truths as to socio-economic organisation of the German state — either economic laissez-faire or a "social market" economy: "Das Grundgesetz garantiert weder die wirtschaftspolitische Neutralität der Regierungs-und Gesetzgebungsgewalt noch eine nur mit marktkonformen Mitteln zu steuernde 'soziale Marktwirtschaft'." (1954), 4 B. Verf. G.E. 7, at p. 17.

[19] Thus Max Weber has convincingly demonstrated that it is decisive,

of Canada, will play a decisive role in the implementation and elaboration of any legislatively-established Bill of Rights is, I believe, inevitable and also necessary and desirable. Our attitudes to the judiciary in general, and to judicial review in particular, have changed markedly in recent years. Not so very long ago, the judicial arm of government was in some widespread public disfavour and disrepute. In the United States, people remembered that the "Old Court" majority on the Supreme Court had defied President Franklin Roosevelt and held up his New Deal legislative programme throughout the whole of his first four-year term:[20] judicial review, in this sense, was accepted by the professors and also by the general public as being vaguely un-democratic, and even reactionary. And in the United Kingdom, people remembered the clamant left-wing charges, associated especially with Professor Laski and his disciples,[21] that the common-law judges in England had been biased against the ideals of the welfare state and had done their best, by the course of their decisions, to frustrate the legislative implemen-

for the character of a legal system, by what kind of *honoratiores*—special institutional or skill group, whether priestly interpreters, judges, attorneys, or professors—*it is dominated*. Weber, Law in Economy and Society (transl. Shils, ed. Rheinstein, 1954). Weber points out that the judge-centredness of the common law is not a general feature of all legal systems, *ibid.*: indeed, as is suggested in the present article, it has not always been true of the common-law countries themselves, over all time periods, *infra*. The term "dignitaries", though somewhat awkward, at least seems preferable to Weber's own term *honoratiores*: it is suggested by Harold Lasswell. (Book Review, Weber) (1954), 7 J. Legal Ed. 301.

[20] The intellectual flavour of the era is reflected in the works on the Supreme Court written by leading figures in academic and public life. See, for example, Boudin, Government by Judiciary (2 vols., 1932); Corwin, The Twilight of the Supreme Court (1934); Commager, Majority Rule and Minority Rights (1943); Jackson, Robert H., The Struggle for Judicial Supremacy (1941). There are some analogies to the court-curbing proposals of the 1930's in some contemporary schemes for the curbing or fettering of the Supreme Court's jurisdiction: the intellectual and political limitations of these various schemes have, however, been clearly demonstrated. Elliott, Court-Curbing Proposals in Congress (1958), 33 Notre Dame L. 597; and see also Pollak, The Supreme Court under Fire (1957), 6 J. Public Law 428, at pp. 429-431.

[21] "Anyone who considers the history of the statutes dealing with workmen's compensation would, I conceive, find it difficult to avoid the conclusion that some of the judges, at least, misled by their no doubt unconscious dislike of limitations upon freedom of contract imposed by these statutes, minimised much of their force by interpreting away their safeguards. It is, I think, also clear that in the history of trade union legislation principles of the Common Law, previously unknown, were invoked to narrow their purposes in a way which defeated the clear intention of those statutes." Memorandum by Professor Laski, Committee on Ministers' Powers, Report (1932), Annex V, 135. "It is hardly possible to say other of the famous Osborne decision [*Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87] than that it represented the views of men at once ignorant of and prejudiced against the methods of trade unionism in the modern state." Laski, Studies in Law and Politics (1932), p. 203. And see also Laski, *op. cit.*, *supra*, footnote 7, p. 309.

tation of its ideals. In retrospect, many of these criticisms seem a little unfair and over-stated; but even granting their substantial validity in the special context of the politically angry 1930's, it is obviously absurd to regard them as being applicable, without more, to the political conditions of the 1950's or even more perhaps of the emerging 1960's. For one thing, the judges themselves have changed: the impact of a whole generation of the legal realists' iconoclasm[22] has at least ensured the destruction of any tendency to judicial self-assurance of personal infallibility: our judges, in this post-war era anyway, are usually keenly aware of the limits of judicial competence and of the dangers of yielding to their own political and economic prejudices—the "inarticulate major premises" in decision-making.[23] And on the whole they know that social security, (if not the planned state itself), is politically-received majority opinion and now beyond the realm of partisan controversy. But more than that, the society itself has changed, and its basic governmental and administrative structure with it. The planned state, the welfare state, and the garrison state, have brought with them an immense and often overnight expansion of governmental departments and agencies, and a great new army of administrators. In an age of controls, the question is asked, who controls the controllers? Traditionally, in the common-law world, checks and balances—in the absence of any fixed and firm tradition of a special administrative tribunal hierarchy after the fashion of the French *Conseil d'Etat* system[24] or the German *Verwaltungsgericht*—have been imposed against proliferating administrative power through the operation of internal executive review, and through the indirect regulation involved in the ordinary legislative process, especially questions in Parliament and similar conventionalised remedies; with the sphere of operation for the ordinary common-law courts remaining a necessarily limited, peripheral (*ultra vires*, "natural justice") one. But this system of rather casual, unorganised, uncoordinated control procedures in the common-law world is so clearly inadequate to the realities of political power and practice in the contemporary state as to cause public law experts in all of

[22] See, for example, the works of the late Judge Jerome Frank of the United States Court of Appeals—Law and the Modern Mind (1930); Courts on Trial (1949).

[23] In the phrase made into a legal term of art by Mr. Justice Oliver Wendell Holmes of the United States Supreme Court. See per Holmes J. (dissenting), *Lochner* v. *New York* (1905), 198 U.S. 45, at p. 74.

[24] See generally Hamson, Executive Discretion and Judicial Control. An Aspect of the French Conseil d'Etat (1954); Schwartz, French Administrative Law and the Common-Law World (1954); Von Mehren, *op. cit.*, *supra*, footnote 13, pp. 250-336.

the common-law countries to re-examine the rather tired *clichés* and invective of the 1930's directed against judicial power.[25] One thoughtful English jurist has recently seen fit to praise, publicly, the fairness and expedition and efficiency of the French *droit administratif* and its specialised court system, and to recommend close study of the relevance of French experience to current English needs,[26] thereby going far to correct, at long last, Dicey's egregious errors on this same general subject.[27] The recent English Committee on Administrative Tribunals and Enquiries—the Franks Committee[28]—considered this problem, having received authoritative testimony favouring a form of English *Conseil d'Etat*, at least for appellate purposes,[29] but after seeming to teeter on the brink, the Committee finally decided to rest with the *status quo*.[30] English opinion on constitutional and public law matters rightly carries great weight in Canada, but the Franks Committee's intellectual caution should not foreclose any independent Canadian initiative to consider the institution of a specialised administrative law-court review of governmental and administrative operations, or for that matter the adoption of a special Canadian Administrative Procedure Act or similar general code of procedure governing the operations of administrative agencies.

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[25] Compare a recent study of changes in basic American attitudes towards judicial review of administrative agencies and their decisions: "Before the last war it was only those of the so-called "right" (accused by their opponents of being concerned only with property rights and really aiming their shafts at the substance, rather than the administrative machinery, of the New Deal legislation) who were articulate in their demands for controls over agency authority. Since the war, however, proposals for safeguards have evoked a bipartisan response all but inconceivable a generation ago . . . . The tremendous expansion in administrative authority caused by the war and post-war emergencies has led people on both sides of the political party-line boundary to realize the need for safeguards. Extremists on both sides have moved towards the middle, and, that being the case, most of the controversy engendered by extremism has not unnaturally tended to abate." Schwartz, Memorandum to the Committee on Administrative Tribunals and Enquiries (1957), 35 Can. Bar Rev. 743, at p. 756. And see also Lederman, The Independence of the Judiciary (1956), 34 Can Bar Rev. 769, 1139.

[26] Hamson, *op. cit.*, *supra*, footnote 24.

[27] Dicey, *op. cit.*, *supra*, footnote 6, p. 328 *et seqq.*

[28] Committee on Administrative Tribunals and Enquiries, Report (1957).

[29] See, for example, Professor W. A. Robson's advocacy of a general administrative appeal tribunal with unusually broad jurisdiction. *Ibid.*, at pp. 28-9.

[30] "Where, in the light of these circumstances, it is justifiable to establish a tribunal or to entrust adjudicating functions to a Minister we are convinced that an ultimate control in regard to matters of law should be exercised by the traditional courts. We are not satisfied that a sufficient case has been made out for the establishment of a separative administrative court to hear appeals from tribunals or ministerial adjudications." Conclusion and Summary of Main Recommendations, para. 407, *ibid.*, at p. 90.

IV. *The Law in Books and the Law in Action. The Role of Societal Facts*

In the light of historical experience with judicial interpretation of Bills of Rights in other countries, several points can be made as to the likely future fate of the Canadian Bill before the courts. Brief and succinct as it is, it seems almost inevitable that it will be subjected to a form of selective interpretation with some provisions assuming an over-riding, paramount importance and the rest receding into the background.[31] Stripped down to their policy and doctrinal essentials, almost all of the great American civil liberties cases could be quite readily subsumed under one or other of the free speech or due process guarantees in the American Bill of Rights:[32] indeed, we could reduce the category of really *essential*

[31] For similar tendencies in judicial interpretation of the main civil codes, see Gutteridge, *op. cit., supra,* footnote 17, pp. 94-100; Lawson, *op. cit., supra,* footnote 17, p. 57.

Compare the debate, in the United States, over the so-called "preferred position" of the First Amendment free speech guarantee in the constitution. See, for example, *Kovacs* v. *Cooper* (1949), 336 U.S. 77, at p. 88, opinion of Reed J. But Frankfutrer J. has assailed the concept as a "mischievous phrase", at p. 90, (concurring opinion); and as one originally put forward [by Stone J. in the *Carolene Products* case (1938), 304 U.S. 144, at p. 152] "with the casualness of a footnote". Per Frankfurter J., concurring, *Dennis* v. *United States* (1951), 341 U.S. 494, at p. 526.

[32] Thus Edmund Cahn, in supporting the notion of the "preferred"-ness of the free speech guarantee in the First Amendment, United States constitution, equates the free speech guarantee with the guarantee of the free exercise of religion, also contained in the First Amendment, pointing out that in Anglo-American political history the guarantee of free speech gradually emerged from the guarantee of free exercise of religion. Cahn, The Doubter and the Bill of Rights (1958), 33 N.Y.U.L. Rev. 903, at p. 915.

By the same token, it has been argued that the Fourteenth Amendment due process guarantee, applicable to the states, is merely a "shorthand" method of applying the whole of the original Bill of Rights (the first eight amendments, applicable, in terms, only to the nation) to the states. See the fierce debate in *Adamson* v. *California* (1947), 332 U.S. 46, between Black J. and Murphy J. (dissenting) in support of this particular proposition, and Frankfurter J. (concurring) *contra.* Black J. supported his "shorthand" theory of the Fourteenth Amendment's scope by a detailed appendix to his opinion containing a résumé of the amendment's history. Frankfurter J., though categorically rejecting Black J.'s arguments, himself gave the Fourteenth Amendment due process clause sweeping definition by making it synonymous with "those canons of decency and fairness which express the notions of justice of English-speaking peoples". Reed J., delivering the opinion of the court in the same case, though rejecting the notion that the Fourteenth Amendment due process clause embraced *all* the rights contained in the federal Bill of Rights, conceded that at least some of these rights were so embraced: adopting the test advanced by Cardozo J., for the court, in *Palko* v. *Connecticut* (1937), 302 U.S. 319, Reed J. held that such provisions of the federal Bill of Rights as were "implicit in the concept of ordered liberty" became secure from state interference by the Fourteenth Amendment due process clause. Whatever the merits of the rival doctrinal attitudes in *Adamson* v. *California,* the expansionist character of due process, on both views, is clear.

Bill of Rights provisions to only one, if need be, by viewing the American free speech guarantee (compatibly with some trends in existing American constitutional case law), as merely a more particularised form of due process.[33] Taken in its modern, expanded sense, as distinct from its original, more limited historical purpose as a guarantee of fair criminal procedure, the "Due Process" clause stands as a high-level guarantee of "reasonableness" in relations between man and the state, an injunction against governmental arbitrariness, intolerance, or oppressiveness.[34] In a way, this is all that the English "Rule of Law" implies,[35] or, correspondingly, the

[33] That the Fourteenth Amendment due process guarantee includes the constitutional guarantee of free speech (applicable, by virtue of the First Amendment, to the national government) is clear: see *Gitlow* v. *New York* (1925), 268 U.S. 652 especially per Holmes and Brandeis JJ., dissenting; *Whitney* v. *California* (1927), 274 U.S. 357, (Brandeis J., concurring, linked with the right of free speech, as covered by due process, also the right to teach and the right of assembly); *Near* v. *Minnesota* (1931), 283 U.S. 697. What is extremely interesting, however, is the tendency to use the concept of due process as an independent test, in its own right, of constitutionality, in situations where the concept of free speech is as readily available: see the constitutional standard of "vagueness", applied especially in cases involving alleged obscenity or sacrilege, worked out in such cases as *Winters* v. *New York* (1948), 333 U.S. 507; *Beauharnais* v. *Illinois* (1952), 343 U.S. 250; *Burstyn* v. *Wilson* (1952), 343 U.S. 495.

By the same token, the Fifth Amendment due process guarantee, applicable to the nation, has been held, in effect, to include a guarantee of equal protection of the laws (such as contained, in terms, in the Fourteenth Amendment and, as such, otherwise applicable only to the states.) This particular holding was vital if the major 1954 decision ending segregation in education in the grade schools — *Brown* v. *Board of Education* (1954), 347 U.S. 483 — was to be capable of application, also, to the special case of schools in the federal territory of the District of Columbia. *Bolling* v. *Sharpe* (1954), 347 U.S. 497, and see generally McWhinney, An End to Racial Discrimination in the United States? The School-segregation Decisions (1954), 32 Can. Bar Rev. 545, at pp. 561-2.

[34] Note a recent formulation by Judge Learned Hand: "We may read [the due process clauses in the 5th and 14th Amendments] as admonitory or hortatory, not definite enough to be guides on concrete occasions, prescribing no more than that temper of detachment, impartiality, and an absence of self-directed bias that is the whole content of justice: *constans et perpetua voluntas suam cuique tribuendi*". Hand, The Bill of Rights (1958), p. 34. And as to Learned Hand's approach, see also Rostow, The Supreme Court and the People's Will (1958), 33 Notre Dame L. 573, at p. 583 *et seqq.*; Cahn, The Doubter and the Bill of Rights (1958), 33 N.Y.U.L. Rev. 903, at p. 909 *et seqq.*

[35] Compare Learned Hand's explanation of the foundations, in mediaeval English legal history, for the American due process formulation: "It is my understanding that the 'Due Process Clause', when it first appeared in Chapter III of the 28th of Edward III — about a century and a half after Magna Carta — was a substitute for, and was regarded as the equivalent of, the phrase, *per legem terrae*, which meant no more than customary legal procedure. I believe that it had never been construed otherwise before Coke's gloss upon it in *Bonham's* case, which did say that 'when an Act of Parliament is against common right and reason, or repugnant, or is impossible to be performed, the common law will control it and adjudge such Act to be void'". *Ibid.* 7 at p. 35. And see also Arndt, *op. cit.*, *supra*, footnote 6; Dixon, The Common Law as an Ultimate Constitutional Foundation (1957), 31 Aust. L.J. 240.

French *notion de légalité*[36] or the German *Rechtsstaat* concept—that is, a philosophic duty of self-restraint among administrators in their dealings with the public, an over-riding obligation of fairness on the part of governmental officials.[37]

As a second point, it is clear that the meaning and working content of the Bill of Rights is going to change as Canadian society changes, and that a reasonably close correlation will ensue between the law and society—the positive law of the Bill of Rights, on the one hand, and the *de facto* attitudes, demands, and practices, of the people in respect to whom it is expressed to operate, on the other. I am speaking here not merely of the fact, amply borne out by the experience with judicial review in comparative constitutional law, that constitutions drafted in a horse-and-buggy age or earlier will tend to be given a form of generic (progressive) interpretation on the part of the courts so as to adjust their terms to changed community conditions—this process, after all, can quite readily be reconciled with traditional canons of constitutional and general statutory construction. I mean that the practical ambit of the Bill of Rights guarantees will tend to expand or contract according as the society's own libertarian impulses expand or contract. Once again, American experience provides the most dramatic illustra-

[36] See generally Letourneur and Drago, The Rule of Law as Understood in France (1958), 7 Am. J. Comp. L. 147.

[37] The current marked disfavour that the American due process clause enjoys among constitution-makers in other countries —a skill-group not usually averse to borrowing freely from existing texts —is clearly a reaction to the notoriety of the "Substantive Due Process" era of American constitutional law when the clause was used, in the name of "liberty of contract", to immunise business entreprises from governmental regulation. Although this era ended with the great changes in United States Supreme Court interpretations from 1937 onwards, the old impressions seem to die hard outside the United States. See Mendelson, Foreign Reactions to American Experience with "Due Process of Law" (1955), 41 Virg. L. Rev. 493; Frankfurter, Of Law and Men (Elman ed., 1956), p. 22. Frankfurter is, of course, an old foe of the due process clause, dating from his professorial days at Harvard: see his editorial, The Red Terror of Judicial Reform (1924), 40 New Republic 110, at p. 113; Frankfurter, Law and Politics (MacLeish ed., 1939), p. 16. Yet though foreign constitution-makers may be at pains to avoid having, in terms, a "Due Process" clause in their own constitutional text, its core ideal of "fairness", as presented by Learned Hand in his modern-day formulation—Hand, *op. cit.*, *supra*, footnote 34, especially at pp. 56-61—tends to recur nevertheless. See, for example, Republic of India, Constitution (1949), art. 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law": as to the actual record of interpretation of "procedure established by law", see, for example, *Gopalan* v. *State of Madras* (1950), 13 Sup. C't J. (India) 174; *Keshavan Madhava Menon* v. *The State of Bombay* (1951), 14 Sup. C't J. (India) 182. And see generally McWhinney, *op. cit.*, *supra*, footnote 4, p. 130 *et seqq.* In a Canadian context, see the recently announced decision of the Canadian Supreme Court in *Roncarelli* v. *Duplessis*, (1959), not yet reported, especially the majority opinions of Martland J. and of Rand J.

tions. The Fourteenth Amendment "equal protection" guarantee was judicially interpreted, immediately after the Civil War when Radical Republican sentiment was dominant in Congress, in the broadest sense as a guarantee against racial discrimination;[38] in 1896 it was held to permit racial segregation according to the "separate but equal" formula;[39] in 1954, the line of precedents from 1896 was reversed and segregation (even where equal facilities were provided) was held to be unconstitutional.[40] The correlation between these changing, often quite conflicting, judicial interpretations and changing popular attitudes has been clearly made by American jurists who have studied this particular period of American legal and social history;[41] but indeed the difficulties in concrete application, in all parts of the American South, of the 1954 Supreme Court decision ending segregation in the public schools are ample enough demonstration of this process of inter-action between law and society.[42] Recognition of this proximate relationship or sym-

[38] See, for example, *Railroad Company* v. *Brown* (1873), 17 Wall. 445, where the device, through state statute, of segregating white and negro passengers into separate but identical railroad cars on the same train, was held to be unconstitutional as a violation of the Fourteenth Amendment "equal protection" clause.

[39] *Plessy* v. *Ferguson* (1896), 163 U.S. 537. The opinion of Brown J., for the court, reflects the changed community attitudes on the ambit of the "equal protection" clause: "The object of the [14th] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognised as within the competence of the state legislatures in the exercise of their police power", at p. 544.

[40] *Brown* v. *Board of Education, supra,* footnote 33; and see generally Bischoff, One Hundred Years of Court Decisions: Dred Scott after a century (1957), 6 J. Public Law 411.

[41] Thus in commenting, during the pendency of *Brown* v. *Board of Education,* on the two earlier United States Supreme Court decisions (*Railroad Company* v. *Brown* (1873), and *Plessy* v. *Ferguson* (1896)), a leading constitutional historian, John P. Frank, correctly noted: "What is important about each of these decisions is that each reflects the dominant social, moral, and political spirit of its times. In 1873 the Court sensed that the dominant element of the country wanted real equality. By 1896 the Court very accurately recognised that this was no longer so." Frank, Can the Courts Erase the Color Line? (1952), 2 Buffalo L. Rev. 28, at p. 29.

[42] The general problem of the operation of positive law in shaping and conditioning social attitudes, and correlatively, of social attitudes in so far as they themselves shape and condition positive law, is discussed, so far as it concerns especially race relations, in my articles An End to Racial Discrimination in the United States?, *supra,* footnote 33; Law and Politics and the Limits of the Judicial Process—An End to the Constitutional Contest in South Africa (1957), 35 Can. Bar Rev. 1203; and see also *op. cit., supra,* footnote 4, pp. 121-5.

biosis between positive law and societal facts is the beginning of judicial wisdom: it does not, however, involve any necessary surrender to judicial fatalism and a policy of judicial self-abnegation on the theory that the relationship is an automatic, mechanical, one which the judges are powerless to deflect or influence. Rather, it involves an acceptance by the judiciary of the political limits within which they must operate in implementing any activist, civil libertarian role. The court is a dependent institution, and for this reason, if the judges wish to set themselves against the course of society as a whole or for that matter even of political authority in the executive-legislative arenas of government, theirs must tend to be a Fabian, delaying role rather than to involve the employment of direct, frontal assault tactics. It is often a fine equation how much the weight of judicial authority and prestige can tilt the scales against popular prejudice and mass injustice,[43] particularly where executive-legislative authority feels unable or unwilling to intervene or act. Criticism of the United States Supreme Court for its failure effectively to intervene to protect civil liberties in the United States against the more irrational cold-war security drives, at the height of the McCarthy era, should be tempered by realisation of these truths. The moral is that there may be occasions, in Canada in the future, when the courts will be unable to intervene to protect civil liberties; in such cases, though the cause of judicial activism should not be abandoned, it must be recognised that self-discipline and vigilance on the part of the general public remain the ultimate sanctions for preserving the liberal democratic way.[44]

As a third point, it is highly unlikely that any of the guarantees in the new Canadian Bill of Rights, unqualified as they may seem to be in terms, will ever be judicially interpreted in an absolute form. I know of no society that has consistently interpreted its

[43] The late Mr. Justice Jackson of the United States Supreme Court was aware of the problem, though perhaps unduly pessimistic as to possibilities of its solution in concrete cases: ". . . I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions. . . . No court can support a reactionary regime and no court can innovate or implement a new one. I doubt that any court, whatever its powers, could have saved Louis XVI or Marie Antoinette. None could have avoided the French Revolution, none could have stopped its excesses, and none could have prevented its culmination in the dictoratship of Napoleon." Jackson, *op. cit., supra,* footnote 10, p. 80.

[44] ". . . This much I think I do know —that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish." Learned Hand, The Spirit of Liberty (Dilliard ed., 1953), p. 164.

free speech or free practice of religion guarantees in absolutistic terms. Considerations of public order and even good manners must necessarily limit and condition the actual exercise of the verbally unqualified prescriptions of the Bill of Rights. The business of judicially determining whether an infringement of the constitutionally sanctioned interests in speech and religion has taken place thus becomes a matter of balancing these particular interests against other, countervailing interests.[45] Not every purported user of a constitutionally sanctioned interest will be of equal weight and value, and equally deserving of judicial protection. We may need to know more as to the exact manner and form in which the particular interest has been sought to be exercised, and any such judicial inquiry may well yield the answer that the occasion has been trifling or insubstantial, and undeserving of special judicial advancement.[46] In particular, I suggest, the claims of aggressive, proselytising groups that they are engaging in activities involving free speech interests need careful judicial scrutiny in the specific fact-context of the cases in which they arise:[47] whatever else it does, the new Canadian Bill of Rights should not be regarded as automatically and in all circumstances conferring a legal licence for deliberately abusive and insulting attack by any one political or social out-group on other out-groups or minorities within the community. What can be said, in such cases, is that when it is the majority that is thus selected for attack, deference to the ideal of the open society with its necessary free flow of ideas (even of unwanted ideas), may warrant the court's asking the majority to show meekness in the face of rudeness or public contumely on the score that the democratic way of life requires, for its successful carrying on, a certain muscularity and strength and power of restraint.[48] In any

[45] Thus the "clear and present danger" test, as enunciated by Holmes J. — the classic formula for the determination of the ambit of the constitutional guarantees of free speech, under the United States constitution — itself necessarily presupposes that any absolutist claims to free speech must be qualified by consideration of countervailing interests in national security. See per Holmes J., for the court, *Schenck* v. *United States* (1919), 249 U.S. 47, at p. 52; and see also Jackson J., (concurring specially), *Dennis* v. *United States, supra*, footnote 31, at pp. 567-70.

[46] Holmes J. himself noted: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic." *Schenck* v. *United States, ibid.*, at p. 52.

[47] Compare, for example, the American cases *Cantwell* v. *Connecticut* (1940), 310 U.S. 296; *Chaplinsky* v. *New Hampshire* (1942), 315 U.S. 568; *Kunz* v. *New York* (1951), 340 U.S. 290; *Feiner* v. *New York* (1951), 340 U.S. 315.

[48] "What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens — real and not the factitious product of propaganda — which recognises their

case it is clear that the facts will be all-important in the judicial balancing of interests and consequent determination whether or not to protect the interests in speech and religion in particular cases: I have said enough already, elsewhere, on the importance of developing more efficient fact-finding techniques in Canadian constitutional jurisprudence.[49]

As a final point in this particular context, it must be borne in mind that there will be many areas of social behaviour, involving both individual and group conduct, raising issues that would conventionally be categorised as civil liberties issues, but which may only with difficulty be brought within the area of operation of a constitutional Bill of Rights. I am thinking here, especially, of such matters as the refusal of hotel accommodation on racial grounds,[50] and the operation of restrictive covenants prohibiting the sale or lease of property to persons of particular religious affiliations.[51] Even in the case of the United States, with its constitutional guar-

common fate and their common aspirations—in a word, which has faith in the sacredness of the individual. If you ask me how such a temper and such a faith are bred and fostered, I cannot answer. They are the last flowers of civilisation . . . . But I am satisfied that they must have the vigor within themselves to withstand the winds and weather of an indifferent and ruthless world; and that it is idle to seek shelter for them in a courtroom." Learned Hand, *op. cit., supra,* footnote 44, at pp. 164-5.

[49] I am referring here, for example, to the Canadian Supreme Court's recent disapproval, by implication, of counsel's attempt, novel in Canadian jurisprudence up to that time, to employ the technique of the Brandeis Brief as a method of apprising the court of underlying, societal facts. *Saumur* v. *Quebec,* [1953] 4 D.L.R. 641, at p. 666. And see my remarks, Legal Theory and Philosophy of Law in Canada, in Canadian Jurisprudence. The Civil Law and Common Law in Canada (1958), p. 16.

[50] Note, for example, *Constantine* v. *Imperial Hotels Ltd.,* [1944] K.B. 693—strictly speaking, a case concerning the innkeeper's obligation, at common law, to receive all travellers regardless of race or colour: in that case, an action was held to lie for breach of the obligation even in the absence of proof of special damage.

[51] See the landmark decision of Keiller Mackay J., of the Supreme Court of Ontario, holding void, as contrary to public policy, a covenant in a deed of land that the land was not to be sold to "Jews or persons of objectionable nationality". *Re Drummond Wren,* [1945] O.R. 778; and see generally Smout, An Inquiry into the Law on Racial and Religious Restraints on Alienation (1952), 30 Can. Bar Rev. 863.

In *Noble and Wolf v. Alley,* [1951] 1 D.L.R. 321, the Supreme Court of Canada had to pass on a restrictive covenant in a conveyance of summer resort property, the covenant stipulating that the property should not be sold, transferred, or leased to any person "of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention to restrict the ownership, use, occupation and enjoyment to persons of the white or Caucasian race not excluded by this clause." The Supreme Court of Canada, reversing the Supreme Court of Ontario, held, (with Locke J. dissenting), *first* that the covenant was not one which would run against subsequent purchasers of the burdened land since it did not touch or concern the land within the meaning of the doctrine of *Tulk* v. *Moxhay;* and *second* that the covenant was void for uncertainty since there was nothing in it to enable a court to say in all cases whether a proposed purchaser came within the prohibited classes.

antee of freedom of religion and with its quite specific prohibitions, also, of racial discrimination, there have been considerable problems in imposing legal regulation of these practices since they have traditionally been regarded as affecting "private", and not "public", interests.[52] Though the limits of legal ingenuity in bringing this class of matter within the definition of public law should not be regarded as having been exhausted,[53] it is likely that there will remain a large number of civil liberties cases that must be dealt with, so to speak, interstitially, in the course of ordinary private-law decisions given by the ordinary common-law courts. Such traditional private law concepts as the "public policy" concept[54] urgently require intensive and sympathetic study by both the academic and practising profession if they are to meet the demands likely to be placed upon them in the future in the cause of legal solution and alleviation of social tension issues.

V. *Judicial Self-Restraint and Judicial Activism. Profile of a Liberal Judge*

The fate of the new Canadian Bill of Rights will turn, as I have said, in the ultimate on the judiciary and on the particular philosophic attitudes and outlook that the individual judges care to take to its detailed provisions. We know, of course, that a Supreme Court opinion is an "orchestral and not a solo performance".[55]

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[52] See, in this regard, *Dorsey* v. *Stuyvesant Town Corporation* (1949), 229 N.Y. 512, where the Court of Appeals of New York held that the Corporation in question, in spite of its receiving certain tax exemptions and other benefits under the state laws, was still not indulging in state action so as to attract the operation of the Fourteenth Amendment equal protection clause: in effect, then, the Stuyvesant Corporation enjoyed the privilege, possessed by private landlords, of excluding negroes as tenants. Review of this decision was formally denied by the United States Supreme Court, with the notation—"Certiorari denied, Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted. . . ." (1950), 339 U.S. 981.

[53] Compare *Shelley* v. *Kraemer* (1948), 334 U.S. 1 where the United States Supreme Court, through Chief Justice Vinson, held that restrictive covenants attaching to land, since dependent for their enforcement in the ultimate upon judicial application in the courts, were no longer "private" action, but "public" in character and as such violated the Fourteenth Amendment equal protection clause.

[54] For a valuable survey essay bearing on a number of aspects of this problem, see, for example, Lloyd, Public Policy. A Comparative Study in English and French Law(1953).—By the same token, though a "Due Process" clause in a formal Bill of Rights might have simplified judicial solution of the problem-situation in *Roncarelli* v. *Duplessis* (1959), not yet reported, in the absence of a Bill of Rights the Canadian Supreme Court resolved the case by recourse to general principles of common-law jurisprudence. See the majority opinions of Martland and Rand JJ., *ibid.*

[55] Frankfurter, The Commerce Clause under Marshall, Taney and Waite (1937), p. 43.

Since the Supreme Court judges function as a collectivity and not as isolated units, there is necessarily a considerable amount of give-and-take in the informal judicial conference, and so the exact measure of contribution of each judge to a particular decision of the court can never be completely isolated even with a court like the Canadian Supreme Court that indulges in the practice of separate opinion-writing, both specially concurring and dissenting opinions.[56] Nevertheless, it is possible to identify widely differing, and often conflicting, judicial philosophies or conceptions of the judicial office; and it is the inter-play and inter-action of these rival viewpoints as to the proper functions of a final appellate judge exercising judicial review, that is the life-blood of constitutional jurisprudence. A Bill of Rights may supply the jural postulates or high-level values common to a civilisation: but what the judges choose individually to do with those postulates or values may vary very considerably. The more positivist-minded[57] judges may feel that it is their duty to interpret the Bill of Rights harshly, insofar as the Bill constitutes an interference with and abridgment of Dominion (and inferentially, perhaps, also of provincial) legislative powers; that strict and literal interpretation should be the key-note in judicial review, and that care should be taken not to expand the Bill's operation beyond its express terms. On the other hand, a different type of judicial personality may choose to regard the Bill of Rights as no more than an authoritative starting-point, and as a general licence for a judicially-elaborated civil liberties jurisprudence.

On the first of these two broad views of the judicial office, the court should, for example, insist on the observance of strict jurisdictional requirements before giving a ruling;[58] it should decide

[56] See generally my article Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunals (1953), 31 Can. Bar Rev. 595.

[57] I stress (repeating a warning given earlier—see, for example, The Great Debate: Activism and Self-restraint and Current Dilemmas in Judicial Policy-making (1958), 33 N.Y.U.L. Rev. 775, at p. 780), that the term "positivist" is used here for purposes of jurisprudential classification, only, and that I do not regard the term as *per se* pejorative, in a North American context anyway: some of the recent writings by members of the contemporary English neo-positivist school have seemed to me unnecessarily apologetic and defensive, perhaps in reaction to the strong criticisms, in Continental European legal circles after World War II, of the consequences in action of positivism, as a philosophy of law in the era of totalitarian dictatorship.

[58] "The fact that it would be convenient for the parties and the public to have promptly decided whether the legislation assailed is valid, cannot justify a departure from these settled rules of corporate law and established principles of equity practice. On the contrary, the fact that such is the nature of the enquiry proposed should deepen the reluctance of

cases narrowly[59] and where possible avoid ruling on the constitutional (Bill of Rights) issue;[60] and it should be at pains to avoid striking down legislative or executive action on the ground of existence of some conflict with the Bill of Rights' substantive provisions—it should start out, in effect, with a presumption of the constitutionality of legislative (and executive) action. This is the doctrine of judicial self-restraint; and it looks to the substantial limits, both institutional and political, to the exercise of any sustained policy-making role by the court.[61] The doctrine of judicial self-restraint takes note of the fact that the court is an appointive, non-elective body that can make no valid claims to having a popular "mandate"; that its members' prestige and public standing depends, in certain measure, on their political non-involvement and the

courts to entertain the stockholder's suit . . . . The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an Act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies . . . ." (Footnotes omitted). Per Brandeis J. (concurring) *Ashwander* v. *T.V.A.* (1935), 297 U.S. 288, at p. 345.

[59] "The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (Footnote omitted). *Ibid.*, at p. 347.

[60] "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground." (Footnotes omitted). *Ibid.* For a recent re-affirmation of these principles, see also per Warren C.J., for the court in *Peters* v. *Hobby* (1955), 349 U.S. 331, at p. 338.

Courts in countries other than the United States, of course, are not so consistent in application of these principles of caution, particularly the principle against the granting of "premature" constitutional rulings. Thus the High Court of Australia, for example, has not hesitated to grant a declaratory judgment at the suit of a state Attorney General against the Commonwealth (national) Government to restrain it from giving effect to an Act even before it was proclaimed. *Attorney-General for Victoria* v. *Commonwealth* (*Pharmaceutical Benefits Case*) (1945), 71 C.L.R. 237; and see generally Friedmann, Declaratory Judgment and Injunction as Public Law Remedies (1949), 22 Aust. L.J. 446. The Supreme Court of Canada, of course, renders advisory opinions, on reference. An American commentator, Freund, blames this assertion of a "premature" jurisdiction on the part of Australian and Canadian appellate courts for the extraordinarily high degree of abstractness and conceptualism in Australian and Canadian constitutional jurisprudence in comparison to that in the United States. Supreme Court and Supreme Law (Cahn ed., 1954), pp. 87-8.

[61] For a more detailed discussion of the doctrine of judicial self-restraint, and the antinomic doctrine of judicial activism, see my remarks, in *op. cit., supra,* footnote 4, pp. 173-185; and, *op. cit., supra,* footnote 57.

extent to which they in fact stay aloof from the exigent here-and-now;[62] that its members, though experts, are highly specialised experts, and not always, or even usually, well equipped for wise community policy-making; that the court, in any case, has only the most rudimentary executive powers to implement and enforce its decrees, and is therefore dependent, in the ultimate, in the giving of decisions on great tension-issues, on the full co-operation of the elective (executive and legislative) arms of government for purposes of applying sanctions for those same decisions.[63]

The argument in favour of the second view is that the judges are an *élite* group of high talents, aspirations, and ideals; that, though they may not be omniscient or for that matter philosopher-kings, they are normally far better equipped intellectually than most people in government; and that, so long as they are aware of their own limitations, there is no grave risk of abuse of their great powers. The case is made that the liberal democratic society rests, at bottom, on certain basic ideals—free speech and discussion, freedom of association, freedom of conscience—and that when these are threatened by executive-legislative authority it is absurd to rest on any abstract, academic conception of the separation of powers and say that the judges may not properly intervene in protection of them.[64] This is the civil libertarian activist conception of the judicial office and it bespeaks an affirmative right and even duty on the part of the judges to keep the political processes open, and free and unobstructed.[65] It posits the maintenance of the free society on the existence of an independent judiciary and the entrusting to the judiciary of the responsibility, in the ultimate, for preservation of the open society ideal.[66] The activist judicial philosophy has its

[62] "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." Per Frankfurter J., for the court in *Tenney* v. *Brandhove* (1951), 341 U.S. 367, at p. 378.

[63] "Courts are not equipped to pursue the paths for discovering wise policy. A court is confined within the bounds of a particular record, and it cannot even shape the record. Only fragments of a social problem are seen through the narrow windows of litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution." Per Frankfurter J., dissenting in *Sherrer* v. *Sherrer* (1948), 334 U.S. 343, at pp. 365-6.

[64] The concept of the "preferred position" of the First Amendment free speech guarantees in the United States constitution is merely the most dramatic illustration of this particular judicial position, *supra*, footnotes 31 and 32.

[65] Compare per Stone J. in *United States* v. *Carolene Products Co.* (1938), 304 U.S. 144, at p. 152.

[66] The phrase itself, of course, is Dr. Popper's: The Open Society and Its Enemies (1st ed., 1945), though the sentiment it reflects is at least as old as the American Declaration of Independence and the mainsprings of English constitutionalism.

representatives, already, in the history of Canadian constitutional jurisprudence, even though the philosophy may not have been formally identified as such until the last few years. It permeates the majority opinions of Chief Justice Sir Lyman Duff[67] and Mr. Justice Cannon[68] in the *Alberta Press* case; and it is formulated with characteristic clarity and brilliance in the special concurrences of Mr. Justice Ivan Rand, of the present bench of the Canadian Supreme Court, throughout the great constitutional *causes célébres* of recent years.[69]

Mr. Justice Rand is, of course, the philosopher of Canadian constitutional law, the judge who thinks through the mass of disparate detail in the case law to the great universal, organising principles in terms of which alone the scattered details have significance: and Rand J. is also the judicial innovator, the judge who is not afraid to break new ground and put forward new, experimental hypotheses for testing in action. The analogy to Lord Denning[70] among contemporary English judges is both proximate and fair, even though Lord Denning is essentially a private lawyer and Mr. Justice Rand pre-eminent in the public law above all, — undoubtedly the most outstanding public law judge now sitting in the Commonwealth countries. When one first attempts to study Rand J.'s opinions in detailed, systematic fashion, there is a temptation to assimilate him to Mr. Justice William O. Douglas of the current United States Supreme Court bench; but Douglas J.'s opinions have had at times a touch of absolutism in them — perhaps the product of the frustrations of having to dissent too often — and consequently on occasion a certain element of acidity[71] that mark them off, as examples of libertarian activism, from Rand J.'s

[67] Per Duff C.J.C., *Re Alberta Statutes*, *supra*, footnote 5, at p. 107.

[68] Per Cannon J., *ibid.*, at p. 119.

[69] See, in this regard, *Winner* v. *S.M.T. (Eastern) Ltd.*, *supra*, footnote 5, per Rand J., at p. 558; *Saumur* v. *Quebec*, *supra*, footnote 5, per Rand J., at pp. 670-1; *Henry Birks and Sons (Montreal) Ltd.* v. *Montreal*, *supra*, footnote 5, per Rand J. at p. 322; *Switzman* v. *Elbling* (1957), 7 D.L.R. (2d.) 337 per Rand J., at pp. 357-8. And see my discussion, *op. cit.*, *supra*, footnote 4, p. 190; Mr. Justice Rand's "Rights of the Canadian Citizen" — The "Padlock" Case, (1958), 4 Wayne L. Rev. 115. And see, most recently, Rand J's concurring opinion to *Roncarelli* v. *Duplessis* (1959), not yet reported.

[70] Lord Denning has conveniently summarised his personal philosophy in a number of recent monograph studies. See, for example, Denning, The Changing Law (1953).

[71] Douglas J. at least has never lapsed into the pejorative dissent. Compare Clark J.'s recent dissenting opinions in such cases as *Yates* v. *United States* (1957), 354 U.S. 298, at p. 344; *Watkins* v. *United States* (1957), 354 U.S. 178, at p. 217; *Jencks* v. *United States* (1957), 353 U.S. 657, at p. 680. And see Pound, Cacoethes Dissentiendi — the Heated Judicial Dissent (1953), 39 A.B.A.J. 794.

special concurrences: liberalism perhaps requires a certain element of kindliness to reach its full development as a working judicial philosophy. In any case when one considers how crucial the independent judiciary will be in the translation of the abstract, positive law of the new Bill of Rights into the community "living law"—law-in-action—one can only regret the perverse rule governing tenure of members of the Canadian Supreme Court—a rule only once, to my knowledge, departed from, by Executive dispensation in the case of Sir Lyman Duff—that compels a great liberal judge like Mr. Justice Rand, at the height of his intellectual powers, to retire this year on his reaching the age of seventy-five years.[72] One wonders, in any case, who, among the present bench, will succeed to his mantle as liberal judge; and, for that matter, who, among the legal profession, can properly aspire to take his seat on the court. (When Mr. Justice Holmes stepped down from the United States Supreme Court in 1932, there was general agreement in the country that only Cardozo J. had the necessary intellectual and moral qualities to be appointed to the Supreme Court in Holmes' place).

VI. *Judicial Values and Judicial Techniques. The Complexity of the Judicial Task as a Challenge to Greatness*

It must not be thought that I am advocating now an undiluted judicial activism as the governing philosophy at *all* times for *all* members of the Canadian Supreme Court. In any country's constitutional history, there may be some time-periods when judicial liberalism will be the prime motive force in national constitutional and general legal development, and other time-periods (possibly the majority of time-periods) when caution should normally be the watchword. In any case, the balanced court will be the court that benefits by having its share of all main competing philosophies, with the Chief Justice usually acting as the moderator[73] and know-

[72] The fallacy that elderly judges must be reactionary or at least incompetent seems largely to have been propagated, in modern times, by supporters of President Franklin Roosevelt's abortive "court-packing" plan of 1937: Mr. Roosevelt and his disciples conveniently forgot that at the time the plan was hatched, the oldest member of the United States Supreme Court was its most liberal member, Brandeis J.; and that Holmes J. himself, the idol of American liberals, had retired only a few years before after sitting on the court through his ninetieth year. Actually, the experience of the final appellate tribunals of most of the English-speaking countries suggests little or no correlation between age and political conservatism on the part of the judiciary.

[73] As to the crucial role of the Chief Justice, see for example McElwain, The Business of the Supreme Court as Conducted by Chief Justice Hughes (1949), 63 Harv. L. Rev. 5.

ing when to tilt the scales in favour of broad policy enunciations and when to decide, narrowly, on the facts or else on some non-constitutional (for example, statutory construction) ground, or even when to decide not at all.[74] In the majority of problem-situations an intermediate solution in which the actual principle (*ratio decidendi*) of the case is formulated modestly (preferably in an official opinion of the court)[75] and the wider-ranging judicial attitudes are left for expression in the ancillary opinions only—(special concurrences or dissents) will normally be most satisfactory. I have, in fact, elsewhere criticised[76] the tendency, in American constitutional jurisprudence, to think too much in black-and-white terms and insist that a judge must be able to be categorised, finally and for all cases, as either an apostle of activism or an apostle of restraint, thereby foreswearing the advantages from time to time of taking the more modest, intermediate position. In fact this two-way classification of judicial philosophy in constitutional law—judicial self-restraint—judicial activism—is not really a pure dichotomy at all: for many purposes, the opposing judicial positions may better be characterised, not as polar extremes but as points on a continuum.[77] In any case, to refuse, in the words of the popular song, to accentuate the positive and eliminate the negative, is not necessarily to lack judicial courage. On some great political and social tension-issues that arise for the first time for judicial decision, no clear national policy may have jelled as yet: in such cases, the path of judicial wisdom may

[74] Foreign cases which come to mind where courts seem consciously to have postponed the arriving at, or even announcement of, a decision are such *causes célèbres* as *A. L. A. Schechter Poultry Corp.* v. *United States* (1935), 295 U.S. 495 (the motive here apparently being to see the N.I.R.A.'s particular legislative scheme tested, as a technique of economic planning, in actual working operation, —Freund, On Understanding the Supreme Court (1949), p. 109); *Brown* v. *Board of Education*, *supra*, footnote 33, (the delay of several years while the cases were actually before the court —from 1951 to 1954—at least facilitating the development of a majority consensus—Bischoff, *op. cit.*, *supra*, footnote 40, at p. 425); the *K.P.D.* (Communist Party of West Germany) decision (1956), 5 B. Verf. G.E. 85, (the delay of judgment for five years, until August, 1956, being dictated, presumably, by a desire not to exacerbate relations between West Germany and Soviet Russia—McWhinney (1957), 32 Ind. L.J. 295, at pp. 299-300).

[75] Some greater self-discipline on the part of members of the Canadian Supreme Court in terms of co-operation in the preparation of an official opinion of the court representing the majority judges, or as far as possible a clear majority of the court, would undoubtedly facilitate study and analysis of the court's decisions. It could be achieved without in any way derogating from the individual members of the court's current complete liberty to file separate opinions, whether specially concurring or dissenting opinions. The Chief Justice's role would, of course, tend to be rather crucial in the actual allocation of responsibility for preparation of the opinion of the court. Compare Hughes, The Supreme Court of the United States (1928), pp. 58-9.

[76] *Op. cit.*, *supra*, footnote 57. [77] *Ibid.*, at pp. 786, 790-1.

be to refrain from any sweeping enunciation of principle and to concentrate instead on the concrete facts of the case and to give a predominantly fact-oriented decision.[78] The court, in such case, is making an ally of time and relying on the processes of community give-and-take and compromise to yield, in time, a clear policy-solution.

This is especially important in the case of a plural federal society, like Canada, in which, in contrast to most other federal systems and especially those of the English-speaking countries, two quite different and occasionally opposing sets of values operate within the same territorial frontiers. The fact that Canadian federalism is pluralistic in character means that the judicial decisions of essentially monistic federal societies like the United States, while making interesting reading in view of the clarity and directness of their reasoning and the freedom with which policy issues are discussed, must be received with some caution and certainly not treated as automatically conclusive in regard to questions of ultimate value choice.[79] Many of the problem-situations thus confronting the Canadian Supreme Court will in fact be *sui generis*. To resolve them finally may require advanced judicial thinking on problems of legal theory —on the key concepts of Canadian federalism at the present day. Recourse to history,—what the Founding Fathers may have intended originally—will be useful in this regard, but should surely not be regarded as decisive, by itself, at the present day. The answer to the question whether, for example, the province of Quebec should enjoy some special status, distinct from that of the other provinces in relation to Ottawa—whether, so to speak in American terms, (to take an extreme example), it is to be in Canada a Calhounian rather than a Jeffersonian-type thesis of federalism[80] (with corresponding provincial rights analogous to

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[78] This, as I interpret it, was the governing motive behind Kerwin J.'s crucial, tie-breaking opinion in the *Saumur* case, for he seems to have been at some pains to avoid the polar extremes of doctrinal position taken by both the four other majority justices and also the four dissenters. *Saumur* v. *City of Quebec and Attorney-General of Quebec*, *supra*, footnote 5, per Kerwin J. at 665.

[79] This same proposition applies, *a fortiori*, to the judicial decisions of an essentially simple, un-complex federal society like the Australian federal system. Rand J.'s refusal, in this regard, to regard the Australian commerce and marketing cases (based on s. 92 of the Australian constitution) as relevant to Canadian experience, seems wise and clearly correct even if the ground of distinction might more happily have been based on the developed practice, rather than the abstract constitutional texts, of the Australian and Canadian federal systems respectively. See per Rand J., *Murphy* v. *C.P.R. and Attorney-General of Canada* (1958), 15 D.L.R. (2d) 145, at pp. 151-2.

[80] See generally Scott, The Constitutional Background of Taxation

"nullification" or "interposition"[81] vis-à-vis certain categories of Dominion actions)—should sensibly, I think, be determined on pragmatic considerations, and then only case by case. Comity, as between the individual members of what is a federal society,—involving certain reciprocal tolerances and also mutual understandings not to embarrass unnecessarily the other members of the federal society by one's own actions—is what is involved here: the German constitutional law notion of the *Bundestreue* (federal fidelity),[82] which seems to have some analogies to the French private law concept of *abus du droit* and which comes very close to being a sort of code of constitutional "good manners", may perhaps help supply the answers, here.[83]

In the meantime, while the final policy solution is being sought for by the judges, it may often turn out that the crucial factors in the particular problem-situation actually before the court are not really questions of *values* but questions of concrete *techniques* actually used to implement particular values in the particular case.[84] The court is entitled to insist on a reasonable relationship between

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Agreements (1955), 2 McGill L.J. 1, at p. 10; Scott, Areas of Conflict in the Field of Public Law and Policy (1956), 3 McGill L.J. 29, at p. 35; McWhinney, The United States Supreme Court and Foreign Courts: An Exercise in Comparative Jurisprudence (1958), 6 J. Pub. Law 465, 477-8; Beetz, Le contrôle juridictionnel du pouvoir législatif et les droits de l'homme dans la constitution du Canada (1958), 18 R. du B. 361.

[81] Compare Miller and Howell, Interposition, Nullification and the Delicate Division of Power in a Federal System (1956), 5 J. Pub. Law 2.

[82] As developed, for example, in the decision of the Federal Constitutional Court of West Germany in the *Concordat* case (1957), 6 B. Verf. G.E. 309, discussed McWhinney, (1957), 35 Can. Bar Rev. 842; and also in the decision on the *Referendum on Atomic Weapons*, 2 Bv. G 1/58; 2 Bv. F 3/58; 2 Bv. F 6/58 (30th July 1958,).

[83] In the *Referendum on Atomic Weapons* decision, the principle of federal fidelity clearly dicated that the member-states of the West German federal system should not embarrass the federal government in its conduct of defence and foreign relations by holding a popular referendum poll on whether the new West German army should be equipped with Atomic weapons. In the *Concordat* case, where the court held that even though West Germany be still bound by the 1933 treaty between Germany and the Vatican guaranteeing "separate" schools, the member-states of the West German federal system could nevertheless, under the constitution of West Germany of 1949, require non-denominational schools for all children, the principle of federal fidelity offered the only opportunity of overcoming the conflict between Germany's obligations at the international law level and the provisions of her internal, municipal law: if the state statutes, being otherwise within state legislative power, were intended to embarrass the federal government in the conduct of foreign relations or if the states unreasonably with-held their co-operation from the federal government in this area, then the state statutes would presumably fall before the federal fidelity principle. McWhinney, *ibid.*, at pp. 843-6.

[84] Compare Freund, *op. cit.*, *supra*, footnote 74, p. 27; and see also per Frankfurter J., concurring, *Dennis* v. *United States*, *supra*, footnote 31, at p. 539.

ends and *means*—between postulated community values and the actual machinery devices used by governmental authority to translate the values into law-in-action.[85] The old hands-off, watchman's state may, by the inexorable pressure of economic, social, and political events of the last seventy-five years, be gone forever, but we are at least entitled to insist on a certain prudent exercise of economy in the use of power, as between government and citizen.[86]

There may even be occasions, in a federal polity, when the desired principle of territorial decentralisation of policy-making may suggest the merits of judicial deference to local or provincial action, even in cases where judges may think such local or provincial action wrong. Good federalism and good manners, in such case, may dictate that the judges go along with other people's mistakes: making mistakes is a part, (albeit, if long continued, a rather expensive and socially costly part) of that trial-and-error experimentation that is central to the free society.[87]

If the problems of Canadian federalism in general and of the

[85] Thus in the *Saumur* case fact-situation, the *techniques* of control actually employed by provincial executive-legislative authority—blanket prohibition—seem to have been grossly disproportionate to the *end* sought to be attained by the province—protection of the Catholic church and Catholic values against insulting or "aggressive" proselytising activities. Whether or not the particular *end* be regarded as a legitimate user of provincial power, a question not necessarily requiring an immediate judicial answer, a *more moderate* control would clearly have sufficed to attain that *end*—say, a system of administrative licensing with grant or retention of the license predicated upon demonstration or maintenance of certain (judicially reviewable) standards of public conduct and behaviour. *Saumur* v. *Quebec*, *supra*, footnote 5. Rather analogous arguments apply, I suggest also, in the "Padlock" case fact-situation. *Switzman* v. *Elbling*, *supra*, footnote 5.

[86] Dewey puts it thus: "The criterion of value lies in the relative efficiency and economy of the expenditure of force as a means to an end. With advance of knowledge, refined, subtle and indirect use of force is always displacing coarse, obvious and direct methods of applying it. This is the explanation of the ordinary feeling against the use of force. What is thought of as brutal, violent, immoral, is a use of physical agencies which are gross, sensational and evident on their own account in cases where it is possible to employ with greater economy and less waste means which are comparatively imperceptible and refined." Force and Coercion (1916), 26 Int. J. Ethics 359, at p. 363.

Even in the area of military strategy where policy-makers might be expected to operate with much less deference to ethical restraints on the application of force than is the received practice, for example, in matters of government, the principle of economy in the use of power is well accepted: "It [the principle of economy of power] prescribes that in the use of armed force as an instrument of national policy no greater force should be employed than is necessary to achieve the objectives toward which it is directed; or, stated in another way, the dimensions of military force should be proportionate to the value of the objectives at stake." Osgood, Limited War: The Challenge to American Strategy (1957), p. 4. And compare McDougal and Feliciano, International Coercion and World Public Order: The General Principles of the Law of War (1958), 67 Yale L.J. 771, at p. 797.

judicial process in particular may thus seem unduly complex and even baffling, this should be taken as a measure of the infinite variety and potentiality for experimentation of Canadian society, rather than a constitutional vice or weakness. In any case it is clear that the solution of the major problems of Canadian constitutional law will require a spirit of calmness and moderation and tolerance, and a large measure of co-operation on the part of the practising bar as well as of the judges. As Jeremy Bentham perceived, — "The law is not made by judge alone, but by judge and company."[88] The opportunities and also the affirmative responsibilities of the practising bar in Canada in regard to the creation and development of an indigenous constitutional jurisprudence representing the two main elements, civil law and common law, in Canadian law, have regrettably been too little recognised or appreciated to date.[89]

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[87] "Another and contrasting justification for a free society must be added. Sometimes new truth rides into history upon the back of an error. An authoritarian society would have prevented the new truth with the error . . . ." Niebuhr, The Children of Light and the Children of Darkness (1946), pp. 75-6

[88] Freund, *op. cit.*, *supra*, footnote 74, p. 78.

[89] The immense psychological burdens, and also the massive intellectual loneliness, of the appellate judicial office are manifest in the plea by the present Chief Judge of the United States Court of Appeals (Second Circuit) and former Dean of the Yale Law School, Charles E. Clark, — The Dilemma of American Judges: Is too great "Trust for Salvation" Placed in Them? (1949), 35 A.B.A.J. 8.