THE SUPREME COURT OF CANADA IN THE AGE OF RIGHTS: CONSTITUTIONAL DEMOCRACY, THE RULE OF LAW AND FUNDAMENTAL RIGHTS UNDER CANADA'S CONSTITUTION

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In the aftermath of the Second World War, democratic nations have embraced judicial protection of individual autonomy, equality and respect for human dignity. While each nation's arrangements have distinctive features, there is a discernible model of postwar rights protection. This essay traces the role of the Supreme Court in Canada's transformation into such a postwar, rights-protecting polity both before and after the adoption of the Charter in 1982. Just after the war, the Supreme Court took the intiative to protect rights just as Canada reached political independence and the Court became Canada's highest appellate court. Facing challenges to the most basic assumptions of liberal democracy, some of the judges inferred protection for fundamental freedoms from the structure of Canada's parliamentary democracy, the federal-provincial division of powers and the heritage of the flexible, unwritten British constitution. Although the Court ultimately abandoned this approach, it recently returned to this legacy in important reference cases that deliberated upon the place of direct democracy and the independence of the courts in our constitutional order. This essay compares the Court's understanding of its role in protecting rights under this traditional approach as well as under the Charter, to the postwar model of rights-protection. It notes that the Court has on occasion departed from this model to resolve a perceived tension between vigilant judicial protection of rights and the prerogatives of the executive and the legislature in our system of government. The author argues that Canada's adaptation of the postwar model to the Canadian context resolves that tension without prompting such departures. Support for this argument rests on a number of considerations. These include the conceptual substructure of unwritten constitutional norms, the institutional structure and remedial purposes of the Charter, and the common law's affinity to the postwar model of rights-protection.

Au lendemain de la Seconde Guerre Mondiale, les nations démocratiques ont embrassé les politiques de protection de l'autonomie individuelle, d'égalité et de respect de la dignité humaine. Bien que les dispositions de chaque nation comportent des particularités, on peut identifier un modèle d'après guerre de protection des droits. Cet article retrace le rôle de la Cour suprême dans la transformation du Canada par cette politique d'après guerre de protection des droits, aussi bien avant qu'après l'adoption de la Charte en 1982. Juste après la guerre la Cour suprême a pris l'initiative de protéger les droits au moment même où le Canada atteignait l'indépendance politique et que la Cour devenait la plus haute cour d'appel au pays. Faisant face à une remise en question des postulats les plus fondamentaux de la démocratie libérale, certains juges ont déduit la protection des libertés fondamentales de la structure de la démocratie parlementaire canadienne, du partage des pouvoirs entre le provincial et le fédéral, et de l'héritage de la constitution britannique, souple

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et non écrite. Bien que la Cour ait ultimement abandonné cette approche, elle est revenue à cet héritage dans des affaires importantes de renvoi portant sur la place de la démocratie directe et sur l'indépendance des tribunaux dans notre ordre constitutionnel. Cet essai compare la compréhension que la Cour a de son rôle dans la protection des droits, en vertu de cette approche traditionelle et en vertu de la Charte, avec le modèle d'après guerre de protection des droits. Il relève qu'à l'occasion la Cour s'est écartée de ce modèle pour résoudre le problème de la tension qu'elle avait perçue entre une protection judiciaire des droits faite avec vigilance et les prérogatives de l'exécutif et du législatif dans notre système de gouvernement. L'auteur soutient que l'adaptation du modèle d'après guerre au contexte canadien résout cette tension sans pour autant sacrifier la protection des droits. Cette thèse s'appuie sur un certain nombre de considérations. Parmi celles-ci il y a la sous-structure conceptuelle de normes constitutionnelles non écrites, la structure institutionnelle de la Charte et ses objectifs de remédier à des problèmes, ainsi que les affinités de la common law avec le modèle d'après guerre de protection des droits.

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"The development of the constitutional state can be understood as an open sequence of experience-guided precautionary measures against the overpowering of the legal system by illegitimate power relations that contradict its normative self-understanding."[1]

"...'true' democracy recognizes the power of the constitution — fruit of the constituent authority — to entrench the fundamental human rights and the basic values of the system against the power of the majority. Such limitation of majority rule does not impair democracy but constitutes its full realization."[2]

"That in the questions facing courts we must exclude theory has never been the rule and never can be the rule: theory is simply the completion of ideas."[3]

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[1] J. Habermas, *Between Facts and Norms* (Cambridge, Mass: MIT Press, 1996) at 39.

[2] *United Mizrahi Bank Ltd.* v. *Migdal Cooperative Village* (1995), P.D. 221 at para. 47 per Justice Aharon Barak, President, Supreme Court of Israel.

[3] I.C. Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951) 9 U.T.L.J.1 at 12.

I. *The Age of Rights: Principles in Transition*

We live in the age of rights.[4] In the aftermath of the Second World War, commitment to the principles embodied in the modern idea of human rights has intensified in the West, although the record of achievement is undeniably blemished. Liberty, equality and respect for human dignity have come to enjoy unprecedented support as abstract principles. Nonetheless, no single magic formula protects these principles in all contexts. It falls to each nation to make and re-make its own arrangements, either alone or in concert with other nation states:

> The fundamental problem concerning human rights today is not so much how to justify them, but how to protect them.[5]

These arrangements build upon several fundamental tenets of constitutional government. The first is an understanding of democracy as the sovereignty of the people, not of the legislature in the abstract or as a particular, temporarily elected, law-making body. It is this meaning of democracy that legitimates the exercise of state power over all members of the postwar nation state.[6] The second is that government power is not unlimited. It operates under the discipline of the rule of law, bolstering the idea that liberty prevails unless and until the law-making machinery has taken the trouble to stipulate otherwise. To these, a third "experience guided precautionary measure" has been added in the postwar period, that the constitutional state must directly protect fundamental rights and freedoms.[7] This third tenet reflects the painfully learned lesson of the twentieth century. Generally accepted practices of democratic government reliably secure neither the long-term continuity of democracy, nor the optimal operation of the rule of law, nor the entitlements to liberty, equality and respect for dignity now considered fundamental within the postwar, pluralist, egalitarian, and often divided state. The postwar redesign of the democratic state has as its daunting aspiration the correction of these failings.

The postwar agenda is an ambitious undertaking. It responds to dramatic changes in the nation state. The nation state is no longer the state of the nation:

> ...today all of us live in pluralist societies ... [in which] the majority culture must give up its historical prerogative to define the official terms of the *generalized* political culture that is to be shared by all citizens, regardless of whence they come and how

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[4] C.N. Tate & T. Valinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), M. Shapiro and A. Stone, "The New Constitutional Politics of Europe" (1994) 26 Comparative Political Studies 397.

[5] N. Bobbio, *The Age of Rights* (Cambridge: Polity Press, 1996) at 10.

[6] S. Freedman, "Constitutional Democracy and the Legitimacy of Judicial Review" (1990-91) 9 Law and Philosophy 327. See R.L. Brown, "Accountability, Liberty, and the Constitution (1998) 98 Colum. L. Rev. 531 for the origins of the counter-majoritarian dilemma in the U.S. context.

[7] Habernas, *supra* note 1.

> they live..... Such generalized political cultures have as reference national constitutions; each of them contextualizes the same universalist principles, popular sovereignty and human rights, differently from the perspective of their own particular history. On this basis nationalism can be replaced by what one might call constitutional patriotism.[8]

Democracy in the multicultural, constitutional state can no longer amount to the election of a temporary, all-powerful government, sustained by and sustaining the cultural preferences of the historical majority whose values reflect a shared past, culture and aspirations. Elected representatives must cater to a more diverse public in terms of ethnicity, religion and race, for example. The increase in actual diversity has rendered the modern state more pluralistic and secular. The public sphere is no longer the privileged preserve of the white, male, Christian, property-owning, heterosexual, paterfamilias.

In the postwar constitutional state, the changes that precipitated new appreciation of the complexity of political representation have also transformed our understanding of political accountability. When a diverse population of free and equal citizens rule themselves through the instrument of elected government, they do not vest their representatives with paramount authority over their fundamental rights and freedoms between elections. This would make no sense in the light of the diversity and pluralism of the modern nation state. It makes even less sense given the post war lesson that civil society can abandon its "normative presuppositions" — even descend to barbarism — in the face of real, imagined or fabricated dangers.[9]

The need for added accountability is intensified by the fact that modern government has extensive regulatory reach, affecting our lives at every turn, permeating its most private corners. Accountability must be constant when so many rules and programs of benefits affect a diverse population with multifaceted values. Accordingly, governments are made to do their work under the discipline of delineated, enforceable limits on power. The core idea is that governments lack authority, even in the short term of an electoral mandate, to alter the basic structure of the constitutional state, which includes its democratic framework, the rule of law and respect for fundamental rights and freedoms. The judiciary acts as guardian of that basic structure.

There is no single blueprint for the postwar constitutional state, nor has there been a uniform mode of transition to its strictures. A number of patterns have emerged. Many countries have subscribed to international, post-war, rights-protecting instruments that strongly influence the development of the domestic legal system, especially when these instruments apply directly to domestic law or provide recourse for citizens to international tribunals. Some of the defeated nations adopted new constitutions in the immediate aftermath of the War. Other countries did so later, in response to other influences, such as change of regime or civil war. These modern constitutions, the products of

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[8] J. Habermas, "The European Nation State: Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship" (1996) 9 Ratio Juris 125 at 133 [emphasis in original].

[9] Habermas, *supra* note 1.

intensive theoretical and comparative study, establish democratic institutions, the rule of law and a substantive commitment to fundamental rights suited to the particular national context and history. Absent the opportunities created by such exceptional circumstances, an alternative mode of constitutional reform is discernible. The judiciary has taken a leadership role in effecting a more gradual, organic transformation to the constitutional state in some countries by infusing the postwar norms into statutory interpretation and development of the common law, both public and private. Some courts have gone further, reformulating unwritten constitutional traditions and reinterpreting old constitutional instruments in light of the fundamental tenets of post war constitutionalism.

The potential that rights-protection has for legitimation is well established at both the national and international levels. The postwar "global human rights constituency" is so strong that "no state and no developed political entity... could afford to eschew its language or its values".[10] Such legitimation serves as a strong force for integration in otherwise diverse political systems, whether multilateral or federal in structure. A common sense of citizenship can build upon shared understandings of fundamental rights and freedoms, even when other cultural and linguistic traditions diverge.[11]

Canada's response to the age of rights has been unusually complex, engaging almost every possibility. This paper traces this evolving process, focussing on the vital role played by the Supreme Court of Canada. Parts II and III relate the pre-*Charter* part of this story. In Part II, I present the postwar model and briefly outline the judicial role it demands. I then consider, in Part III, the Supreme Court of Canada's first major attempt to identify the fundamental tenets of postwar liberal democracy as the principles animating the Canadian Constitution. Pressed to review extraordinary encroachments on those tenets by legislatures and the executive, a number of judges began to re-examine their own constitutional responsibilities. They elaborated a sophisticated theory of Canadian constitutional law, weaving together its written and unwritten strands to mandate a strong judicial duty to protect these basic tenets from erosion by any branch of government. Although ultimately rejected in the context in which it was advanced, this theory did not disappear. It re-emerged as the cornerstone of the written Constitution with the adoption of the *Charter of Rights and Freedoms*.

The remainder of the paper deals with the Supreme Court and the *Charter*. In Part IV, I describe how the *Charter*'s legal structure and institutional roles establish in Canada, by design, the basic tenets of the post war constitutional state. In Part V, I make the claim that the Supreme Court has not yet effected the full transition

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[10] Gráinne de Búrca, "The Language of Rights and European Integration" in J. Shaw & G. More, eds., *New Legal Dynamics of European Union* (Oxford: Clarendon Press, 1995) at 40-1. See also L. Henkin, *The Age of Rights* (New York: Columbia University Press, 1990).

[11] A. Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Kingston: McGill-Queen's University Press, 1992) 1.

to the constitutional state as required by the *Charter*. While many of its judgments establish and develop these tenets, others occasionally display a lack of confidence in the mode of judicial review that they mandate. This tendency has produced marked instability and variation in the development of important legal doctrines. It threatens to undermine the remedial purpose of the *Charter* — to establish a postwar, constitutional state.

I conclude by noting that the *Charter* does not, as some judges may fear, vest in the courts a political prerogative snatched from elected representatives. Nor does it give the judges free reign to delineate a more deferential review function when the usual approach would undermine the social mores established by the historical cultural majority. Rather, it commits the judicial authority to ensure that every organ of state adheres to democracy as the sovereignty of the people, to the rule of law, and to respect for fundamental rights and freedoms as the highest constitutional norms. The judicial role it expressly mandates, in effect, revives the approach developed under the short-lived "implied bill of rights", which marked the Court's first attempt to bring the Canadian Constitution within the postwar model. While the members of the Court who supported this approach were ahead of their time in the aftermath of the War, the current members of the Court can take comfort in the fact that the courts of the common law world have now caught up. The mode of judicial analysis stipulated in the postwar model now flourishes in the common law world, under the auspices of international human rights-protecting instruments, new constitutions, as well as the development of the common law itself. The full transition to the *Charter*'s regime of postwar constitutionalism depends on the Supreme Court's willingness to regard the postwar model that is embedded in the *Charter* not as a foreign graft or institutional anomaly, but as the maturation of our constitutional heritage.

II. *The Postwar Model*

The postwar model of liberal democracy rejects a simple majoritarian idea of democratic rule, respects the rule of law and offers effective protection for liberty, equality and human dignity. The rise of totalitarian regimes and the resulting war demonstrated, in far too many contexts, the fragility of democratic institutions and the inadequacy of the rule of law. Unspeakable atrocities, breaches of the most basic norms of civil society, were not merely the product of lawlessness; they were also the products of accepted processes endorsed by judges.[12] Rights guarantees have emerged as the favoured instrument by which to protect the basic structure of constitutional democracy. These guarantees establish new institutional roles that have the effect of reconstructing the relationship between the state and the individual as citizen and right holder. By extension, they also establish the way in which groups function within a society

[12] L. Lustgarten, "Taking Nazi Law Seriously" (2000) 63 Mod. L.Rev. 1; L.E. Weinrib, "Sustaining Constitutional Values: The Schreiner Legacy" (1998) 14 So. Af. J. of Human Rights 351.

built on rights and freedoms that respects history, identity and faith. In the fully developed model, the guarantees empower the right holder to challenge the exercise of state power, including legislation, in the courts.

The doctrine of legislative sovereignty, which precludes judicial review of statute, is not, in operation, necessarily inimical to the objectives of the constitutional state. It may work well under optimal conditions, particularly in a homogeneous nation state. However, it leaves the fundamental rights and freedoms necessary to the constitutional state dependent on the good will, self-restraint and sensitivity of majoritarian, temporarily elected governments. These rights and freedoms are thus viewed, not as legally entrenched entitlements that any citizen can insist upon, but as privileges contingent on the continuing endorsement of the majority.

Although the postwar constitutional state does not render these rights and freedoms absolute, it does, in one way or another, put them beyond the reach of the ordinary political process. Given the gravity of the harm that may follow the malfunction of representative democracy, that process can no longer enjoy supremacy. In the constitutional state, the ordinary legislative process does not lose its capacity to do what it does well. It remains the primary engine of public policy within its mandate. But it no longer enjoys paramountcy over the basic structure of the constitutional order, including the democratic function itself, the rule of law and fundamental rights and freedoms.

In the fully developed model of constitutional democracy, the fundamental rights and freedoms enjoy the status of higher law under a constitutional bill of rights. Their enforcement falls to the independent judiciary, either the general courts of law or special constitutional courts. The judges review the legislative and administrative process, indeed every exercise of state power, for fidelity to these constitutional norms. They also develop the common law, in its private and public forms, in line with constitutional values implicit in the scheme of guaranteed rights and freedoms.[13] The courts possess extensive remedial authority, including power to invalidate legislation, in whole or in part. In addition, constitutional amendment that undermines the fundamental tenets of liberal democracy, if possible, will require extensive consensus. There may be special constraints imposed on the substantive reach or the procedural requirements for amendment having this effect.

Unlike older bills of rights, postwar rights-protecting instruments do not merely negate state power, leaving to the judiciary the task of elaborating their scope and limits of generally formulated entitlements. Those who designed the later instruments had the opportunity to improve upon the early efforts and to adapt to changes in government responsibility. In particular, they had in mind the development of the active, regulatory, welfare state as well as increased diversity and pluralism. The later instruments thus provide more direction as to

[13] See Justice A. Barak, "Constitutional Human Rights and Private Law", (1996) 3 Review of Constitutional Studies 218 and L.E. Weinrib & E.J. Weinrib, "Constitutional Values and Private Law in Canada" [forthcoming].

the values and principles on which the rights stand and the basis on which they may be limited. One of the most significant developments is that postwar constitutions avoid the possibility that honouring the specific guarantee might, in a particular context, undermine the constitutional structure as a whole. They expressly permit limitations on stipulated grounds, giving flexible strength to these instruments.

Limitation clauses testify to the non-absolute nature of the specific guaranteed rights and freedoms without negating the abstract principles that inform the rights-protecting instrument in its entirety. They allow the rights-protecting instrument to function as a coherent scheme of rights protection, in which judges constantly work to adjust the enumerated rights to one another and to the broader principles that underlie them all. The system sustains the normative connection between the right and the limitation by offering the state the opportunity to *justify* — not merely to explain or to excuse — any encroachment in a court of law on the basis of these principles when challenged by a rightholder. The requisite mode of justification has two steps, the first formal and the second substantive.

First, the state must establish that its impugned policy meets formal standards of legality.[14] If the policy is in statutory form, this requirement ensures that the measure has withstood the rigours of the legislative process—rigours that in the Canadian context usually include executive formulation, parliamentary process and deliberation, and perhaps public debate. Encroachments on the guarantees must take the form of specific, concrete and clear directives by those who carry democratic responsibility. An intention to encroach will not be inferred from general language. If the policy is formulated in a common law rule, the measure will be the creation of the principled reasoning of the common law courts. The formal legality structure offers assurance that encroachments on rights stand as the product of a public deliberative process that includes some deliberation and a formal record. From the standpoint of affected holders of the encroached right, material is available for the assessment of their constitutional position. From the standpoint of the state, public authorities are disciplined to put their policies through a proper law-creation process. The result is that, far from transferring political power from legislatures to courts (as critics of judicial review allege), the constitution through its legality stricture channels policy-making into the legislative arena.

If the encroachment is found to satisfy the formal standard of legality, the limitation analysis can then move to the next stage, when the state has the opportunity to justify its encroachment on substantive grounds. If, however, the legality stricture remains unsatisfied, the matter should end, giving the state no opportunity to make justification arguments. The legality stricture imposes a general discipline on the work of government. In the law-making process, it ensures that constitutional policy is worked out in more detail, which may lead to more

[14] M. Delmas-Marty, "The Richness of Underlying Legal Reasoning", in M. Delmas-Marty, ed., *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Dordrecht: Martinus Nijhoff, 1992) 319 at 323-24: accessibility (to the citizen), sufficient precision, and clarity (so that the citizen can foresee the consequences of given action) are the "three qualitative requirements" necessary for democratic legality.

extensive research and consideration of a wider range of affected constituencies. In the law-application process, it ensures that constitutional rights do not lie in the hands of officials who work behind the scenes with little or no transparency, expertise in rights-protection, or incentive to respect rights and freedoms in their day to day work. In the litigation context, the legality stricture should ensure that governments do not defend enactments or state action alleged to infringe on higher law guarantees if the impugned measures have not passed through the rigours of the stipulated processes. They should either undertake to bring the measure into the proper legal form or repudiate it.

Where the legality stricture is satisfied, consideration moves to the second and substantive stage. At this stage the state has the burden of demonstrating that the encroachment on the right is consistent with the principled structure of the rights-protecting system considered as a whole.[15] Thus, the specific rights guaranteed by the constitution are controlling unless the state can show that an encroachment is justified by its consonance with systemic constitutional values. To this end, the postwar model has developed a complex set of doctrinal tests for the justification of limits on guaranteed rights. These doctrines, collectively known as proportionality analysis, call for consideration of the consistency of the impugned measure with constitutional norms, of the connection between its means and ends, the necessity for the encroachment, and of its impact on the guarantees in question.[16] The proportionality analysis thus imposes on the state a sequence of exacting tests to ensure that a limitation is consistent with the entire scheme of constitutional rights-protection in which the specific guarantee participates. Proportionality analysis requires an essentially adjudicative, not legislative, determination. In performing this task, courts do not assess the wisdom of the impugned measure or second-guess a political compromise or construct "major guidelines for society".[17] Rather, independent judges with expertise in the law, operating in an adversary context and at the initiative of the rights-holders most affected, consider

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[15] See e.g. The Syracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4 Annex, nos. 15-18; R. Marcic, "Duties and Limitations Upon Rights" [1968] International Commission Jurists 59 at 61; J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 358-59; A.C. Kiss, "Permissible Limitations on Rights" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 290 at 310; P. Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983) at 88, 91.

[16] The proportionality principle has become the central analytic feature in judicial review of rights-protecting instruments. See E. Ellis; *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999); N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London: Kluwer Law International, 1996); G. de Búrca, "Proportionality and *Wednesbury* Unreasonableness: The Influence of European Legal Concepts on U.K. Law" (1997) 3 European Public Law 561"; J. Schwarze, *European Administrative Law* (London: Sweet & Maxwell, 1992) at c. 5.

[17] E. Smith, "Cross-fertilisation of Concepts in Constitutional Law" in J. Beatson & T. Tridimas, *New Directions in European Public Law* (Oxford: Hart Publishing, 1998) 101 at 120-22 and A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) at 24-26, making the distinction between principle and policy.

principled arguments of justification concerning an encroachment's overall consistency with the constitutional norms to which society is already committed.

In addition to and apart from principled limitation, the postwar model also allows for temporary legislative abrogation of a right under specified conditions. These conditions include compliance with formal strictures in the law-making process, as in the Canadian and Israeli legislative override provisions, or proof that the measure is a response to a (continuing) emergency, as in the derogation clauses included in many international and domestic rights-protecting systems. Such abrogation is the exercise of a political power and does not depend on being capable of justification as a matter of legal analysis. However, because abrogation entails a temporary departure from the constitutional values that normally obtain, its exercise is intended to be exceptional. Moreover, because the abrogation power is exceptional and not plenary, the state must legitimate its exercise by demonstrating compliance with the constitutionally prescribed process and/or conditions either in the public arena or in a court of law. For these reasons, the possibility of abrogation does not reintroduce legislative supremacy through the back door.

The postwar model thus restricts the doctrine of legislative sovereignty with a complex system of government that requires courts to carry out legal functions while leaving legislatures free to carry out political ones. Under this model government powers are limited by a guarantee of rights and freedoms that crystallize the foundational principles of the state as a constitutional democracy. The model permits principled and measured limitation of these guarantees, when the state satisfies the formal strictures of legality and the substantive requirements of justification. It also permits temporary abrogation, upon compliance with prescribed formal or empirical conditions. The result is that temporarily elected governments cannot use the ordinary political processes to transform the basic constitutional structure. That power is reserved to the more demanding political process stipulated for constitutional amendment, which also remains subject to judicial review to assure lawful exercise of state power.[18]

The postwar model thus contracts the historical prerogatives of established cultural majorities formerly protected by the doctrine of legislative sovereignty. It makes room for protection of fundamental rights and freedoms by giving these entitlements higher law status enforced by the judiciary. Courts take on the task of explicating the content of the guaranteed rights and freedoms. They must also assess compliance with the legality stricture, and if it is satisfied, apply the proportionality analysis to the state's arguments as to justification of the measures that limit any of the guaranteed rights and freedoms. In addition, they

[18] In the *Secession Reference*, [1998] 2 S.C.R. 217, the Supreme Court of Canada ruled that negotiations for constitutional amendment must comply with the following constitutional principles: democracy, federalism, the rule of law, and the rights of minorities. The constraints on the exercise of the constituent authority are more severe in the German constitutional system, where some provisions are not subject to amendment. More generally, international obligations may also apply to restrict the range of possible amendments.

oversee compliance with the substantial and formal strictures applicable to temporary abrogation and amendment.

These new responsibilities, however, do not involve the transfer to courts of law of political powers taken from legislatures. The postwar model does not transfer political power so much as transform it. This truth obtains both from the political and from the juridical perspective.

On the one hand, from the political perspective, the law-making authority that characterized the system of legislative sovereignty no longer exists. Under the postwar model neither courts nor legislatures have the power to make laws free from the formal and substantive constitutional norms that underpin constitutional democracy. Every exercise of state power must conform to the strictures of the rights-protecting system. Nonetheless, although the legislatures are no longer considered supreme, they continue to exercise the broadest policy making function within the state. They are constrained of course by the need either to respect the guaranteed rights or to be capable of, first, demonstrating that the impugned measure has been prescribed by law, and, second, justifying any encroachment when rightholders bring challenges to courts of law.

On the other hand, from the judicial perspective, the judiciary does not acquire the lost legislative power. Courts do not make policy or law in the sense that sovereign legislatures did. Rather, in cases that they can neither invite nor refuse, courts evaluate claims that constitutional norms have been breached. Within the confines of defined legal reasoning that reflects the primacy of the rights and freedoms of the citizen against the state, judges develop and apply constitutional norms to concrete questions. Over time, they build a stable and coherent body of legal principles that delineates the authority under law of the democratic arm of government and those who exercise power in its name.

Moreover, the constitutional role of courts under a postwar constitution is continuous with the traditional judicial role and unlike the legislative function. Many of the norms involved are rooted in judicial creations of the past that took the form of common law presumptions, canons of statutory interpretation, and restrictions on the exercise of public power by the administrative arms of the state. The expanded judicial role extends these longstanding norms of fairness to the assessment of statutes, under constitutionally constrained modes of analysis that include review for legality and proportionality. Judicial review does not lead courts into the open-ended world of political debate and policy formation, but allows them to operate as the independent and legally expert institution that safeguards the basic constitutional structure.[19]

[19] "[A] limited Constitution [,]... one which contains certain specified exceptions to the legislative authority.. can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." J. Madison, A. Hamilton & J. Jay, *The Federalist Papers* (Harmondsworth: Penguin, 1987), No. LXXVIII. See also *Marbury* v. *Madison*, (1803) 5 U.S. (1 Cranch) 137.

So traditional is this function, that courts in many countries have come to exercise it without express constitutional directive. The exercise of this authority in this manner by some members of the Supreme Court of Canada just after the Second World War is the subject of the next section of this essay.

III. *The Supreme Court and the "Implied Bill of Rights"*

In Canada, the transition to rights-based democracy on the postwar model has been a protracted process marked by a number of stages. The Supreme Court of Canada's first response to the "age of rights" began with the short-lived attempt by some of its members, under the shadow of events in Europe, to resist the application of laws they believed inconsistent with the basic elements of British constitutional tradition. Because the judicial review power at hand derived from the main preoccupation of Canadian constitutional law — the federal-provincial division of powers— the tools were not well suited to the undertaking. Nonetheless, in the hands of determined and imaginative judges, they worked surprisingly well. The Court's second response began with a more decisive commitment to the postwar model, the adoption of the *Charter* in 1982. I now turn to the first of these.[20]

The Supreme Court of Canada first responded to "the age of rights" in a handful of judgments collectively referred to as the "implied bill of rights" cases. Canada's constituent instrument, the *British North America, 1867*, did not include a bill of rights.[21] Proposals to amend the Constitution to this end just after the War floundered. In a line of cases starting just before the War and continuing for more than a decade afterwards, members of the Supreme Court began to work out a distinctive account of the normative underpinnings of Canada's constitutional order. From an examination of Canada's constitutional tradition and constituent instrument, they extrapolated a basis for judicially protecting fundamental freedoms in Canada just as these stood threatened elsewhere. Although they did not refer to the momentous events of their day or import ideas foreign to Canadian constitutional thought, they did on occasion breach the rule that directed them to decide cases on their narrowest grounds. This suggests the extraordinary significance they attached to the process of constitutional reflection that they initiated.

At the root of the "implied bill of rights" cases lay a choice between two approaches to the Canadian Constitution. Under the standard approach, rejected by those who favoured the "implied bill of rights" analysis, the Constitution stood on the rigid foundation of British statute, which established parliamentary government and distributed plenary power exhaustively between the federal

[20] I leave aside for the purposes of this discussion of the statutory *Canadian Bill of Rights*, S.C. 1960, c. 44, which had little positive effect other than to illustrate some of the pitfalls that a constitutional bill of rights, designed with some care, might avoid.

[21] (U.K.), 30 & 31 Vic., c. 3. now renamed the *British North America Act, 1867*, see *Constitution Act, 1982* (U.K.), 1982 c. 11, s. 53(2). Since the judgments under examination refer to the *British North America Act, 1867*, I use that term as well.

and provincial levels of government. The Constitution would then attract interpretation along the lines of statute law, drawing upon ideas of legislative supremacy, original intent and social stability. In contrast, the 'implied bill of rights" cases regarded the Canadian Constitution as continuing to grow on its flexible common law roots. On this view the Constitution incorporated the British Parliament's graft of independent domestic parliamentary institutions and a federal structure of government while continuing to develop as an organic, responsive system of limited government, attentive to the primary importance of residual freedoms.[22]

The "implied bill of rights" approach combined the judicial role under the flexible British common law constitution with the judicial review authority established under Canadian federalism. There were no specified, directly enforceable constitutional rights or freedoms in either the British or the Canadian system. Nonetheless, the judges combined the two roles to create an impressive degree of judicial protection of fundamental freedoms. The narrow legal question was the same whether one subscribed to the "implied bill of rights" or not: was the impugned law within the available grant of jurisdiction? If it was, the judges had no further authority to inquire whether there was an encroachment on a fundamental right or freedom. Thus the differences between the two approaches largely played themselves out in the determination of the scope of legislative jurisdiction under the federal distribution of powers.

The two approaches generated very different judicial analyses. The standard approach presupposed that all jurisdiction was distributed, either to the federal Parliament or to the provincial legislatures. Judicial analysis was restricted to the precedents defining the legislative subject matters. The constitutional document itself protected linguistic, ethnic, religious and cultural identity through its construction of the political units of the federation and through specific provisions such as those concerning language in the political process. What would now be considered fundamental rights were protected only to the extent that they were located in the constitutional document. Otherwise they were dependent on widely shared notions of political moderation and restraint.

The "implied bill of rights" approach offered a wider basis for judicial review. The Constitution did not divide the legislative powers merely according to the rules of Canadian federalism. In addition, it restricted those powers in a way that judges could articulate through the consideration of fundamental

[22] See I.C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Can. Bar Rev. 135 at 152 where Justice Rand, the primary proponent of the implied bill of rights approach, contrasts two metaphors for the *British North America Act, 1867*. The first is a "tree growing in organic expansion", its language interpreted by judges "in its application to the realities of 1959" (This metaphor, as applied to the Canadian Constitution, has its origin in *Edwards* v. *A.G. Canada*, [1930] A.C. 124 at 136). In contrast, the metaphor of a "ship with watertight compartments" would confine interpretation to the "unaided text, a somewhat arid and unrealistic conceptualism" (See *A.G. Canada* v. *A.G. Ont. (Labour Conventions)*, [1937] A.C. 326 at 354). Rand preferred "enlargement of considerations ... significant to the interpretation of a fundamental instrument" by taking contemporary "conditions and consequences" into account. See *infra* text at note 30, 39, and 45.

constitutional principles. The freedoms reflected in these restrictions were not the gift of sovereign, law-making institutions; they were concrete examples of the residual freedoms lying beyond the reach of the totality of legislative authority.

The notion of residual freedoms was central to the complex of ideas underpinning the expanded practice of judicial review. Residual freedoms originated in the tradition of political self-restraint that characterized the British system. These freedoms, such as "freedom of speech, religion, and the inviolability of the person" were the "residue" of "original freedoms ... at once the necessary attributes and modes of self-expression of human beings and the primary conditions of community life within a legal order."[23] Under the British system they had the fluid status of political conventions. They were then tacitly acknowledged in the preamble to the *British North America Act*, which announced that Canada was to have a constitution "similar in principle to the British constitution." From this, the proponents of the "implied bill of rights" inferred that the jurisdiction distributed through the federal division of legislative powers was the legislative authority exercised in Britain. Accordingly, the residual freedoms lay outside that division and had not been allocated. Indeed, by setting out a specific list of the powers granted to the national and provincial legislative bodies, the Constitution could be regarded as having fixed the totality of legislative authority in a way that excluded the residual freedoms. These thereby emerged from the fluidity of British constitutional convention to implicit recognition in the formal provisions of Canada's constitutional instrument.

In the few judgements that took up this approach, the restrictions fell on the provinces, rather than the federal government. The cases that arose did not present the Court with the opportunity to consider the limits of federal jurisdiction. This was not surprising. Sub-units in federal countries tend to produce more extreme public policy than the national unit, which operates within a wider spectrum of political opinion. This was, and remains, a characteristic of Canadian politics given the size of the country, its regional diversity, high immigration levels, the increasingly cosmopolitan and multicultural character of its urban centres, and the uneven impact of globalization.

Other considerations prompted the Supreme Court to look restrictively at provincial jurisdiction. The "implied bill of rights" model arose just as an expanded Supreme Court succeeded the Privy Council as the highest appellate court for Canada. The general wisdom, outside Québec at least, was that the Privy Council had pushed Canadian federalism too far from its original, centralized design.[24] The result was an exceptionally weak national government,

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[23] *Saumur* v. *City of Québec and A.-G. Québec*, [1953] 2 S.C.R. 299.

[24] See, for example, J. Beetz, "Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867" in P.-A. Crepeau & C.B. Macpherson, eds., *The Future of Canadian Federalism* (Toronto: University of Toronto Press, 1965) and "Le Contrtle juridictionnel du pouvoir législatif et les droits de l'homme dans la constitution du Canada" (1958) 18 Rev. du Bar. 361 for the Québec position noted. Generally, see K.E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990).

particularly in respect to economic regulation. Its inability to mount a national response to the Great Depression, on the lines of the New Deal in the United States, had re-enforced widespread exasperation and fuelled calls for change. Formal readjustment to the division of powers was not feasible. It seemed likely, however, that vesting final appellate jurisdiction in a domestic court would result in adjudication more alert to Canadian exigencies. Advocates for this change hoped that the Supreme Court would seriously re-examine its predecessor's expansive view of provincial jurisdiction. At the same time, Canada was also establishing its political independence from the British Empire, so that the Supreme Court's new status materialized just as it became relevant to consider what kind of nation Canada would be.[25]

Turning to the past for legitimation, the judges who developed the "implied bill of rights" invoked Canada's constitutional heritage. British colonies inherited the basic structure of the common law, with the addition of a constituent instrument to provide the institutions of government and, in some cases, federal arrangements as a well. Because the written constitution enjoyed higher law status as British imperial statute, the domestic courts enforced its primacy over domestic law through judicial review, subject to appeal to the Privy Council. Canada's constitutional arrangements followed this pattern. The preamble to the *British North America Act, 1867*, Canada's constituent instrument, described Canada's Constitution as "similar in principle to the British constitution".

The "implied bill of rights" analysis emphasized this preamble, as well as the historical development in Britain of the parliamentary institutions that Canada enjoyed. A feature of this development was the invocation against absolute and divinely ordained rulers of the fundamental constitutional principles that had created and sustained democracy and the rule of law. The elaboration of those principles had been largely the work of judges. The "implied bill of rights" continued that evolutionary process. Proponents of the "implied bill of rights" did not regard the text of the *British North America Act, 1867* as a comprehensive constitutional instrument. Rather, they employed a purposive approach, delineating the contours of the new Canadian national polity as a self-governing democracy for a diverse, pluralist and, to some extent, divided society. Three of their themes are of particular interest for the development in Canada of the postwar model of the constitutional state: democracy as self-government, the rule of law, and the relationship between the citizen and the state.

The theme of democracy as self-government arose in the context of challenges to extraordinary provincial legislation. Just before the war, the Supreme Court of Canada struck down Alberta legislation that interfered with

[25] Among the important transitional developments at this time were the achievement of legislative independence from the United Kingdom Parliament, the creation of Canadian citizenship to replace British subject status, and Canada's increasing role on the world stage as an independent actor.

freedom of the press.[26] In the 1950's, it considered a Québec City by-law that prohibited the dissemination of literature in the streets without official permission, which was denied (as was apparently intended) only to Jehovah's Witnesses.[27] It also invalidated a Québec statute that suppressed what were considered subversive political doctrines.[28] These were clear breaches of the freedoms protected under modern bills of rights and put in jeopardy by totalitarian governments. At the time, however, Canada did not have a modern bill of rights.

The judges who favoured the "implied bill of rights" approach reasoned that the *British North America Act*'s preamble and its provisions establishing parliamentary institutions created a democratic system of government. That system required the conditions prerequisite for the free development of public opinion.[29] The democratic process, as stipulated by the provisions establishing parliamentary government at both the federal and provincial levels, would fail if the government could restrict or penalize access to ideas and public debate, even when that debate included strong criticism of government policy or discussion of alternative forms of government. Democracy under the Constitution was not merely a right to vote, or regular elections, or a system of representative government. Democracy was self-government by free and equal citizens, who were reasoning beings, living lives that included social interaction as well as membership in faith communities. The democratic process did not install a temporary and authoritarian regime empowered to restrict the very freedoms that legitimated its temporary authority to govern. Democracy, as self-government, reflected the sovereignty of the people, not the sovereignty of government over the people. Accordingly, the subject matter of the *British North America Act, 1867* presupposed freedom to consider ideas that the ruling political party rejected or abhorred or that so deeply offended members of

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[26] *Re Alberta Information Act*, [1938] S.C.R. 100. Alberta statute put newspapers under the directive of an official to ensure publication of the "true and exact objects of the policy of the Government". To this end, the newspaper had to publish statements relating to government policy and activity as required and supply the sources for articles published upon request. Contravention could lead to prohibitions against any further publication of the newspaper, publication of articles by a particular person or emanating from a particular person or source.

[27] *Saumur* v. *City of Québec and A.-G. Québec*, *supra* note 23. A municipal by-law of the City of Québec required the written permission from the Chief of Police to distribute any written material in the city's streets. Saumur, a Jehovah's Witness, was charged with distributing religious literature without a permit. The by-law gave no direction as to its purpose or how discretion was to be exercised. It was enacted when the Jehovah's Witnesses became very active in various places in the province. During argument the province did not deny the statement that permission had been refused only to Jehovah's Witnesses. The trial judge expressed the view that the situation amounted to religious persecution. See reasons for judgment of Estey J. at 361-62.

[28] *Switzman* v. *Elbling* (1957), 7 D.L.R. (2d) 337 (S.C.C.). The statute had two branches. First, it made illegal the printing, publication and distribution of material "propagating or tending to propagate communism or bolshevism," without defining those terms. Second, it authorized the Attorney General, upon satisfactory proof, to order the closing of any premises, including residential premises, used for these purposes for up to one year.

[29] *Re Alberta Information Act*, *supra* note 26 at 133 per Duff C. J. and at 145ff. per Cannon J.

society, even a great majority of them, as to possibly provoke unrest or social strife. The stability of the system would derive from an enlightened body of citizens engaged in open and robust debate, not from state repression of wayward subjects.[30]

The judges who supported the "implied bill of rights" extended these ideas to public law generally, thereby giving new vitality to the notion of the rule of law. They saw no bright line between their review function over division of legislative powers and administrative law. In all contexts, government power was limited, not plenary. Its limited character had to be apparent both to the citizen affected and to courts of law. In effect, the judges imposed the constraint of express reason, the life force of the common law, upon every exercise of state authority. Here the constraints on the state were formal rather than negative. Statutes had to indicate their subject matter, and thus their jurisdictional foundation, and delegate authority to administrative officials in prescribed terms. Otherwise, there would be no demarcation between freedom, on the one hand, and permissible regulation or prohibition, on the other. Courts of law would be unable to carry out their constitutional duty to police this important boundary. To some extent, the judges were taking up an old battle, the supremacy of the legislature over the executive. But they were also imposing the rule of law on legislatures.

The "implied bill of rights" cases provided numerous examples of statutes that did not meet these standards. Some statutes vested general powers on officials, used to target behaviour perceived to be subversive or immoral with excessive penalties. In the most dramatic instance of unauthorized power, the Premier of Québec directed the administrator of the Québec Liquor Commission to revoke a restaurant owner's liquor licence. This order destroyed a family business, in effect punishing the owner for providing bail to fellow Jehovah's Witnesses charged under laws created to protect the Roman Catholic majority from their religious activity. Rand J. characterized this episode as the "beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure."[31] There were other instances of arbitrary administrative power, which the judges could do no more than point out, given their limited powers of review.[32]

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[30] "[Parliamentary institutions in the British tradition, as in Canada, rest] ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed: the government, as licensor, becomes disjoined from the citizenry. The only security is steadily advancing enlightenment, for which the widest range of controversy is the sine qua non", per Rand J., *Saumur*, *supra* note 23 at 330.

[31] *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121 at 142.

[32] A Chief of Police, without any terms defining his discretion, had the authority to permit or forbid the distribution of written material in the streets and used that power only against Jehovah's Witnesses: *Saumur, supra* note 23, at 332 per Rand J., 336-38 per Kellock J. A Québec statute that penalized the propagation of communism or bolshevism, in any building or in print, included a detailed and expansive definition of the word "house", but offered no definition of the words "communism" and "bolshevism": *Switzman* v. *Elbling*, (1957), 7 D.L.R. (2d) 337 at 363, per Fauteux J., at 368, per Abbott J., and at 353 per Rand J.

By subjecting every exercise of legislative or administrative power to review based on the idea of limited government, the "implied bill of rights" afforded a new articulation of the relationship between state and citizen. For example, the Privy Council had construed the provincial power over property and civil rights as a plenary grant of authority over the entire range of public and private activity in the province. Thus it had affirmed a provincial statute that had denied the franchise to Japanese residents, whether naturalized or not.[33] Following this precedent, the Supreme Court later upheld a provincial law that prohibited any "Japanese, Chinaman or other Oriental person" from employing white women.[34] In a judgment that anticipated the "implied bill of rights" approach, Idington J. dissented. He read the statutory language narrowly so that it did not apply to British subjects, whose naturalization, under federal statute, indicated good character and attracted certain liberties that the province could not deny. This type of analysis was generally considered unacceptable for judges because it broached on the "wisdom" of the plenary power of the legislature in respect to public policy.

In contrast, the "implied bill of rights" cases read the grant of legislative power to the provinces not as a reference to a domain of social life over which the legislature was paramount, but to the vindication of civil injury on the model of private law. The result was that the province could not invoke this power to suppress the distribution of religious pamphlets offensive to the majority. Such suppression would constitute prior restraint over free expression in the absence of any impending harm, which, as a remedy unknown to private law, could not qualify as the regulation of "civil rights." Nor could the suppression of opinion fall under provincial jurisdiction over matters of a "local and private nature." That head of jurisdiction was not a general grant of power over public wrongs. Such a power would be incompatible with the federal power over criminal law, which was explicitly concerned with public wrongs and was itself restricted by the residual liberties.[35] These contractions of provincial legislative authority gave additional scope to the residual freedoms, because the less expansive the province's power, the more room there was to regard fundamental freedoms as residual.

Conversely, by affirming that the federal criminal law power required that public wrongs be public in a national rather than provincial sense, the Court began to develop the notion of national citizenship entitlements, anticipated by Idington J.'s dissent in *Quong-Wing*. The Court's analysis recognized political and religious freedom as national in scope, uninhibited by provincial law. Ideas, debate and faith were matters of national, rather than local, concern.[36] Thus,

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[33] *Cunningham* v. *Tomey Homma*, [1903] A.C. 151.

[34] *Quong-Wing* v. *The King* (1914), 49 S.C.R. 440. For a fascinating study of this notable case, see J.W. St. G. Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo:, Ont.: Wilfred Laurier University Press, 1997).

[35] *Re Alberta Information Act*, *supra* note 26 at 144, per Cannon J.; *Saumur*, *supra* note 23 at 329-32, per Rand J. at 349-50, per Kellock J., *supra* note 23 at 329-32, per Estey J. at 359-61; *Switzman*, *supra* note 32 at 354-56, per Rand J. at 364-65, per Fauteux J.

[36] *Switzman*, *ibid.* at 358-59, per Rand J., *Saumur*, *ibid.* per Rand J. at 329, per Kellock, at 349, per Abbott *ibid.* at 371.

access to newspapers free of government censorship and direction was vested in all Canadians across the country.[37] This approach was extended to other citizenship entitlements, such as the right to engage in interprovincial economic ventures free of provincial regulation, the right to enter and move freely within the country, and the right to stay in the country.[38]

This idea of national citizenship entitlements had potential to establish extensive limits on state power, leaving more space for enjoyment of freedom. Justice Rand, for example, expressed the view that provinces could not discriminate against citizens on the basis of place of birth or racial origin, contrary to Privy Council precedent.[39] He indicated that he would extend protection to foreign nationals of friendly countries.[40] Although this approach seemed to leave fundamental interests exposed to federal legislative encroachment, some of the judges were apparently prepared to impose the same kind of restrictions even on the federal government. Justice Abbott in *Switzman* v. *Elbling* expressed the view that Parliament could not abrogate the "right of discussion and debate", although it was not necessary to decide the point.[41] Justice Rand did not take a position, but seemed to be similarly inclined.[42] Consistent with such restricting of federal authority was the narrow reading of federal statutes to leave room for the enjoyment of fundamental freedoms.[43]

The judges who developed the "implied bill of rights" understood that the Constitution required them to act as guardians of the constitutional order, protecting the fundamental principles inherent in the British tradition of parliamentary government and implied by the terms of the *British North America Act, 1867*. They regarded the Canadian Constitution as an organic body of law, part written and part unwritten. Such a constitution was responsive to the challenges produced by governments that aggrandized their regulatory authority, overzealously maintained public order and stability, and assisted the majority to sustain its cherished and traditional way of life at the expense of those who adhered to other beliefs or practices. They understood that citizenship in a nation of immigrants had to enjoy a foundation of principle rather than a foundation of majoritarian cultural norms. Accordingly, judges were to use their expertise and independence to police the boundaries between limited grants of

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[37] *Re Alberta Information Act*, *supra* note 26, per Duff C.J.C. at 134.

[38] *Winner* v. *S.M.T. (Eastern) Ltd.*, [1951] 4 D.L.R. 529 at 563, Rand J., dissenting in *Co-operative Committee on Japanese Canadians* v. *A.G. Canada*, [1946] S.C.R. 248. The Privy Council affirmed the Supreme Court's ruling: [1947] A.C. 87.

[39] I.C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Can. Bar Rev. 135 at 156.

[40] *Winner*, *supra* note 38, per Rand J. at 559.

[41] *Switzman*, *supra* note 28 at 371.

[42] *Ibid.* at 359. In an interview given in 1962 he went further, see J.A. Barron, "The Constitutional Status of Freedom of Speech and Press in Canada: The History of a Quiet Revolution" (1963) 58 Northwestern Univ. Law Rev 73 at 100-01.

[43] *Japanese Cdn. Ref.*, *supra* note 38, S.C.C. per Rand J; *Boucher* v. *the King*, [1950] 1 D.L.R. 657; *Canadian Federation of Agriculture* v. *A.-G. Québec*, [1951] A.C. 179, per Rand J. (*Margarine Reference*).

governmental authority and a sphere left free for the exercise of fundamental freedoms. Constitutionalism so conceived was not in conflict with democracy. On the contrary, the purpose of constitutional review was to ensure the continuity of democracy, not just as an empty shell, but as self-government by free and equal citizens, living their lives in a large, diverse and pluralistic society. Intellectual pursuits, access to information, social and economic interaction, faith and community were not contingent on customs rooted in a more homogeneous context or concessions granted by temporarily elected governments.

These judges knew that they were implementing change in the interpretation of the division of powers. Organic development of this kind they considered legitimate as long as it remained true to its principled foundation. Rand J. stressed this idea of change within continuity. The Supreme Court of Canada possessed the same authority that the Privy Council had enjoyed in the past to "modify the language" by which it described the grants of jurisdiction under Canadian federalism, he wrote, and to "revise or restate" its "general interpretative formulations". This "incident of judicial power" was "inseparable from constitutional decision" and arose when the judges deemed it "necessary":

> It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.[44]

In extra-judicial writing, Justice Rand was more forthcoming. He described the most "significant and essential" attribute of the judicial role as courage, describing Coke's famous statement to King James that he must submit to the independent, learned and experienced judiciary in their articulation of the law of England.[45] That courage emboldened the judiciary to carry out its role as "the special guardians of the freedoms of unpopular causes, of minority groups and interests, of the individual against the mass, of the weak against the powerful, of the unique, of the nonconformist."[46] What were the sources for this role? After dismissing the view that they were expressions of the judge's "private opinion", Justice Rand gave this account:

> The basic principles and considerations which are to give shape and direction to judgment must be gathered as best they can from the precedents and affirmations of the traditional law, from legislative enactments, from universally accepted attitudes and working assumptions of our polity and their organic tendencies, from the fundamental conception of freedom in society, and from tested experience of what, considering all factors and interests, the mass of free and rational men applying the rule of universality will ultimately accept or demand: these and the modes of reasoning built up over the centuries, "the artificial reason," as Coke called it, of the law, expanded and made flexible by the nature of the new matter of which it partakes.[47]

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[44] *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198 at 213.

[45] I.C. Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951) 9 U.T.L.J. 1 at 8.

[46] *Ibid.* at 13.

[47] *Ibid.* at 12-13.

The ideas developed under the "implied bill of rights", as applied to the federal-provincial division of powers, were emphatically rejected in the Supreme Court's ruling in 1978, in *A.G. Canada* v. *Dupond*.[48] A majority of the Court reasserted the Privy Council's mode of analysis. As a result of this case, it could no longer be said that there were any liberties presumptively withdrawn from legislative reach. Provincial legislative jurisdiction was both primary and plenary. Rights and freedoms were the product of positive law, not constitutional entitlements protected against state encroachment by shared understandings of the limits of state power. The preamble and the heritage of parliamentary government to which it referred no longer functioned as the touchstones of Canada's constitutional tradition. Democracy meant majority rule, and the majority, defined by political commitments and religious belief, could properly protect itself from challenge or offence. If sanctioned by the majoritarian legislative process, societal security and solidarity might be promoted through the suppression of ideas and activities branded as dangerous, dissident, and provocative. It remained the historical prerogative of the local majority to impose its own imprint on political and social life of the country, centred in the province as a cohesive community, not in the more diverse and pluralistic nation.[49] The judicial task was to respect the established political order, not to nurture a constitution system whose principles respected the freedom, equality and human dignity of citizens of a diverse society. Adherents to this position might well have agreed with the approach to constitutional instruments offered by Justice Scalia of the United States Supreme Court when he stated:

> The very objective of a basic law, it seems to me, is to place certain matters beyond risk of change, except through the extraordinary democratic majorities that constitutional amendment requires. ...The whole *purpose* of a constitution — old or new — is to impede change, or, pejoratively put, to 'obstruct modernity'.[50]

The Supreme Court's rejection of the "implied bill of rights" affirmed the view that Canadian constitutionalism was based on legislative supremacy, federally divided between the two levels of government. Fundamental rights and freedoms, even the range generally considered essential to the democratic function and the rule of law, stood dependent on the good will and self-restraint of the majoritarian legislative process. Governments were under no obligation to bridle the administration or to measure punishment, and could regulate behaviour, even in the home, to sustain the community's orthodoxies.

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[48] (1978), 84 D.L.R. (3d) 420 (S.C.R.) While *Dupond* brings end to implied bill of rights analysis in federalism, other areas of public law, where judicial review of statute is not in issue, have continued this approach, the development of doctrines of fairness and reasonableness review in administrative law and the protection of the independence of the judiciary.

[49] For another example of the parallel phenomenon in the U.S. federal system, see R.M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).

[50] Justice A. Scalia, "Modernity and the Constitution" in E. Smith, ed., *Constitutional Justice under Old Constitutions* (The Hague: Kluwer Law International, 1995) [emphasis in original].

However, this rejection of the "implied bill of rights" did not mark the permanent demise of the idea that Canadian constitutional law should give greater emphasis to the basic principles of modern liberal democracy. A constitution understood to give no primacy to these principles proved unacceptable to the people of Canada. Public debate on the state of the law, which often singled out specific Supreme Court rulings as objectionable, galvanized support for a federally sponsored constitutional reform agenda designed to create a pan-Canadian citizenship based on guaranteed rights enforced by the judiciary in the postwar model. Eight of the ten premiers strenuously opposed this project, deploying arguments that invoked legislative sovereignty and conceived of the province as the primary social and political community. The *Charter*'s popularity eventually prompted seven to agree to the final compromises that led to the adoption of the Canadian *Charter of Rights and Freedoms, 1982*. Once the *Charter* was in place, all eyes turned to the Court to see whether a formal constitutional directive specifically mandating the Court to give priority to rights would push the Court onto the path that the "implied bill of rights" had illuminated.

IV. *The Structure of Charter Rights: Legal Structure and Institutional Roles*

The adoption of the *Charter* marks Canada's most ambitious response to the age of rights. It followed a number of failed initiatives. The attempt to coax an implied bill of rights from the existing system had ultimately failed. Judicial review under the Canadian *Bill of Rights, 1960* had disappointed those who hoped, despite its statutory status and conflicted text, that it would establish some degree of judicial restraint on the federal government. There was no reason to believe that the Canadian Parliament and the legislatures would spontaneously internalize the postwar norms of liberty, equality and respect for human dignity in the near future. It appeared that the majoritarian system would continue to preserve the historical prerogatives intact. Only constitutional amendment, by adding a bill of rights to the Canadian Constitution, would effect the transition to the postwar constitutional state. But constitutional amendment on such a scale seemed very unlikely.

The Canadian *Charter* emerged from an extensive and intensive public debate on the nature of the Canadian polity. The *Charter* project became part of a larger exercise in constitutional renewal. Its main purpose was to bring Canada to full legal independence, ending the authority of the Parliament at Westminster to amend the *British North America Act, 1867*. Prime Minister Trudeau's ideas on the *Charter* reflected those developed in the judgments supporting the "implied bill of rights", demonstrating the strong influence of his teacher, Frank R. Scott, who had brought a number of these cases to court.[51] Trudeau sought to institute a common, rights-based citizenship for a fractured population, originally bifurcated by

[51] F.R. Scott, *Essays on the Constitution: Aspects of Canadian law and politics* (Toronto: University of Toronto Press, 1977); S. Djwa, *The Politics of the Imagination: A Life of F. R. Scott* (Vancouver: Douglas & McIntyre, 1989); L.E. Weinrib, "Trudeau and the

religion and ethnic origin and increasingly multicultural. His undertaking was a response to de Tocqueville's question: "how can society escape its decline without a strengthening of the moral bonds as the political bonds loosen?"[52] Having come of age in the repressive and homogeneous Québec reflected in the "implied bill of rights" cases, Trudeau sought to battle Québec nationalism by establishing protections for the individual and for the identity group, as well as the rule of law.[53] In this, his project was, in effect, to create Habermas' constitutional state, wherein constitutional patriotism would replace ethnic nationalism and displace the historical majority's cultural hegemony. Trudeau hoped that the *Charter* would elevate the individual above the particularities of birth, create equality of opportunity across Canada for all Canadians, and firmly establish the basic range of democratic and legal rights.

Opposition to Trudeau's *Charter* came from those whose interests would suffer in this new dispensation. Québec nationalists opposed any pan-Canadian vision. Most provincial premiers opposed the *Charter*'s potential to erode provincial power and, more generally, the authority of the legislatures and the executive. They preferred the flexible British mode of constitutionalism, in which, in their understanding, legislatures held paramount authority. When efforts to reach a compromise among government leaders failed, Trudeau appealed to ordinary Canadians to support his *Charter* as part of a "people's package" of constitutional reform. The response was very positive. Opinion polls consistently revealed a strong preference for a constitutional system that protected rights, although there was less public confidence in the ability of Canadian judges to perform the function that would fall to the judiciary in such a system.

A decade of effort produced a multitude of draft texts that followed the pattern of other rights-protecting instruments, blending universally accepted concepts with domestic Canadian features.[54] In conformity with the postwar model, all the *Charter* drafts included lists of rights and some sort of formula for permissible limitation on those rights. Some expressed the important distinction between limitation and abrogation of rights. The early versions, for example, would have permitted the state to limit rights guarantees when it exercised traditional public powers, such as protection of public order, safety,

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Canadian *Charter* of Rights and Freedoms: A Question of Constitutional Maturation" in A. Cohen & J.L. Granatstein, eds., *Trudeau's Shadow: The Life and Legacy of Pierre Elliott Trudeau* (Toronto: Random House, 1998).

[52] G. Frankenberg, "Tocqueville's Question. The Role of a Constitution in the Process of Integration" (2000) 13 Ratio Juris 1. See also L. Káhnhardt, "European Courts and Human Rights" in D. Greenberg et al., eds., *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993).

[53] See L.E. Weinrib, "Trudeau and the *Canadian Charter of Rights and Freedoms:* A Question of Constitutional Maturation" in A. Cohen and J.L. Granatstein, eds., *Trudeau's Shadow: The Life and Legacy of Pierre Elliott Trudeau* (Toronto: Random House, 1998) 57.

[54] L.E. Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution" (1992) 42 U.T.L.J. 207.

health or morals, national security and the rights and freedoms of others.[55] The particular powers specified were those considered appropriate to supersede rights to which the various limitation clauses attached. Later, the limitation clause became a general, more abstract formula applicable to all the rights and freedoms guaranteed and found its place in the first section of the *Charter*. These developments in the text reflect the evolving understanding of the nature of rights guarantees and the institutional roles appropriate to their protection. The general and abstract formulation defined both the scope and limits of the entire body of *Charter* guarantees. These features the central importance of this clause in the general scheme.

Although the federal government's commitment to the *Charter* project was strong, it accepted a weak limitation clause in the hope of winning the support of the opposing premiers. The compromise draft guaranteed a range of rights subject to "reasonable" limits, "acceptable in a democratic society with a parliamentary system of government." This formula would arguably have subordinated the *Charter*'s content to legislative sovereignty, one of the hallmarks of parliamentary government given the repudiation of the "implied bill of rights" approach. A standard of general acceptance in a majoritarian system of government, with no higher law system of rights protection, would likely have perpetuated the historical majority culture. The compromise limitation clause gave no clear directive to do otherwise. As Lord Sankey, L.C., had admonished fifty years earlier,

> Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.[56]

Common sense or custom often departs from reason, which stands as the basis of the common law methodology as well as of the fundamental principles within the "implied bill of rights" approach to Canadian constitutionalism.[57]

The final formulation of the limitation clause rejected this understanding. It subordinated the historical majority's customary political prerogatives to shape Canadian social and political life in its image. In sharp contrast to the compromise formula, the *Charter*'s first provision sets down stringent rules for meeting the standards of permissibility of limiting *Charter* guarantees. The stringency imposed is the stringency of reason over custom, principle over accepted practice.

The politicians did not initiate the changes to the *Charter*'s text that subordinated majoritarian preferences to reasoned elaboration of fundamental rights and freedoms. They preferred a text that signalled no clear departure from

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[55] A.F. Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History*, vol. 1 (Toronto: McGraw-Hill Ryerson, 1989) at 215.

[56] *Edwards* v. *A.G. Canada*, [1930] A.C. 124 at 134 (*The Persons Case*).

[57] C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 10-11 makes a similar distinction. He differentiates between common sense as a cultural system that reflects a "loosely connected body of judgement and belief", on the one hand, and a rational frame of mind, on the other.

the status quo, by which their governments preserved and protected the traditional values of Canadian society. The popularity of the *Charter* project signalled widespread demand for constitutional change in order to introduce more sensitivity to diversity and pluralism in the formulation of public policy. When the politicians ultimately accepted the stringent and principled formula for the *Charter*'s first provision, they acknowledged the legitimacy of claims to constitutional rights made by individuals and groups whose interests Canadian legislatures, federal and provincial, had consistently ignored or disregarded. Parliamentary hearings, foisted on the Liberal government by the opposition Conservatives who wanted merely to slow the process down, provided the opportunity for individuals and groups to make their priorities known to their premiers and prime minister. Aided by experts, Canadians who held the highest personal stake in the precise operating features of the new system of rights-protections had the opportunity to design those features.[58]

In nationally televised, lengthy, parliamentary hearings, ordinary Canadians appealed to the politicians and to the general public. They mounted sustained criticism of the *Charter* draft. Established public interest groups as well as ad hoc groups came forward, committed to liberal democracy generally or to the well being of less well-served segments of Canadian society drawn on racial, religious, gender and indigenous lines. One after another they pointed out various failings in the proposed draft text. All denounced the limitation clause as a sell-out. Experts added their voices, declaring their preference for the admittedly inadequate status quo in order to preserve for a more propitious proposal what was perceived as the one opportunity for constitutional change.

How, they demanded to know, would a standard of "acceptable" limits on rights offer any protection whatsoever? Every incursion on fundamental rights in Canadian history, whether major or minor, they pointed out, had enjoyed general acceptance by a majority of the relevant political constituency at the time of enactment and, in many instances, for long periods thereafter. A system that left such fundamental interests to majoritarian policy-making was the problem, not the solution. These well-remembered outrages had been the work

[58] The parliamentary hearings demonstrated the widespread belief that there had been a profound democratic failure in Canada. The popularity of the *Charter* across the country gave great weight to the submissions to the parliamentary committee. In the statutory context, John H. Ely has made the case for special judicial scrutiny over laws that discriminate against the effectively disenfranchised, to rule out the possibility of democratic failure. See *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980). The Canadian example gives the opportunity to carry his ideas over into the constitutional context, where the political have-nots acquired the rare opportunity to effect changes to their constitutional entitlements because of identified democratic failure. Ely's argumentation, transferred to the constitutional level, would require careful scrutiny by the judiciary for compliance with constitutional provisions drafted by the effectively disenfranchised to remedy deficiencies in the political process. When those provisions contain not only the content and basis for limitation on constitutional rights, but also the whole framework of institutional roles in respect to policy formation and rights, Ely's approach would demand an active role by the judiciary to sustain the design captured by the amendments.

of every arm of the state — the executive, the representative and accountable legislatures, and the courts of law. The most egregious examples had produced challenges under the rules of Canadian federalism, precipitating the "implied bill of rights" cases, as well as under the Canadian Bill of Rights. These failed challenges provided the benchmark that the new *Charter* had to meet.

The attack on the "generally acceptable" limitation formulation was persuasive and effective. With public opinion polls demonstrating overwhelming popular support across the country for the *Charter* project, the federal government set aside the compromise clause. It accepted new text, proposed by leading experts in rights protection, Walter Tarnopolsky and Gordon Fairweather, based on the postwar rights-protecting instruments. The result was a more restrictive and more principled limitation clause, one that reflected the purposes of the *Charter* project as defined by the Canadian public. This public engagement lends extraordinary legitimacy and clarity to the *Charter*'s first provision and thus to the role of courts in delineating the content and limits on the new rights and freedoms. The *Charter*'s political history makes clear that its final text left behind the system of government that elevated and preserved the established prerogatives of the cultural majority. It introduced the diversity and pluralism of the modern liberal state.

Each of the changes to the text brought the *Charter* text closer to the postwar model of rights protection. This, indeed, was the express purpose of these changes.[59] The final formulation of the limitation clause required limits on rights to be "prescribed by law", to import the protections of the rule of law in accordance with the postwar model. In addition, permissible limits had to satisfy a standard of reasonableness as well as demonstrable justification "in a free and democratic society". This was the strictest of the limitation standards contained in the earlier drafts. It removed the invitation to judicial deference issued by the "generally acceptable" limits standard. These changes gave normative priority to the guarantee over the limitation, by allowing only justified, i.e., principled, limits on guaranteed rights and freedoms. This clause made the final benchmark of limitation the idea of a free and democratic society. Such a society offers not the perpetuation of the majority's power or its cultural hegemony its historical context, but equal concern and respect for all members of a diverse and pluralist postwar constitutional state. The bottom line is that limitation would not include unprincipled, power-based abrogation of the *Charter*'s guarantees.

The compromise limitation formula would have invited courts to abrogate, not merely limit on principle, fundamental rights and freedoms as long as government policy met the "generally acceptable" standard. Other features of the earlier drafts also permitted abrogation of the guarantees. From it earliest stages the drafting process had included clauses that permitted abrogation, often in the form of provincial opt-in or opt-out options. The premiers who opposed

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[59] See L.E. Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" Rev. Const. Stud. [forthcoming in 2001].

the *Charter* insisted that the text include these provisions to ensure that political power continued to trump the guaranteed rights.

In the final text, abrogation was confined to the legislative override or notwithstanding clause. Whereas the final formulation of the limitation clause drew on the pattern of postwar rights-protecting instruments, the notwithstanding clause was a distinctively Canadian creation. Its immediate models were rarely used sections of the *Canadian Bill of Rights, 1960* and a number of provincial human rights statutes.[60] These provisions empowered legislatures to expressly depart from the regime of rights guarantees in order to afford the legislative arm of government a measure of flexibility in exceptional circumstances. They had almost never been used. Unlike the emergency derogation clauses of the postwar rights-protecting instruments, to which the notwithstanding clause might be compared, the *Charter* does not stipulate the presence of exceptional conditions.[61] The override is also the work of the legislature, not the executive. By majority vote, a legislature may temporarily suppress the guarantee of certain rights for a maximum five-year renewable period if it states in the body of the relevant enactment that it is to have this effect.[62]

The insertion of the notwithstanding clause at the insistence of the provincial premiers who opposed the *Charter* marked the final structural compromise. Although it has attracted considerable controversy, one can argue that the notwithstanding clause preserved the institutional coherence of the *Charter*. The rejected limitation clause attempted to bridge the unbridgeable gap between those who wanted a *Charter* and those who did not. It would have invited the courts to administer a system of rights protection in one hand and take it away in the other. Some commentators assert that the *Charter*'s combination of a guarantee of rights, a limitation clause, and an override clause produces the same effect. That, however, is not the case. The combination of an override with a postwar model limitation clause offers a greater measure of institutional coherence than the "generally acceptable" limitation clause.

The "generally acceptable" limitation clause would have sent a contradictory message to the courts. How could judges meaningfully exercise judicial review if the rights guarantees could be limited by any generally acceptable exercise of power? The *Charter* would have mandated judicial review while simultaneously destroying any intelligible standard for such review. Moreover, the "generally acceptable" limitation clause failed even to require that limitations on rights be "prescribed by law". The point of reference for a "generally acceptable" limit seemed to be majoritarian approval, in Canada or elsewhere, with no stipulation of compliance with the norms of legality associated with the rule of law.

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[60] Bayefskey, *supra* note 55, vol. 2 at 905.

[61] See R. St. J. MacDonald, "Derogations under Article 15 of the European Convention on Human Rights" (1997) 36 Col. J. of Transnational Law 225 and J. OraB, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992).

[62] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 33.

The acid test of any proposed constitutional formula was how it would impact on the judicial review function of the Supreme Court of Canada that the public had found unsatisfactory in the past. The "generally acceptable" clause may well have produced rulings upholding the repressive and authoritarian laws reviewed in the "implied bill of rights" cases.[63] For example, under this test a court would have confirmed the restrictions on the press imposed by the Alberta government before the War to ensure that provincial newspapers did not undermine the government's economic policy by printing contradictory data or opinion. The government's claim was that the policy could only operate if Albertans believed in it without distraction by critics or contradictory information. In the Québec cases in the 1950's, several Supreme Court judges invoked the majority's historical prerogative to preserve and protect its way of life. They cited the urgent need to protect the feelings and safety of this majority by suppressing the religious activities of the Jehovah's Witnesses in the streets and the discussion of communism in private homes. The majority judgment in *Dupond* shared this view. The legislation and administrative actions in issue in these cases were not merely generally acceptable; they were overwhelmingly supported.

In contrast, the limitation clause finally inserted into the *Charter* text creates a legally intelligible standard of judicial review. The courts are to ensure not that the policy emanated from a duly elected government or that it enjoyed strong support, but that it is consistent with the equal rights of all members of Canadian society. In performing this function, the courts do not usurp the policy-making role. They analyse the content of rights, oversee prescription by law, and determine whether the impugned policy can meet the test of demonstrable justification. Demonstrable justification requires application of the proportionality tests, by which the postwar rights-protecting systems maintain the primacy of the rights or of their underlying principles over ordinary political preferences. These components make up a judicial role that has legitimacy in a democracy whose members are considered free and equal citizens, not merely occasional voters in a system in which the majority sets its way of life as the general standard.

The messy politics of the *Charter*'s adoption ultimately created a complex but coherent set of institutional roles. The *Charter* vests the courts with oversight of the conditions imposed by those roles. That function includes two main tasks. First, because the guarantee of rights restricts the range of permissible policy, the courts examine laws alleged to encroach on guaranteed rights. Second, because rights are not absolute, courts examine whether the legislature and executive have met the standards set down in the limitation

[63] The analysis offered here stresses the "generally acceptable" part of the formulation. It does not put much weight on the "parliamentary system of government". To reach the conclusion that parliamentary democracies do not, for example, interfere with freedom of the press or political demonstrations, would depend on analysis similar to the a implied bill of rights approach. It is unlikely that this version of the *Charter* would have generated a return to those ideas.

clause. The courts must first determine whether the impugned measure satisfies the stricture of being "prescribed by law". In addition, they must determine the permissibility of state encroachment on these guarantees under the principled strictures of the limitation clause. *Charter* guarantees are thereby put beyond the reach of the ordinary law-making process. The guarantees not subject to the override clause remain entirely within the realm of adjudication. These are the mobility rights, language rights and democratic rights, which even the premiers who opposed the *Charter* ultimately accepted as appropriate subject matter for final judicial review. The other guarantees — fundamental freedoms, legal and equality rights — they left within the auspices of the courts in the same way, unless the Parliament of Canada or the legislature of a province invoked the notwithstanding clause to bring them back into the political arena.[64] In that event, the right would be suspended for the currency of the legislative directive, to a maximum renewable period of five years. When — and if — a particular *Charter* claim or judicial ruling proved intolerable to the general public or to their elected representatives, the notwithstanding clause made it possible for a majority of legislators to bring the issue back into the legislature for resolution unencumbered by the *Charter* guarantee.

The notwithstanding clause put the opposition to the *Charter*, which the Trudeau government could not decisively defeat, where it belongs: in the arms of government that is politically accountable. The preconditions set down for exercise of the override power require the legislature to bring the *Charter* issue out into the open for legislative and public debate. These preconditions intensify political accountability in three ways. First, they require express invocation of the power. Sunlight remains the best disinfectant. Second, they require reference to the right or freedom superseded so that the debate will have some focus. Third, they make invocation of the override power temporary so that the political headache never goes away. An issue debated in the legislature without an override clause is just one more issue of public policy. Add an override clause and the same issue takes on constitutional stature. Experience has shown that public reaction against using the override can be swift and decisive. The intensity of the accountability that the override clause precipitates has prompted some governments to pledge not to invoke it without a referendum. While its architects anticipated that the override would be used rarely, in exceptional situations, the political cost has turned out to be higher than expected. Opprobrium has reached beyond a particular province's borders to influence political opinion in the rest of the country, verifying the idea that fundamental freedoms have a national dimension as suggested by the "implied bill of rights" analysis.

[64] The override clause does not require that the legislature act only after a court ruling, but this has become the practice. It makes sense that the government use the override only when it has failed to convince the highest court that the impugned law is prescribed by law and demonstrably justified. Much of the debate on using the override clause now turns on such considerations. Unless the policy in issue is diametrically opposed to the *Charter*, there is always some way to narrowly tailor it so that it merely limits and does not abrogate the constitutional guarantee in question. In result, reliance on the override is not necessary.

Indeed, in the instance of Québec's use of the override to suppress language rights guaranteed under the *Charter*, the ramifications have reached beyond Canada's borders.[65] Thus the *Charter* creates constitutional politics as a new kind of political engagement in Canada.

In this respect, the *Charter* stands in contrast to rights-protecting systems that do not reflect the post war model, such as the United States. Bill of Rights. These systems leave no room for constitutional political activity other than the politics of constitutional amendment. Constitutional amendment, however, is made difficult in order to support the stability of liberal democracy over the long term against the forces of transient majorities. Legislatures therefore have no discernible day-to-day constitutional role. Critics of judicial review in such a system assert that elected representatives have lost the highest institutional status, based upon legislative supremacy, and stand subordinate to the constitutional mandate of the non-elected, non-representative, unaccountable judiciary. Under these circumstances, many assert, the democratic function is unacceptably weak. Frustrated politicians blame the judiciary for usurping the legislative prerogative. They argue that the judges impose their own political agendas without accountability. They turn their attention to controlling or changing the method by which judges are appointed, or they may attempt to exert whatever pressure they can to discourage judges from fulfilling their mandate.

The *Charter*'s more complex institutional arrangements alleviate much of this tension between rights-protection and democracy. Concerns about democratic function motivated the Canadian premiers opposed to the *Charter*, who did not accede to its adoption until there was agreement on the override clause. This clause designates legislatures as constitutional actors but only, as is appropriate, to the extent of their time-limited electoral mandate. The ordinary political process cannot alter the enduring structure of the constitutional state. By permitting legislatures to suppress some *Charter* rights for a maximum five year period — to cover the period of the electoral mandate — legislators continue to possess a day-to-day constitutional policy-making power. From the standpoint of constitutional engagement, it does not matter whether they use this power or refrain. What is important is that legislators have the responsibility to monitor *Charter* claims and to take seriously the option they hold of reversing court judgments according to their views of public policy and the demands of their constituents.

Moreover, unlike bills of rights that preceded the postwar model, the *Charter* text expressly mandates a particular mode of judicial review. The judicial role is consistent with the traditional roles of institutions under the general framework of the separation of powers — adjudicating claims that rights have been breached and evaluating claims of justification. The interlocking

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[65] For more detail on the ways in which provinces have used the notwithstanding clause, see L.E. Weinrib, "The Notwithstanding Clause: the Loophole Cementing the *Charter*" (1998) 26 Cite Libre 47.

operation of the guarantee, limitation and override provisions restricts the court to a legal, rather than a policy-making, constitutional function. The *Charter* places this judicial review function within a complex of intersecting institutional roles. It leaves legislatures able to abrogate rights when willing to pay the political price for expressly departing from a constitutional norm in a statute that may remain a matter of continuing political contention because of the override's temporary duration. When politicians possess an override power, their bitter condemnations of court judgments, or their attempts to alter the appointment process in order to have less "activist" judges, ring false.

The provisions for the rights guarantees, the limitation clause, the notwithstanding clause, and judicial review are not the only institutional directives under the *Charter*. A number of other provisions further elaborate the legal structure for judicial activity under the *Charter*. A supremacy clause, applicable to the whole Constitution, declares that "law" inconsistent with the constitution as supreme law, is "of no force or effect". This clause provides the core of the postwar model, in which the constitutional arrangements stand prior to ordinary law-making, thus signalling the end to the hegemony of the historical majority. The *Charter* also spells out the normative content of the rights and freedoms in a number of interpretative sections. These provisions direct judges to take into account the continuing existence of rights and freedoms beyond those guaranteed, stipulate the preservation and enhancement of the multicultural heritage of Canadians, and direct that *Charter* guarantees vest equally in male and female persons.

The preamble, which has less interpretative force than the *Charter*'s other provisions, states that Canada is "founded upon principles that recognize the supremacy of God and the rule of law". The reference to the "supremacy of God" might suggest that *Charter* interpretation should promote traditional values, including the majority's religious beliefs and practices. However, there is strong indication that parliamentarians did not favour this view. The Conservative opposition in Parliament proposed adding language from the preamble to the *Canadian Bill of Rights, 1960* to the limitation clause, to ensure that *Charter* interpretation would respect these values. This amendment was defeated.[66]

The institutional roles set down by the *Charter* vest authority consistent with the traditional roles of courts, legislatures and the executive. The legitimacy

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[66] The text of the proposed amendment read:

1. Affirming that

(a) the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free individuals and free institutions, and

(b) individuals and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.....

See Bayefsky, *supra* note 55, vol. 2 at 814. For a fuller account, see L.E. Weinrib, *"Do Justice to Us': Jews and the Constitution of Canada"* in M. Brown, ed., *Not Written in Stone: Jews, Constitutions and Constitutionalism in Canada* [forthcoming].

of the court's role is supported by the independence of the judiciary, legal expertise, and experience in ensuring that limited powers do not exceed their legal authority. The determination of the scope and content of rights is a standard legal exercise. Purposive review in the abstract prompts judges to review the political theory underlying rights protection generally and in respect to each guarantee. More focussed purposive review prompts the judges to evaluate the general and specific remedial purposes of the *Charter* in the same way. The determination that there has been a breach of a right so formulated is also a traditional judicial function.

Determination of the permissibility of limiting recognized rights also falls within traditional modes of judicial analysis. Oversight of compliance with the "prescribed by law" stricture is a standard mode of judicial review, also falling well within the experience and expertise of judges who have developed the common law to scrutinize the exercise of public power subject to law.[67] The *Charter*'s requirement that the state demonstrably justify limits on rights on the standard of a "free and democratic society" does not go beyond the modes of analysis developed by the common law. Proportionality analysis follows from the idea that rights are the norm to which encroachments stand as exceptions. This type of review is deeply embedded in our legal system:

> ...the very denomination of certain interests as ... rights means that any interference should be kept to a minimum. In this sense proportionality is a natural and necessary adjunct to the recognition of such rights.[68]

The idea that particular rights cede to principles has become a central analytic tool for analysis under postwar rights-protecting instruments, both international and national.[69] Its inclusion in the development of British common law, under the influence of the European Convention and in anticipation of the coming into operation of the *Human Rights Act 1988*, in October 2000, demonstrates that proportionality analysis is a judicial preoccupation rather than an exercise of raw political power.[70]

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[67] *R.* v. *Secy. of State for the Home Department, ex parte Simms*, [1999] 3 All E.R. 400. The House of Lords construed general or ambiguous language in a prison standing order, which might otherwise have been read to impose a blanket ban on oral interviews between prisoners and journalists, narrowly. To read the order as imposing a blanket ban would have denied a prisoner who maintained that he was innocent the right to persuade a journalist, by an oral interview, to investigate the circumstances of conviction and publicize the findings in the pursuit of justice. The narrow reading accorded with the principle of legality, that general or ambiguous words should attract a narrow reading consistent with fundamental rights. The *Human Rights Act 1988* (U.K.), 1998, c. 42, s. 3(1) dictates that legislation must be interpreted so far as possible to be compatible with the rights guarantees under the European Convention.

[68] P. Craig & G. de Búrca, *EU Law: text, cases and materials*, 2d ed. (New York: Oxford University Press, 1998) at 351.

[69] *Supra* notes 14 and 15.

[70] Hon. Sir J. Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?" (1993) Public Law 59 at 69: "...the greater the intrusion proposed by a body possessing public power over the citizen into an area where his fundamental rights are at

Thus, in creating new constitutional roles for the judiciary, the legislature, and the executive, the *Charter* does not undermine the traditional separation of powers. Courts apply a review function that is similar to their common law functions. The mode of analysis they use is now well established in rights-protecting instruments at the national and international levels under the postwar model. The availability of the override means that courts have the last word only with respect to the rights that the political framers of the override thought appropriate. For other rights, the politicians retained the last word. In either case, the political prerogative is not shifted to the courts. The proportionality analysis, which reflects the legal structure in which fundamental rights and freedoms enjoy priority over ordinary political preferences, assures that courts do not engage in determinations as to the merits or wisdom of state policy.

The legislatures' constitutional role under the *Charter* enhances the democratic function in Canada. In our constitutional system, legislatures must conform to the rule of law. Certain freedoms prevail, unless the legislature expressly and clearly encroaches. This is the structure applicable to common law rights and presumptions. The requirement in the *Charter*'s limitation clause that any limit on a right must be "prescribed by law", as a precondition to justification, enforces that principle in respect to constitutional guarantees. If the legislature wants to be in a position to claim in a court of law that its policy should prevail over a *Charter* guarantee of a fundamental right or freedom, then it must at least work the ordinary machinery of law-making, the very machinery that legitimates its authority. When governments work under the discipline of the legality stricture, citizens enjoy the benefits of the law-formation process generally, including legislative debate and public and media comment.

The override clause marks a further application of this idea. It imposes strictures in addition to those imposed by the "prescribed by law" stipulation. The formal conditions set out in the notwithstanding clause (express invocation of the override power, stipulation of the right(s) to be suppressed, temporary duration and renewal) ensure that the legislature has worked the machinery of law-making in a special way to reach an extraordinary end. To override a right, the legislature must signal the constitutional significance of its behaviour. The legislature derives its legitimacy not only from its compliance with the rule of law, but also from the fact that its law-making process is the day-to-day exercise of the sovereignty of the people. It is therefore fitting that when a Canadian legislature sets out to deliberately

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stake, the greater must be the justification which the public authority must demonstrate. ... Such an approach is, I believe, no more a usurpation of constitutional propriety than is the conventional *Wednesbury* approach itself. No one suggests, nowadays, that the courts behave improperly in requiring a Minister to bring a rational mind to bear on a question he has to decide. In doing so, the court imposes a judge-made standard on the decision-maker. To bring forward a more exacting standard where the decision-maker proposes to prohibit the citizen from expressing his opinions or communicating information in his possession is not in principle a different exercise. In fact the courts do this already..." See also P.P. Craig, *Administrative Law*, 4th ed. (London: Sweet & Maxwell, 1999) at 692 and 600-01, with reference to *R.* v. *Ministry of Agriculture, Fisheries and Food, ex parte First City Trading*, [1997] 1 C.M.L.R. 250 at 279.

subordinate a *Charter* right or freedom to a preferred policy, it must alert its constituents. The special features that signify invocation of the override are designed to generate attention and highlight the significance of the proposed action. They may well impose a high, immediate and enduring political price for depriving members of Canadian society of their constitutional entitlements.[71] Moreover, the need to renew the override within five years to prevent it from lapsing means that an override cannot become permanent unless its political sponsors are willing to re-open the political debate. If the system works well, the announced intention to use the override will precipitate public and parliamentary debate in *Charter* categories: what is the effect of the proposed policy on *Charter* rights?; why does the government consider its policy more important than *Charter* rights?; if encroachment is desired or deemed necessary, why can't the government merely limit the rights or freedoms as permitted by the standards of limitation?[72]

The *Charter* was formulated by an established parliamentary democracy whose democratic institutions had been found wanting in the postwar period, against the background of mid-century perversions of state authority. There was no need to imagine what new institutions might do, as the formulators of a constitution must when they create a comprehensive constitutional framework, including new legislatures, executive and courts. The strengths and failings of Canadian institutions were well known and fully debated. These failings provided the remedial foundation of the *Charter* project — to secure protection of liberty, equality and human dignity in the creation of public policy and the exercise of state power. Their strengths gave confidence that the new constitutional dispensation would be viable.

The political battle for and against the *Charter* was a prolonged and intensive confrontation that came to an innovative and unexpected conclusion. Neither side won; neither side lost. Those who wanted rights protection did not want the override. Those who wanted the override did not want the *Charter*, especially a *Charter* as strong as the final text dictated, with its rich array of rights guarantees and its narrow, principled limitation clause in the postwar model. The *Charter* text thus embodies a compromise that created strong judicial review, but not at the expense of the democratic function of elected

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[71] I make this statement as a general statement, although I am aware that there a number of override instruments in place in Québec that attracted no press coverage or public discussion in Québec, and no reverberations in the rest of the country. These measures slipped under the radar screen, in my view, because there were no judicial determinations of *Charter* breach, and that there likely were no *Charter* breaches. See T. Kahana, *The Partnership Model of the Canadian Notwithstanding Mechanism: Failure and Hope* (S.J.D. Thesis, University of Toronto, Faculty of Law, 2000) [unpublished].

[72] The transformed political discourse, like the work done in government on proposed policies, will be a discourse of public reason. Citizens treat each other as equals, not as temporary (or permanent) winners and losers in the majoritarian game of politics. They develop a political system that in process and substance reflects tolerance and mutual respect even when their society is characterized by pluralism, diversity and even division. See J. Rawls, "The Idea of Public Reason Revisited" (1997) 64 Univ. of Chicago L. Rev. 765.

bodies with limited mandates of limited duration. The *Charter* did not create absolute rights nor did it impose a super-judiciary dominant over the other branches of government. The *Charter*'s institutional structure allows the courts to be courts, and the legislatures to be legislatures.[73]

This was the compromise that the first ministers opposed to a *Charter* wrested from their counterparts. The premiers would have defeated the *Charter* project but for one feature of the conflict. The people of Canada, especially those who, in an increasingly multicultural and pluralist society, had failed to command equal concern and respect from their governments, made clear their desire for a country responsive to the imperative of the age of rights.[74] They did not put their trust in the majoritarian processes of Canadian legislatures. They put their trust in the judiciary. They attributed the past performance of the courts, in repudiating the "implied bill of rights" and in rendering the statutory Canadian Bill of Rights ineffective, to the inadequacies of the legal system, not to the judges. The people of Canada therefore demanded constitutional restructuring of that legal system. They understood that the only way to constrain state power to the norms of the postwar world was to create a constitution that gave rights enforceable priority over ordinary political preferences.

The birth of the *Charter* thus featured the coalescence of the three constitutional themes referred to in the introduction to this essay: the ultimate sovereignty of the people, the restraint of the rule of law upon the exercise of state power, and the protection of fundamental rights and freedoms.[75] The formal exercise of constituent authority gave constitutional status to rights and freedoms under law, supported by a process in which the politicians had to bend to the people's will.

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[73] Sir J. Laws, "Judicial Review and the Meaning of Law" in C. Forsyth, ed., *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) 173 at 185: The common law's evolution of principle is a process which cannot be replicated in the processes of the sovereign Parliament in its legislative capacity... [A]ny adherence to and respect for the concept of evolved principle on the part of Parliament is contingent, not necessary; and this constitutes a difference in nature, of great importance, between Parliament's law and the common law.

[74] I set out the historical account in "Canada's *Charter* of Rights: Paradigm Lost?" Review of Constitutional Studies [forthcoming in 2001]. The basic supporting material is the record of the 1980-81 Joint Parliamentary Committee. It reveals how ordinary Canadians, including a wide variety of interest groups representing many identity communities whose interests had been disregarded by Canadian legislators, captured the agenda. In addition, the solidarity of the provinces opposing the *Charter* was broken by Prime Minister Trudeau's offer of a referendum, which the premiers knew would lead to utter defeat of their position. It is a political tragedy that Québec was isolated from the final compromise, but it is clear that Québec did not reject the project of rights-protection in general. While Québec initially protested the *Charter* by using the override clause as extensively as possible, the current separatist government has decided not to use the override. Ironically, the disincentive is not provincial or even federal political protest. It is the desire to avoid appearing to oppress the linguistic minority, a factor that might, if the separatist program meets further success, undermine international support for an independent Québec.

[75] See text, *supra* note 6.

V. *The Supreme Court and the Charter*

In 1982, two important changes were made to Canada's Constitutional order. Canada became a truly independent country, belatedly acquiring the ultimate authority of a sovereign state — the power to amend its constituent instrument. At the same time, Canada acquired a constitutional bill of rights that imposed constraints upon the ordinary exercise of political authority in the postwar model. It fell to the Supreme Court of Canada to integrate these extensive changes into a coherent constitutional whole. The Court has not yet fully met that challenge.

So far as constitutional interpretation is concerned, the 1982 amendments imparted renewed vigour to the perspective that had animated the "implied bill of rights" approach to constitutional interpretation decades earlier. The Supreme Court judges who subscribed to that approach considered the *British North America Act, 1867* to be Canada's Constitution, not merely a statute dealing with constitutional matters. They did not regard the Court's new pre-eminence as Canada's highest appellate body merely as one more formal step on the road from colony to nation. Canada's legal independence amounted to a directive to the Supreme Court to read that text as embodying the deepest values of Canadian nationhood.[76] In effect, these judges took up the mantle of a modern constitutional court, faithful to the liberal democratic principles on which the country had been founded but liberated from the legal legacy that had secured the hegemony of the established majority in an increasingly diverse and pluralistic society.

The adoption of the *Charter* marked the rejection, by the people as well as by political compromise at the highest level, of the Court's repudiation of the interpretative presuppositions of the "implied bill of rights". In 1978, in the *Dupond* case, a majority of the Court endorsed the understanding that the *British North America Act* created legislative authority that was, when exercised within its proper jurisdiction, both plenary and supreme. No operative constitutional norms constrained the exercise of this authority: rights and freedoms were the product of statutory creation or self-restraint. The *Charter* did not have the effect of re-instating or validating the "implied bill of rights" approach. It provided express constitutional guarantees, not freedom residual to limited state power. Nonetheless, like the "implied bill of rights", the *Charter* wove liberal democratic values into the country's constitutional fabric. In addition,

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[76] For a parallel change in interpretation by the Israeli Supreme Court of regulations promulgated under the British Mandate, see *Schnitzer et al.* v. *The Chief Military Censor*, H.C. 680/88 at para. 9 per Barak J., as he then was:

"A legal norm - whether enacted or created by the judiciary - does not stand on its own. It is a "creation which lives in its environment" ... It fits into its environment, influences it and is influenced by it. The "legal environment" which influences every legal norm "includes not only the immediate legislative context but also wider circles of accepted principles, basic aims and fundamental criteria which derive ... from the 'sources of social consciousness of the nation within which the judges live'... It is not necessary to repeat these principles in every law; they constitute a kind of 'normative umbrella' over all legislation."

the *Charter* text, by its stature as a constitutional text and by its provisions, precluded the restrictive reading that the Supreme Court had applied to the statutory Canadian Bill of Rights.

The *Charter* transformed the political process. It created some zones in which state action was forbidden and others in which it was mandated. For both, the limitation formula permitted the legislature to reassert its authority, but only through the extraordinary exercise of establishing formal legality and substantive justification in a court of law. A further reassertion of legislative authority could come through the override or notwithstanding clause, which established a different kind of framework, in a different forum, producing a different result. By formal political enactment expressly invoking this power, the legislature could temporarily reassert its primacy over certain, specified *Charter* guarantees. The new amending formula added the final layer to this complex structure. By meeting another set of political strictures, still more stringent, legislatures could effect permanent alteration of the *Charter* or the Constitution. Each step in this continuum required oversight by the courts because each operated subject to defined legal powers. Standard approaches to interpretation would dictate the need for strict compliance, because each possibility operated to relieve the state of the duty to honour established legal entitlements having the highest normative status.

For some of these institutional arrangements, the new constitutional text gave full and specific directives. For the others, it provided only the shorthand phraseology characteristic of modern, postwar bills of rights. This latter language affirmed the primacy of the common set of principles that constitute postwar constitutionalism, adapted to a particular political context. It also established the institutional framework to support these principles. So, for example, the text of the notwithstanding clause, which embodied a concrete compromise hammered out by the first ministers, expressed the detailed terms of their bargain. The text of the limitation formula, in contrast, was relatively brief. While the former said all that was necessary to capture the bargain it embodied, the latter spoke volumes. The limitation formula signified the emphatic rejection of the penultimate limitation proposal, which would have left fundamental interests hostage to the ordinary political process. Moreover, it inscribed with clarity the *Charter*'s remedial purposes by incorporating the established terminology and concepts of other postwar rights-protecting instruments. The *Charter*'s guarantees manifested the same pattern. The clauses that reflected a concrete, made-in-Canada content, often a compromise, contained more detail than those that followed in the well worn path of the domestic and multilateral rights-protecting instruments that were invoked as the chosen models.[77]

It fell to the judiciary to oversee the fulfilment of the remedial purposes of both types of drafting. This responsibility did not derive from special merit or demonstrated prowess in deliberating upon claims to fundamental rights and

[77] Section 15, equality rights, and section 23, minority language education rights, are examples of the more detailed, concrete drafting style while sections embodying the fundamental freedoms and legal rights exemplify the more abstract and universal drafting style.

freedoms of the type the *Charter* guaranteed. The debates that preceded the adoption of the *Charter*, which emphasized the deficiencies of the existing jurisprudence, suggested otherwise. Rather, the judicial role inexorably followed from other factors. First, the task required interpretation of a constitutional text that made up part of the supreme law of Canada. Second, it called for expertise in the adjudication of legal rights claims. Third, it demanded independence because the claims would be the claims of right holders against the state. All of these elements dictated that the task fall to the expert, experienced and independent judiciary. The political significance of each aspect of the judicial role was undeniable; the function itself, however, was quintessentially legal. It was firmly rooted in the British common law foundation of the Canadian Constitution, whether one subscribed to the "implied bill of rights" approach or not. Moreover, it took as its exemplar the role of judges under postwar rights protecting instruments, embedded in both civil and common law legal systems, on which the *Charter* was modelled.

The Court's new responsibilities were situated in the interstices of the adjudicative function expressly established by the *Charter*. In cases that came forward in great volume and in no particular sequence, the judiciary had to give incremental effect to the *Charter*'s pervasive transformation of our system of government. The age-old case method that had produced the common law had now to produce the foundation for a comprehensive and coherent new body of legal doctrine having the status of supreme law. In the early stages, it was necessary for the judges not merely to decide the case at bar on its merits but to provide the other arms of government with sufficient guidance concerning their responsibilities and obligations to ensure an orderly transition. Thus, in addition to ruling on the particular challenge, the Court had to elucidate the primary principles, the structural framework and the interpretative methodology of *Charter* analysis. Otherwise, governments would be unable to make intelligent and informed decisions as to which of the many challenges instituted to defend and which to cede. Moreover, they would be slow in fulfilling their *Charter* responsibilities in the administration of government or in policy formation. While all eyes were on the courts in the *Charter*'s early days, the purpose of the *Charter* was not to produce endless cycles of *Charter* litigation. On the contrary, the remedial purposes of the *Charter* would be left unfulfilled if the Supreme Court became the oracle of a *Charter* whose meaning was inscrutable, incoherent or unpredictable.

In mounting its second major response to the "age of rights", under the 1982 amendments, the members of the Court did not take the initiative as some of their predecessors had done under the "implied bill of rights".[78] On the contrary, constituent power had intervened to amend the Constitution. It remained to be seen whether the Court would welcome or resist the new constitutional directives.

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[78] The Court did play an important role in the process. Its judgments in *Re Resolution to Amend the Constitution,* [1981] 1 S.C.R. 753, and, after the fact, in *Re Objection by Québec to Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, were important steps. The Canadian Constitution would be very different today if the Court had ruled differently in those cases.

The Court has done both. It has, to a certain extent, welcomed and, to a certain extent, resisted the incorporation of the *Charter* into Canada's Constitution. The tensions that the cases now routinely display would not be so surprising if the Court's *Charter* judgements had not started out so strongly.[79] Overall, the first cases exuded confidence and precision. The Court delineated the *Charter*'s purposes crisply. The judicial and political roles were distinct and legitimate. The Court was confident in invoking the *Charter*'s principled foundation, searching out comparative case law in the postwar model that provided the necessary direction. Then the structure, its contours barely sketched, began to falter. Considerations inappropriate to a postwar rights-protecting instrument entered the analysis. The postwar model of rights-protection diminished in importance. The *Charter*'s text, remedial purposes and political history no longer dominated the analysis. The cases came to include the full range of possibilities, from strict rights-protection, in the postwar framework, to deference to pre-*Charter* institutional prerogatives, often under the influence of the more conservative stream of United States constitutional theory and case law. Many cases marked fidelity to consensus, tradition and custom, often with roots in majoritarian cultural and religious beliefs and practices, with little regard for the normative foundation of the *Charter* or for the diverse and pluralistic nation that it was designed to serve.

In the beginning, the Court built its structural foundation for the *Charter* by identifying the purposive method as the appropriate tool to interpret the scope and content of *Charter* guarantees. Purposive interpretation is the standard approach in the postwar model and provided the inspiration for the "implied bill of rights". It explicates the normative principles and values that legitimate elevating certain fundamental interests as supreme law and thus as situated beyond the reach of the ordinary political process. These principles dissolve the traditional lines of thinking that service legislative sovereignty and maintain ordinary majoritarian preferences. Political theory, legal theory and history illuminate the project of rights-protection generally as well as the particular provision under review. The judge examines in detail the degree to which the ordinary political process and/or the judicial system had proved inadequate in the pre-*Charter* past. Comparative analysis plays a key role. The text of other rights-protecting instruments, case law in other domestic and international systems, and secondary sources provide a wide range of examples and a storehouse of analytic patterns. All this material comes together to provide a normative foundation on which to delineate the scope of the *Charter* right generally in an early case, or to consider its application in a new context in a later one. This multifarious material fills the gap that precedent normally occupies in a system that is not undergoing transformation. Against this background, the Court can focus on the claim put forward by the claimant that state action of some sort, in purpose or effect, breached the deepest norms of our political community.[80]

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[79] L.E. Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State" (1999) Is. L. Rev. 13.

[80] For examples of purposive interpretation see *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Hunter* v. *Southam*, [1984] 2 S.C.R. 145; *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R.* v. *Keegstra*, [1990] 3 S.C R. 697 (majority); *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30; *Rodriguez* v. *British Columbia*, [1993] 3 S.C.R. 519 (dissents); *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493. For detailed analysis of some of these cases, see L.E. Weinrib , "The Religion Clauses: Reading the Lesson" (1986) 8 Sup. Ct. Law Rev.

While the Court still employs purposive interpretation, it does not do so consistently. When it departs from this methodology, it does not account for the departure. The analysis simply ceases to regard the *Charter*'s guarantees as crystallizations of the deepest norms of the postwar constitutional state, or as corrections of failings in pre-*Charter* legal system. The benchmark for the content of *Charter* guarantees switches to positive law-making, consensus, custom, tradition, community values, the family, nature and the public good.[81] One is reminded of the analysis that stood opposed to the "implied bill of rights" as well as that which prevailed under the statutory Canadian Bill of Rights.

The Court's treatment of the limitation formula displays a similar pattern. The Court began by building its understanding of permissible limits on rights, derived from the postwar model, into the structural foundation established by purposive interpretation. Then, members of the Court began, on occasion, to revert to pre-*Charter* patterns of thought in a line of cases that privileged reasonableness and, by extension, judicial deference to the ordinary political process. The abandonment of purposive interpretation of the rights and freedoms was connected to the development of the reasonableness-based approach to limitation. This change implied an unarticulated shift in the conception of the guarantees themselves. It is only for guarantees understood to embody the most fragile and fundamental entitlements in our political community that the combination of formal promulgation and the most principled basis for limitation would make sense. For guarantees defined by the values that the majoritarian political processes protect in any event, a reasonableness-based approach to limitation is well-suited.

In the early cases, the Court introduced the postwar model of limitation. It emphasized that the judicial role even under the limitation clause was to read the *Charter* as a rights-protecting instrument. It also made clear that the limitation formula shared the same normative orientation as the rights guarantees. It then went on to establish the structure of adjudication appropriate to these understandings. The state would bear the burden under the limitation clause, first, to satisfy the legality stipulation and next, if successful, to address the demands of justification. The state would then have to meet a sequence of doctrinal tests for proportionality: pre-eminent importance of the impugned action, rational connection of means to ends, minimal impairment of the guarantee and proportionality of effects.[82]

507; "The *Morgentaler* Judgment: Constitutional Rights, Legislative Intention, and Institutional Design" (1992) 42 U.T.L.J. 22; "Hate Promotion in a Free and Democratic Society: *R.* v. Keegstra" (1991) 36 McGill L.J. 1416; "The Body and the Body Politic: Assisted Suicide under the Canadian Charter of Rights and Freedoms" (1994) 39 McGill L.J. 618.

[81] Examples include *Big M*, *supra* note 80; *Singh*, *supra* note 80; *Reference re Section 94(2) of the Motor Vehicle Act* (B.C.), [1985] 2 S.C.R. 486; *Morgentaler*, *supra* note 80, (dissent); *Keegstra*, *supra* note 80, (dissent); *R.* v. *Butler*, [1992] 1 S.C.R. 452, *Egan* v. *Canada*, [1995] 2 S.C.R. 513, per La Forest J.; *Rodriguez*, *supra* note 80, (majority); *Weatherall* v. *Canada*, [1993] 2 S.C.R. 872; *Law* v. *Canada*, [1999] 1 S.C.R. 497.

[82] Examples include *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200; *Keegstra*, *supra* note 80 (majority); *Morgentaler*, *supra* note 80 (majority); *Rodriguez*, *supra* note 80 (dissents); *Vriend*, *supra* note 80; L.E. Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 Sup. Ct. L.R. 469.

Unfortunately, the Court's opinions did not adequately buttress this early salutory approach.[83] The Court gave no indication that its complex doctrinal edifice was consonant with (and indeed imported from) the evolving model of postwar rights protection. There was no reference to the purpose, development or application of express limitation clauses at the national or international level. The judges did not cite the extensive literature on the operation of limitation clauses in other systems of rights-protection. More particularly, they did not take note of cases from other rights-protecting systems, which offered theory, analysis, and example elucidating these clauses. Nor did the Court refer to the legislative history of Canada's limitation provision, formulated to include the postwar strictures on ordinary political preferences, rather than to maintain the priority those preferences had hitherto enjoyed. The Court set out a complex doctrinal system for analyzing proffered arguments of legality and proportionality, but without offering a full purposive interpretation of the *Charter*'s limitation clause.

This silence withheld the strongest bases for elucidating and legitimating this central feature of the *Charter*'s structure of rights protection. The cases do not mention, for example, that the limitation clause became, in the final stages of the *Charter*'s drafting, the battleground between the first ministers who wanted the *Charter* and those that did not. Nor do they reveal that it was the public support for a strong *Charter*, one that would deprive the legislatures and the executive of the power formerly used to negate or disregard fundamental interests, that had secured the final strict and principled formulation. One would not learn that the final formula was drafted to restrict limitation on rights to the mode of analysis employed under the postwar rights protecting instruments. Finally, one would not realize that there had been a trade-off in which the First Ministers had accepted the narrow and principled limitation clause in place of the deferential penultimate draft, in exchange for the notwithstanding clause.

Perhaps because the Court offered little beyond textual and logical analysis to buttress its complex and surprisingly restrictive reading of the limitation formula, a number of judges introduced an alternative approach. These judges, sometimes in majority and sometimes in dissent, opted for a benchmark of reasonableness, and therefore deference, for an ever-enlarging rubric of social and economic policy questions. This approach undermines the whole purpose of the *Charter*. It has no basis in the *Charter*'s final text or chosen models. Instead, it approximates the deferential "generally acceptable", reasonable limits clause that fell by wayside in the parliamentary hearings; in other instances, it effectively revives the formula, also rejected when the *Charter* was drafted, that would have subordinated *Charter* rights to traditional values.[84]

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[83] In contrast, when the Supreme Court of Israel and the Constitutional Court of South Africa, in their turn, established the framework of their new rights-protecting adjudication, they gave full attribution, including generous reference to Canadian cases. See *United Mizrahi Bank Ltd.*, *supra* note 2 and *infra* note 111.

[84] *Supra* note 64.

How do the judges support a reading of the limitation formula that reaches back to earlier, repudiated versions? The analysis reintroduces the arguments against entrenchment of the *Charter* based on the singular ability of the legislatures to forge public policy with the advantages of representation and accountability.[85]

The advocates of a deferential, reasonableness-based standard for limits on rights mistakenly assail proportionality analysis as too abstract, formal, rigid, and mechanical.[86] This language is taken from the realist assault on legal formalism in the early decades of the twentieth century in the United States. The critique was mounted against what was taken to be an arid conceptualism divorced from facts and social context. The *Charter* limitation clause, applied in the postwar manner, has no such failings. The doctrinal tests do not establish a set of conceptual standards divorced from the real lives of those who bring their complaints of rights deprivation to the courts. Nor do they inhibit the state from introducing into the courtroom any factual material, statistics or social science expertise. On the contrary, their design is to force the parties to introduce all manner of relevant adjudicative and legislative facts. The state must produce this material or risk failing to discharge the various components of the onus stipulated for departing from constitutional guarantees. In addition, various features of *Charter* litigation, such as public interest standing, intervention and the introduction of legislative facts, bring the real world into the courtroom.

The resistance to proportionality analysis, based on its purported rigidity and mechanical qualities, has also affected the way in which the Supreme Court of Canada has applied the legality stipulation in the limitation formula. In some cases the Court insists on fulfilment of this formal requirement, in others it does not. When judges regard review for "prescription by law" as an important safeguard for the right holder, they ensure that any limit on a right reflects some degree of deliberation and formal law-creation. When they bypass this stricture, they regard such protection as a technical and somewhat unfair fetter on the state.

As noted earlier, the stipulation that limitation on rights must be "prescribed by law" constitutes the first part of the limitation analysis. Its design is to impose on the state the onus to demonstrate that compliance with formal components of the rule of law, as a precondition to substantive justification. These formal properties include concerns such as promulgation under legal authority, clarity, accessibility and non-retroactivity. Attention to these aspects of the rule of law would have addressed some of the excesses that arose in the "implied bill of rights" cases, such as prohibitions couched in very general language, blanket delegation of authority to officials, as well as arbitrary action by officials.

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[85] L.E. Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?", *supra* note 59.

[86] E.g. F.L.Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

The "prescribed by law" stricture was initially applied by the Supreme Court in this way. The Court expressly aligned this application to its postwar model where the concern is to protect the rightholder by affording the benefits of the rule of law.[87] Under this approach, failure to comply means that the state has not discharged the formal component of its onus, so that it loses the opportunity to justify its impugned action under the proportionality analysis. The Supreme Court has adhered to this approach where police officers acted without legal authority.[88] In other instances, however, it has completely omitted to examine whether this stricture was satisfied.[89]

Where concerns as to the "vagueness" of impugned legislation is in issue, the Court prefers to leave this consideration aside and move on to what it calls "the merits", i.e., the rational connection or minimal impairment stage of the proportionality analysis. This preference seems to be based on the view that it is reasonable for governments to legislate in broad terms or confer wide discretion unless there has been a failure to provide an intelligible standard.[90] However, the intelligibility of the standard rests on judicial definition after the fact, affording the rightholder an inadequate basis on which to evaluate her legal and constitutional position before the fact.[91] This approach denies the rightholder the benefit of being subjected only to the more clearly defined regulatory authority that would emerge from a deliberative process complying with the stricture.[92]

These ideas of reasonableness and deference have extended to the notwithstanding clause as well. The political genesis, institutional design, and impact of this clause suggest a restrictive reading. It marks a departure from the highest norms, crystallized in the catalogue of guaranteed rights and further protected by the requirement that limits on rights pass both the legality and justification standards. Its terms were drawn from Canadian statutes that had seldom, if ever, been used. It embodies the precise terms of a political compromise exacted to appease the First Ministers who did not want a *Charter* at all. Its terms make clear that it is both an exceptional and narrow power.

The Supreme Court has not had much opportunity to consider the notwithstanding clause. In *Ford* v. *A.G. Québec*, where such an occasion arose,

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[87] *R.* v. *Therens*, [1985] 1 S.C.R. 613. *Re Sunday Times* (1979), Eur. Ct. H.R. Ser. A. No. 30.

[88] For example, *Therens*, *supra* note 87; *Strachan* v. *The Queen*, [1988] 2 S.C.R. 980; *Debot* v. *The Queen*, [1989] 2 S.C.R. 1140; *Kokesch* v. *The Queen*, [1990] 3 S.C.R. 3; *R.* v. *Grant*, [1991] 3 S.C.R. 139.

[89] For example, *Weatherall, supra* note 81; *New Brunswick Broadcasting Co.* v. *Nova Scotia*, [1993] 1 S.C.R. 319.

[90] *Canada (Human Rights Commission)* v. *Taylor*, [1990] 3 S.C.R. 892; *R.* v. *Morales*, [1992] 3 S.C.R. 711; *New Brunswick (Minister of Health and Community Services)* v. *G.(J.)*, [1999] 3 S.C.R. 46.

[91] *Sunday Times*, *supra* note 87; *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139 at 213-14, per L'Heureux-Dubé J.

[92] P. Reyburn, *The Constitutional Requirement of Legality in Limitation of Human Rights* (LL.M. Thesis, University of Toronto, 1999) [unpublished].

the Court offered a mixed approach.[93] Applying a standard consistent with the rule of law's abhorrence of retroactive removal of rights, the Court ruled invalid Québec's retroactive invocation of the override power. However, the Court applied a reasonableness standard to other interpretative questions. Overruling the Court of Appeal on this point, it did not require that the notwithstanding clause specify the rights and freedoms actually breached by the laws into which the clause was inserted. The Court thus permitted Québec, by omnibus enactment, to insert a boiler-plate notwithstanding clause into every statute. The clause recited every right or freedom that the override power could suppress, offering no indication of the actual rights and freedoms that the government wanted to subordinate to the policy embodied in the particular statute. This reading extended the reach of the notwithstanding clause beyond its framers' bargain and arguably beyond a strict reading of its text.[94] It enabled the Québec legislature to use this power to reject the *Charter*, to the extent possible, as a protest against its adoption. The non-applicability of the *Charter* thus became the norm in Québec, not the exception, without the bureaucratic cost of specification or the contentious political debate or protest that may well have followed from such specification.

This overview of three basic features of *Charter* interpretation — rights, limitation and override — indicate that in important ways members of the Supreme Court have yet to find common ground in the *Charter*'s purposes, legitimacy or institutional structure. The Court is sometimes faithful to the *Charter*'s postwar mode of rights-protection, sometimes not. Even within this model, there would inevitably be some degree of divergence in the case law. The cases often arrive at the Court lacking important elements, such as factual material, legislative history, constitutional history or theory, and/or comparative research. Given the difficulty and complexity of the cases and the fortuity of the sequence in which they arise, judges can be expected to reach different conclusions as to the strength of the argument and the supporting material. Law after all does not generate single correct answers, but merely provides a structure for analyzing legal claims. However, the divergence in the Supreme Court's *Charter* analysis does not reflect the expected range of application of common presuppositions in specific cases. Nor, in view of the relative clarity and cohesion of the Court's early judgments, does the present variability reflect the difficulty of implementing a significant transition in legal rules, or a lack of certainty about the nature of rights within the postwar model. Instead, what seems to be in evidence is a wavering commitment to the postwar model of rights protection or a lack of clarity about the *Charter* as an exemplar of that model.

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[93] L.E. Weinrib, "Learning to Live with the Override" (1990) 35 McGill L.J. 541, commenting on *Ford* v. *A.G. Québec*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, in which the author acted as counsel to the Attorney General for Ontario.

[94] Bayefsky, *supra* note 55, vol. 2 at 905.

VI. *Conclusion*

Constitutional change, whether by reinterpretation in new circumstances or by formal amendment, is a daunting undertaking. It unsettles the foundational premises that routinely provide the legal system with its ultimate stability. The 1982 amendments precipitated extensive constitutional transformation of the most basic kind in Canada. The incorporation of a charter of rights transformed the relationship between citizens and the state. The patriation of the capacity for amendment domesticated the power to alter the basic framework in the future. Both changes required the most extensive rethinking of the role of existing legal institutions.

In the last resort this task fell to the Supreme Court of Canada. In respect to the first component of the change, the Court's initial response was consistent with the remedial aspirations captured in the *Charter*'s text, flowing from its political history, and exemplified in its chosen models. Subsequently, although not decisively rejecting this approach, the Court subjected the *Charter* to a deferential reading whose internal weaknesses are elaborated in earlier parts of this essay. As a result of combining these inconsistent approaches, the Court has not yet settled upon a secure and coherent understanding of the *Charter*'s transformation of our political system. In respect to the second component, the amending formula, the Court has done better. In the *Secession Reference*, a unanimous Court, in response to a challenge to the continuity and integrity of Canada as a federal nation state, emphatically dismissed arguments elevating majoritarian politics to sovereign status.[95] In so doing, the Court returned to the ideas of constitutional coherence that nurtured the "implied bill of rights" cases and the best of its *Charter* jurisprudence.

The task that remains is for the Court to integrate the approach to majoritarian politics taken in the *Secession Reference* and under the "implied bill of rights" into the Court's analysis of the *Charter*. This integration will have two major beneficial effects. First, it will bring coherence and consistency to the Court's constitutional jurisprudence. Second, it will bring to an end the first stage of transition into Canada's new constitutional arrangements. The Supreme Court will then no longer have to carry the burden of elaborating the framework of the transition and will only have to maintain the stability of the transformed constitutional order, resisting (in Habermas' words) "the overpowering of the legal system by illegimate power relations that contradict [the constitutional state's] normative self-understanding".[96]

In the *Secession Reference*, the Court did not defer to legislative supremacy or privilege majoritarian process. Nor did it parse the terms of the new amending formula as isolated grants of plenary, political power. Rather, it returned to first principles, citing some of its most important cases for propositions that illuminated the values that make for the coherence of the Canadian constitutional

[95] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217.

[96] *Supra* note 1.

order. It then delineated the place of the democratic function in our constitutional order and, in consequence, rejected the assertion that the Québec legislature could unilaterally effect Québec's secession from Canada even pursuant to a clear referendum mandate.[97] Secessionism's unprecedented assault on the national integrity of Canada prompted the Court to articulate what lies at the core of the Canadian Constitution.

In the *Secession Reference* the Court affirmed that the Canadian Constitution, although primarily a written instrument, nonetheless has a "basic structure" rooted in its origins in British constitutionalism.[98] Fundamental principles "inform and sustain" the Canadian Constitution as "vital unstated assumptions". These principles provide the Constitution's "internal architecture", its "constitutional structure as a whole", and its "foundation". So fundamental are they that they give life to the very idea of constitutionalism and the rule of law.[99] As among themselves, they enjoy a symbiotic relationship, such that "no single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[100] In these statements the Court recognizes that principles can only limit, and not abrogate, one another.

These principles provide interpretative direction for reading the text. Thus, they help to define jurisdiction and to delineate rights and obligations. They also provide the basis for constitutional development and evolution. They therefore have a twofold function, simultaneously offering stability to the political system and generating its potential for maturation and response to changed circumstances.[101] The latter idea is captured in the organic imagery that the Court invokes, referring to the principles as "vital",[102] as breathing life into the system,[103] and as providing the Constitution's "lifeblood".[104] In this context, the Court also refers to the preamble as having the effect of incorporating constitutional principles by reference to fill the gaps in the incomplete text.[105] The Court also invokes the image of the Constitution as a "living tree", the image that Lord Sankey, L.C. had used in the famous *Persons* case to invoke the twofold function of constitutional principles.[106]

The core constitutional principles give rise to substantive limitations upon the state by providing interpretative direction for general or ambiguous language

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[97] The Court held that if the people of Québec expressed clearly their will to secede in a referendum there would arise a reciprocal obligation to negotiate constitutional change, consistent with the constitutional principles. *Secession Reference, supra* note 95 at para. 87 to 93.

[98] *Ibid.* at para. 49.

[99] *Ibid.* at para. 49-54.

[100] *Ibid.* at para. 49.

[101] *Ibid.* at para. 52.

[102] *Ibid.* at para. 49.

[103] *Ibid.* at para. 50.

[104] *Ibid.* at para. 52.

[105] *Ibid.* at para. 53-4.

[106] *Ibid.* at para. 52.

and by filling the gaps in the express terms of the constitutional text.[107] Democratic engagement is one of these principles, but it does not (as contended) enjoy sovereign status, even if it gives voice to national aspirations. Nor does it stand independent of other constitutional principles, such as federalism, constitutionalism and the rule of law, and the protection of minorities. It must function within the framework of these principles taken as a whole.[108]

Citing *Oakes* (the first case on justified limits) and *Switzman* v. *Elbling* (a leading exposition of the "implied bill of rights"), the Court reaffirmed a substantive content for democracy. Included in this content are respect for inherent human dignity, social justice, equality, pluralism and citizen engagement in social and political institutions.[109] Thus we enjoy a system of government that is best described as "constitutional supremacy", not parliamentary supremacy.[110] Democracy does not trump the other principles; nor is it the *raison d'être* of the Constitution. One can sum up the Court's analysis with the following statement from an Israeli judgment elucidating the Israel's new rights-protecting system, which is, in part, modelled on Canada's *Charter*:

> "...'true' democracy recognizes the power of the constitution—fruit of the constituent authority — to entrench the fundamental human rights and the basic values of the system against the power of the majority. Such limitation of majority rule does not impair democracy but constitutes its full realization."[111]

The invocation of first principles in the *Secession Reference* is consistent with only one strand of the Court's ambivalent *Charter* case law. Only as an exemplar of the postwar model of constitutionalism does the *Charter* reflect the content of each principle, the multiplicity of principles, and the symbiotic and non-negating relationship between principles. If the Constitution is to have the inner coherence to which the Court aspires, then the *Charter*, as the part of the Constitution that serves the function of protecting fundamental rights and freedoms, must take up the same ideas in microcosm.[112] It must promise either the enjoyment of the rights and freedoms themselves, or, through postwar mode of limitation analysis as originally delineated in *Oakes*, the principles on which they stand. The Court's reference to *Oakes* and not to cases in which deference has held sway is hardly fortuitous.

In contrast, the reasonableness-based, deferential approach takes the *Charter* in a quite different direction, away from this idea of constitutional coherence. It emphasizes democracy as a one-dimensional process that stands prior to the

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[107] *Ibid.* at para. 53.

[108] *Ibid.* at para. 71.

[109] *Ibid.* at para. 64, with reference to *Oakes*, *supra* note 82 at 136 and *Switzman* v. *Elbling*, *supra* note 28 at 306.

[110] *Ibid.* at para. 72, 78.

[111] *United Mizrahi Bank Ltd.*, *supra* note 2, per Justice Aharon Barak, President, Supreme Court of Israel.

[112] For a theoretical exposition of this idea, see R. Alexy, "The Concept of Coherence and Its Significance for Discursive Rationality" (1990) 3 Ratio Juris 130.

substance of rights guarantees, the rule of law, and the protection of minorities. It allows traditional ideas of consensus and community to overwhelm the complex institutional structure that the postwar model established to realize liberty, equality and respect for human dignity in a diverse, pluralist and divided country.

Similarly, in the *Judges' Remuneration Reference* the Court applied this holistic approach to the constitutional principle of judicial independence.[113] In analysis that anticipated the fuller account in the *Secession Reference*, the Court emphasized that this principle does not merely elevate judicial independence above the democratic machinery and its product. It also lays the basis for effective judicial self-protection against the majoritarian machinery of government in the rare circumstance when such self-protection is demanded.[114] This important ruling is fully consistent with the understanding of the *Charter* in the postwar, rather than the deferential, model. It too invokes the preamble, the "implied bill of rights" analysis, the organizing principles of the Constitution and the need to supplement gaps in the text to support its conclusion, that inferior courts enjoy judicial independence.[115]

The *Secession Reference* indicates that the constitutional framework in which the *Charter* operates is based on an ensemble of fundamental constitutional principles, not merely on dry text or on the machinery that registers majoritarian preferences. These principles mark the continuity between the *Charter*'s original remedial purposes and its ongoing development. The principles have proved to be remarkably flexible. Inherited from the common law, they have facilitated the advance from colony to independence, supported the working of a complex federal system, and fostered the "implied bill of rights". More recently, they have supplied the foundation for important rulings on the independence of the judiciary and the amending process. Unfortunately, however, the Supreme Court's interpretation of the *Charter* is not entirely in line with this understanding of our constitutional structure.

The Court's reluctance to fully embrace the *Charter* as a postwar rights-protecting instrument may abate when the full significance of the *Judges' Remuneration Reference* and the *Secession Reference* take root. Already, the Court is allowing the postwar model to influence its jurisprudence in other fields. Its insistence that the common law should be developed in a manner consistent with *Charter* values is one indication of this.[116] Another indication

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[113] [1997] 3 S.C.R. 3.

[114] In this instance the challenge to the independence of the judiciary arose in the form of salary reductions.

[115] *Re Remuneration of Judges* (No.2), [1998] 1 S.C.R. 3, para 83, 85,94,95, 102-03. At para. 103, Lamer C.J.C. takes the "logic" of the implied bill of rights approach one step further than did its early formulators, noting that since political institutions are fundamental to the "basic structure" of the Canadian Constitution, "governments cannot undermine the mechanisms of political accountability" that legitimate those institutions. This "dramatic conclusion" seems to entail limits on Parliament's authority to act in this manner, aside from *Charter* guarantees to that effect. As noted earlier, this question had been posed in some of the "implied bill of rights" cases.

[116] See "Constitutional Values and Private Law in Canada", *supra* note 13.

is in administrative law, where the framework of rights subject only to justified limitations, prescribed by law is emerging. This may be the significance of the *Baker* case, in which the Court affirmed that international human rights norms are an available interpretative resource when deliberating upon the exercise of statutory discretion and, in addition, that the exercise of discretion must be reduced to writing.[117]

Developments on the world stage may support this trend. Some of our judges seem to harbour a lingering apprehension that the *Charter* takes us away from our constitutional heritage by introducing modes of reasoning and institutional roles that undermine legislative supremacy. The introduction of the *Human Rights Act*, incorporating the European Convention into the law of the United Kingdom in October 2000, will bring judicial analysis in British courts closer to the postwar features of *Charter* analysis. In addition, recent developments in the common law, both public and private, introducing respect for fundamental rights, legality, and proportionality analysis, demonstrate that the core features of *Charter* analysis can be understood as one more stage in the organic development of our shared constitutional tradition.[118] The co-existence to date of these constitutional principles as shared between Canada and other Commonwealth countries, despite the contrast between unitary and federal governments, as Lamer C.J.C. noted in the *Judges' Remuneration Reference*, suggests that the principles are highly adaptable.

Respect for the democratic function within the postwar framework of the constitutional state is respect for constitutional democracy, not for legislative sovereignty based on majoritarian process. Temporarily elected governments are not sovereign. Rather, they are subject to the Constitution, which both mandates the protection of specific rights and imposes duties of compliance with the rule of law and with other constitutional principles. Interpretation of the *Charter* that resists this transformation undermines the coherence not only of our system of rights-protection but of our entire constitutional structure, both written and unwritten. Indeed, it undermines the coherence of every aspect of public and private law that lies in the hands of the judiciary. In deferring to the ordinary democratic process out of respect for the supposed sovereignty of the legislature, judges risk a greater transgression of the constitutional order. They risk usurping the constituent authority, which has now expressly subordinated the ordinary legislative function to a system of rights-protection.[119] They also

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[117] *Baker* v. *Canada*, [1999] 2 S.C.R. 817.

[118] See *supra* notes 16 and 17.

[119] The judges who rejected the "implied bill of rights" did not resist an exercise of the constituent authority. They viewed the constitutional text as definitive and interpreted it narrowly. They were resistant to evolutionary constitutional development. The "implied bill of rights" approach was based on a re-interpretation of constitutional history, text and theory in new circumstances, including the development of the postwar constitutional state, demographic transformation of Canada and the abandonment of colonial status. It was based on a theory of constitutional change and development consistent with fundamental, structural principle, as set out in both the judicial and extra-judicial writing of the judges.

expose themselves to the very critique that their deference is designed to avoid — that they are not adjudicating as independent actors, according to established legal rules and principles, but entering into the merits of the impugned law, choosing (in Justice Scalia's words) to "impede modernity", and/or preserving a preferred structure of legal authority.

Earlier in this century members of the Supreme Court formulated the "implied bill of rights" in response to various pressures that revealed the inadequacies of regarding the Canadian Constitution as a federal arrangement of divided plenary authority. Because they had little constitutional text on which to build their edifice, their efforts eventually faltered. However, the adoption of the *Charter*, as well as the *Judges Remuneration Reference* and the *Secession Reference*, reinstates their vision. In this vision, the Constitution is written and unwritten. It contains implicit principles that judges may invoke to preserve its integrity. Interpretation of its text is not the same exercise as interpretation of a statute, giving rise to "a somewhat arid and unrealistic conceptualism."[120] The provinces do not frame our social and political lives to the exclusion of a national, multicultural and pluralist dimension for citizenship and fundamental rights. The judiciary stands as the living Constitution's guardian. This approach, in the age of rights, is the defining function of a court that possesses ultimate constitutional authority:

> ... an organ explicitly entrusted with the perpetual guardianship of the Constitution, a stewardship that implies the continuous elaboration of the Constitution's meaning, its singular purpose being to close the gap between constitutional reality and constitutional normativity.

The resistance to the *Charter* as a post-war rights-protecting instrument, in contrast, involves rejection of an exercise of constituent authority to transform the constitutional system, including institutional roles. It does not see the constitutional text as central, as it does not recognize its obvious postwar features. It depends on the idea that constitutions are fixed, and views the institutional roles under the Canadian Constitution as unchanged. For further elaboration of these ideas, see "Canada's *Charter* of Rights: Paradigm Lost?, *supra* note 59.

[120] Rand, "Some Aspects of Canadian Constitutionalism", *supra* note 39.