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MEANING FROM CHAOS: REFLECTIONS ON SEPTEMBER 11, 2001 — TWO YEARS AFTER

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INTRODUCTION

On 10 September 2002, the Centre for Constitutional Studies sponsored a symposium at the University of Alberta Faculty of Law, entitled "September 11, One Year Later." At the end of symposium, audience members put questions to the panel, on which I had the privilege of participating. The very last question was along these lines: "Would you say that anything good has come out of the events of September 11?" I shall attempt here to respond once more to that question. But I must take care with my response.

I must avoid the bad theology of finding purpose in every tragedy. Finding a message or lesson in disaster may be a mode of denial. It may be a way of making tolerable what is fundamentally intolerable; a way of making comprehensible what is fundamentally incomprehensible; a way of distracting us from what fundamentally demands to be seen. One might recall Job's quest to find the purpose of his tragedies, and his friends' poor efforts to establish that purpose: Job was ultimately answered by the Lord "out of the whirlwind"; and the Lord provided no justification or explanation, no description of hidden meaning.[1] Calamities are not always parables.

These thoughts raise the issue of whether I should "say" anything about September 11. When faced with a horrifying event, we should resist our urge to hide it behind a cloud of words. Our primary posture before horror fixed in history should be one of silence. This allows the event to remain what it is and allows us to experience what it is as purely as we are able. We should have the courage to confront history without words.[2]

This is a caution not to resort to talk too quickly. But while meditation and due regard for experience should be a starting point, silence cannot be our only response to the world. On a general level, we are bound to try to move beyond experience and to make some sense of what has happened, to gain some understanding of events, to integrate events into our relevant intellectual frameworks. Our efforts at understanding and integration will entail verbalization, since we appropriate the world through our linguistic and conceptual apparatus. On a more practical level, September 11 demands not only silence and thought, but action. Unlike the case of Job, our story does not simply end with fortunes restored. We must work to repair, defend, and maintain. Our work is made easier by sound analysis.

But the movement to words engages another caution. Once the immediate need for action has been addressed, once we have the luxury of some time and distance — as we do now — we should not be embarrassed to engage in reflection that does not, or does not directly, serve practicality. Our path to assimilating a serious and terrible event should allow

[1] *The New Oxford Annotated Bible*, rev. standard ed. (New York: Oxford University Press, 1973) "Job," c. 28–42 at 650–54.

[2] One particular form of verbal thoughtlessness is turning away from the attacks to dwell on U.S. corporate blame — "but they deserved it"; "but U.S. foreign policy has resulted in many more casualties"; "but look at what happens every week in the Middle East"; or even "but this was the result of our secularism, pornography, and undermining of traditional institutions" (on the last, see C. Hitchens, *A Long Short War: The Postponed Liberation of Iraq* (Toronto: Penguin Canada, 2003) at 28. The "but" in this type of non-thought is a cowardly pivot that directs the gaze from these dead innocents to topics more comfortable to the speaker. I do not assert that U.S. — or Canadian — foreign policy is immaculate. Our job as participants in our political processes is to criticize and reform. This job, however, must sometimes wait. Assessing grievous events in themselves and for themselves is a prior obligation. Glib distractive social criticism is only a form of bad faith in our relationship with the world and others.

some place for relatively abstract, theoretical, "useless" reflection, that tries to stay close to the experience of the event itself. This is what I shall offer here, as a sort of meditative response to the audience's last question.[3]

In keeping with the context and location of our symposium, I shall try to relate September 11 to the law. Despite the terms of the question, with one exception, I shall not claim that any of the implications of September 11 which I describe were "good." The events happened. They may or may not have the significance I attribute to them. Their significance does not elevate innocent death to good.

I

The terrorist attacks of September 11 threw our constitutional system into stark relief. By "constitutional system," I mean our system of democratic politics that engenders and is bounded by statute and common law, and which is limited by our constitutional rules and the principles and values expressed in those rules. In the manner that being emerges only in contrast to nothingness, our constitutional system was set off or manifested against the negation of the attacks. The attacks represented an almost pure repudiation of the values supported by our constitutional system. The negation of the attacks sounded on four main levels.

First, our constitutional system, as developed particularly through our *Charter*[4] jurisprudence, turns on the pre-eminent importance or moral primacy of the individual — on the dignity and autonomy of the natural person.[5] Practically, the attacks repudiated the moral value of individuals; symbolically, the attacks preyed on our valuation of individuals. Practically: In the attacks, victims were used merely as means to ends. Individuals and their interests were not treated as warranting any special protection, but were subordinated to the interests of the terrorists. The victims were killed to make the terrorists' point, whatever that might have been. Indeed, the terrorists' contempt for life extended to their own lives — they gave up their own lives willingly. Symbolically: The outrage we felt at the attacks was, in part, in response to individuals being treated merely as means, as nothing more than things used by the terrorists for their purposes. Moreover, these were innocent individuals, who had not consented to be put in harm's way, and who in no way deserved to die. Absent consent or desert, our belief would be that the victims should have been left alone.

Second, our constitutional system is based on the "rule of law, " a commitment manifest in the Preamble to the *Charter*. One aspect of the rule of law is the principle that public acts be rationally defensible.[6] This rational defensibility principle presupposes an "existential" setting. Rational defensibility is possible only in an environment in which individuals and their opinions matter deeply (again the importance of the individual); opinions are judged against objective or interpersonally accepted standards; emotion or passion, important as they may be, are subordinated to rationality; debate is conducted according to more-or-less explicit procedural rules; and action is deferred until decisions are duly reached. The attacks repudiated rational debate and its setting. The attacks were the subject of thought (malice aforethought), but conveyed no rational meaning. The attacks were not debate, but a silencing. The attacks exhibited passion, without the bridle of reason. The attacks demonstrated action, not human-to-human communication.[7]

Third, our constitutional system is secular, while it permits individuals freedom of religion. The Preamble to the *Charter* does state that "Canada is founded upon principles that recognize the supremacy of God and the rule of law." It is worth noting that the term "and" links "the supremacy of God" to "the rule of law." We do not put the deity (anyone's deity) above the law. The deity and the rule of law are coordinated. A natural law theorist may approve of the link between the deity and our basic law; a theorist bearing Occam's razor may consider the coordinated deity to add nothing to the basic law itself. Regardless, the deistic reference in the Preamble has not permitted the promotion of religious

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3 There is a psychological and psychiatric literature respecting responses to disaster: see C.A. Markstrom & P.H. Charley, "Psychological effects of human caused environmental disasters: A case study of the Navajo and uranium" 2003 *American Indian and Alaska Native Mental Health Research: The Journal of the National Center* [forthcoming]. In contrast, I am gesturing towards a phenomenology of disaster — which I hope is not merely symptomatic.

4 *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.

5 See *e.g.* the "presumption of innocence" jurisprudence: *R. v. Oakes,* [1986] 1 S.C.R. 103 at 119–20 (Dickson C.J.C.); the "minimum fault" jurisprudence: *e.g. Re B.C. Motor Vehicles Act,* [1985] 2 S.C.R. 486 at 503 (Lamer J.); and *R. v. Martineau,* [1990] 2 S.C.R. 633 at 645–46 (Lamer C.J.C.); the "privacy" jurisprudence: *e.g. R. v. Dyment,* [1988] 2 S.C.R. 417 at 427, 429 (La Forest J.); and the freedom of expression jurisprudence: *e.g. Irwin Toy Ltd. v. Quebec (A.G.),* [1989] 1 S.C.R. 927 at 976 (Dickson C.J.C., Lamer and Wilson JJ.).

6 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3 at para. 181 (Lamer C.J.C.).

7 "Enfolded in any definition of 'terrorism' . . . there should be a clear finding of fundamental irrationality": Hitchens, *supra* note 2 at 25.

ends (as by legislation) at the expense of *Charter* rights and freedoms.[8] Insofar as the attacks had a religious motivation, they put the deity and service to the deity precisely above the law. The pursuit of perceived religious interests overwhelmed all rules for civilized human community.

Fourth, our constitutional system, as a species of democracy, presupposes a substantial public commitment to mutual trust. If we are to accede to the views of a majority that does not include us, we must have some assurance that others will not discriminate against us merely because of our minority status.[9] We need not be convinced of the majority's wisdom, so long as we are assured of its good will. Even more fundamentally, our day-to-day transactions and interactions are premised on the silent assumption that others will not intentionally injure us or subject us to excessive risk. We know that we do face some risks from others, but, for the most part, our trust in others is borne out. The attacks both exploited and repudiated our trust. The attacks were facilitated by our trust, by our assumption that no one, particularly people who had lived among us, would attempt actions like the attacks. The attacks raised the possibility that our trust of others is misplaced. If the attacks were carried out once, they may be carried out again. If they were carried out by others' neighbours before, they may be carried out by our neighbours next time.

By throwing our constitutional system into relief, the attacks of September 11 did not thereby justify our system. The attacks only made more apparent what our system is.

The contrast between our system and the attacks creates a space for choice. The terrorists' tactics may have a certain allure: as they did to us, so we should do to them (if we can find a suitable "them"). At the very least, we might consider abandoning some elements of our system, in an effort to reduce the risks of further attacks. We might wonder whether we should maintain our commitment to our constitutional system, in the face of the radical challenge of the attacks.

This line of speculation is misplaced. Assume that we do believe that our constitutional system and the values it embodies are right. The principles and values that lay claim to us, then, are what we should pursue, promote, and maintain. That is what it means to say that the principles and values are "right." To ask why we "should" do what we know we "should" do is, if not nonsensical, at least odd. Furthermore, the moral obligation to do the right thing does not depend on whether doing the right thing would be hard or easy. A moral obligation is significant just because it directs us to act against our non-moral inclinations. Maintaining constitutional principles in times of peace and relative domestic calm takes no great resolve. Commitment only in good times is not commitment at all. If we do truly believe in the value of individuals and the rule of law, that must entail that we will abide by our principles, despite provocation. It is true that "ought implies can" and principles are not to be a death sentence. If we cannot realistically adhere to our principles fully because of the pressure of circumstance, we may be excused. We have the responsibility of deciding whether circumstance has overcome us, or whether we may overcome circumstance. September 11 tests our will to preserve the right, the depth of our commitment:

> To paraphrase what La Rochefoucauld once remarked with regard to love, one might say that just as the small fire is extinguished by the storm whereas a large fire is enhanced by it — likewise a weak faith is weakened by predicaments and catastrophes whereas a strong faith is strengthened by them.[10]

II

September 11 exposed our personal vulnerability. Part of the explanation for the strong impact of the attacks is our recognition that we could have been the people in the airplanes or in the buildings — or if not us, our friends or our relatives. Vulnerability is indiscriminate. Terrorists do not care about your voting patterns, your support for international peace, your strong arguments in favour of tolerance and understanding. If you are caught in the wrong place, you are dead. Like it or not, we are all in the fight.[11]

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[8] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 (Dickson C.J.C.). In particular contexts, freedom of religion may have to be balanced against other *Charter* rights, such as the right to be free from discrimination, protected under s. 15: *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772.

[9] Of course, mutual trust has had to expand outward from the trust extended to members of one's own ethnic and social groups, and the expansion has not been perfect. We are not done with Human Rights Commissions or s. 15 litigation.

[10] V.E. Frankl, *The Unconscious God: Psychotherapy and Theology* (New York: Simon & Schuster, 1975) at 16.

[11] "The whole point of the present phase of conflict is that we are faced with tactics that are directed *primarily at civilians*. . . . It is amazing that this essential element of the crisis should have taken so long to sink into certain skulls": Hitchens, *supra* note 2 at 20. See also A.M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) at 108.

Of course, we all were vulnerable before September 11. Ask any victim of violent crime. September 11, however, did vaporize the complacency or obliviousness we might have absorbed from our geography and history. We felt safe here, at least from the violence of the Middle East.[12]

The reminder of vulnerability pushes in two directions. First, it encourages personal responsibility. The attacks, particularly involving American Airlines Flight 93, reminded us (should we have needed reminding) that public security personnel will not always be present to assist us when circumstances go bad. A feature of living on the new front lines is that we must be prepared to take action ourselves, if the situation demands it. If we know that we may have to take responsibility for our own safety and the safety of our family and friends, we must be alert. We cannot stay constantly in "condition white," ignoring what's around us — leaving our security to others.[13] Taking personal responsibility entails a proper balancing of the relationship between civilians and public security agencies. On the one hand, we should ensure that we do not give up too much psychological or legal power to the state. On the other hand, we should not think that we can replace security professionals. Our competence is only limited and transitory.

At this point, we begin to march on a delicate constitutional edge. In aid of the "proper balancing," one might be inclined to favour greater co-operation between civilians and public security agencies. "Tipster" programs may be proposed, permitting civilians to provide information to investigatory agencies.[14] We already have Crime Stoppers programs, and have strong evidential protections for informers.[15] But we do not want to become a society of informers.[16] (We might consider that the targets of suspicion are likely to belong to visible minorities.) Similarly, increased public video surveillance might be advocated.[17] But we do not want to become a Panoptic society, under the relentless eye of the state. Overemphasizing co-operation with authorities could undermine the mutual trust on which our constitutional system relies, and could undermine our constitutionally-protected rights.

What tends to imbalance sensible relations between citizens and public authorities is the second "push" of vulnerability. Vulnerability engenders fear. We should not underestimate the constitutive political role of fear. Plato, for example, tells us that the tyrant is motivated chiefly by fear:

> Therefore, the real tyrant is, even if he doesn't seem so to someone, in truth a real slave to the greatest fawning and slavery, and a flatterer of the most worthless men; and with his desires getting no kind of satisfaction, he shows that he is most in need of the most things and poor in truth, if one knows how to look at a soul as a whole. Throughout his entire life he is full of fear, overflowing with convulsions and pains.[18]

Hobbes lay his conception of the social contract on a foundation of fear: In the state of nature, "where every man is Enemy to every man," there is "continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short."[19] Fear is polymorphic. Fear could drive our leaders into the shell of Plato's tyranny. Fear could drive citizens toward an over-reliance on the state, toward the subordination of individual rights and freedoms to state interests. Fear could take us to Hobbes' authoritarian sovereign. In contrast, fear could drive us toward an overreliance on ourselves. If we become suspicious of others, if we lose the mutual trust on which our constitutional system is founded, if we do not believe that our majorities (or those with "real political power") will act in good faith,

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12 Certainly another factor amplifying the psychological impact of the attacks was the violation of our territorial integrity: see N. Chomsky, *9-11* (New York: Seven Stories Press, 2001) at 12. While the factual and moral scope of tragedies at different locations may be precisely equivalent, in terms of our perceptions, it is one thing for horrible events to happen *there*; it is quite another for them to happen *here*.

13 The four-part awareness colour code was devised by Jeff Cooper. It is widely used in law enforcement and private defensive training. The other levels are "condition yellow" — a state of relaxed alertness, "condition orange" — a state of alarm, and "condition red" — combat consciousness: see E. Lovette & D. Spaulding, *Defensive Living* (Flushing: Looseleaf Law Publications, 2000) at 18.

14 "Operation TIPS Fact Sheet," online: <www.citizencorps.gov/tips.html>; D. Kash, "Hunting Terrorists Using Confidential Informant Reward Programs" *FBI Law Enforcement Bulletin* (April 2002), 26.

15 *R. v. Leipert*, [1997] 1 S.C.R. 281 (McLachlin J.).

16 When Germany unified, it was learned that the Stasi, the East German intelligence agency, had collected information about many citizens willingly supplied by other citizens: "The Stasi built an astonishingly widespread network of informants — researchers estimate that out of a population of 16 million, 400,000 people actively cooperated. The Stasi kept files on up to 6 million East German citizens — one-third of the entire population," online: CNN Interactive <edition.cnn.com/specials/cold.war/experience/spies/spy.files/intelligence/stasi.htm>. See also J. Legner, "Commissioner for the Stasi Files" (2003) 28 German Issues, online: <www.aicgs.org/publications/PDF/legner.pdf>.

17 "In the past decade, successive UK governments have installed over 1.5 million cameras in response to terrorist bombings. While the average Londoner is estimated to have their picture recorded more than three hundred times a day, no single bomber has been caught," online: Electronic Privacy Information Center <www.epic.org/privacy/surveillance>.

18 *The Republic of Plato*, trans. by A. Bloom (New York: Basic Books, 1968) at 260.

19 T. Hobbes, *Leviathan*, ed. by C.B. MacPherson (New York: Penguin Books, 1968) c. 8 at 186.

we might retreat to small isolated communities of individuals who share our beliefs and who alone can be trusted. Fear could take us to the militia movement and social fragmentation.

September 11 opened us to personal responsibility, and may serve as a catalyst for a new balance of personal and public security. We must take care that the fear that ripples from the attacks does not tilt this balance toward either excessive or inadequate State authority.

III

September 11 reminded us of a reality noted by Simone Weil — the good has no force.[20] What I mean is this: We conduct ourselves according to a variety of rules and practices, including moral and legal rules. With respect to moral and legal rules, what forces, compels, or binds us to follow those rules? One might respond that multiple mechanisms ensure compliance. We have established processes and penalties to deter; social stigma attaching to prosecution or conviction may deter; we may be biologically "hard-wired" not to perform some criminal actions, such as assault or murder;[21] we may be habituated, trained, or disciplined to abide by norms; we may be wholly or partially incapacitated (whether by incarceration or drugs) from offending. What, though, of potential offenders like the terrorists, who will not suffer social stigma if caught, who are unconcerned with potential penalties (who are in fact willing to die to carry out their plans), and who believe that their actions are justified by the ends they seek? For them, the good — our good — certainly has no force. And what of us? Unless we are incapacitated, what stops us now, even as bound by chains of deterrence, biology, or socialization, from committing offences? What blocks us from pursuing what we know is wrong? The answer, put baldly, is nothing. If we want to offend, we can offend. People choose to violate our moral and legal rules every day, often (although not always) because they believe they can "get away with it." Although we may know what is good and right, that knowledge does not force us to obey. In this sense, even for us, the good has no force.

The terrorists demonstrated the radical weakness of good; they demonstrated the triumph of will, of choice, over right. They showed just how easy it is to subvert, destroy, and violate. We should not forget that the attacks were low-budget (their cost has been estimated at about $400,000) and low-tech (box-cutters and flying lessons). Attacks of this nature are not beyond any determined person or group. Again, the attack's negation throws our reality into visibility. The marvel exposed is that our system, on the whole, to a greater or lesser degree, relies on individuals choosing to follow moral and legal rules. I do not ignore crime, cheating, depravity. I do not ignore that fact that some of our communities have become the moral equivalents of war zones. My point is only that, despite temptation and opportunity, we manage to work and live together with surprisingly little friction. What makes this marvelous or worthy of wonder is that our system is sustained by such a fragile thing as our choice. Our reality could easily — all too easily — be otherwise, as many other communities in many other places show.

The terrorists may have demonstrated the weakness of good, but they did not destroy good or the will to pursue it. Consider the actions of the firefighters who responded to the attacks. They ran into the smoke and fire. Carrying heavy equipment, they ran up flights of steps, through heat and panic and exhaustion. They ran to save the ordinary people caught in the destruction, and to save friends who had been trapped. They died to save others. Their sacrifice attested to the value of life. Their sacrifice marked their hard choice to do what was right. If it is possible to say that anything "good" came out of the attacks of September 11, it was their example — a light that the darkness of September 11 could not extinguish.

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[20] S. Weil, *Gateway to God*, ed. by D. Raper (Glasgow: Fontana Books, 1974) at 37.

[21] D. Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (New York: Little, Brown, 1995) at 6.

THE *DUNMORE* DEPARTURE: SECTION 1 AND VULNERABLE GROUPS

Caroline Libman

INTRODUCTION: THE *DUNMORE* DEPARTURE

In the recent decision *Dunmore v. Ontario (A.G.)*,[1] the Supreme Court of Canada held that the complete exclusion of agricultural workers from Ontario's *Labour Relations Act*[2] was a violation of section 2(*d*) of the *Charter*[3] that could not be justified under section 1. *Dunmore* was a novel case; as Bastarache J. noted in the introduction to the majority decision, it represented "the first time" the Court had been called on to review "the total exclusion of an occupational group from a statutory labour relations regime, where that group is not employed by the government and has demonstrated no independent ability to organize."[4]

The uniqueness of the *Dunmore* claim compelled an equally original response from the Court, both in its section 1 analysis and in the remedy it prescribed to redress the section 2(*d*) infringement. In comparing the *Dunmore* decision to the relevant body of case law, it becomes clear that *Dunmore* represents a marked departure from established *Charter* adjudication norms in three important respects. First, the court in *Dunmore* applied a strict *Oakes*[5] test in its analysis of the impugned legislation despite the fact that the LRA was directed towards the protection of a vulnerable group (namely, family farmers in Ontario). The stringent section 1 inquiry in *Dunmore* stands in contrast to the deferential approach the Court has traditionally adopted when reviewing legislation aimed at the protection of vulnerable groups. Second, the Court in *Dunmore* offered an unblinking analysis of the context, purpose and effects of the impugned legislation, and explicitly declined to give the respondent Attorney General latitude when evaluating the appropriateness of the LRA.[6] This stands in contrast to the Court's traditionally cautious approach to labour relations cases and its previously-stated preference that labour issues be dealt with by the legislatures or by specialized tribunals.[7] Finally, the Court in *Dunmore* prescribed the unusual remedy that the LRA be amended to include agricultural workers, in order to safeguard the appellants' section 2(*d*) rights. This stands in contrast to the Court's position articulated by Bastarache J. in *Delisle* that "the fundamental freedoms protected by s. 2 of the *Charter* do not impose a positive obligation of protection or inclusion on Parliament or the government, except perhaps in exceptional circumstances."[8]

For all the above reasons, *Dunmore* was clearly an exceptional circumstance; this article examines why this was so. In Part II, I will compare the *Dunmore* treatment of section 1 to the one advocated in the landmark *Edwards Books* and *Labour Trilogy* decisions in order to illustrate the extent to which *Dunmore* represents a departure from the usual analysis of protective legislation,[9] especially in the labour relations

1 *Dunmore v. Ontario (A.G.)*, [2001] 3 S.C.R. 1016 [*Dunmore*].

2 R.S.O. 1980, c. 228 [LRA].

3 *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.

4 *Dunmore*, *supra* note 1 at para. 2. The majority consisted of McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ. Justice L'Heureux-Dubé wrote a concurring opinion. Justice Major dissented. The LRA exclusion was effected by the enactment of *the Labour Relations and Employment Statute Law Amendment Act* [LRESLAA], which repealed the short-lived *Agricultural Labour Relations Act* [ALRA]. The ALRA had extended trade union and bargaining rights to agricultural workers; the effect of the LRESLAA was to roll back these rights and instead subject agricultural workers to an exclusion clause in the LRA. For purposes of this discussion I will focus chiefly on the LRA, since it was that piece of legislation which explicitly excluded agricultural workers from the labour relations scheme, thus triggering the *Charter* claim.

5 *R. v. Oakes*, [1986] 1 S.C.R. 103.

6 *Dunmore*, *supra* note 1 at para. 57.

7 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para. 183 [*Alberta Reference*].

8 *Delisle v. Canada (Deputy A.G.)*, [1999] 2 S.C.R. 989 at para. 33 [*Delisle*].

9 By "protective legislation" I mean legislation aimed at the protection of vulnerable groups enacted in the state's benevolent capacity; this is in contrast to restrictive legislation in which the state acts as the "singular antagonist" of the

context. In Part III, I will account for that departure, using the Court's holding in *Delisle* as evidence that it was the vulnerability of those *excluded* from the LRA — not those protected by it — that was the decisive factor in *Dunmore*. In Part IV, I will conclude that *Dunmore* has effectively added another contextual factor for the courts to consider in future section 1 analyses of protective legislation: the relative status of those excluded from the protective regime.

PROTECTIVE LEGISLATION AND SECTION 1 SCRUTINY

In applying the *Oakes* test to determine if a *Charter* violation can nonetheless be justified under section 1, Robert Sharpe and Katherine Swinton observe that "the court has explicitly stated that a more relaxed standard of scrutiny is called for where the legislation challenged represents an attempt by the legislature to … protect vulnerable groups."[10] This deferential approach was first articulated by Dickson C.J.C. in *Edwards Books*:

> In interpreting ... the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.[11]

The Court expanded on the idea of a relaxed section 1 inquiry under certain circumstances in *Irwin Toy*. Again writing for the majority, Dickson C.J.C. held that when legislatures are called on to mediate between the "justified demands" of competing groups and are thus forced to make "difficult choices" about the allocation of scarce resources, the courts should be respectful of the outcome. He wrote: "as courts review the results of the legislature's deliberations, *particularly with respect to the protection of vulnerable groups*, they must be mindful of the legislature's representative function."[12] Based on this reasoning, the Court has upheld under section 1 legislation directed at the protection of, *inter alia*, retail workers (*Edwards Books*), children under age thirteen (*Irwin Toy*), Jews (*Ross v. New Brunswick School District*), women (*Prostitution Reference*), and ethnic minorities (*Keegstra*).[13]

While the Court is generally deferential to the legislatures when evaluating what I have termed "protective legislation," it has been remarkably reluctant to review labour relations legislation in particular. This approach was clearly articulated in the *Alberta Reference*, one of the *Labour Trilogy* cases which first defined the scope of section 2(*d*). Writing for the majority in the *Alberta Reference*, LeDain J. held that labour relations were so fraught with social and political issues that "[t]he resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates … the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted."[14] This judicial anxiety was echoed in McIntyre J.'s oft-cited concurring judgment, where he wrote: "Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems … it is scarcely contested that specialized labour tribunals are better than courts for resolving labour problems."[15] Justices Cory and Iacobucci, writing in *Delisle*, affirmed the deferential approach first articulated in the *Labour Trilogy*: "We agree that, in many if not most cases, it will be found appropriate to defer to the legislature in its determination of how best to strike the delicate balance among labour, management, and public interests."[16]

One might therefore have expected the Court in *Dunmore* to follow this approach of lenience, since the impugned legislation in that case was ostensibly directed towards the protection of the vulnerable family farm industry in Ontario. And indeed, the Court was clearly sensitive to the precedent of judicial deference. Justice Bastarache, writing for the majority in *Dunmore*, stated that when drafting legislation, governments are not required to "produce the result most desirable to this Court," and that "one might be tempted to conclude that a wide margin of deference is owed to the enacting legislature" given the complexity

individual.

10 R.J. Sharpe & K.E. Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 50. In contrast, a strict *Oakes* test is employed for legislation directed towards the criminally accused; in these cases the state is characterized as the "singular antagonist" of the individual.

11 *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at para. 141 [*Edwards Books*].

12 *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 993 [emphasis added] [*Irwin Toy*].

13 *Edwards Books*, *supra* note 11; *Irwin Toy*, *ibid.*; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

14 *Alberta Reference*, *supra* note 7 at para. 144. For a critical analysis of the *Alberta Reference* decision, see Harry Arthurs, "'The Right to Golf': Reflections on the Future of Workers, Unions and the Rest of Us Under the *Charter*" (1988) 13 Queen's L.J. 17.

15 *Alberta Reference*, *ibid*. at para. 183. It is therefore not surprising that the body of s. 2(*d*) case law is markedly smaller than that of other s. 2 collections.

16 *Delisle*, *supra* note 8 at para. 127.

of the interests at stake.[17] However, Bastarache J. qualified, the Court in *Edwards Books* also held that the legislature must "attempt very seriously to alleviate the effects" of its laws on those whose rights have been infringed, and that the holding in *Thomson Newspapers* established that "political complexity is not the deciding factor" in deciding the margin of deference under section 1.[18] These caveats weighed against the respondent Attorney General in *Dunmore*.

In *Thomson Newspapers*, Bastarache J., writing for the majority, suggested four contextual factors for judges to consider, the presence of any of which might favour a deferential approach. These are: (1) that the legislature has sought a balance between competing groups; (2) that the legislature has sought to defend a vulnerable group, where that group has a subjective apprehension of harm; (3) that the legislature has chosen a remedy whose effectiveness cannot be measured scientifically; and (4) that the value of the activity which the legislation infringes is relatively low.[19] Justice Bastarache noted that this list did not represent "categories of standard of proof which the government must satisfy, but are rather factors which go to the question of whether there has been a demonstrable justification."[20] Indeed, the considerations mentioned in *Thomson Newspapers* can be found in earlier cases like *Edwards Books* and *Irwin Toy* and should not be read as a new supplement to the *Oakes* test, but rather as a sort of "roadmap" to indicate how and why the section 1 analysis has been undertaken.

With these issues in mind, the Court in *Dunmore* undertook an analysis of the impugned LRESLAA and LRA. At the first stage of the section 1 inquiry, the Court in *Dunmore* found that the protection of family farms in Ontario was a sufficiently pressing objective to justify the infringement of section 2(*d*) of the *Charter*. The Court was not persuaded by the appellants' claim that the family farm was on the decline in Ontario, and so its protection was of diminished importance. On the contrary, Bastarache J. wrote, the overtaking of the family farm by "corporate farming and agribusiness" increased the need for protection of family farms. The Court went on to accept the respondent's economic evidence that the agricultural industry in Ontario "occupies a volatile and highly competitive part of the private sector economy, that it experiences disproportionately thin profit margins and that its seasonal character makes it particularly vulnerable to strikes and lockouts."[21] Given these factors, the Court found that the protection of the vulnerable family farm met the first stage of the *Oakes* test.

Next, the Court examined whether the impugned legislation met the *Oakes* rational connection test. That is, it set out to determine if the objective of protecting family farms was advanced by the exclusion of agricultural workers from the LRA. The outcome of this analysis was foreshadowed in the opening line of the section: "At this stage," Bastarache J. wrote, "the question is whether the wholesale exclusion of agricultural workers from the *LRA* is carefully tailored to meet its stated objectives."[22] The Court agreed with the respondent that unionization, insofar as it involves the formalized right to strike and bargain collectively, might threaten the flexible family farm dynamic. However, Bastarache J. went on to caution that this concern "ought only be as great as the extent of the family farm structure in Ontario and it does not necessarily apply to the right to form an agricultural association." In cases where the employment relationship is already formalized, he wrote, "preserving 'flexibility and co-operation' in the name of the family farm is not only highly irrational, it is highly coercive."[23]

Furthermore, the Court found that the economic rationale for protecting the agricultural sector — which had been accepted at the first stage of the section 1 inquiry — did not meet the rational connection requirement. Though it may be true that the agricultural sector suffers from thin profit margins, unstable production cycles and other vulnerabilities, Bastarache J. wrote, these are liabilities faced by many industries in Ontario. Therefore while denying agricultural workers the right of association might be a rational policy "in isolation," Bastarache J. held, "it is nothing short of arbitrary" where this right has been extended to "almost every other class of worker in Ontario."[24]

The Court then turned to the minimum impairment test and, after excerpting the lengthy catalogue of "agricultural workers" excluded from the LRA, it found

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17 *Dunmore*, *supra* note 1 at paras. 60, 57.

18 *Ibid*. at para. 60, citing *Edwards Books*, *supra* note 11; *Dunmore*, *ibid.* at para. 57.

19 *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877 at para. 90 [*Thomson Newspapers*].

20 *Ibid*. The *Thomson Newspapers* "contextual factors" make for a circular application. Their purpose is ostensibly to help the Court assess whether a strict or relaxed s. 1 approach is warranted. However, the Court will only be able to consider many of these factors during a s. 1 analysis (especially within the minimal impairment test). Therefore an assessment of the *Thomson Newspapers* factors seems to follow the s. 1 analysis, not precede it.

21 *Dunmore*, *supra* note 1 at para. 53.

22 *Ibid.* at para. 54.

23 *Ibid*.

24 *Ibid.* at para. 55.

that the impugned legislation was unjustifiably overbroad.[25] Interestingly, Bastarache J. prefaced this conclusion with reference to the *Edwards Books* decision by describing the tailored features of the *Retail Business Holidays Act*[26] exemption clause which had satisfied the Court in that case. By contrast, he wrote, "neither enactment in this case includes a concrete attempt to alleviate the infringing effects on agricultural workers."[27] Justice Bastarache instead found that the LRA and LRESLAA impaired the appellants' section 2(*d*) "more than is reasonably necessary" first by denying the right of association "to every sector of agriculture," and second by denying every aspect of that right to them.[28]

Justice Bastarache concluded his section 1 analysis by rejecting the respondent's submission that distinguishing between sectors within the agriculture industry required "an impossible line-drawing exercise" which the legislature was empowered to avoid.[29] The fact that other provinces have enacting nuanced labour codes containing exclusions for smaller or family-run farms, the Court held, "suggests that such an exercise is eminently possible, should the legislature choose to undertake it."[30] Finally, Bastarache J. wrote that the respondent had provided no justification for the exclusion of agricultural workers from all aspects of association, and no evidence that the protection of agricultural workers under the LRA would pose a threat to the family farm.

When viewed in light of the Court's landmark section 1 analysis in *Edwards Books*, it is clear that the Court in *Dunmore* had solid precedent upon which to uphold the impugned legislation. As in *Dunmore*, the Court in *Edwards Books* was called on to assess the constitutionality of a piece of provincial legislation which protected one group of people, but violated the section 2 rights of another. In that case the Court acknowledged that Ontario's Sunday closing law infringed the appellants' section 2(*a*) *Charter* guarantee of freedom of religion, but that such infringement was justified under section 1. Whereas the Court in *Dunmore* found that the targeting of the agricultural industry in the LRA failed the "rational connection" requirement of *Oakes*, in *Edwards Books* it found that the singling-out of an industry for legislative scrutiny was not necessarily arbitrary for purposes of the rational connection test. On the contrary, in *Edwards Books*, Dickson C.J.C. wrote that "[I]n regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy."[31] That statement seemed to give the Court in *Dunmore* ample latitude to find that the protection of the rapidly-disappearing family farm made the LRA exclusion reasonable. Moreover, at the least restrictive means stage of the section 1 inquiry, Dickson C.J.C. in *Edwards Books* held that when legislatures undertake to prioritize the needs of various groups, "[t]he courts are not called upon to substitute judicial opinion for legislative ones as to the place at which to draw a precise line."[32] This seems to have given the *Dunmore* Court licence to accept the respondent's submission that the LRA exclusion was the only way to protect the family farm.

Given these considerations, one may read the *Dunmore* majority's section 1 analysis in one of two ways: either the Court was inclined to adopt an *Edwards Books*–style approach to the legislation but found it so egregiously overbroad as to be unsalvageable; or the Court, persuaded by the context of the legislation, felt that a relaxed test was simply not in order. One might surmise that the former explanation is the accurate one, especially since *Dunmore* dealt with labour relations, an area in which the Court has traditionally been uncomfortable and highly deferential to legislative choice. Surprisingly though, the Court in *Dunmore* — far from feeling constrained by the labour relations context — felt compelled to adopt a strict section 1 approach, ultimately leading to its conclusion that the impugned legislation was unconstitutional.

DUNMORE, *DELISLE* AND VULNERABLE GROUPS

Delisle v. Canada (Deputy A.G.) provided the Court in *Dunmore* with an important point of reference — and of departure — in its assessment of the LRA exclusion. In *Delisle*, the appellant argued that the exclusion of RCMP officers from the federal *Public Service Staff Relations Act*[33] was an infringement of his section 2(*d*) guarantee of freedom of association. The

25 *Ibid.* at para. 56. The LRA s. 3(*b*) exclusion clause defined agriculture workers as persons employed in, *inter alia*, dairying, beekeeping, aquaculture, the raising of traditional and non-traditional livestock, mushroom growing, maple, egg, and tobacco harvesting.

26 R.S.O. 1980, c. 453.

27 *Dunmore*, *supra* note 1 at 60.

28 *Ibid.* at para. 60.

29 *Ibid.* at para. 64.

30 *Ibid*.

31 *Edwards Books*, *supra* note 11 at para. 130.

32 *Ibid.* at para. 147. Peter Hogg suggests that the *Edwards Books* case demonstrated to the Court that the "least drastic means" requirement in *Oakes* was unreasonably strict, and that a "margin of appreciation" for legislative choice was necessary. P.W. Hogg, *Constitutional Law of Canada*, student ed. (Scarborough: Carswell, 2001) at 762.

33 R.S.C. 1986 (2d Supp.), c. 33 [PSSRA].

majority decision, written by Bastarache J., held that there was no such infringement. The Court instead found that the right to freedom of association exists independently of any legislative framework, and that exercising this did not require the appellant's inclusion in the PSSRA or any other labour relations regime. The very notion of a constitutionally-recognized "freedom," Bastarache J. wrote, "generally imposes a negative obligation on the government and not a positive obligation of protection or assistance."[34] Moreover, a survey of section 2(*d*) case law indicated that the exclusion of a group of workers from a protective regime "does not preclude the establishment of a parallel, independent employee association, and thus does not violate s. 2(*d*) of the *Charter*."[35]

By contrast, in *Dunmore* the Court found that the effect of the exclusion in the LRESLAA and the LRA (and possibly its purpose) was to prevent unionization of agricultural workers, thus violating their section 2(*d*) rights. Here Bastarache J. wrote that the purpose of the LRA was to "safeguard the exercise of a fundamental freedom, rather than to provide a limited statutory entitlement to certain classes of citizens." As such, the LRA "provides the only statutory vehicle by which employees in Ontario can associate to defend their interests, and, moreover, recognizes that such association is, in many cases, otherwise impossible."[36] However, the Court went on to qualify that exclusion from a statutory labour relations regime does not automatically gives rise to a *Charter* violation, as evidenced by *Delisle*. "[A] group that proves capable of associating despite its exclusion from a protective regime will be unable to meet the evidentiary burden required of a *Charter* claim," Bastarache J. wrote. This is the essential difference between *Delisle* and *Dunmore*.

In *Delisle*, the Court was not persuaded that this evidentiary burden had been met. First, it rejected the appellant's submission that the "specific and exclusive" segregation of RCMP members from the PSSRA had a chilling effect on their freedom of association, since it indicated they could not unionize or form associations to protect their labour interests. The Court instead found that the PSSRA only excluded them from the protection of trade union representation, not from forming other independent associations. As well, the Court noted that the exclusion of RCMP members from statutory labour regimes is not exclusive; "[n]umerous other groups such as the armed forces, senior executives in the public service, and indeed judges are in a similar situation," Bastarache J. wrote.[37] Most significantly, the Court noted that the appellant's exclusion under the PSSRA did not render him defenseless against unfair labour practices on the part of his employer. As public servants working for a branch of the government within the meaning of section 32(1) of the *Charter*, RCMP members have direct access to the *Charter* in such a circumstance.[38]

Again by contrast, the appellants in *Dunmore* successfully established that they were incapable of exercising their freedom of association without the protection of the LRA. The Court accepted the distinction between those who are "strong enough to look after [their] interests" without protective legislation, and those "who have no recourse to protect their interests aside from the right to quit."[39] The appellant in *Delisle* fell into the former category; the Court placed the appellants in *Dunmore* squarely in the latter. "Distinguishing features" of agricultural workers as the Court identified them were "political impotence," "lack of resources to associate without state protection," and "vulnerability to reprisal by their employers." Further, the Court agreed with the lower court's finding that agricultural workers are "poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility."[40] Moreover, "unlike RCMP officers," Bastarache J. noted, agricultural workers are not government employees and therefore do not have direct access to the *Charter* in the face of unfair labour practices.[41]

The Court in *Dunmore* then went on to agree that the effect of the LRESLAA and the LRA was "to place a chilling effect on non-statutory union activity. By extending statutory protection to just about every class of worker in Ontario," Bastarache J. wrote, "the legislature has essentially discredited the organizing efforts of agricultural workers. *This is especially true given the relative status of agricultural workers in Canadian society*."[42] This was precisely the complaint that the Court declined to acknowledge in *Delisle*. Justice Bastarache accounted for the difference:

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34 *Delisle*, *supra* note 8 at para. 26.
35 *Ibid.* at para. 28.
36 *Dunmore*, *supra* note 1 at paras. 35–36.
37 *Delisle*, *supra* note 8 at para. 30.
38 *Ibid.* at para. 32.
39 *Dunmore*, *supra* note 1 at para. 41, citing *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (1968) at paras. 253–54.
40 *Ibid*.
41 *Ibid*., citing *Delisle*, *supra* note 8 at para. 32. The appellants were able to link their inability to associate to the government via the legislative exclusion; the Court agreed that the LRA exclusion "reinforced" the private barriers faced by agricultural workers by excluding them from "the only available channel for associational activity." *Dunmore*, *ibid.* at para. 44.
42 *Ibid.* at para. 45 [emphasis added].

> In *Delisle, supra*, I linked RCMP officers' ability to associate to their relative status, comparing them with the armed forces, senior executives in the public service and judges. The thrust of this argument was that if the PSSRA sought to discourage RCMP officers from associating, it could not do so in light of their relative status, their financial resources and their access to constitutional protection. By contrast, it is hard to imagine a more discouraging legislative provision than s. 3(*b*) of the LRA. The evidence is that the ability of agricultural workers to associate is only as great as their access to legal protection, and such protection exists neither in statutory nor constitutional form.[43]

Of course, Bastarache J.'s claim that *Delisle* equated RCMP officers with judges and other public servants is somewhat misleading; this connection was made in *Delisle* to counter the appellant's argument that the PSSRA targeted the RCMP "exclusively." Nevertheless, the above passage makes clear that it was the vulnerable, low status of the appellants in *Dunmore* that distinguished their case from *Delisle*.

While the majority in *Delisle* did not find a section 2(*d*) violation and therefore did not need to embark on a section 1 analysis, the dissenting opinion by Cory and Iacobucci JJ. offered a thorough discussion of the application of section 1 to the PSSRA. In the *Delisle* dissent, Cory and Iacobucci JJ. considered the factors set out in *Thomson Newspapers* and found that, despite the labour relations context, a deferential approach was not indicated. One of the problems that led Cory and Iacobucci JJ. to this conclusion was that the PSSRA "is not designed to protect a vulnerable group in Canadian society."[44] While it is true that the public might be vulnerable in the event of a police strike, they wrote, "the general public is not a vulnerable group in the sense understood in this Court's s. 1 jurisprudence."[45]

Rather, the justices found, the vulnerable group in the *Delisle* case was the RCMP members themselves. The dissenters did not directly challenge the majority's finding that RCMP officers enjoy good standing in Canadian society; they acknowledged that "police officers are not generally considered a vulnerable group within the overall fabric of Canadian society."[46] However, Cory and Iacobucci JJ. qualified, "[police officers] are members of a vulnerable group in a relative sense insofar as they are employees."[47] This is a fairly sweeping statement, and if it is to be accepted, one that would undermine or even reverse the Court's previous position on labour relations and judicial deference. After all, if employees by their nature constitute vulnerable groups, then a strict section 1 analysis will be warranted in all cases where the government restricts the actions or associations of employees, even though the legislation at issue deals with labour relations. This is presumably not what the justices intended this statement to imply, and it was not mentioned by the Court in *Dunmore*.

The majority in *Dunmore* did, however, briefly discuss the validity of enacting legislation as restrictive as section 3(*b*) of the LRA in order to protect the family farm. Although the Court in *Dunmore* did not go so far as to say that family farmers did not actually constitute a vulnerable group in Canadian society, it did question the extent to which the existence of the "family farm" — characterized by informal working relationships — was truly reflective of the farm industry in the twenty-first century. The respondent's own agricultural expert agreed that "the modern viable family farm no longer consists of twenty acres and a few cows, but typically represents a sophisticated business unit with a minimum capital value of $500,000 to $1,000,000 depending on the commodity." This evidence led the Court to conclude that it was "over-inclusive to perpetuate a pastoral image of the 'family farm,'" and that some if not all such farms would not be negatively affected by the creation of agricultural employee associations.[48] It would therefore not have been a great leap for the majority in *Dunmore* to conclude — as the dissent in *Delisle* did — that the impugned legislation not only violated the rights of a group that was in need of protection, but did so to justify the protection of a group that was not.

The final point of comparison between *Delisle* and *Dunmore* with respect to vulnerable groups is the remedy prescribed in *Dunmore*. As discussed earlier, the Court in *Delisle* found that those who were excluded from the PSSRA were nonetheless strong enough to exercise their section 2(*d*) rights even without its protection, and so the statute was found to merely "enhance" the exercise of freedom of association.[49] This led the Court to conclude that "[o]n the whole, the fundamental freedoms protected by s. 2 ... do not impose a positive obligation of protection or inclusion on Parliament or the government, except perhaps in exceptional circumstances."[50] The Court in *Delisle* did not go on to elucidate what those "exceptional circumstances" might be, but it is clear that such conditions were present in *Dunmore.* After all, in that case the Court found that the LRA was so essential to associational activity, and those excluded from it so vulnerable and powerless, that they had no way to exercise their section 2(*d*) rights in the absence

43 *Ibid*.
44 *Delisle, supra* note 8 at para. 130.
45 *Ibid*.
46 *Ibid*.
47 *Ibid*.

48 *Dunmore, supra* note 1 at para. 62.
49 *Ibid.* at para. 39.
50 *Delisle, supra* note 8 at para. 33.

of its protection. In this way, the LRA was found to "safeguard" the freedom of association, and so the Court held that the Ontario government would have to extend the labour relations regime to the appellant agricultural workers.[51]

LESSONS FROM *DUNMORE*

In *Dunmore*, none of the usual rules of *Charter* adjudication applied. The *Labour Trilogy* should have led the Court to adopt a deferential approach to the LRESLAA and the LRA, since these were labour laws that engaged political, social and economic issues. *Edwards Books* should have led the Court to apply a relaxed *Oakes* test when the section 2(*d*) violation was found, since the acts were aimed at the protection of a vulnerable group; *Thomson Newspapers* reinforced that principle. Certainly *Delisle*, which paralleled *Dunmore* so closely, should have led the Court to decline even to recognize a *Charter* violation; at the very least, it suggested that there would be no positive state obligation attached to section 2(*d*). But instead, the Court in *Dunmore* acknowledged a breach of section 2(*d*), then applied a strict *Oakes* test which led it to conclude that the Government of Ontario was compelled to redress this breach through inclusive legislation. What can account for the departure?

The answer is that none of the adjudicative tools discussed above are equipped to deal with a situation where the impugned legislation, enacted to protect a vulnerable group, effectively strips the *Charter* rights of the group which has been excluded in order to achieve the desired result. For all the Court's discussion of "vulnerable groups" and *Charter* protection, its principal focus has — until now — been on the group protected rather than on the group excluded. One could argue that a consideration of the relative status of groups left out of protective legislative regimes is addressed by the "deleterious effects" portion of the section 1 proportionality review, but that would assume that the Court (a) adopted a sufficiently stringent analysis of the legislation to reach the section 1 stage, and (b) adopted a similarly stringent *Oakes* test at that stage. However, the Court favours deference in the face of protective legislation, so the "deleterious effects" test will not be enough to protect vulnerable groups whose *Charter* rights have been infringed by these types of laws.

In this way, *Dunmore* can be seen as giving the Court a new tool of *Charter* adjudication, one that considers the vulnerability of groups left out of protective regimes as well as of those whom governments seek to protect. *Dunmore* stands for the proposition that the Court will take a holistic approach when reviewing protective legislation, and will not defer to governments when the fundamental freedoms of vulnerable groups are at stake. Moreover, *Dunmore* has illustrated that *Charter* rights are, under certain circumstances, positive ones which in turn require positive state action in order to safeguard them. As we embark on the next twenty years of *Charter* jurisprudence, we can expect that *Dunmore* will have an important role to play.

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[51] *Dunmore*, *supra* note 1 at para. 67. In prescribing this remedy, the Court neither required nor forbade the inclusion of agricultural workers in a full collective bargaining regime. The *Labour Trilogy* had previously established that the scope of section 2(*d*) did not include the rights to strike and bargain collectively.

THE ISRAELI CONSTITUTION AND THE FIGHT AGAINST TERRORISM

Ariel L. Bendor

INTRODUCTION

The obvious security difficulties in Israel also carry problematic political, economic and social consequences. The unique Israeli condition — as a young democratic state, whose mere existence is still not self-evident to all — also has legal implications. In Israel, the law and the courts of law are often involved in resolving political issues, including issues pertaining to foreign and security policy. This involvement is more intensive in Israel than in many other democracies.[1] That is why one might be interested in comprehending some legal aspects, especially those of constitutional law, that are present in the background of Israeli reality.

In this article I will discuss two issues which are at the centre of the legal and political Israeli agenda. The first issue is the unique Israeli Constitution. The mere existence of a constitution in Israel is controversial.[2] In this sense, the situation in Israel is idiosyncratic. I do not know of any other comparison. The other issue is the legal rules pertaining to the fight against terrorism, especially the relevant constitutional limitations. The two issues are obviously closely linked, in ways which I will try to illuminate by using some examples.

I

Some years ago, while visiting Canada, I told a Canadian friend that I taught constitutional law in Israel. My friend was surprised and asked: "Is it possible to have constitutional law in Israel, a state which does not have a constitution?" And the answer then — more than ten years ago — was that although Israel does not have a formal document titled "Constitution," Israel does have material constitutional law. Indeed, since its establishment in 1948, the prevailing Israeli master-narrative had been that Israel does not have a formal constitution, but rather material non-superior legal rules in constitutional matters. This narrative had crucial influence on the interpretation given to Isreal's "founding documents." The lack of "Constitution" narrative has gained a strong hold on the Israeli political and legal discourse.

But if my friend had asked the same question today, I would say that the question was based upon a popular fallacy. In many significant ways, Israel does have a formal written constitution, although unique in its nature and still not known by a large portion of Israeli citizens and even politicians. The old narrative has been subjected to a process of change over the last decade. In order to understand this, I will elaborate at least part of the relevant historical background.

The Israeli Declaration of Independence was accepted in May 1948, by a body called the "State Temporary Council." The Declaration itself did not presume to be the Constitution of Israel, but it stated a date for the election of a Constitutional Assembly that was supposed to compile Israel's Constitution. This Assembly was elected in 1949. It also took upon itself the powers of a legislature, and changed its name to the "First Knesset."

A dispute arose as to whether a constitution was desirable. The constitution opponents, headed by David Ben-Gurion, Israel's first Prime Minister, claimed that at that stage, when the young state was struggling with the prospect of millions of immigrants expected to arrive in the coming years, establishing a constitution with the current population would not be fair. Beyond that, at that time constitutional judicial review did not enjoy the best of reputations. Ben-Gurion, who was

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1 See Ariel L. Bendor, "Investigating the Executive Branch in Israel and in the United States: Politics as Law, The Politics of Law" (2000) 54 U. Miami L. Rev. 193 at 232–34.

2 See Ruth Gavison, "The Controversy over Israel's Bill of Rights" (1985) 15 Isr. Y.B. Hum. Rts. 113; Daphne Barak-Erez, "From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective" (1995) 26 Colum. H.R.L. Rev. 309.

aware of the famous American *Lochner*[3] trauma, was reluctant to subject the government to judges. As a result, the Constitutional Assembly, at that time known as the First Knesset, reached a compromise, called the "Harrari Decision" of 1950.[4] In this decision it was written:

> The First Knesset is appointing its Constitution, Statutes and Law Committee to prepare a proposal of Constitution for the State. The Constitution will be composed chapter by chapter, so that every chapter will be considered a Basic Law by itself. The chapters will be brought before the Knesset when the Committee will finish its task, and the chapters altogether will be compiled into the Constitution of the State.[5]

At first, over almost eight years, nothing had been done according to the Harrari Decision. Later, and gradually, the Knesset enacted eleven Basic Laws.[6] These Basic Laws deal with almost all of the significant constitutional issues, such as the main branches of government and a great portion of basic human rights and civil liberties.

II

The Basic Laws were considered for many years to be regular statutes. The Knesset amended them or deviated from them through regular parliamentary statutes. Indeed, in four cases the Supreme Court declared void Knesset statutes that deviated from the electoral system set forth in *Basic Law: The Knesset* enacted without the special majority required in the *Basic Law*. Yet, the Court didn't accompany this decision with any substantial reasons. The issue of the Basic Laws' legal status remained rather peripheral until the beginning of the 1990s. I recall that when I started teaching Constitutional Law not much more than a decade ago, my syllabus included only one or two cases pertaining to this issue, and even those cases were intended for self-study.

Only few years later, a typical Israeli syllabus on Constitutional Law includes a considerable number of sources on the Basic Laws. Currently, Basic Laws are interpreted and applied by the courts on a daily basis as chapters of a constitution, and are used as a basis for judicial review. The Supreme Court has declared void statutes which contradict Basic Laws in eight cases thus far.[7] Many, and among them the Israeli Chief Justice, Aharon Barak, go even further, stating that Israel does have a formal constitution, and that the Basic Laws are it.

III

The trigger for this evolution — the "Constitutional Revolution" in Barak C.J.'s famous,[8] some would say notorious, idiom — was two Basic Laws on civil liberties enacted by the Knesset in 1992: *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation*. These Basic Laws explicitly purport to limit the power of the Knesset to violate the rights and liberties anchored therein through regular statutes. Since issues connected to civil liberties arise quite often, the courts had no choice but to decide whether a violation of these Basic Laws was a cause for judicial review.

Yet, the Supreme Court of Israel, while discussing cases related to the new Basic Laws on human dignity and liberty and freedom of occupation, based its decisions on constitutional theory relevant to Basic Laws as such. The Court ruled that the Knesset enacts Basic Laws through its authority as the Constitutional Assembly, a power the Knesset has held since 1949. As a result, only Basic Laws can amend Basic Laws, and regular parliamentary acts cannot deviate from norms anchored in Basic Laws.

The Knesset can amend Basic Laws by using the same procedure as that for amending regular statutes, and most of the Basic Laws can be changed by an ordinary majority of the participating Knesset members. Even the Basic Laws that require a special majority for amendments suffice with a majority of Knesset members, which is sixty-one out of 120 members, a requirement that is not difficult to comply with. However, in practice the Knesset does not take

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3 See *Lochner v. New York*, 198 U.S. 45 (1905).

4 *Harrari Resolution* (13 June 1950), from the First Knesset debates.

5 *Ibid*.

6 These Basic Laws are: *Basic Law: The Knesset* (1958); *Basic Law: The Lands of the State* (1960); *Basic Law: The President of the State* (1964); *Basic Law The Government* (originally 1965; the current version, 2001); *Basic Law: Economy of the State* (1975); *Basic Law: The Army* (1976); *Basic Law: Jerusalem the Capital of the State* (1980); *Basic Law: The Judicature* (1984); *Basic Law: The Comptroller of the State* (1988); *Basic Law: Human Dignity and Liberty* (1992); and *Basic Law: Freedom of Occupation* (originally 1992; the current version, 1994).

7 See HCJ 98/69 *Bergman v. Minister of Finance*, 23(1) P.D. 693; HCJ 246/81 *Derech Erets Association v. The Broadcasting Authority*, 34(4) P.D. 1; HCJ 141/82 *Rubinstein v. Chairman of the Knesset*, 37(3) P.D. 141; HCJ 142/89 *L.A.O.R. Movement v. Chairman of the Knesset*, 44(3) P.D. 529; CA 6821/93 *Hamizrahi Bank v. Migdal*, 49(4) P.D. 221; HCJ 6055/95 *Tsemach v. Minister of Defense*, 53(5) P.D. 241; HCJ 1030/99 *Oron v. Chairman of the Knesset*, 56(3) P.D. 640; HCJ 212/03 *Herut v. Chairman of the Central Election Committee*, 57(1) P.D. 750.

8 The first appearance of the "Constitutional Revolution" was in a title of Barak C.J.'s article: see Aharon Barak, "The Constitutional Revolution: Protected Human Rights" (1992) 1 Mishpat Umimshal (U. Haifa L. & Gov't J.) 9 (Hebrew).

advantage of this easy possibility to change Basic Laws in order to bypass judicial review.

IV

As I mentioned before, the Basic Laws on human rights limit the Knesset's power to restrict the rights set out in them by regular statutes. Those rights are the right to life; to bodily safety and to human dignity; the right to liberty from imprisonment, detention, extradition and any other violation of liberty; the right of every person to leave the country and the right of citizens to get in; various rights to privacy; and freedom of occupation. Indeed, this list is not inclusive of all rights, but the Supreme Court's inclination has been to interpret the right to human dignity broadly, and as including central aspects of rights such as free speech and equality. In any case, rights that are not mentioned in one of these two Basic Laws are considered part of Israel's material constitution, and are entitled to judicial protection that in fact grants them a similar amount of protection to the protection given to the rights set out in the Basic Laws.

Indeed, basic rights — whether enumerated in Basic Laws, regular statutes or the Israeli common law — are not absolute. But limitations of them must comply with the requirement, inspired by section 1 in the *Canadian Charter of Rights and Freedoms*,[9] set out in the "Limitation Clause." This clause reads:

> The rights conferred by this Basic Law shall not be infringed save where provided by a statute which befits the values of the State of Israel, intended for a proper purpose, and to an extent no greater than required, or under an aforesaid statute by virtue of an explicit authorization therein.[10]

The last requirement, "an extent no greater than required" — a proportionality requirement — is the focus of the clause, and usually the law-makers, including the courts, put it at the centre of their analysis. This requirement was interpreted by the Israeli Supreme Court as including three sub-requirements. First, limiting a right must be compatible with the purpose it is degisned to achieve; that is, it must be rational. There is no room to limit basic constitutional rights if the limitation does not assist in achieving the public purpose that the authority seeks to achieve. Second, the limitation must be as minimal as possible in order to achieve the purpose. Third, there must be a reasonable proportion between the importance of the purpose and the severity of the limitation of the right. It is not permissible to severely violate an important right in order to achieve a public purpose with a limited importance.

This brings us to the question of fighting terrorism and the relation between this battle and human rights, as well as to the Basic Laws that entrench those rights. Fighting terrorism entails limiting human rights. On the face of it, limiting human rights should be practiced according to criteria set out in the Basic Laws, especially in the limitation clause. But that matter is not so simple. There are various reasons.

V

One difficulty stems from the fact that in Israel a significant portion of the fight against terrorism takes place in the occupied territories, which are not part of Israeli sovereignty. The law of Israel is not supposed to be applied in those territories, and Israel's courts are not supposed to adjudicate issues concerning them. Yet, in fact, the situation is different. The Israeli Supreme Court, sitting as the High Court of Justice — that is, Israel's central court in matters of constitutional and administrative law — deals routinely with petitions of occupied territory residents and those of others against the Israeli army. The Government of Israel — probably in order to gain legal, public and even international legitimacy — has never denied the authority of Israeli courts to deal with those petitions. The legal basis for this adjudication is that the army is an Israeli government authority, and as such is subject to Israeli courts even when operating outside the borders of the state. Indeed, the primary legal norms that bind Israeli authorities in the territories are those of international law. However, as an Israeli authority the army — even when acting in the occupied territories — is bound to the principles of Israeli constitutional and administrative law, while taking into account the situation of occupation and the security interests of Israel.

VI

Another issue pertains to the extent of the courts' involvement in the fight against terrorism. Unlike the situation in many other countries, the courts in Israel hardly acknowledge any limitation on judicial review — not of non-justiciable "political questions," and not of standing. Petitions against security acts of the authorities, including acts that are taken in the fight against terrorism, are essentially dealt with by the courts.

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[9] *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11.

[10] *Basic Law: Human Dignity and Liberty*, s. 8. See also *Basic Law: Freedon of Occupation*, s. 4.

And indeed, the dilemmas embedded in the relationship between democracy and the battles against terrorism are commonly presented through an institutional prism, which expresses a realistic legal outlook. The question that is often asked, both in Israel and in other countries, is, "What are the limits of the judicial intervention in the anti-terror policies of the government, the army and other national security entities?" To be more precise, the question is, "How should or could courts limit the means that other agencies employ in fighting terror?" Indeed, experience proves that although security authorities are purportedly responsible for protecting and preserving all aspects of democracy, including not only its existence but also those aspects concerning human rights, in reality the authorities are inclined, and not only in Israel, to favor security interests. This is particularly evident during emergency periods, when protecting human rights seems to those authorities to be subordinate to their responsibility to the physical existence and security of the citizens and residents of the state. This treatment can be explained not only by the fact that the government in a democratic state is accountable to the public, and the public itself tends during such times toward a rigid and uncompromising stance that favours national security, but also by the fact that security authorities are usually experts only in security. They consider themselves responsible for achieving optimal security while human rights considerations are, from their point of view, even if they are taken into some account, only "external" constraints. On the other hand, the court is actually the dominant guardian of human rights, at least in emergency times, and its role is to balance human rights and security considerations, and to ensure that the security considerations do not override human rights.

This realistic perception, maintaining that balance between the needs of the fight against terrorism and other constitutional principles, especially human rights, is applied primarily by the courts, is only partly a faithful description of reality. The actual situation — institutionally and substantially — is far more intricate. I would like to offer several examples. Each example illustrates a different aspect of this intricacy.

VII

One example deals with the legitimacy and constitutionality of using physical force by interrogators against suspected terrorists. Several years ago the Israeli Supreme Court granted an application against such measures because the interrogators were not authorized by law to take them.[11]

Nonetheless, the judgment states that the Court refrains from expressing an opinion as to what its decision would be if the Knesset were to enact a statute explicitly authorizing physical pressure in certain interrogations, for instance, in "ticking bomb" situations where an immediate danger to life exists should the terrorist withhold information. But when the issue came up, the Knesset rejected a proposition to enact such a statute. The reason for the rejection, apart from the moral dilemma, was mainly the fear that the statute would not comply with the constitutional demands of the *Basic Law: Human Liberty and Dignity*, and that such a statute might be damaging in the international arena.

Indeed, in practice, the influence of the human rights Basic Laws has not materialized through nullification of statutes by the courts — a step that has been rarely taken — but through restraint on the part of the Knesset from enacting unconstitutional laws. The Knesset has a legal advice mechanism for constitutional issues, and in almost every case in which the legal advisers have had doubts about the constitutionality of a suggested law, the Knesset has refrained from enacting it.

VIII

In certain cases in which the Court based its decision upon an existing law, the Knesset chose to amend the law after the decision. An example of this is the case of the administrative detention of about fifteen people — some of them members of terrorist organizations — captured by Israel in Lebanon in order to facilitate the negotiation for the release of Israeli captives, among them Ron Arad.[12]

The Israeli Supreme Court, in a further hearing, and after the Chief Justice changed his mind, annulled the detention, stating that detention of people for the sake of bargaining when the detainees do not create direct security risks is not permitted by the existing law.[13] In light of this judgment, most detainees were released. Two of them — senior members of Lebanese terrorist organizations — remained in custody after the

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[11] See HCJ 5100/94 *Public Committee against Torture v. Government of Israel*, 53(4) P.D. 817.

[12] Ron Arad was a navigator in the Israeli Airforce when he was captured by the Amal Militia on 16 October 1986.

[13] See CAH 7048/97 *John Doe et al. v. Minister of Defense*, 53(1) P.D. 721.

Knesset enacted the new statute, which validated the detention of members of terrorist organizations.[14]

IX

An interesting case that emphasizes the fact that a court will not always weigh human rights more heavily than security interests is a petition currently pending before the Israeli Supreme Court. The petition seeks to reverse judicial orders to prevent publication of material that endangers the security of the state and to direct such material to the military censor, an army officer. It seems that judges, who are reluctant to assume responsibility for endangering security through the publication of information, comply with almost all requests to order publication bans that stem from security concerns. In comparison, the military censor has a more controlled attitude, and prevents publication only in cases in which there is a concrete reason to believe with certainty that the publication will cause a security problem.

X

There has been frequent criticism claiming that the percentage of granted petitions submitted by residents of the occupied territories is considerably lower than the percentage of granted petitions submitted by Israeli citizens. It may be claimed that this fact illustrates the subordination of the Israeli Supreme Court to governmental security policy, even when this policy is barely legal. But it seems that such a depiction would not be very accurate because the percentage of petitions submitted by occupied territory residents who fully or partly achieve their purpose is higher than the parallel general percentage.[15] The reason is that in many cases the state, before the matter reaches a judicial determination, accepts the demands of the residents, sometimes after mediation by the judges. There are also cases in which the petition is formally rejected, but the court includes in its decision instructions that practically give way, at least partly, to the requests of the petitioners.

CONCLUSION

In spite of all this, the situation is far from being ideal. In certain issues, for instance, those concerning expulsion or demolishing houses of terrorists' families, there are doubts as to whether the rulings of the Israeli courts are compatible with international law, or even with some of Israel's own constitutional laws.[16] Yet the judicial involvement, even in questions of the struggle against terrorism, is of assistance.

There is a well-known saying that when the cannons speak, the Muses are silent. This statement does not reflect the Israeli attitude. Constitutional law, like law at large, is unable to solve all problems, but can, and actually is, to be of some important use.

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[14] See *Imprisonment of Illegal Fighters Act*, 2002.

[15] See Yoav Dotan, "Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada" (1999) 33 L. & Soc'y Rev. 319.

[16] See D. Kretzmer, *The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002).

THE AFFAIR OF THE CHAIRS

David E. Smith

Early in November 2002, a political tremour shook Parliament Hill — fifty-six Liberal MPs voted against the will of their leader and with the opposition parties in the House of Commons. At issue was a Canadian Alliance motion to change House rules to allow chairs of committees to be elected by secret ballot. Purple prose and fervid speculation followed: Had the unthinkable happened and the Prime Minister "lost control of his caucus"? What did the future hold now that his caucus had "tasted blood"? How much of a personal humiliation was the vote for Jean Chrétien, and was it enough of one to cut short his interminable long goodbye? Or, was it evidence that the official opposition had coalesced sufficiently after its own leadership turmoil to carry through a successful divide and conquer mission? Could more of the same strategy be expected?[1]

It was inevitable that the episode of the chairs, with its mixture of opposition intrigue and Liberal caucus disloyalty, should rivet the media's attention. But it was equally predictable that they should equivocate when it came to interpreting its significance. Predictable because, as this article will argue, like politicians and the public, the media are inconsistent in the position they take regarding the place of party discipline in legislative politics. Nonetheless, in this instance a ready excuse for uncertainty presented itself. The results of the first committee elections using the secret ballot rather than the customary voice vote saw two Bloc Québécois MPs, two Tories and one New Democrat replace five Canadian Alliance MPs, who had previously served as vice-chairs of Commons committees. (Under House of Commons Standing Order 106, each committee has two vice-chairs, one drawn from the governing party and the other from the opposition.) By contrast, all those expected to be appointed as chairs of the Commons standing committees, that is, Chrétien's previous choices, were elected.

What kind of disobedience is this, to tweak the king's nose in public but do his bidding in private? Is it anything more than an attention-getting device; and whose attention is being sought? A month after the revolt, the president of Ipsos-Reid said the Liberal majority government was "governing like a minority" in that its opposition "comes from within."[2] The chairs affair lends support to his claim, for the significant feature of the disloyalty was its isolation. Even if it were to reappear, it would remain internal to the Liberal caucus. In this drama the opposition parties are destined to remain supporting players.

Is the ferment in the governing caucus symptomatic of some fundamental problem in the party, or Parliament, or both? At one level, the answer to that question is easy. Yes, there is a deep concern about the shadow Jean Chrétien casts over all parliamentary activity. Instances that could be cited in addition to the selection of committee chairs are the extended ethics controversy — be it about contracts, the role played by the current counsellor (Howard Wilson) or of a new guardian in the form of an Officer of Parliament; or the proposed stringent limitations on political donations; or the intrusiveness everywhere of the office of the Prime Minister, captured in Paul Martin's aphorism, "Who do you know in the PMO?"[3] Here, say critics, are the ingredients of "executive dictatorship." This is an extreme charge but increasingly heard even in

[1] For a sample of newspaper comments, from which these quotations are taken, see Bill Curry, "56 Liberals Rise Against PM" *National Post* (6 November 2002) A1; Andrew Coyne, "Once They've Tasted Blood" *National Post* (6 November 2002) A1; Jane Taber, "Backroom Bid for Solidarity Fails to Rally MPs to Cause" *Globe & Mail* (6 November 2002) A4; and Paco Francoli & Mike Scandiffio, "Liberal Caucus Grievances Animated by Atmosphere" *The Hill Times* (4 November 2002) 661.

[2] Joe Paraskevas, "Liberals' Opposition comes from within" *Star-Phoenix* (7 December 2002) A1. Paul Martin, the front-runner in the race to succeed Jean Chrétien, used the same language, although in denial: "I am not about to become the Leader of the Opposition" in Anne Dawson, "Martin Vows to Support Chrétien" *National Post* (31 January 2003) A7.

[3] Paul Martin, "The Democratic Deficit" (December 2002–January 2003) 24:1 Policy Options 10 at 11 (extract from speech on parliamentary reform and public ethics, Osgoode Hall, York University, Toronto, 21 October 2002). The most cited work on the PMO is Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

established quarters and iconically expressed, for instance, in the doctored photograph of a smiling Jean Chrétien, in generalissimo's uniform, that graces the cover of Jeffrey Simpson's *The Friendly Dictatorship*.[4] Yet, there is no shortage of descriptions of autocratic tendencies on the part of every Prime Minister. For instance, order-in-council appointments, which are an example of the exercise of *real* prerogative power as opposed to the selection of committee chairs, have generated strong criticism of the last three Prime Ministers.

The "decay," or "demise," or "decline" of Parliament is nowadays an editorial staple, comprised of critiques of the plurality electoral system (parliamentary representation of political parties is mathematically "unfair" because the number of seats won is not proportionate to the number of votes won); the appointed Senate, which is decried as triply "unfair" because its members are appointed on prime ministerial advice alone — their numbers ranging from four to twenty-four per province — and, whatever the numbers and however selected, a chamber unable to hold the government to account; and the practice of party discipline which stifles free expression of opinion and participation by members of Parliament and thus perverts representation of the people. Criticisms of the electoral system and of an unelected Senate are relatively recent additions to the bill of indictment. By contrast, party discipline and variations on that theme, such as quarrels with the confidence convention, are seasoned topics, never more forcefully advanced than by the Progressives of the early 1920s.[5] Three-quarters of a century later, in his farewell address as an MP, Lee Morrison of the Canadian Alliance described the House as "a totally dysfunctional institution," "a rubber-stamp Parliament" composed of "irrelevant, ministerially guided committees." The *National Post* used the occasion to print an editorial on the "decay of Parliament" and to run a week-long series of articles under such titles as "Putting the Whips in Chains: MPs want greater role," "Constituency contact helps Grit endure job's drudgery," "A recipe for change: MPs and political observers suggest ways to revive a Cabinet-dominated Parliament," "Backbenchers fight back," and "No room for dissent."[6]

What is to be made of the longevity of a complaint about executive dominance whose source lies in the personal submission of legislators to the party whips? Does the discontent actually run so deep that its continuous expression is inexhaustible? Or, despite the echo of outrage, do the current attacks on elected dictatorship mark the resurrection of another, long-quiescent campaign to reform government by removing party politics altogether? Or is it, as Peter Aucoin has argued, a sign of "implicit acceptance of republican ideals [by which he means balanced constitutional arrangements] as the standard of conduct in parliamentary government"?[7] Certainly, there is evidence to support these different interpretations. Still, the fact remains that they are different, even contradictory, in their diagnoses of Parliament's problem and in their prescriptions for change. What they share is antagonism toward the executive. On the one hand, they deny a strong executive, which is the tradition of Parliament most admired by outsiders and, on the other, the benefits of party government, which has long been the envy of foreign observers.[8] But unity in what is opposed seldom assures clarity in its alternative.

Common to these interpretations is the element of reaction — MPs must act in order to staunch their institution's decline; something must be done to check the executive! The history of rules reform communicates this mood, although perhaps more gloomily than most parliamentary initiatives, since its inevitable sequel is a periodic audit that demonstrates how ineffectual rule changes are on the conduct of governments. Inevitably too, since executives in parliamentary systems continue to dominate, expectations are dashed, frustration mounts and institutional malaise spreads. More than that, expectations of what is required to make change happen grow still more inflated. Early in 2003, the author of a full-page letter to Liberal members of Parliament,

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4 Michael Bliss, "Southern Republic and Northern Dictatorship" *National Post* (6 September 2002) A18. Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland & Stewart, 2001).

5 See Robert MacGregor Dawson, ed., *Constitutional Issues in Canada, 1900–1931* (London: Oxford University Press, 1933) c. 4, s. 3; and Anthony Mardiros, *William Irvine: The Life of a Prairie Radical* (Toronto: J. Lorimer, 1979).

6 "Decay of Parliament," Editorial, *National Post* (14 February, 2001) A15; Sheldon Alberta, "Putting the Whips in Chains: MPs want greater Role" *National Post* (14 February 2001) A15; Jane Taber, "Constituency contact helps Grit endure job's drudgery" *National Post* (12 February 2001) A12; Robert Fife, "A recipe for change: MPs and political observers suggest ways to revive a Cabinet-dominated Parliament" *National Post* (17 February 2001) A12; Christopher Moore, "Backbenchers fight back" *National Post* (13 February 2001) A16; Luiza Chwialkowska, "No room for dissent" *National Post* (15 February 2001) A14.

7 Peter Aucoin, "Accountability: The Key to Restoring Public Confidence in Government" (The Timlin Lecture, University of Saskatchewan, 6 November 1997) at 1. On the removal of partisan politics see John English, *The Decline of Politics: The Conservatives and the Party System* (Toronto: University of Toronto Press, 1977).

8 Woodrow Wilson, *Congressional Government: A Study in American Politics* (Boston: Houghton, Mifflin, 1885) at 298, 310; American Political Science Association, *Toward a More Responsible Two-Party System: A Report* (New York: Rinehart, 1950); Austin Ranney, *The Doctrine of Responsible Party Government: Its Origins and Present State* (Urbana: University of Illinois Press, 1962).

which appeared in the *National Post*, recommended, along with fixed election dates and free votes in Parliament on all bills except for budgets, non-confidence and key government policy initiatives, the introduction of "a two-term limit for future Prime Ministers."[9]

If there is one feature that stands out in this analysis of Parliament's problem, it is its circularity — the same problem (the executive), the same solution (more power to the MPs), the same outcome (stasis). From all sides Canadians are told their political system fails them. The political executive and bureaucracy are depicted, at least at the national level, since not much is said about the quality of provincial politics, as a cabal organized against the public interest. At the same time, members of Parliament present themselves as, in Aucoin's words, "hapless victims" who could do much more for Canadians if only given the resources. It may, however, be profitable to look at the matter from another direction, rather than asking what is to be done with the political executive, ask instead, what is the role of Parliament? True, there is always a danger of over-interpretation when ascribing significance to one event; but the chairs affair is not a single datum. Rather, it is symptomatic of Parliament's mood and behavior — indeed, of national legislatures in several countries. The explanation for what is happening in Canada's Parliament today goes beyond the narrow executive-centred interpretation so often favoured. If that were the root cause, why would criticism not have been heard long before now, and why (if parliamentary ways are the cause) is criticism so muted in the provinces?

The short answer to these questions is that national legislatures in the past did not feel the same need to justify themselves. Now, in Ottawa (and London, and Canberra), the justification of Parliament proceeds apace. A number of reasons for this development might be suggested. Reaction to executive dominance is one, but there is another which, while related to concern about the executive, has a different emphasis — to demonstrate that legislatures work and that the work they do is good. A new book on the Canadian Senate, edited by Senator Serge Joyal, fits this description. So too does Robert Dahl's recent work, *How Democratic Is the American Constitution*? Although in one respect a jeremiad, part of Dahl's thesis is that Congress is good and can be still better. In Great Britain, Damien Welfare has argued that during the years of Margaret Thatcher, the House of Lords, despite the predominance of Tory peers, acted as an effective defender of local authorities and an unexpected adversary of the national government.[10] Another reason for justification is that legislatures today, as opposed to the past, have competitors, be they the courts and the *Charter*, a revived enthusiasm for direct democratic mechanisms (plebiscites, referenda, and recall), or the attraction of social movements, usually international and frequently global in reach and organization. Elected parliamentarians are determined to show that they are not the nobodies Pierre Trudeau said they were, a stigmata that has proved hard to erase thanks to the media's long-term memory.

But who are they, and what should they do? There appears to be growing uncertainty, not least among the members themselves, over the answer to this question. But uncertainty should not be confused with inaction. Whether in the constituencies or in the House, MPs today, when compared to their predecessors, are models of purposeful employment. Gone are the benign days of Louis St. Laurent, for example, when Members had few resources, travelled little and corresponded infrequently with their constituents. In Ottawa, says one close observer, "members of Parliament have come to devote major portions of their time to providing assistance to individual constituents."[11] David Docherty, whose book *Mr. Smith Goes to Ottawa* is subtitled *Life in the House of Commons*, goes even further: "MPs," he says, "have come to see constituency service as a primary role."[12]

The time and resources devoted to the home front and away from the parliamentary arena might be seen as a cost. The late Alan Clark, a former Thatcher minister in Great Britain, so viewed it and gave it a name — "democratic overhead."[13] The cost is particularly steep in Canada, where constituents appear to have a different view of the significance of constituency work. "While it is valued by those who receive it, it has only limited influence in getting a

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9 T. Caldwell, "Letter" *National Post* (25 January 2003) B12.

10 Senator Serge Joyal, ed., *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal & Kingston: McGill–Queen's University Press, 2003); Robert A. Dahl, *How Democratic Is the American Constitution?* (New Haven: Yale University Press, 2002); Damien Welfare, "An Anachronism With Relevance: The Revival of the House of Lords in the 1980s and Its Defence of Local Government" (1992) 45:2 Parliamentary Affairs 205.

11 Library of Parliament, Political and Social Affairs Division, *The Roles of the Member of Parliament in Canada: Are They Changing?* (Ottawa: Library of Parliament, Research Branch, 2002) at 10.

12 See David Docherty, *Mr. Smith Goes to Ottawa: Life in the House of Commons* (Vancouver: University of British Columbia Press, 1997) c. 7.

13 Alan Clark, *Diaries* (London: Phoenix Giant, 1993) at 120; see also Philip Norton & David Wood, "Constituency Service by Members of Parliament: Does It Contribute to A Personal Vote?" (1990) 40:2 Parliamentary Affairs 196.

Member re-elected."[14] To this paradox might be added the irony that nothing the MP does by way of constituency service has anything particular to do with Parliament, and it could be done, in a less personal manner perhaps, by a bureaucrat.

Constituency labours apparently do not occur at the expense of Chamber activity. Peter Milliken, now Speaker of the House of Commons, maintains that "the role and importance of committees in the House of Commons has increased dramatically over the past 20 or 30 years."[15] Contrary to the thesis much discussed in the 1960s that legislatures were in decline, there has been "a world-wide growth of parliamentary committees."[16] While this reversal may be a matter of quantitative record — number of committees, frequency of their meeting, size of membership — and of qualitative evaluation — disposition of recommendations, public and media response to committee reports — the phenomenon requires explanation because it runs counter to the thesis of an ever-expanding and more powerful executive.

At first glance, Parliament's rehabilitation appears counterintuitive. The communications revolution, that is, the Internet and the transformation of knowledge, has irrevocably altered the relationship between government and Parliament on one hand and the public (or publics, if the kaleidoscopic diversity of the modern polity is to be acknowledged) on the other. Indeed, it is this transformed condition between leader and led which some observers say explains, first, the "revolt of the voting classes" — lower turnout, less confidence in government and a decline in political party loyalty and second, the power of social movements to set the political agenda. As a result, "citizens now have an active marketplace of participation in which to shop."[17] "Marketplace" is a peculiarly apt description, because social movements enter or leave the political arena at their own choosing; they are movements in both senses of that term. Here, surely, is a recipe for the disintegration of the familiar institutions of politics. And yet the challenge to Parliament that these developments present has elicited a compensatory response. Turning their backs upon their tradition as generalists, members of Parliament seek, through the avenue of standing committees, to become specialists and to speak with authority on the issues that resound through Parliament and which are dominated by expert bureaucrats and academics, interest groups and scientists. It is this context that frames the familiar plea heard from MPs, of which the following is representative: "If the committees had more independence from the government, from the executive of cabinet, would it not be more beneficial for legislation and for the feeling that we are here for a purpose and with the ability to do something more than to be a talk shop or to have busy work going on in committees?"[18]

Arthur Kroeger, a former long-time senior civil servant, has said that "modern communication technologies … not only increas[e] the public's understanding of political issues but … whe[t] their appetite for more meaningful involvement."[19] The first part of that proposition needs testing as well as modification. There is much evidence to suggest, not surprisingly, that public understanding of issues varies according to their complexity. Involvement is another matter. The consequence of the Internet, which is to annihilate distance, will be in Kroeger's words, "similar to that of the extension of the franchise in the nineteenth century." Members of Parliament need specialist knowledge not only to hold their own against a proliferation of experts (among whom, for the purpose of this discussion, should be included the occupants of the PMO) but also to respond to an aroused citizenry. The last word is important because specialist MPs speak not on behalf of the voters in the constituency they represent in the House but on behalf of individuals, wherever located, whose particular interests or concerns the MP articulates as a member of the standing committee.

The difference is important since committee members see themselves as formulators of public policy. "Liberal MP Reg Alcock … said policy making should be in political hands because MPs are accountable."[20] If that is too presumptuous, then they see themselves at least as contributors to policy formation. Once that perspective gains hold, the party whip chafes indeed. The whip in question is wielded

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14 *Supra* note 11 at 11.

15 Peter Milliken, "The Future of the Committee System," in Gordon Barnhart, ed., *Parliamentary Committees: Enhancing Democratic Governance* (London: Cavendish Publishing, 1999) at 82–95.

16 Lawrence D. Longley & Roger H. Davidson, "Parliamentary Committees: Changing Perspectives on Changing Institutions," in Lawrence D. Longley & Roger H. Davidson, eds., *The New Roles of Parliamentary Committees* (London: Frank Cass, 1998) at 1.

17 J. Richardson, *The Market for Political Activism: Interest Groups as a Challenge to Political Parties* (San Domenico: European University Institute, 1994), quoted in Arthur Lipow & Patrick Seyd, "The Politics of Anti-Partyism" (1996) 49 Parliamentary Affairs 276.

18 *House of Commons Debates* (4 October 2002) at 329 (Dick Proctor).

19 Arthur Kroeger, "How to Keep Parliament Relevant," in *The Eclipse of Parliament? The Concentration of Power in Canadian Politics* (Ottawa: Canadian Study of Parliament Group, 26–27 November 1999) at 1.

20 Quoted in Kathryn May, "MPs, Bureaucrats Vie for Power" *Star-Phoenix* (8 October 2002) A10.

most obviously within the governing party, since the opposition party retains the luxury of criticizing discipline on the other side of the House — where the concern is to pass legislation through the Chamber — and at the same time voting in opposition to the government. The emergence of a committee culture, that is, the belief in legislative participation on policy-making, raises serious implications for the way the House works. First, it assumes what cannot be assumed — that MPs know what the public wants and that they can transmute this knowledge into policy. The logic of that assumption depends at the very least upon there being a congressional system, as in the United States, where, in the words of Preston Manning, there is a "political marketplace" in which popular support is mobilized "to force [ideas] higher and higher on the political agenda," and where it is "necessary to build and maintain coalitions across regional and party lines."[21]

Even when that condition is met, there is no assurance that the *vox populi* will be clear, or that varied interests will not result in a "cacophony of voices," since "Office holders cannot '*re*present … until the public *presents*.'"[22] What kind of consultation is necessary? If there is extensive deliberation and discussions, ultimately some choice and some refinement of what is heard must follow. A recent example of the problem of contradictory messages can be found in the challenge posed by some western grain farmers to the Canadian Wheat Board. Late in 2002, thirteen farmers were jailed for refusing to pay fines incurred after they sold wheat in the United States outside the marketing scheme established by the Board. They depicted their action as civil disobedience in the face of a government sanctioned monopoly. Certainly, their grievances were shared by others, but how many others? Uncertainty as to the answer deepened when, the same month, grain farmers in CWB elections voted in four of five directors committed to maintaining the Board's monopoly.[23]

Conflicting opinions are a fact of life; more particularly, they are a feature of political life that complicates the act of representation. The Wheat Board controversy is relevant in the current discussion as an example of the potential for contradictory positions to arise even within one relatively homogeneous group. It is unusual, however, in that the expression of opinion proved so categorical — go to jail in the one instance; vote for those Board candidates who support or oppose the status quo in the other.

Normally, choices in politics are not so stark, which may explain the confusion parliamentarians seem to display about their role and that of Parliament. The Manning view (and now the position of the Canadian Alliance) demonstrates a profound unease with the principle of representation. More than that, there is a suspicion of government and of political parties and, further still, of politics. What theory of politics informs the proposition that coalitions are more credible when they embrace interests found beyond those within a single political party? How does this improve upon parliamentary government, as traditionally set down in the textbooks; indeed, how is it reconcilable with parliamentary government? It is not reconcilable, and Manning has made no attempt in this direction. Implicitly, according to this interpretation, politicians acting within the confines of conventional party discipline are not to be trusted. Consider the following "householder" sent in 2002 from the office of the current Leader of the Official Opposition, Stephen Harper, with the message: "Our approach is not to say, 'Trust us,' quite the contrary. The Canadian Alliance approach is to set up a truly independent official to ensure honesty and integrity in government, regardless of who is in office."[24] Those sentiments were first expressed in the House of Commons in the continuing debate over ethics and the need for a commissioner with a status of Officer of Parliament similar to that held by the Auditor General and the Information Commissioner.[25]

Responsible government is about accountability, but the Canadian Alliance has an apolitical understanding of that term. That is why they invoke Officers of Parliament so regularly. Opposition parties have always looked to the Officers' reports for political ammunition — after all, those officials serve Parliament — but the Canadian Alliance view is qualitatively different. They see members of Parliament, that is, the legislators, as in opposition to the executive. It is scarcely an exaggeration to say that from this perspective, the unity of responsible government as classically understood ceases to exist.

The Canadian Alliance speak in what might be called a second political vocabulary. Like the Reform Party, it has discussed proposals that would see voters,

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[21] Preston Manning, "How to Remake the National Agenda" *National Post* (13 February 2003) A18.

[22] John Gastil, *By Popular Demand: Revitalizing Representative Democracy Through Deliberative Elections* (Berkeley: University of California Press, 2000) at 111.

[23] Jim Ness, "Selling Wheat, Doing Time" *National Post* (12 October 2002) A21; Les Perreaux "Monopoly Foes Defeated in Wheat Board Vote" *National Post* (16 December 2002) A7.

[24] *House of Commons Debates* (20 June 2002) at 12938 (Stephen Harper).

[25] As a collectivity, Officers of Parliament remain understudied. See Megan Furi, *Officers of Parliament: A Study in Government Adaptation* (M.A. Thesis, University of Saskatchewan, 2002) [unpublished].

through referendums, override the *Charter of Rights and Freedoms*. In contrast to mediated politics that view parties as central to government, the Canadian Alliance champions unmediated politics which, by definition, deprives parties of their *raison d'être*. Yet, whatever affinity the Canadian Alliance may display with American direct-democracy movements, in its own way it remains as far removed from that country's republican tradition of "representation from the people" as the system it says has betrayed the people and which it seeks to replace.[26]

In its platform the Canadian Alliance may espouse policies and adopt positions that echo American and, more particularly, Republican party views (for instance, the attack on Canada's election finance regime that restricts third-party financing in the interests of establishing a so-called level playing field for candidates, and which the Canadian Alliance sees as a restriction on freedom of expression), but the advantages of coalition building, as celebrated by Manning and identified with the United States Congress, misrepresent or, at least, misunderstand the tone of American political debate. Contrary to the inclusiveness purported to follow upon the negotiations leading to coalitions, many Americans resent what they call "deal-making," and "compromises," and for very specific reasons: "Th[e] belief that Congress members were inattentive, unresponsive, and out of touch," and needed to be "coerced into doing something."[27]

This is not the place to evaluate the comparative merits of the congressional and parliamentary systems. Still, it needs to be emphasized that comparison is possible because the systems are different, and that the Manning–Canadian Alliance perspective ignores this difference in fundamental respects. Again, that feature of their critique would be of no more than moderate interest except that it has helped to condense and intensify the debate about trust that now envelopes national politics. The question of trust is not a uniquely Canadian concern. The BBC Reith Lectures for 2002 have this very title; and their author, Onora O'Neill, Principal, Newnham College, Cambridge, says that "'loss of trust' has become a cliché of our time."[28] It arises wherever there is reliance on professional knowledge — doctors and scientists, politicians and, in Canada since Walkerton, possibly water-treatment engineers.

"Trust us"? There is no need, proclaims the Leader of the Official Opposition, when, by inference, we have lost trust in ourselves. Perhaps that is an unfair extrapolation of his message, but it is not an indefensible one. Legitimacy once arose out of a ballot box; it was conferred, not earned. Politicians no longer appear to believe in that morality. The want of confidence that is so favoured a topic of debate lies as much within the legislators themselves as it does in the government. It is fed by two beliefs that have recently gained currency. The first has to do with listening. It is often said that governments and MPs do not hear what citizens are saying, and that is because the parliamentary process offers no opportunity to incorporate citizens' views. The attraction of the Canadian Alliance lies exactly in this — that it offers citizens what critics say is crucially absent in the Canadian model of politics, the promise of "actually exercis[ing] power and pass[ing] judgment, either directly or through their individual MPs."[29] Listening is linked to concerns about inclusion, consultation and the interposition of opinion into policy-making instruments. Here is the justification for belief in direct democracy and for disdain in representative government as its poor substitute.

Listening can occur outside the legislature, through extra-parliamentary organizations like the National Citizens' Coalition. The NCC must be the most successful extra-parliamentary organization in Canadian history. Aggregating and articulating public opinion *against* Parliament, first with regard to MPs' pensions, and then the election finance law, the G.S.T., and more, created a constituency whose voice was heard in Parliament. Significantly, the NCC campaigns used the newspapers to communicate their message to the Canadian reading public and to provide a channel, through prepared statements to be sent to MPs postage free, to relay that message to Ottawa. Thus the NCC helped reduce the sense of difference between governors and governed that has been a feature of parliamentary government for several hundred years.

The role of media has been crucial to the success of the NCC and others who speak in what this article calls Canada's second political vocabulary. But the media have been more than facilitators in this regard — they

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[26] For more on this subject, and bibliography, see David E. Smith, *The Republican Option in Canada; Past and Present* (Toronto: University of Toronto Press, 1999) at 139ff.

[27] John R. Hibbing & Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes Toward American Political Institutions* (Cambridge: Cambridge University Press, 1995) at 97.

[28] Onora O'Neill, *A Question of Trust* (Cambridge: Cambridge University Press, 2002) at 9. For a rigorous examination of the topic, see Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997); for a general Canadian review, see J. Patrick Boyer, *"Just Trust Us": The Erosion of Accountability in Canada* (Toronto: Dundurn Press, 2003).

[29] Jonathan Malloy, "The 'Responsible Government Approach' and Its Effects on Canadian Legislative Studies," Canadian Study of Parliament Group (Ottawa: Canadian Study of Parliamentary Group, 2002) at 9.

too have introduced what one British commentator has described as "an increasingly critical edge to their reports."[30] "The 'reality' which the media construct for the public" is important not only for how citizens view politics — the launching of the *National Post* in the late 1990s and the confrontational tone it adopted in its editorials and coverage of the Chrétien government, faced by a disunited opposition in the House of Commons, helped feed the cynicism citizens increasingly expressed — but also for how parliamentarians view citizens.[31] Abandon fixed ideas of rank and order and replace them with mechanisms by which ordinary Canadians might overcome everything that politically hampers them. And yet the new order of politics — with its insistent demands for participation — is flawed, for much of what people dislike about Parliament is endemic to what a modern Parliament is — party discipline and executive pre-eminence.

If listening is one modern belief that is transforming parliamentary politics, or at least political discussion, then resisting is a second. Here the emphasis is not on incorporation from below but on autonomy from above. To return to the matter of committee chairs, there is nothing in that controversy that speaks to citizens or groups of citizens or other political parties. Nor is there mention of negotiations or coalition-building. The concerns described above — for inclusion or deflection of critics — has no place here. And the reason is that the discipline "question" is a concern of those within the citadel who speak the insider's tongue, the first political vocabulary. Traditionally, government has viewed the people as a rival and the expression of opinion outside of political parties as less than legitimate. The public could not be admitted because they were not accountable. And that gap has widened with the arrival of the *Charter of Rights and Freedoms*. Whether it need be this way is open to debate. Paul Martin's remarks on the "democratic deficit" and a speech by Robin Cook (then Leader of the House of Commons in Great Britain), "A Modern Parliament in a Modern Democracy," suggest that the House must become more like the people — pluralist.[32] Whether that is possible in practice or in parliamentary theory is open to debate. And that is what is missing in the "chairs affair."

Like the Canadian Alliance, the Liberal dissidents are theoretically at sea. On what grounds is party discipline to be impugned; how far is it to be challenged? The House cannot return to some golden age of independence where members debated issues and weighed — but how? — the national, the party and the constituency's interests. Did such a time ever exist in Canada's parliamentary history?[33] Wherein lies the authority for the actions Liberal dissidents have taken? It is intriguing to speculate whether the greater importance MPs now attach to their constituency role and, indeed, the extra work they do to bridge the distance between member and constitutent are factors leading to a greater sense of independence. In the debate over Canada's role in military action against Iraq, it was common to hear MPs use language such as the following: "MPs must be given the chance to express their constituents' views on Canadian military participation."[34] But then again, it was not unique to hear another rationale for dissent: "I want to send the Prime Minister a very strong message that attacking Iraq without UN authorization is not an option."[35] During the Chrétien recessional, some Liberal MPs, either as a representative of someone else or as a representative of no one but themselves, have taken an interest in guided independence in so far as procedures are concerned. When in February 2003, twenty-two Liberal backbenchers voted against the wishes of the Prime Minister and for an amendment to an ethics bill (C-15, the Lobbyist Registration Bill), one of their number explained the rationale: "On some of these issues, you have to represent both your own view and the view of your constituents … It's not a problem. The[re] aren't questions of confidence in the government."[36] Thus, on several matters in recent months, discontent with the Prime Minister's treatment of the Liberal caucus has led to criticism but no defection by Liberal MPs.

Long-time, former NDP Member of Parliament Ian Deans has said each Prime Minister sets the tone of the House. He or she sets the standard of behaviour. If the Prime Minister does not care about the House, neither will the Prime Minister's Office, and that disdain will spread to cabinet ministers and to the members themselves.[37] Is this another way of saying that

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30 Bob Franklin, "Keeping it 'Bright, Light and Trite': Changing Newspaper Reporting of Parliament" (1996) 49 Parliamentary Affairs 303.

31 Richard Hodder-Williams, "British Politicians: To Rehabilitate or Not?" (1996) 49 Parliamentary Affairs 292.

32 For Martin, see *supra* note 3; Robin Cook, "A Modern Parliament in a Modern Democracy" (State of the Union Lecture, The Constitution Unit, University College London, December 2001).

33 See Norman Ward, "The Formative Years of the House of Commons, 1867-1891" (1952) 18 Can. J. Economics & Poli. Sci. 431.

34 Sheldon Alberts, "Let House Debate Role in Iraq War: Liberal MPs" *National Post* (15 January 2003) A1.

35 Jeff Sallot, "Liberals Break Ranks on Iraq Vote" *Globe & Mail* (12 February 2003) A4.

36 Bill Curry, "Liberal Dissidents Vote to Amend Ethics Bill" *National Post* (27 February 2003) A5.

37 Ian Deans, "The Eclipse of Parliament? The Concentration of Power in Canadian Politics" (Ottawa: Canadian Study of Parliament Group, 26–27 November 1999) at 18.

Chrétien is responsible for the outcome of the vote on committee chairs within the Liberal caucus? But there is also the fact that there is a leadership contest underway and that cabinet is experiencing much tension as a consequence. Following the selection of a new leader, will the unrest among the renegades abate? In all likelihood, yes, because there is no coherent theory of parliamentary politics or leadership to sustain it. At best, it is a half-theory: emancipate (to a limited degree) rank and file members but pay no attention to the effect change will have on the conduct of government. This closed circle approach to parliamentary improvement omits what is essential and what the Blair Government's Memorandum on "Modernization of the House of Commons: A Reform Programme for Consultation" has remembered: "The objectives of any programme must be to enhance [the executive's] authority to lead national debate on important political issues and to improve the capacity of the Chamber and Committees to scrutinize Government, both in its executive actions and in its legislation."[38] Notwithstanding the Manning–Canadian Alliance interpretation of a separation of institutions in parliamentary government, the executive and the legislature are one. It is salutary to bear this truth in mind if the constructive power of reform is to be realized.

Yes, the Prime Minister has too much power. Yes, the PMO sometimes treats ministers and caucus members with disdain. Yes, members have opinions and, in some instances, specialized knowledge and yes, the public believes its demands for participation go unacknowledged. What conclusion is to be drawn from these affirmations, and how are they to be incorporated into Canada's system of responsible, partisan government? The chairs affair has raised intriguing questions; it remains for students of Canadian government to provide the answers.

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[38] U.K., Select Committee on Modernization of the House of Commons, *Modernization of the House of Commons: A Reform Programme for Consultation* (Memorandum HC 440) (London: Her Majesty's Office, 2001).

FEDERAL HOUSE COMMITTEE REFORM: MINDLESS ADVERSARIALISM WELL DONE

S.L. Sutherland

INTRODUCTION

Intermittently in the fall of 2002, starting in early September, and then dominating the period of 30 October to 5 November, the attention of the national media, all parties in the House of Commons, the Government House Leaders, and the Prime Minister was engaged by the possibility of one House vote. At issue was what looked like a minor change to Standing Committee procedure to adjust Standing Order 106, proposed in two motions brought under different procedures, one of them to be perhaps passed before the session's committees would be struck. The formal goal was to provide that standing committee chairs and vice-chairs would be elected in their respective committees by a *mandatory* secret ballot. The benefit promised by supporters was that the change would liberate the House's standing committees from government direction, allowing them to pursue democracy and the public interest.

All the opposition parties — the Canadian Alliance (the Official Opposition), the Bloc Québécois, the Progressive Conservatives and the New Democratic Party — and the section of the split parliamentary Liberal party owing loyalty to the former Finance Minister, Paul Martin, were united for Parliament and against the Prime Minister. The Prime Minister, often mentioned in the context of non-elected advisers in the Prime Minister's Office and the enforcer of party discipline in the House, was called many names. All this might seem dismissible as normal House theatrics.

But, labouriously, through a series of procedural moves by its House Leader, John Reynolds, and assisted by a significant Speaker's ruling, the Canadian Alliance did achieve a vote on the issue on 5 November. The Prime Minister declared a free vote for backbenchers, but told members of the government to vote against the provision. The public differences between Martin and the Prime Minister did the rest. Martin had, since his departure from the position of finance minister and thus from government ranks on 1 June 2002,[1] been openly running for the party leadership. Just two weeks earlier he had declared his approval of such a secret ballot to deal with what he called the "democratic deficit" and "mindless adversarialism" in Canada's Parliament.

The existing practice for electing chairs by show of hands provided a technical option of a secret ballot that could be invoked by unanimous consent of all committee members, and on occasion this occurred. The practice, however, was that the government whips identified prospective chairs and government vice-chairs from among government committee members (having first allocated members with other whips), and managed the elections by communicating their choices to government-side backbenchers. Normal practice has been to nominate one candidate for each post. Committee chairs in the House are all Government members, and — unlike the Speaker — remain in caucus when serving. Since 2001, the chairs and vice-chairs receive a stipend from government for their work.[2] (Opposition whips identified their own vice-chair for each committee.)

A vote by show of hands, it might be said, would be reassuring to government house managers. Standing committees — with the exception of a handful of specialist committees — largely reflect ministerial departments, and in Canada they are richly multifunctional. Significantly, standing committees handle most government legislation that falls within the

1 Library of Parliament, Information and Documentation Branch, "Ministerial Resignations: Current List" (updated 2 June 2002).

2 In part to encourage the Standing Committees to review more energetically the annual Estimates of Expenditure, the Commission to Review Allowances of Parliamentarians (the Lumley Commission) recommended additional salaries for chairs and vice-chairs of all but two House and Senate Committees in recommendation 5 in its report of May, 2001. The Commission recommended about $10,000 for chairs and half that for vice-chairs. The recommendation was swiftly passed as part of Bill C-28, *An Act to Amend the Parliament of Canada Act, the Members of Parliament Retiring Allowances Act and the Salaries Act*,1st Sess., 37th Parl., 2001, receiving Royal Assent on 14 June 2001.

policy sphere of government organizations in their remit.[3] Government of course is responsible for the product of the legislative system.

The theme of the article is that while the event looked arcane, its substance was both radical and important for several reasons. Most obviously, the Alliance–Martin victory was enacted on a particular view of House Standing Committees that denies the majoritarian principle of democracy: they could and should be freed from the government's majority rule of the House and thus from government control. Reynolds and Martin, the latter outside the House, both argued essentially that committees belong to the House and not to the government, and are in some sense foundational to and constitutive of the House. Second, of real practical importance, the expression that "the House is master of its own procedures" had before this meant that procedural change is agreed consensually by the various parties in careful and civil discussion. This was somewhat despairingly explained only in the second portion of debate on 31 October by the Government House Leader, Don Boudria.[4] In pushing for a vote, the various House factions showed themselves willing to seize House procedure to advance their political goals. In effect, in the use of a procedural ruse in this case, a certain line has been crossed. Third, the government's leading ministers were unwisely silent on this issue, a factor that becomes increasingly important for the record. Partly because of this lack of leadership, the debate lacked content, poetry and passion. There was no thorough, consistent, cohesive and principled explanation offered for the reform or the manner used to achieve it.

The procedure of this article is to first briefly sketch a context for the events as the last part of this introduction. It then provides a chronology of the procedural tactics put into play, before moving to the pre-debate positioning of the major actors. This segment is dominated by an account and discussion of Martin's views on House reform made in a speech that was not subject to House contestation. The next section walks the reader through the main points made in the debate that preceded the vote in the House, to provide evidence for the claim above. It starts with the arguments of the House leaders and whips, first, and then summarizes the stands taken by the backbenchers who participated. The last section sketches a description of the practices for choosing committee chairs in Britain and in the United States, often the implicit cultural model for Canadian reformers.

The first Mulroney Government implemented the McGrath Committee's reforms in 1985–1986, which were in turn based on work done by the Lefebvre Committee. In regard to standing committees, the reforms conferred authority on committees to choose their own subjects for investigation, set their own agendas, shadow departmental and portfolio administration and assess results, enjoy stable memberships, elect their officers, and exclude parliamentary secretaries (the minister's representative) from their membership. (For the current powers of standing committees which have developed since McGrath, see Chapter XIII of the Standing Orders. [5]) More generally, the McGrath changes provided for the election of the Speaker and established a separate set of legislative committees to whom government would thenceforth send legislation, an innovation borrowed from Britain.[6] Thus a model "McGrath" committee was intended to execute departmentally-oriented scrutiny functions, conduct broader inquiries from time to time, and provide contributions to the earliest stages of policy development, including discussing policy that could lead to Bills — but not to process legislation. As it happened, the legislative committees proved deeply unpopular in practice, and although they remain an option, the "expert" standing committees recaptured the role of examining legislation.

Before the 1985 reforms, party managers sitting together in a striking committee had openly allocated committee memberships and designated their chairs and vice-chairs. In the session following the McGrath changes, the downside of removing top-down

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3 In the second session of the thirty-seventh Parliament, beginning 30 September 2002, there are eighteen committees of which most follow the estimates, administrative processes and policy outcomes for a group of major government organizations, of which a department is usually at the centre. While the system is always subject to adjustment to reflect changes in the organization of government, "standing" means, loosely, that a committee has no determined end. Public Accounts has a specific constitutional duty and status, thus one speaks somewhat loosely of seventeen standing committees at the moment. There are other types of committees: legislative committees can be struck even though most legislation is presently handled by the standing committees; special committees can be given references; and there are both standing and special joint committees between the House and the Senate. See Canada, House of Commons, *Committees: A Practical Guide*, 6th ed. (Ottawa: House of Commons, 2001), online: <www.parl.gc.ca/InfoCom/documents/GuidePratique>.

4 *House of Commons Debates* (31 October 2002) at 1159–60.

5 Canada, House of Commons, *Standing Orders of the House of Commons* (Canadian Government Publishing, 2001).

6 Canada, House of Commons, *Report of the Special Committee on the Reform of the House of Commons: Third Report* (The McGrath Report), Appendix V, 127, Votes and Proceedings, 33d Parl., 2d Sess. (18 June 1985). See also S.L. Sutherland, *Parliamentary Reform and the Federal Public Service*, University of Western Ontario: National Centre for Management Research and Development (July 1988).

government management of committees was made evident. In several committees, clerks found themselves sending out for Bibles as members insisted that public servant witnesses swear formal oaths to tell the truth.[7] In 1987, government members in the Labour, Employment and Immigration Committee behaved so outrageously that the chairman resigned rather than, in his words, "endorse its proceedings by his presence."[8] The committee then rejected the government's new choice of chair and instead elected a colourful Quebecker. The new committee chair drove the Deputy Minister of the Department into retirement by providing or encouraging one accusation after another both in committee and on the floor of the House.[9] The MP accusers were protected by privilege and the public servant, without standing in the House, could not defend himself against even the most egregious fictions. Such events made it clear that with the overt, understood, visible control of the striking committee and the Parliamentary Secretary gone, very attentive *sub rosa* management — which would necessarily involve considerably more intelligence-gathering activity and blandishment — could not be avoided. The McGrath team had counted on their reforms to change the culture of the House such that collegiality would replace partisanship.

In short, an idea that demonstrable influence over governance could be exercised by supporters of government and opposition working harmoniously in self-restraining committees, was put vaguely onto paper in the mid-1980s. The cultural change that followed was an opposition willingness to interpret government management of committees as "interference," at least rhetorically, an idea not shared by the government side. The divide helps one interpret Government Whip Marlene Catterall's plain statement to the effect that, the government having the right to govern, it must be able to have confidence in the chairs of the committees.[10] There are overlapping questions behind the Catterall statement that can guide a reading of this text. How can Standing Committees be free of government coordination (whips' influence) and at the same time assist with the implementation of the government's basic policy program? How, if committees are self-directing, are their activities to remain relevant to the government's plan of work? Given that committees are created and mandated by the House, by what right can they exercise powers beyond those delegated? In short, parliamentary government in its party government form — ministerial responsibility, confidence and collective responsibility, and party discipline — cannot in logic be both the basic mode of operation and at the same time "the problem" of the system.

How the Vote Was Won Procedurally

The procedural manoeuvres on how to select chairs and vice-chairs of committees were set up in the Standing Committee on Procedure and House Affairs in late October. The Alliance House leader, Reynolds, introduced a motion in the Procedure Committee on 29 October to make the secret ballot mandatory. This provision, unadorned, would have allowed members of all parties to secretly elect chairs without any party allocation principle whatever. Carolyn Parrish, a Liberal MP, resolved the impasse with an amendment that only a member of the government could hold the chair — the proposed secret ballot would therefore allow all members of a committee to secretly choose between Liberals should there be more than one Liberal nominee for the chair or vice-chair. A second amendment was added that the change should be reviewed before "its next application." Parrish and another backbench Liberal, Guy St. Julien, joined the opposition representatives on the committee to pass the motion, allowing the recommendation to be sent to the House for its decision in the form of a Report.[11]

It was therefore the Committee on Procedure and House Affairs that first got the change onto the floor of the House, by serving notice on 29 October 2002 that it would make a motion in the House in forty-eight hours that its recommendation be concurred in. By 30 October, all opposition parties had committed

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7 For a general introduction to the unpredictable outcomes of reforms, see J.R. Mallory, "Parliament: Every Reform Creates a New Problem" (1979) 14:2 J. Can. Stud. 26 at 26–34. See also Peter Dobell, *Parliamentary Secretaries: The Consequences of Constant Rotation*, Institute for Research on Public Policy (September 2001); and Canadian Study of Parliament Group, *Parliamentary Reform: Making it Work* (Proceedings of the Conference, Parliament Buildings, Ottawa, 13 May1994).

8 For a partial history, see S.L. Sutherland, "Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem" (1991) 24 Can. J. Poli. Sci. 91 at 114–17. In July of 1988 the Conservative Government also experienced a House revolt, the so-called "dinosaur" uprising by eighteen backbenchers against Bill C-72 amending the Official Languages Act to enhance bilingual requirements and also to guarantee a right to trial in English or in French.

9 *Ibid.*

10 Cited in CBC News transcript of "MPs back elected chairs for Commons committees" (30 October 2002) at 21:25, online: <cbc.ca/storyview/CBC/2002/10/29/committees>.

11 Although the sequence of events is clear in testimony, the following provides a colourful history: Bill Curry, "PM tried for two weeks to avoid vote" *National Post* (6 November 2002) A4.

themselves to support the motion, as had Martin and a number of other Liberal backbenchers.

However, on 30 October, Reynolds set in motion a spare plan. He proposed two motions for debate under the aegis of an allotted opposition supply day (under Standing Order 81) that the Alliance had earlier borrowed for the purpose from the New Democratic Party. The second of these two motions was the same as that moved by the Procedures Committee Chair. The supply day debate would occur the very next day — the same day as the House debate on the Procedure Committee's Report. Boudria, the Government House Leader, objected to the Alliance tactics on 30 October, asking the Speaker for clarification on which "supply" matter would be brought forward. The Speaker replied that he would rule the following morning, "unless some other arrangement has been made."[12] The next day, the "other arrangement" had prevailed. The Alliance withdrew one motion, retaining the motion on the secret ballot as its supply day business, the debate on which would take place in the second part of the day.

Therefore, on 31 October, the Procedure Committee's chair, Liberal Peter Adams, made a motion in the House at approximately 10:00 AM, recommending the adoption of his own Committee's Report. Yvon Godin, an NDP member, next asked Adams whether he believed the motion should be voted upon immediately, without any government amendments. Fifteen minutes on, Jacques Saada, the Liberal deputy whip, moved an amendment that the report of the Procedure Committee be referred back to the Committee for reconsideration, reporting to the House again within fifteen sitting days, effectively bringing the motion under government control. Reynolds soon moved that the House proceed to Orders of the Day. His motion was voted on and lost 119 to eighty-six. (Thus the government apparently had a majority early in the day on October 31.) From that point forward the House debated the Procedures Committee Report as amended by Saada. The debate consisted primarily of name-calling. Since only two of the House of Commons' standing committees — Finance and Foreign Affairs — had then been struck, supporters of the secret ballot urged that the reform should take effect immediately, to affect the current session. As 2:00 PM drew near, Adams rose to ask for unanimous consent to revert to his original motion, and vote. The Deputy Speaker asked whether there was unanimous consent, but voices were heard saying "no," and the House moved to Statements by Members and other business of the day.

Just after 3:00 PM that same afternoon, the House moved to the supply motion. Boudria began with a point of order, attempting to convince the Speaker that because the Alliance's supply day motion was identical with the Procedures Committee motion before the House that morning, it should be disqualified for recurrence for debate that afternoon. Reynolds objected that the Procedures Committee motion had been effectively adjourned, the government having amended it, and the morning's debate had been on the government motion. Reynolds then told the Speaker that in disallowing the motion, he would be putting the subject matter of the opposition's supply motion into the hands of Cabinet, and, of course, establishing a grave precedent. Reynolds had in hand a ruling by Speaker James Jerome, which stated that "the opposition prerogative … is very broad in the use of the allotted day and ought not to be interfered with."[13] Loyola Hearn, a Progressive Conservative member, next rose to cite Erskine May that a question may be raised again if it had not been definitely decided, alongside Beauchesne's statement that "[m]otions on allotted days may relate to any matter within the jurisdiction of the Parliament of Canada … and ought not be interfered with except on the clearest and most certain procedural grounds."[14] Chuck Strahl, a Canadian Alliance Member, added the point that, if allotted day motions can be disallowed on grounds that such business is already before the House in some sense, then any subject whatever could be prevented by government by identifying a report awaiting attention.

The Speaker then made his ruling on the admissibility of the opposition motion proposed for that supply day, adding "what is left of it."[15] On the basis of Speaker Lamoureux's finding in 1973 that between then and 1968, when the practice of allotted opposition days had begun, no opposition motion had been ruled out of order,[16] combined with the negative results of a search by his Office that morning for any such case between 1973 and the present, he ruled that the Opposition motion was in order.

The debate on the Alliance supply day motion began at about 3:25 PM. At 6:15 PM the Deputy Speaker deemed that all the questions necessary for disposing of the matter under supply had been put, and that a recorded division was further deemed requested and deferred until Tuesday, 5 November at 3:00 PM.

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12 *House of Commons Debates* (30 October 2002) at 1081.

13 *Supra* note 4 at 1148. He does not give the details of the ruling.

14 *Ibid.*

15 *Ibid.* at 1149.

16 *Ibid.*

On 5 November, the Alliance motion was carried with 174 MPs voting for it, and eighty-seven against. Fifty-six Liberal MPs stood beside Martin and the Alliance. The government's usual comfortable majority of more than forty votes over all four opposition parties was thus denied by its own MPs. During the next few days, in the fifteen committees that had not yet been struck, the result of the mandatory secret ballot was that the Alliance was voted out of five or about a third of the vice-chair positions it had previously held as the Official Opposition. The government fared better. Liberal Members, free at last, upset one of the Liberal whip's choices for the fifteen committee chairs in the Transport Committee.[17]

Positioning Reform before the Liberal Party Split

As they approached the beginning of the second session of the thirty-seventh Parliament at the end of September 2002, every player — the Government, the Official Opposition, Martin and his supporters as opposition internal to the Liberal party — made statements about the role of Parliament, sometimes designating the House of Commons, and sometimes the House, Senate and Crown, which together constitute Parliament in its formal identity as the sovereign authority of the state. The intention of the government to improve procedures in both the House and Senate was signalled but not elaborated in the Speech from the Throne of 30 January 2001. Government-led change would "strengthen" the "institutions of Government."[18] Since 1993 the government had created "new opportunities for MPs to represent their constituents," primarily through pre-budget consultations and more generous provision for private members' bills.[19]

Alliance Preparation

Also in January, 2001, Reynolds, as the House leader of the Alliance party, published a paper titled "Building Trust," containing proposals for reform. [20] These elements were updated in a revised paper published on 18 September 2002.[21] One prominent continuing recommendation was the election of standing committee officers by secret ballot. The rationale, written by Reynolds, draws a parallel between the Speaker's task in the House of Commons and the role of the chair of a standing committee. Both are officers whose task is to preside impartially, he claims. Two further recommendations were crafted by Chief Opposition Whip Dale Johnson, and the Deputy Opposition House Leader Carol Skelton. One recommends that parliamentary secretaries be (once more) effectively excluded from membership in the standing committee related to their Minister's portfolio, with the goal that the government no longer "interfere" in the standing committees. The second recommendation would have the effect of *requiring* committee reports to be put to a vote in the House of Commons, as opposed to being talked out as basically occurred in the first half of 31 October in the case of the Procedure Committee report, and which had been understood as a convention of House management.

The three Alliance provisions are coherent and mutually reinforcing. As a package, they could further block low-profile government coordination of committee business with the work of the House, even while allowing the standing committees more isolation from the government's program and the right to command significant amounts of House time with mandatory votes on their own concerns (given that there are presently seventeen such committees). The minimum impact of the Alliance package would be to make government work harder to accomplish less of its program.

Then, on 24 September, Reynolds sent a letter to Liberal backbenchers encouraging them to vote for the forthcoming Procedure Committee proposal for secret ballot elections for committee chairs. In early October,

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17 See "Alliance victory leads to backlash as committee vice-chairs dumped" *Red Deer Advocate* (8 November 2002) A8; and Joan Bryden, "Rebel Liberals punish Alliance: Official opposition members get dumped from parliamentary committee chairs" *Edmonton Journal* (8 November 2002) A5. The spirit of autonomy again visited the Transport Committee in June 2003, when the secretly-elected chair and a number of rebels met over breakfast in the parliamentary restaurant and cut VIA Rail's budget by $9 million. See Bill Curry, "MPs clash over VIA budget" *National Post* (5 June 2003) A9. The writer speculates that the Committee at this point is hoping to get House support for its budget challenge to government, and thereby to provoke a general election. On 6 June, the *Globe and Mail* reported that the Transport Committee, dominated by Martin's Liberals, intends to stall and therefore kill the government's Bill C-26 reforming the *Canada Transportation Act*, S.C. 1996, c. 10. See Steve Chase, "Infighting threatens transport legislation" *Globe & Mail* (6 June 2003) A4.

18 See the last page of the "Speech from the Throne to Open the First Session of the 37th Parliament of Canada: Address by Prime Minister Jean Chrétien in Reply to the Speech from the Throne," online: Privy Council Office, Government of Canada <www.pco-bcp.gc.ca/default.asp?Page=InformationResources&Sub=sftddt&Language=E&doc=sftddt2001_reply_e.htm>.

19 *Ibid.*

20 The papers are on the Canadian Alliance website, online: Canadian Alliance <www.canadianalliance.ca/english/policy/building_trust_II_01_introduction.asp>. The Alliance also supported the election of chairs in its materials leading up to the 2000 election.

21 *Ibid.*

the Prime Minister reportedly argued in caucus that the government needed to control these elections for effective coordination of his legacy agenda, amid further speculation that Martin supporters wanted to take over the committees precisely to prevent decisions and spending that could limit Martin's future degree of freedom once he had become Prime Minister.[22]

Martin Brings House Reform to Osgoode Hall

On 21 October 2002, Martin presented his own proposals for reform of the House of Commons to Osgoode Hall, York University's law school, making this speech his statement of record.[23] Martin asserted that the Office of the Prime Minister holds too much power over individual Members of Parliament. His six-point plan of reform is comprised of the following: degrees of party discipline under a British-type three-line whip;[24] more frequent referral of legislation, under an existing provision, to standing committees after first reading in the house; further changes to the system for private members' legislation; more review of senior appointments by committees, under an existing provision; appointment of an independent ethics commissioner; and a nest of recommendations for committees. The committee material is broken into elements: one is the election of committee chairs by secret ballot; another is a separate proposal to remove the authority to strike committees from the party leaders and whips, giving the role of allocating places on committees to party caucuses; and a third is more Ministerial appearances before committees. Some resource proposals for committees are also offered.

No rationales are given for the package or for the various committee items, which should have been worked through. For example, one might ask how a big caucus could make the complex allocations involved in choosing 300 committee members for about seventeen committees. If each caucus were to form a committee for this purpose, what would be the substantial difference between the Osgoode Hall proposal and the status quo? The secret ballot for committee chairs might suggest that the single vice-chairs belonging to the Opposition would be identified by government majorities on the committees, as did happen. Where is democracy when the Prime Minister's control reaches to other parties?

Martin's framework for the package of reforms starts with a study by the Canadian Policy Research Networks that is cited as showing that Canadians most prize their "democratic rights" among the elements supporting their quality of life.[25] The speech then immediately states that it is the "democratic process" that citizens value, although most would agree that this is a shift of topic: rights have content while process is about rules or the means of making decisions. It next links the broad democratic process and its ills to institutional decline. At present, the speech says, all MPs "find themselves trapped in a morass of mindless adversarialism."[26] Partisan spectacles in the House cause voter "alienation, indifference and even hostility … toward a system they see as remote and unresponsive."[27] Next, the "significant" drop in voter participation in the 2000 election (documented in the CPRN work) is linked to alienation. In its turn, alienation is caused by the fact that "We have allowed power to become too centralized." The key to "getting things done," says Martin, is "Who do you know in the PMO."[28] In short, voter alienation, low turnout and a mindless House are the Prime Minister's fault. He is the only independent variable.

Restoration of "the virtues of the Westminster model" is signalled by reference to Edmund Burke. This deserves more care. Burke died at the end of the eighteenth century, almost three-quarters of a century before "manhood" suffrage would create the mass political party. In Burke's day, the electorate was small, with voters being solvent as well as male. In the eighteenth century, members of the House of Commons were male, mostly landed, each in nostalgic memory a notable (and principled) personality in the world of his own constituency and in the House of Commons. But

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22 Mike Scandiffio, "Trouble is brewing in House committees on Parliament Hill" *The Hill Times* (7 October 2002) at 16.

23 Martin, "Address," Osgoode Hall Law School, York University (21 October 2002), online: <paulmartin.ca> for the bare list of proposals, and <paulmartin.ca/doc/speech_e> for the Osgoode Hall speech.

24 The "three-line whip" means that Martin would impose party discipline on backbenchers on the model of the graduated or three-stage whip of British practices, where the insistence on discipline is commensurate with the importance of a matter to government.

25 Although it is not referenced clearly in the speech, the CPRN paper was probably by J.H. Michalski, *Quality of Life in Canada: A Citizen's Report Card*, CPRN Background Report (July 2002) at 90. CPRN arranged about forty focus-group discussions with 350 Canadians, facilitated by moderators. The participants had studied background materials. The two indicators of "democratic rights and participation" in this work are exercising democratic rights (voter turnout) and tolerance of diversity. The groups established the rankings of indicators, but the development of the indicators appears to have been the lion's share of the work. This particular report does not link the "rights" priority of this small number of persons (not statistically representative of the population) to institutional renewal of Parliament.

26 *Supra* note 23.

27 *Ibid.*

28 *Ibid.*

electoral practices were often corrupt, protecting small and safe enclaves for particular candidates who served particular patrons and interests. Some did not visit their constituencies. Mass suffrage created competitive political parties. Election practices and districting were to a large degree cleaned up. Competitive parties in turn created disciplined party governments in all western industrializing democracies, by organizing the vote into the basis for programmatic action. Party government is then majority government built upon party platforms and party discipline. It is seldom recalled that Burke did in fact support political parties, if only in the restricted sense of his time. Deeply conservative, he nevertheless allied himself with the Whigs.

Burke is, however, most frequently remembered by practicing politicians for his denial that representatives should allow themselves to be instructed by their constituents or act as delegates of their constituents. [29] Regardless of his particular views, he represents a period when Parliament could and did make decisions that did not in the least coincide with the content of public opinion or welfare.[30] The speech continues by warning that the concentration of power at the very centre of government, alongside citizen apathy, is a "dangerous trend" which could lead the Canadian public to withdraw "its consent to be governed."[31] The phrase could refer to civil disorder. Or it could equally mean the electorate will gradually become so apathetic that elected governments will have too little voter support to claim legitimacy. Here was an opportunity to discuss the serious matter of the increasing use by western governments of the executive prerogative,[32] but it is not fulfilled. Indeed, the speech suggests that Martin would be a firm Prime Minister because he is effectively promising reform of the representative institutions. [33]

Overall, in the Osgoode Hall speech, remedies begin and end in the House. While the lack in federal Canada of an electable opposition party is not the fault of the Liberal party, there are House reforms that would foster opposition. The Osgoode proposals do not seriously undertake to develop the scrutiny capacity of the opposition. A relatively well-tested reform in Westminster parliaments is, for example, to allocate chairmanships of committees proportionately to the membership of parties in the house, concentrating opposition chairs in the committees whose duties lean to scrutiny. In effect, the robust element of the Osgoode Hall speech is that it offers the Alliance party's measure on secret ballots at the same time as the Alliance.

In summary, therefore, leading into the debate on committee chairs and the splitting of the government majority into two parties, there was a general climate of interest in reform of the House.[34] United on one narrow provision for House reform, one had the Canadian Alliance, Martin as the probable new head of the sole party of government, and the Standing Committee on Procedure and House Affairs — the whips' and house leaders' forum. As noted, the Liberal majority in the whips' forum had been overturned with the help of two Liberal members. The next section takes the reader through the play on the issue in the House of Commons, scattered through September to November, with the major debate taking place on 31 October 2002.

Summary and Analysis: House Debate on Secret Ballot Elections — September through November 2002

In the following summary of the content of House debates on the secret ballot, the two-part debate of 31 October is the centrepiece, although an attempt is made

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29 *Ibid.* at 18–22. In 1774, Burke was elected in a general election to represent Bristol. The text Martin's speech writer probably had in mind is E. Burke, "Speech to the Electors of Bristol," in *Works*, vol. 3 (London: Rivington, 1801), found in many collections.

30 David Judge, *Representation: Theory and Practice in Britain* (London: Routledge, 1999) at 51. For a discussion of the three phases of representative government (government by notables as in Burke's world, by party government and by image-making in the post-modern phase of audience democracy) see Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997).

31 *Supra* note 23 at 1–8.

32 John Locke discussed the prospect that citizens might "appeal to the Heavens," that is, rise in violent revolt to overthrow their "unjust prince" for his misuse of prerogative powers. See "Of Prerogative," in any edition of Locke's political writings. The citation here is from David Wooton, ed., *John Locke: Political Writings* (London: Penguin, 1994) at 344–49. Although Locke lived from 1632 to 1704, his ideas on the prerogative, essentially the unlegislated and essential executive power to respond autonomously to new or unknown threats and events, are much more relevant to the modern situation in a fluid world than Burke's House of Commons.

33 Reinforcing the impression of power, on 8 May 2003, Martin said that, as Prime Minister, he would simply not implement Bill C-7, *First Nations Governance Act*, 2d Sess., 37th Parl., 2002, then being piloted through the House by Robert Nault, the Indian Affairs Minister. See "If he differs with Nault, what is Martin's plan?" *Globe & Mail* (8 May 2003) A18.

34 For other initiatives, see Canada, House of Commons, "Report Of the Special Committee on the Modernization and Improvement of the Procedures of the House Of Commons" (Ottawa: House of Commons, 2001), online: <www.parl.gc.ca/InfoComDoc/37/1/SMIP/Studies/Reports>.

to bring in contributions before and after. [35] The discussion begins with some context, then moves to the arguments of those who led the discussion for the government, followed by Reynolds' views. The shorter interventions by backbenchers are next rolled up under four themes. The importance of this material is that it constitutes a good portion of the empirical basis for the conclusion that the debate was insubstantial.

One can begin by observing that, at least in their formation, committees are indisputably miniature versions of the House of Commons. It is hard to do better than the sketch of a typical committee of the thirty-seventh Parliament provided by Bloc member Pierre Bryan in the first part of the 31 October "main" debate. Bryan's example is based on a sixteen member committee, whereas most committees have one or two more, but he communicates the principle economically. He notes that nine members in such a committee are from government, three from the Official Opposition, plus two from the Bloc Québécois, one from the NDP and one from the Conservatives. Nine of sixteen members are then Liberals. One becomes the chair, which leaves eight Liberal members, with seven members from the opposition. "If the Liberals remain united on the policy ... they are still in the majority."[36]

The debate proper is begun with Peter Adams' asking the House to support the Report of the Procedure Committee. He defends the Report's substance on three matters. First, in a political point, he emphasizes that the partisan distribution of chairs and vice chairs remains as it was, the government always keeping the chair (except for the Public Accounts Committee, which has had an opposition chairman since 1958). His second point is that MPs should be at work: with eighteen committees (counting Public Accounts) of sixteen to eighteen members, about 300 MPs could be at work on "*the topics that interest them most* if the matter were voted upon as opposed to being returned to this Committee for further study."[37] His third point is that he personally, as a committee chair, feels "responsible for the working conditions of members of Parliament." [38] Thus Adams presents the secret ballot motion as a moral change to support workplace democracy.

The government's position is represented in the main debate primarily by three figures: Paul Szabo, Parliamentary Secretary to the Minister of Public Works and Government Services; John Harvard, Chair of the Northern and Western Caucus and a former Parliamentary Secretary; and, later in the day, by Boudria. Szabo's themes are that opposition members "know very well that Parliament, by its very nature, is a partisan institution," and thus the so-called democratization of Parliament is more complex than they allow; that Liberal members are indeed able to dissent, which many did in the gun control debate in the thirty-fifth Parliament; that a majority government is expected to implement its platform; that Members are not elected as individuals but as representatives of political parties; and that the government is accountable to the electorate.[39]

Harvard, on the other hand, emphasizes that the straight application of a majority principle within committees could destroy representativeness of region and gender among chairs, and that the existing system resulted at the end of the last session in twelve Ontario chairs, two from Québec, three from Atlantic Canada, and three from the West, with four women overall. [40] He, too, speaks of "the reality of the House," in which committee chairs manage the first stages of public business in a system of responsible government. The secret ballot, he says, is irresponsible as a method for choosing chairs: "We are public representatives and we should be voting publicly and openly."[41] He denies that PMO exercises omniscient coercion over all features of parliamentary life.

Later, Harvard points out that chairs of committee are not miniature Speakers. They remain members of caucus whereas the Speaker of the House does not. He expands on the lack of parallelism in remarking that the U.K. Speaker is not opposed in general elections after becoming Speaker, and thus holds the job in complete independence until retirement.[42]

Taking the floor after the Speaker's ruling on the Alliance's supply motion, when he would have known that the secret ballot would come to a vote, Boudria protests the Alliance's strategies. His central point is the lack of precedent for deciding House procedures by means of partisan confrontation on the floor of the House. The Alliance strategy to force change through a temporary majority breaks with House convention on how standing orders are amended: "It has been done by unanimous consent in large measure. Ninety-nine per cent of standing order changes have been made by

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35 *Supra* note 4.
36 *Ibid.* at 1224.
37 *Ibid.* at 1112 [emphasis added].
38 *Ibid.*
39 *Ibid.* at 1130–32.
40 *Ibid.* at 1132.
41 *Ibid.* at 1119.
42 *Ibid.* at 1134.

unanimous consent."[43] In cases where standing order changes have been imposed, provision has been made for automatic lapsing on a specified date, unless re-enacted. "We do not want 51 per cent of the members supporting the rules that govern us, with 49 per cent opposing them. It is improper to adopt rules in this fashion, not to mention the fact that it would be almost impossible to change them."[44] Boudria's "wish list" on procedure, besides the expiration date, includes wide consultation with MPs, and an option for choice of committee officers by show of hands.

Reynolds' contribution can be separated into substantial remarks, filler and procedural strategy. The filler has the purpose of achieving his procedural goals by buying time. He carries the whole burden for the opposition after the Speaker's ruling, on recommencement of the debate under supply. In his longest speech, which occurs in the supply half, Reynolds describes the result of his procedural move as a "great victory for democracy in the House," characterizing the government contribution as "filibustering ... all done for naught."[45] He thanks the NDP for giving the Alliance its supply day, and thanks the Conservative Party for its offer of its own supply day. He chose to bring the motion under supply, he says, because "the current procedural mechanism provided for private members is inadequate."[46] There is a catch: committee work can acquire "authority" only when adopted by the House, but the government has a practice of "talking out" committee reports. The government thus acquires the initiative — and will not bring a report forward if it is critical or requests sensitive documents. This "loophole" that stands in the way of committee authority should be removed. In essence Reynolds wants the standing orders further amended such that all motions to concur in committee reports be put to a vote, "not shelved by a simple procedural manoeuvre," "mere procedural trickery," by the government.[47] He rejects the government argument that standing order changes should be done in related packages, rather than in a piecemeal way, citing a number of one-off changes. But his secret ballot proposal is still special, symbolizing "the struggle for power between the executive branch, the PMO, the Prime Minister and the private members of the House."[48]

Reynolds says the government's tactics in favour of its candidates in the standing committee elections is equivalent to "strong-arming tactics of the 19th century thugs" in general elections before the secret ballot was introduced. Further, he notes, "[i]t is the height of hypocrisy for Canada to send observers to a country like Zimbabwe to oversee its election,"[49] given our own behaviour in the federal House. He continues to cite many abuses and developments in general elections in British Columbia and Québec.[50] Reynolds closes this long intervention by urging that all remaining House positions be removed from the Prime Minister to be, instead, appointed by the Speaker.[51]

One other speaker is recognized, but Reynolds is soon back to explain that the government must relinquish the content of legislation. The Environment Committee, he notes, made 300 amendments to a government bill, but at Report stage, only 120 of these changes remained in place. Reynolds asks the House "[W]hat is the purpose of legislation" if the Minister and "his bureaucrats" can "rejig" committee amendments that are the "majority will of Parliament."[52] By the end Reynolds appears exhausted: he says Joe Clark's populist opposition to centralized power has been developed in part (in what must have been very short seminars) with "persons at the Tim Horton's drive-through."[53]

The themes raised most often by backbenchers are:

1. Voting by show of hands is unsafe for government members in that the Prime Minister or PMO will surely retaliate against independence of mind, and that Liberal members are at any rate naturally reduced to puppets of the Prime Minister by their blind ambition to become part of government (one can note that the acting Speaker commented only once on the un-parliamentary attribution of motives, a feature that permeated the opposition attack).

2. The secret ballot is a guarantee of free elections which must be allowed in the House as in any democratic forum including general elections, *and* at the same time secret ballots are the guarantor of workplace democracy. In the second

43 *Ibid.* at 1158.
44 *Ibid.*
45 *Ibid.* at 1150–51.
46 *Ibid.*
47 *Ibid.*
48 *Ibid.* at 1152.
49 *Ibid.*
50 *Ibid.*
51 *Ibid.* at 1153.
52 *Ibid.* at 1170–71.
53 *Ibid.*

sense they will work in a manner parallel to the Speakership in the Chamber, where the Speaker's impartiality in ruling is owed to that officer's election by secret ballot;

3. Committees are House instruments as opposed to government instruments, they are accountable to the House and should thus be free to take any position in their own right as committees (with some Bloc members' views being more parliamentary); and

4. The claim that appointing chairs is a way to ensure regional and gender representation is insincere and irrelevant nonsense, and contravenes election on the merit principle.

On 31 October, the personalized rage against the Prime Minister is well vented. Deborah Grey characterizes the government's procedural move to delay the Procedure Committee motion as "this unbelievable attack on democracy."[54] Later, she says "these people [Liberal backbenchers] are feeling whipped and intimidated."[55] Similar remarks are made by Yvon Godin of the New Democratic Party [56] and Brian Pallister, Canadian Alliance. [57] Rick Borotsik, Progressive Conservative, raises "the intimidation that flows from the Prime Minister's Office." [58] Joe Clark, Progressive Conservative, attempts a reading of the writing on the House wall — "one of the first indications of the development of a totalitarian regime is a fear of free votes and an insistence on secret votes,"[59] perhaps intending to say that the support for the secret ballot is a measure of fear in the House. Odina Desrocher of the Bloc even speaks of the "downfall of the dictator."[60] Jim Gouk, Canadian Alliance, characterizes the issue as government by the elected or by appointed advisors: "we are talking about whether we elect chairs, which therefore is done by secret ballot, or whether the chair will be appointed by the PMO."[61] Claude Bachand, Bloc Québécois, notes that the pattern of the "holy Liberal democracy" is to "bulldoze" over all opposition. [62] Greg Thompson, Progressive Conservative, reinforces that "[t]he issue is control, absolute control."[63] In the second half of the debate Thompson returns to his theme, praising Parrish's bravery in the Procedure Committee in the face of the Prime Minister's total control: "He is a control freak … the Prime Minister resembles Richard Nixon in his dying days."[64] While Nixon's red button was the threat of nuclear war, the Prime Miniser's is "a snap election call" and "four more years."[65]

Bev Desjarlais, one of few NDP members to speak, brings a long personal attack on the Prime Minister into the main debate, essentially echoing Carol Skelton of the Alliance speaking on 1 October in reply to The Speech from the Throne.[66] Skelton on that day said of the Prime Minister:

> He will never solve problems we face if he continues with the same style in governing, continues to use patronage to reward his friends, continues to use the authority of his office to punish his opponents for personal gain [sic], continues to waste taxpayer money, continues to divide Canadians and continues to demean parliament and its members.[67]

The second theme — that secret ballots are necessary in principle— was strongly tied to the Office of the Speaker and by extension to the PM by Skelton as early as 9 September 2002[68] when she reported to the House that the Liberal whip had been outrageously telling government members in February how they were to vote in the Finance Committee: "While we expect discipline in political parties, we cannot accept it being deployed to influence an election."[69] The Alliance member then equates the English Crown's loss of control over the Speaker of the House of Commons some centuries earlier to the forthcoming loss by the present Prime Minister of his power to name the persons to fill committee chairs.[70]

In the main debate, the analogy continues between the Speaker's independence and committee chairs as small speakers equally needing independence. The theme is picked up by Bryan Fitzpatrick, Canadian Alliance[71] and by Liberal rebel Karen Kraft Sloan.[72]

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54 *Ibid.* at 1112.
55 *Ibid.* at 1120.
56 *Ibid.* at 1112.
57 *Ibid.* at 1116.
58 *Ibid.* at 1112, 1115.
59 *Ibid.* at 1116.
60 *Ibid.* at 1119.
61 *Ibid.* at 1120.
62 *Ibid.* at 1129.
63 *Ibid.* at 1132.
64 *Ibid.* at 1167.
65 *Ibid.*
66 *House of Commons Debates* (1 October 2002).
67 *Ibid.* at 40. Desjarlais' less coherent version is found *supra* note 4 at 1126–27.
68 *House of Commons Debates* (30 September 2002). The parallel suffers from the fact that the Monarch was not elected to the House as the head of the most numerous party in the House.
69 *Ibid.* at 7.
70 *Ibid.*
71 *Supra* note 4 at 1118.
72 *Ibid.* at 1124–25.

Alliance Member Brian Pallister takes up Martin's partly-Burkean view of the MP — which perhaps leads him to notice the latter's absence:

> The ability to be elected should not hinge on one playing to the current whims of the public. It should hinge on a sincere desire to fight for changes one believes in. When one does not believe in those changes one is absent from the House when one had the opportunity to express his or her opinion.[73]

One of the Bloc members, Pierre Bryan, argues that "the role of the committees is study, and reporting to the House." Committees "are accountable to the House, and not only to the cabinet." "Committees are therefore for us ... [MPs] ... must do their work and be as neutral as possible.... If members want "a balance of powers" between committees and Government the committees must be able to take positions different from the wishes of the Government."[74] "[T]he public expects us to play a role ... to have a say in the parliamentary debates, *to have real power and influence*."[75] Parenthetically, the Bloc is not as consistent as the Alliance in its remarks; Michel Guimond of the Bloc rises later in the afternoon to state that "a committee is ... a miniature version of the House of Commons."[76]

Returning to Bryan, he is, on my reading, the only debater to complain that the question of opposition chairs is not on the agenda.[77] He notes that in Québec's National Assembly almost half of the committees are chaired by opposition members.

There is more much more variety in the MPs' opinions on the government's attempt to achieve representativeness of committee chairs on criteria of gender and region. Bryan points out that the Liberals' claim that the appointment method increases chairs' representativeness is confirmation that "someone is examining candidates against particular criteria."[78] Progressive Conservative Member Rick Borotsik is against using the chair positions for representative purposes, preferring to see the "best person" elected.[79] NDP Member Bev Desjarlais argues from the opposite perspective, saying that if the method of allocating chair positions did indeed guarantee gender balance, 50 percent of the chairs would be women whereas there is not even gender parity in committee memberships (the unequal representation of women in the House goes unmentioned). On 6 November, Reynolds adds to this topic, heaping scorn on the idea of representativeness in a rambling intervention that includes appointments of Supreme Court judges and the judges' subsequent interference with the legislation passed by Parliament, as well as their influence on everything from sexual morality to extending the right to prisoners to vote. The House is the highest court in the land, says Reynolds.[80]

But Reynolds' true contribution will be remembered as his procedural accomplishment. He managed the secret ballot wedge from start to finish: identifying an isolated reform that Martin could support; his targeting of Liberal MPs with letters of solicitation; engineering the necessary compromises in the Procedures Committee by using Parrish and the other Martin MPs; pushing forward the timing of the motion to concur in that Report as a stalking horse and a focus for MPs; at the same time, negotiating with the other opposition parties to obtain a supply day as insurance and then teasing the government House Leader with two supply motions; prolonging debate on the Procedure Committee motion so the government could make its predictable moves (without explaining them) and make his points for him; keeping the Procedure Committee part of the debate focussed on the person of the Prime Minister to flatter and motivate Martin's section of the Liberal party; being prepared and organized on the procedural points on supply to win the Speaker's support; and himself prolonging the debate on the supply motion to the very end of the day on 31 October so the vote would be postponed. This last accomplishment allowed time to bring Martin to the House for 5 November.

Overall, the debate on the secret ballot saw the system dismantled to simplistic opposites: democratization of the House versus party discipline and cabinet solidarity; the public interest versus party interests; the cabinet as opposed to caucus; Parliament versus cabinet and its coordination function; and backbenchers versus the Prime Minister, and his advisors and inner circle. Opposition and Martin Liberal MPs pushed as hard as they could for the apparent underdog on each of these dichotomies, ending without agreement on workable alternatives, floating in a vacuum.

British and American Practices for Choosing Committee Chairs

Opposition Members of the Canadian House most frequently raise two examples of superior free democratic practice: Britain and the United States

[73] *Ibid.* at 1116.
[74] *Ibid.* at 1120–23.
[75] *Ibid.* at 1121 [emphasis added].
[76] *Ibid.* at 1160.
[77] *Ibid.* at 1120.
[78] *Ibid.*
[79] *Ibid.* at 1115.
[80] *House of Commons Debates* (6 November 2002).

Congress. Nevertheless, neither Britain nor the U.S. allow members of the committees that are the equivalent of the Canadian standing committees to first autonomously nominate and then elect their presiding officers in a secret ballot. In Britain, the equivalents to Canadian standing committees are called select committees. The present system there was established in 1979. There are eighteen committees, each with nine members — proportionately roughly a quarter of the committee places in Canada, given the British House has more than 600 members. Appointments to committee membership are made by the whips. On the other hand, members of opposition parties, chosen by their parties, are appointed to chair committees in proportion to their party's House seats.[81]

The same is true in Ontario: opposition members hold chair positions on scrutiny committees. Chairs are elected on an allocation principle and for this reason the election is by show of hands. (Likewise, as the Bloc member noted, the Québec National Assembly puts opposition chairs on a good number of scrutiny committees.)

In the United States, membership on House of Representative committees is handled with an iron hand by the majority party. The proportion of memberships to be held by the minority party is set by the majority party, then the respective caucuses nominate the members for election by the House. Committee chairs are elected from nominations by the majority party caucus.[82]

It is also interesting to notice which reforms diffuse across countries and which do not. Complaints about executive domination and excessive use of the prerogative powers are not unique to Canada, nor are complaints about non-elected advisors that surround Prime Ministers and Presidents. In Britain, the Minister of International Development resigned on 15 May 2003, mentioning the "unelected Blair coterie's 'control freak style' and their policy 'diktats in favour of increasingly bad policy initiatives ... from on high'."[83] This centrality of appointed advisors in the British Prime Minister's entourage was addressed just weeks before the Minister's resignation by the British Parliament. The British Liaison Committee — made up of all select committee chairs — can, since April 2003, question the Prime Minister on his management several times during the year.[84] Likewise Americans, despite the historical jealous restriction of the President to his listed powers under the Constitution, are beginning to feel a newly broadened presidential use of executive prerogative as evidenced in the decline of both Congressional and judicial independence: "The Republican majority in both houses of Congress and the courts' acceptance of the notion that the President's war powers override all other concerns have given him effective control of all the branches of government. The administration's nominees to the courts would consolidate its domination of the judiciary."[85]

Conclusion

A few weeks after the 5 November vote, the *Canadian Parliamentary Review* published a summary of a debate over the creation of the Special Committee on the Modernization and Improvement of House Procedures. The debate was held on 20 and 21 November, and the Committee was created by the House on 29 November. In his remarks, Reynolds recapitulates the importance of the McGrath Committee reforms that freed committees from government work references, and presents the accomplishment of the secret ballot for committee chairs as a second step "toward freedom and democracy for committees."[86] And what will be next? Committee motions to concur in a report must come to a vote. This is "vital for the authority of committees."[87] In this regard, Reynolds states that committees must be able independently to fully exercise the powers they formerly held as delegates of the House: sending for persons and papers, and bringing proceedings of contempt against persons. Other goals are for the House to have, and to exercise through committees, a veto over order-in-council (political) appointments, in keeping, he says, with the "House ... veto over government legislation ... how the government spends money ... how [government may] tax ... [and its veto] over the appointment of officers of parliament."[88] This is a plan for a House with the government almost out of it. The government will be retained for one thing: "We must find a way to ensure that the government gives effect to the motions that the

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81 Great Britain, House of Commons, Information Office, *Departmental Select Committees*, Fact Sheet P2 (February 2003); and House of Commons, Library, Parliament and the Constitution Centre, *Departmental Select Committees*, Research Paper 02/35 (10 May 2002).

82 United States Congress, *Rules of the House of Representatives* (7 January 2003).

83 Michael White, "It is time for Tony Blair to go: Maverick minister Clare Short resigns and gives PM a word of advice" *The Guardian Weekly* (21 May 2003) 1.

84 Great Britain, House of Commons, Liaison Committee Press Release, *Liaison Committee Annual Report*, HC558, Session 2002–2003 (1 April 2003).

85 Stanley Hoffman, "America Goes Backward" *New York Review of Books* (12 June 2003) 74. Hoffman is a professor at Harvard.

86 Round Table on Modernizing the House of Commons (Spring 2003) 26 Can. Parliamentary Rev. 30 at 31–32.

87 *Ibid.* at 31.

88 *Ibid.* at 32.

House passes ... perhaps through its powers of contempt [the House] can enforce its authority."[89] The government will work for the House, and the House will work for committees.

But if the House were to authoritatively control the levers of government, the answerability of Ministers in the House for action and inaction would be pointless. The House would be making and forcing decisions, driven in various directions by committees less subject to party control than in even the U.S. government. There would be no way to keep House decision-makers in bounds or hold them responsible for decisions, errors or misrule. In short, the government's *ex ante* domination of legislative business and its *ex post* answerability in the House for policy effects, taxing and spending are the two sides of the coin of responsible government.

The day after the November vote, Martin told journalists that the secret ballot "speaks to the independence, the authority of members of Parliament and it will also strengthen the committee system which is a very, very important foundation for the way policy is developed in the parliamentary system."[90] This statement expands on the Osgoode Hall speech and makes it clear that Martin's view of committees is roughly compatible with Reynolds' views and thus at least temporarily revolutionary. In classical doctrine, committees cannot be seen as the foundation for the House's work. This is upside down. The House is the foundation of and the source of authority for any policy work that is to be done by the committees. Committees, as miniature Houses, are useful in government because several can operate at the same time, a form of parallel plumbing allowing more business and more scrutiny to be done. The standing committees are creatures of the House and are in fact comparatively modern experiments (apart from Public Accounts), only beginning to take shape in their present duties and liberties since 1968. Political parties are the bodies entrusted to develop policy in the parliamentary system as we know it. Does Martin really intend that bipartisan committees will design policy for which a Liberal government would be held answerable?

In the first days of the sway of the mandatory secret ballot, individual Liberal members used their new "right" to not only largely confirm the government whip's slate of chairs, but also to handicap the Official Opposition by taking away its role in steering committee business in five committees. Removing scrutiny capacity from an Official Opposition that holds only one committee chair (Public Accounts) shows a bullying lack of seriousness about the responsibility of MPs to work for both open government and the competence of all members of Parliament. In the short term, therefore, the proposition that "one small procedural change" would benefit the House culture appears to have been tested and found to be without support. Parenthetically, it will be interesting to see whether the Speaker had a precedent for the use of supply to change procedure, and if this will be the route for the rest of Reynolds' program.

In the longer term, however, the gulf between responsible government and the bare words of the Standing Orders on the role of committees has been deepened. Amended so disastrously so many times by so many well-meaning people, the surface of committee provisions might seem to justify a vision of "authoritative" policy-making powers for backbenchers. This vision — whether politicians believe in it or only use it — both subverts the classic design of the institution of Parliament and kills the prospect of clear thinking about modernization of structures and procedures.

Boudria's complaint that Alliance leaders pretend "that what they want is modernization when all they had in mind was the creation of chaos"[91] seems more realistic at the end of the research for this article than at the beginning. It also suggests that "mindless adversarialism" does not describe the way the House was used in the series of events making up this episode. Martin and Reynolds silently allied their forces to show that they were capable of preventing the government from governing, without ever having formally announced their alliance to the House and thus to the public.

The concerted attack on the Prime Minister on moral or character grounds constitutes a distraction from the broader misunderstandings of and anomalies in the Canadian political system writ large. Perhaps the way the Liberal party chooses its leader in a mass convention elevates the leader too far beyond any cabinet members; or perhaps the volatility of the Canadian electorate that periodically sweeps away governing experience is a deep flaw; or perhaps the post-1993 implosion of one of the two great parties of Confederation accelerated our slide into a "one-party" system that will see the Liberals divide into factions (succeeding one another as in the Japanese Liberal Democratic Party) — perhaps these features should be examined among others such as a smaller House of

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[89] *Ibid.* at 33.

[90] Tim Harper & Tonday MacCharles, "Chrétien stunned by vote revolt" *Toronto Star* (6 November 2002) A1.

[91] *Supra* note 4 at 1156.

Commons and electoral reform to encourage thematic parties.[92] For if the causes of malaise in the Canadian body politic are to do with politics and not exclusively with Prime Minister Chrétien, then we may expect that Martin will soon be encumbered with all these same powers. We shall then see how seriously he has thought about the question of how safely to divest power into a vacuum.

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With the generous assistance of my colleague at the School of Policy Studies, Queen's University, David Elder. The evaluative component of the paper is solely my responsibility as are the inevitable errors. I would also like to thank the editors of the FORUM for their welcome and intelligent help in improving this text.

[92] Making federal constituencies much larger than they are now to create a smaller and more manageable House would more accurately reflect federal policy presence. Committees could obviously be improved by reducing the number of members on each to allow MPs some thinking time.