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Editor's Preface

This inaugural issue of **Review of Constitutional Studies/Revue d'études constitutionnelles** marks the evolution of the Centre for Constitutional Studies' annual supplement to the Alberta Law Review into a stand-alone journal. This joint venture of the Centre and the Alberta Law Review will continue the mandate of the Constitutional Studies supplement as a scholarly, interdisciplinary, bilingual journal devoted to constitutional issues. As in the past, we intend to publish the work of leading Canadian and international scholars representing a wide variety of disciplines. For example, past contributors have included Charles Taylor, Peter Russell, John Whyte, Lorenne Clark, Ronald Dworkin and Mark Tushnet. The journal will appear twice yearly, allowing us to publish more work and with greater speed.

Volume 1, number 1 of **Review of Constitutional Studies/Revue d'études constitutionnelles** exemplifies this mandate in its presentation of four original articles by Jennifer Nedelsky, Andrew Fraser, Norman Siebrasse and David Getches. Jennifer Nedelsky puts forward a new conception of rights which draws from a feminist focus on relationship. Andrew Fraser offers a reassessment of Canada's Charter debate from a republican perspective. Norman Siebrasse delves into legal history in his exploration of the doctrinal origins of judicial review. And David Getches offers a new approach to the pursuit of sovereignty for Aboriginal people in his discussion of the American experience of intergovernmental agreements between federal and state authorities and Indian Tribes.

We welcome your comments on this new publication, and we encourage submissions of your work.

Avant propos de la directrice

Ce numéro inaugural de la **Review of Constitutional Studies/Revue d'études constitutionnelles** fait passer le supplément annuel de l'Alberta Law Review au rang de publication autonome. Initiative conjointe du Centre d'études constitutionnelles et de l'Alberta Law Review, cette revue poursuivra la vocation du supplément, celle d'une publication savante, interdisciplinaire et bilingue, traitant de questions constitutionnelles. Comme auparavant, nous nous proposons de publier les travaux d'éminents chercheurs canadiens et étrangers œuvrant dans une large gamme de disciplines. Au palmarès de nos collaborateurs jusqu'ici, mentionnons notamment Charles Taylor, Peter Russell, John Whyte, Lorenne Clark, Ronald Dworkin et Mark Tushnet. La revue paraîtra deux fois l'an, ce qui nous permettra de publier un plus grand nombre d'articles plus rapidement.

En présentant quatre articles originaux de Jennifer Nedelsky, Andrew Fraser, Norman Siebrasse et David Getches, le premier numéro du volume 1 de la **Review of Constitutional Studies/Revue d'études constitutionnelles** est bien représentatif de notre mandat. Jennifer Nedelsky propose une nouvelle conception des droits inspirée d'une perspective féministe sur les rapports. Andrew Fraser offre une réévaluation du débat relatif à la Charte Canadienne dans une perspective républicaine. Norman Siebrasse se penche sur l'histoire du droit pour explorer les origines doctrinales du contrôle judiciaire. Et David Getches présente une nouvelle approche concernant la souveraineté des peuples autochtones en examinant l'expérience américaine des accords intergouvernementaux entre les autorités fédérales, les États et les tribus indiennes.

Nous vous invitons à nous communiquer vos commentaires et vous encourageons à soumettre vos travaux.

TABLE OF CONTENTS

RECONCEIVING RIGHTS AS RELATIONSHIP

Jennifer Nedelsky*

The author proposes a new understanding of rights as relationship and constitutionalism as a dialogue of democratic accountability. She takes the position that all rights and the concept of rights should be viewed in terms of relationship and that this view provides a better way of resolving rights problems. It is suggested that the focus of decisions regarding rights should be on the kind of relationship we want to foster and the different concepts and institutions that will contribute to that end. In the proposed model, protected rights would be derived from inquiries into what is necessary to create the relationships needed for a free and democratic society. Using this framework, the author argues against constitutionalizing property and concludes by discussing the Alternative Social Charter as an outline of a model of constitutionalism for democratic accountability.

L'auteure propose une nouvelle façon de concevoir les droits en terme de rapports, et le constitutionnalisme comme une forme de dialogue ou d'exercice de responsabilité démocratique. Selon elle, tous les droits et concepts de droit devraient être perçus en terme de rapports, cette perspective étant plus favorable à la résolution des problèmes juridiques. Ainsi, les décisions relatives aux droits devraient être axées sur le type de rapports qui veulent être promus et sur les différents concepts et institutions qui permettront de réaliser cet objectif. Dans le modèle proposé, l'identification des droits protégés découlerait de recherches visant à déterminer ce qu'il faut pour créer les rapports dignes d'une société libre et démocratique. Utilisant ce cadre de référence, l'auteure se prononce contre l'enchâssement du droit à la propriété et conclut par une discussion sur l'opportunité d'adopter une charte sociale parallèle en tant que modèle de constitutionnalisme visant à promouvoir la responsabilité démocratique.

I. Introduction

In adopting the *Charter of Right and Freedoms*, Canada chose to make "rights" a central and permanent part of its political discourse just when the meaning and legitimacy of judicial review and, more generally, of "rights talk," was increasingly contested among legal scholars. Of course, one might see these contests as an arcane scholarly preoccupation, since the invocation of rights can be heard in North America in every sphere

* Faculty of Law, Political Science and Women's Studies, University of Toronto. The author would like to thank the audience of the 1992 McDonald Lecture and the participants at the legal theory workshops at New York University Law School and Columbia University Law School for their helpful questions and comments.

from self-help groups to environmentalists and is a growing practice world wide. But I think there are problems with rights that we ought to take seriously. In this essay, I identify a set of problems with how we are to understand the meaning of "rights" and to institutionalize those understandings. The problems fall into two broad categories: justifying the constitutionalization of rights and the critiques of "rights talk" in general. In response to each problem, I will suggest how a central tenet of feminist theory, its focus on relationship, directs us toward solutions. My primary focus is on the constitutional sphere, for which I propose a conception of constitutionalism as a "dialogue of democratic accountability" that provides a better model than rights as "trumps."[1] I will not enter the debate about whether it was a good idea to adopt a charter at all, but I will suggest that the structure of the Canadian *Charter* lends itself to a constructive approach to rights as relationship. In closing, I will try to show how this framework helps us to better understand a set of specific constitutional problems.

II. Justifying Constitutional Rights

A. Rights as Collective Choices

Let us begin with the powerful American conception of constitutional rights so that we can see the need for an alternative paradigm. The notion that there are certain basic rights that no government, no matter how democratic, should be able to violate is a basic idea behind the U.S. Constitution and its institution of judicial review.[2] But the simple, compelling clarity of this idea is difficult to sustain in modern times. The

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[1] Ronald Dworkin coined this now widely used phrase in R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978).

[2] As I have argued elsewhere, the Constitution of 1787 did not focus primarily on rights as limits in the sense we now understand as the purpose and legitimacy of judicial review. The Constitution of 1787 was designed to structure the institutions so as to ensure that the sort of men who knew how to govern, including how to respect rights, would be the ones in office. See J. Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990).

Framers of the U.S. Constitution did not worry much about whether there were such basic rights and what they were. The Framers were even sure that although there was no consensus on what constituted the violation of rights such as property, *they* knew what property rights really were and what kind of legislation would violate them. Their confidence was the foundation for their vision of constitutionalism. Today, however, we have before us 200 years of the vicissitudes of rights jurisprudence in the U.S.: for example, neither property nor equality look today like they did in 1787. It is hard to believe in timeless values with immutable content. We have disputes about rights at every level: whether natural rights are the source of our legal rights, what would count as basic among a list of rights, and whether there is any value in using the term "rights" at all. My own view is that it is useful to use the term, and in any case we are institutionally committed to doing so. But if we are to invoke rights to constrain democratic outcomes, we must do so in a way that is true to the essentially contested and shifting meaning of rights.

We need to confront the history of rights and acknowledge the depth of the changes that have taken place in both popular and legal understandings of rights. Consider, for example, our understanding of equality. It was not so long ago that great restrictions on both the legal rights and the actual opportunities for women were widely (though I am sure not unanimously) believed to be consistent with a basic commitment to equality for all. And the changes do not exist only at the level of big general terms like equality. Consider the changes in common law conceptions of contract between the mid-nineteenth century and today. At the popular level, we have come to expect constraints on individual contracts such as minimum wage legislation, and in the courts we continue to work out concepts of unjustifiable enrichment and unconscionability in ways that would have been hard to imagine at the turn of the century. These shifts are not just a matter of past history of conflicts, now long since settled. A workable conception of rights needs to take account of the depth of the ongoing disagreement in Canadian society about, for example, the meaning of equality and how it is to fit with our contemporary — and contested — understanding of the market economy and its legal foundations, property and contract.

1993
Revue d'études constitutionnelles

Once we acknowledge the mutability of basic values, the problem of protecting them from democratic abuse is transformed. We do not have to abandon the basic insight that democracy can threaten individual rights, but we need to reconsider all of those terms: democracy, individual rights, and the nature of the tension between them. First we must see that the problem of defending individual rights is inseparable from the problem of defining them. Even if there are deep, immutable truths underlying the shifting perceptions of the terms that capture those truths, the ongoing problem of defining the terms remains. And then the relation to democracy becomes more complex, for the definition of rights, as well as the potentially threatening legislation, is the product of shifting collective choice.[3]

We find that the neat characterization of constitutionalism as balancing a tension between democracy and individual rights is not adequate for the actual problem. As a society that gives voice and effect to its collective choices and values through government institutions, both the courts and the legislatures[4] must be seen as expressing those choices and values. Courts have traditionally expressed those shifting collective choices in terms of rights, but we must recognize rights to be just that: terms for capturing and giving effect to what judges perceive to be the values and choices that "society" has embedded in the "law." (Here I am being deliberately vague as to how values come to be seen to be basic to the legal system, and which components of "society" end up affecting the choice of values.) Consider, for example, the choices between the right to use one's property as one wishes and the competing values of the right to quiet enjoyment. Judges make those choices, whether they think of the choice as dictated by the basic values of the common law, or as reflecting the choices already made by "society at large" as expressed through custom and common acceptance, or as choices guided by the best interest of all. Other examples are judicial decisions about the conflicts that arise over the importance of environmental health, or the "rights" of tenants to heat and safety.

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3 This paragraph is drawn from *ibid.* c. 6.

4 To leave aside the complexities of cabinet and administrative bodies.

My first point, then, in seeing the hidden complexity of "rights vs. democracy" is that rights are as much collective choices as laws passed by the legislature. And if rights no longer look so distinct from democratic outcomes, democracy also blurs into rights, for, of course, democracy is not merely a matter of collective choice, but the expression of "rights" to an equal voice in the determination of those collective choices.

The problem of constitutionalism thus can no longer simply be protecting rights from democracy. The more complex problem can be posed in various ways, with either rights or collective choice on both sides of the "balance": why should some rights (such as freedom of conscience) limit other rights, namely the rights to have collective choices made democratically? Or, why do we think that some collective choices, that is those we constitutionalize as rights, should limit other collective choices, that is the outcomes of ordinary democratic processes?[5] Since the idea of a "limit" is itself problematic, I think a more helpful way to put it is this: we need a new way of understanding the source and content of the values against which we measure democratic outcomes. Later, I will offer an example of how a conception of rights as relationship helps in this process,

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[5] One workshop participant suggested that this formulation rested on a mistake: confusing the question of limits on democracy with the process of determining or enforcing those limits. To the participant, the content of the rights that should serve as limits is given by a theory of rights, derived, I assume, from human nature or the nature of agency or freedom. My point, however, is that we cannot rely on such theoretically derived conceptions to justify limits on democracy. At the least, as I noted in the text above, the legal meaning of such rights must be determined, and the legitimacy of the process of that determination is inseparable from the legitimacy of treating rights as limits. And, in my terms, that process will inevitably be a collective determination and thus choice. More broadly, the historical shifts in meaning and the diversity of constitutionalized rights in different democracies make it difficult to believe that we can rely on a transcendent, universal, immutable source for the content of rights.

In B.A. Ackerman, *We, the People: Foundations* (Cambridge: Harvard University Press, 1991), Bruce Ackerman also has a compelling argument that the American Constitution is structured in a way that treats "the people" as the source of the meaning of rights rather than transcendent meaning. Here he contrasts the American Constitution with the German Constitution. In this regard, the Canadian Constitution is like the American.

by looking at the question of why property should *not* be constitutionalized. First, however, I want to look more closely at some of the prevalent objections to constitutional rights as violations of democratic principles.

B. Beyond the "Pure Democracy" Critique

The pure democracy critique is primarily aimed at rights as judicially enforced limits on democratic outcomes (rather than "rights talk" more generally, which might include common law rights or statutory rights). The argument comes in two forms. One rejects any judicial oversight of democratic bodies. The underlying claim can be that, in principle, there are no rights claims that can legitimately stand against democratic outcomes, or that there is no justifiable way of *enforcing* such claims, or that, in practice, the best way of ensuring rights in the long run is through democratic procedures, not through efforts to circumvent them. The more common form of the argument acknowledges that even if democracy is accepted as the sole or supreme value of a political system, there may be times when the courts can play a useful role in making sure the procedural conditions of democracy are met. John Hart Ely[6] in the U.S. and to some extent Patrick Monahan in Canada defend judicial review in these terms, and each claims that the Constitution in his country[7] authorizes judicial review primarily or exclusively for democracy enhancing purposes.

My view is that democracy has never been the sole or even primary value of either the U.S. or Canada, and it *could* never be the sole basis for a good society. There have been and always will be other values that are not derivative from democracy. Autonomy is one. The development of our spiritual nature is another, captured by notions of freedom of

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6 J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

7 Monahan draws on Ely, but thinks Ely is wrong descriptively about the U.S. P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1987).

conscience and religion.[8] And of course these values can be threatened by democratic majorities wielding the power of the state. If one accepts that there are values we cherish for reasons other than their relevance to the functioning of democracy and that these values may need protection from democratic outcomes, then neither form of the pure democracy critique of rights is persuasive.[9] However, as I have already suggested, the conventional formulations of rights as limits to democracy are not adequate. Fortunately, I think it is possible to do a better job of capturing the multiple values we care about. If we look more deeply at a value like autonomy, we can begin to see that the value itself is best understood in terms of relationship, and once we see that, we can begin to rethink what it means conceptually and institutionally for autonomy to serve as a measure of democratic outcomes.

First let me contrast my conception of autonomy[10] with the kind of vision that I think underlies the American conception of rights as limits. (I also think that this conception has deep roots in Anglo-American liberalism, more broadly.) There the idea is that rights are barriers that protect the individual from intrusion by other individuals or by the state. Rights define boundaries others cannot cross and it is those boundaries, enforced by the law, that ensure individual freedom and autonomy. This image of rights fits well with the idea that the essence of autonomy is

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8 Of course it is possible to work back from democracy, asking what all the preconditions are for democratic participation, and from that process generate a very wide range of values, including autonomy. But I think such a process distorts our understanding of the genuine diversity of values that in fact are necessary for an optimal society or for the possibility of pursuing a full and good life. It has always struck me as particularly implausible to believe that the value of freedom of religion could be derived from even the most all encompassing conception of the conditions for democracy. Here I think the distortion involved in such derivation is obvious.

9 Unless one wants to make the strong claim that even though in principle it would be legitimate to protect those values, there is no institutional mechanism of doing so that could be legitimate.

10 I have developed this conception in more detail in J. Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities" (1989) 1 *Yale Journal of Law and Feminism* 7.

independence, which thus requires protection and separation from others. My argument is that this is a deeply misguided view of autonomy. What makes autonomy possible is not separation, but relationship.

This approach shifts the focus from protection against others to structuring relationships so that they foster autonomy. Some of the most basic presuppositions about autonomy shift: dependence is no longer the antithesis of autonomy but a precondition in the relationships — between parent and child, student and teacher, state and citizen — which provide the security, education, nurturing, and support that make the development of autonomy possible. Further, autonomy is not a static quality that is simply achieved one day. It is a capacity that requires ongoing relationships that help it flourish; it can wither or thrive throughout one's adult life. Interdependence becomes the central fact of political life, not an issue to be shunted to the periphery in the basic question of how to ensure individual autonomy in the inevitable face of collective power. The human interactions to be governed are not seen primarily in terms of the clashing of rights and interests, but in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy. The whole conception of the relation between the individual and the collective shifts: we recognize that the collective is a source of autonomy as well as a threat to it.

The constitutional protection of autonomy is then no longer an effort to carve out a sphere into which the collective cannot intrude, but a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined.[11] The first thing to note in this reformulation is that it becomes clear that the relation between autonomy and democracy is not simply one of threat and tension — just as the relation between autonomy and the collective is not simply a matter of threat. Autonomy means literally self-governance and thus requires the capacity to participate in collective as well as individual governance. In addition, the long standing argument in favour of

[11] Note that the sources of collective power might include large scale corporations, but here I will just focus on the government.

democracy is that it is the best way of organizing collective power so that it will foster the well-being, which must include the autonomy, of all. So autonomy demands democracy, as both a component and a means — even though democracy can threaten autonomy. (And, of course, the ideals of democracy require autonomous citizens so that each expresses her own rather than another's judgements, values and interests.)

With this relationship-focused starting point, how do we move beyond "rights as limits to democratic outcomes"? We shift our focus from limits, barriers and boundaries to a dialogue of democratic accountability — which does not make the mistake of treating democracy as the sole value. We require two things for this dialogue. We need a mechanism, an institutionalized process, of articulating basic values — particularly those that are not derivative from democracy — which is itself consistent with democracy, and we need ways of continually asking whether our institutions of democratic decision-making are generating outcomes consistent with those values, or, to stick with the autonomy example, of asking whether those outcomes foster the structures of social relations that make the development of autonomy possible. This mechanism for holding governments accountable to basic values should take the form of institutional dialogue that reflects and respects the democratic source and shifting content of those values. (Of course, judicial review has for a long time in the U.S. and recently in Canada been the primary vehicle for the articulation of values against which democratic outcomes can be measured. I will return at the end to a proposal for such a mechanism that is significantly different from judicial review.)

The example of autonomy as relation already helps solve one of the puzzles of justifying rights as limits: how to justify their supremacy over democracy when rights themselves are shifting values. First we no longer have, and thus need no longer justify, simple supremacy, but a more complex structure of democratic accountability to basic values. Second, the shifting quality of those basic values makes more sense when our focus is on the structure of relations that fosters those values. It is not at all surprising that what it takes to foster autonomy, or what is likely to undermine it, in an industrialized corporate economy with an active regulatory-welfare state is quite different from the relationships that would

have had those effects in mid-nineteenth century Canada. These may be different still in Eastern Europe or South Africa. A focus on relationship automatically turns our attention to context, and makes sense of the commonly held beliefs that there are some basic human values *and* that how we articulate and foster those values varies tremendously over time and place.

In this vision, rights do not "trump" democratic outcomes, and so they and the institutions that protect them do not have to bear a weight of justification that is impossible to muster. Rather when we begin with a focus on the relationships that constitute and make possible the basic values, which we use rights language to capture, then we have a better understanding not only of rights, but of how they relate to another set of values, for which we use the short hand "democracy." The mechanisms for institutionalizing both sets of values must aim at maintaining an ongoing dialogue that recognizes the ways democracy and autonomy are both linked together as values requiring each other *and* potentially in conflict with one another.

It will probably have already become apparent to many of you that the Canadian *Charter* is much better suited to implementing such a dialogue than the American system of judicial review, for which, at least formally, "rights as trumps" is an accurate metaphor. The *Charter*'s "override" provision in s. 33 may be seen as an effort to create a dialogue about the meaning of rights that would take place in public debate, the legislature, and the courts.[12] Section 1 invites a dialogue internal to the courts, or to any body considering the constitutionality of a law, by opening the *Charter* with an assertion that rights are not to be seen as absolute.[13] Legislatures

[12] Section 33, the so-called override provision or notwithstanding clause, allows legislatures to expressly state that a piece of legislation shall operate notwithstanding provisions in s. 2 (fundamental freedoms of conscience, expression, assembly and association) or ss. 7-15 ("legal rights" and "equality rights.") Such legislation has effect for 5 years and may then be reenacted.

[13] Section 1 reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

are to be held accountable to the basic rights outlined in the *Charter*, but that accountability must be determined in light of the (implicitly shifting) needs of a free and democratic society.

Perhaps some readers have had occasion to try to explain s. 1 and s. 33 to incredulous Americans—who usually conclude that Canadians simply still do not *really* have constitutional rights. The American vision of rights as trump-like limits is so central to their understanding of constitutionalism that they have a hard time imagining that "rights" could mean anything else. This it true despite the fact that the increasingly obvious problems with this notion drive American scholars to produce thousands of pages each year in efforts to explain and defend it. Rights as trumps is a catchy phrase and an apparently graspable, even appealing, concept, but it cannot capture the complex relations between the multiple values we actually care about. I think "dialogue of democratic accountability," though not quite as pithy, is truer both to the best aspirations of constitutionalism and to the structure of the *Charter*.

III. Critiques of "Rights Talk"

Let me turn now to some of the critiques of "rights talk" in general: 1) "rights" are undesirably individualistic; 2) rights obfuscate the real political issues; 3) rights serve to alienate and distance people from one another. I will not be trying to present these critiques in detail, but merely to sketch them to show how a focus on relationship helps construct a response.

I will begin with the claim that rights talk is hopelessly individualistic, which my argument above has already begun to address. Of course, I am not going to try here to summarize the ongoing communitarian versus liberal individualism debate—which, in any case, is only one form of the critique of individualism.[14] Let me simply note the core of the critique that I find persuasive (and have participated in myself) and then suggest how rights as relationship helps to meet it. The charge that *Charter* rights

[14] An excellent critique and historical account not widely known among legal and political science academics is C. Keller, *From a Broken Web: Separation, Sexism and Self* (Boston: Beacon Press, 1986).

express individualistic values will be familiar to many — for example in arguments about why they should not apply to the collective decisions of First Nations. There are good reasons to believe that the *Charter* draws on a powerful legacy of liberal political thought in which rights are associated with a highly individualistic conception of humanity ("mankind" historically, and there are persuasive arguments that link this gender specificity with individualism[15] — but I cannot go into that here). Indeed, the "rights bearing individual" may be said to be the basic subject of liberal political thought. Now, to compress many long, complicated, and different arguments into a sentence or two, what is wrong with this individualism is that it fails to account for the ways in which our essential humanity is neither possible nor comprehensible without the network of relationships of which it is a part. It is not just that people live in groups and have to interact with each other — after all liberal rights theory is all about specifying the entitlements of people when they come in conflict with one another. The anti-individualism theorists claim that we are literally constituted by the relationships of which we are a part.[16] Virtually all these theories also recognize some significant degree of choice and control over how these relationships shape us. But even our capacity to exercise this choice can and should be understood as shaped by our relationships — hence my argument about the centrality of relationship for autonomy. Most conventional liberal rights theories, by contrast, do not make relationship central to their understanding of the human subject. Mediating conflict is the focus, not mutual self-creation and sustenance. The selves to be protected by rights are seen as essentially separate and not creatures whose interests, needs, and capacities routinely intertwine. Thus one of the reasons women have always fit so poorly into the framework of liberal theory is that it becomes obviously

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15 *Ibid.*

16 For example, C. Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), particularly c. 7, "Atomism"; C. Keller, *ibid.*; M.J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); I.M. Young, "Impartiality and the Civic Public" and S. Benhabib, "The Generalized and the Concrete Other" in S. Benhabib & D. Cornell, eds., *Feminism as Critique* (Minneapolis: University of Minnesota Press, 1987).

awkward to think of women's relation to their children as *essentially* one of competing interests to be mediated by rights. So, it is not that I think the concerns about the individualism associated with rights are unjustified. Rather, it is my hope that the notion of rights can be rescued from its historical association with individualistic theory and practice. Human beings are *both* essentially individual and essentially social creatures. The liberal tradition has been not so much wrong as seriously and dangerously one-sided in its emphasis.

What I have tried to do elsewhere and just alluded to here, is to take the concept of autonomy and identify its core elements — which of course are connected to our sense of ourselves as distinct individuals — and to see how these elements themselves are best understood as developing in the context of relationship. Here I have used autonomy as an example of a value that is not derivative from democracy and to which democratic decision making should be held accountable. Now I want to suggest that all rights, the very concept of rights, is best understood in terms of relationship. Again, I will be quickly condensing a much longer argument so that we can move on to see how this conception of rights meets the critiques and helps us with concrete problems.

In brief, what rights in fact do and have always done is construct relationships -- of power, of responsibility, of trust, of obligation. This is as true of the law of property and contract as it is of areas like family law in which the law obviously structures relationships. For example, as lawyers know, property rights are not primarily about things, but about people's relation to each other as they affect and are affected by things.[17] The rights that the law enforces stipulate limits on what we can do with things depending on how our action affects others (for example, nuisance), when we can withhold access to things from others and how we can use that power to withhold to get them to do what we want (we are now into the realm of contract), and what responsibilities we have with respect to

[17] For a discussion of property rights from a relational perspective see J. Singer, "The Reliance Interest in Property" (1987-88) 40 *Stanford Law Review* 577. My conversations with Joe Singer were also helpful in the early stages of working on this essay.

others' well being (for example, tort law and landlord-tenant law). The law also defines fiduciary relationships. It defines particular relationships of trust and the responsibilities they entail. In the realm of contract, the law takes account of relationships of unequal bargaining power, and it defines certain parameters of employment and of landlord-tenant relationships. In deciding on the importance to give instances of reliance, judges must make choices about the patterns of responsibility and trust the law will foster.

I run through this list only to make it easier to think about my claim that in defining and enforcing rights, the law routinely structures and sometimes self-consciously takes account of relationship. What I propose is that this reality of relationship in rights becomes the central focus of the concept itself, and thus of all discussion of what should be treated as rights, how they should be enforced, and how they should be interpreted. It is really a matter of bringing to the foreground of our attention what has always been the background reality. My claim is that we will do a better job of making all these difficult decisions involving rights if we focus on the kind of relationships that we actually want to foster and how different concepts and institutions will best contribute to that fostering. I hope my closing examples will give a better sense of this.

My point here is that once rights are conceptualized in terms of the relationships they structure, the problem of individualism is at least radically transformed. There will almost certainly still be people who *want* the kind of relationships of power and limited responsibility that the individualistic liberal rights tradition promotes and justifies. But at least the debate will take place in terms of why we think some patterns of human relationships are better than others and what sort of "rights" will foster them.

Suppose we have some initial agreement about what we think optimal human autonomy would look like. We could then proceed beyond conclusory claims that autonomy requires individual rights to a close look at what really fosters the human capacity for autonomy and in what ways the relationships involved can be promoted and protected by legally enforced "rights." For example, I have looked at how administrative law

can be understood as protecting rights in this sense and how we can structure our provision of public services so that they foster autonomy-enhancing relationships.[18] I think all of the traditionally cherished individual rights such as freedom of conscience, of speech, of "life, liberty and security of the person" can most constructively be understood in these terms. It is extremely unlikely that any of them would, under this form of analysis, appear unnecessary. They would thus not disappear. They would not be swamped or overturned by the claims of community. Indeed in constitutional terms their function would still be to stand as an independent measure of the legitimacy of collective decisions (though the determination of that legitimacy would be a process of dialogue, not a one shot, trump-like decision.) However, the specific meaning of each right would probably be transformed as people deliberated on the patterns of relationship that they wanted to characterize their society.

Rights debated in terms of relationship seem to me to overcome most of the problems of individualism without destroying what is valuable in that tradition. Of course, when dealing with such an old and powerful tradition, one has to be ever on guard against the conventional meanings of long standing terms insinuating themselves back into the conversation. But since I think we do not have the option to simply drop the term "rights," and because I think it can be used constructively, that vigilance is the price we will have to pay.

Finally, I will just offer brief suggestions about how this approach can meet the diverse body of criticism (often associated with critical legal studies) that I have lumped into my second category of objection to "rights talk" as obfuscating. One of the most important parts of this set of critiques is the objection that when "rights" are central to political debate, they misdirect political energies because they obscure rather than clarify what is at issue, what people are really after. As with the objection of individualism, this critique points to serious problems, but those problems are transformed when we understand rights as structuring relationship.

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[18] *Supra* note 11.

I think it is in fact the case that many rights claims, such as "it's *my* property" have a conclusory quality. They are meant to end, not to open up debate. As is probably clear by now, I am sympathetic to the idea that whether the issue is a plant-closing, or an environmentally hazardous development project, or a person who wants to rent a room in her home only to people with whom she feels comfortable, simply invoking property rights does not help, and in some circumstances can hurt — by treating as settled what should be debated. That is only the case, however, if the meaning of property rights is taken as self-evident, or if the right questions are not asked in determining their meaning.

If we approach property rights as one of the most important vehicles for structuring relations of power in our society and as a means of expressing the relations of responsibility we want to encourage, we will start off the debate in a useful way. For example, if we ask whether ownership of a factory should entail some responsibility to those it employs and how to balance that responsibility with the freedom to use one's property as one wishes (a balance analogous to that in traditional nuisance law), then we can intelligently pursue the inevitable process of defining and redefining property. We can ask what relationships of power, responsibility, trust, and commitment we want the terms of ownership of productive property to foster, and we can also ask whether those relationships will foster the autonomy, creativity, or initiative that we value. By contrast, to say that owners can shut down a plant whenever and however they want because it is their property, is either to assert a tautology (property *means* the owner has this power) or an historical claim (property has in the past had this meaning). The historical claim does, of course, have special relevance in law, but it can only be the beginning not the end of the inquiry into what property should mean. The focus on relationship will help to give proper weight and context to the historical claims and to expose the tautological ones.

One common form of the allegation of obfuscation is the objection that rights are "reified." They appear as fixed entities, whose meaning is simply taken as a given. This thing-like quality of rights prevents the recognition of the ways in which rights are collective choices which require evaluation. Descriptively, I think this is a valid concern about the

dominant traditions of rights. But, as is no doubt already clear, I do not think it is inevitable. I think that if we always remember that what rights do is structure relationships, and that we interpret them in that light, and make decisions about what ought to be called rights in that light, then we will not only loosen up the existing reification, but our new conceptions of rights as relationship are not as likely to once again harden into reified images that dispel rather than invite inquiry.

Finally, there is the important critique that rights are alienating and distancing, that they express and create barriers between people.[19] Rights have this distancing effect in part because, as they function in our current discourse, they help us avoid seeing some of the relationships of which we are in fact a part. For example, when we see homeless people on the street, we do not think about the fact that it is in part our regime of property rights that renders them homeless. We do not bring to consciousness what we in fact take for granted: our sense of our property rights in our homes permits us to exclude the homeless persons. Indeed, our sense that we have not done anything wrong, that we have not violated the homeless persons' rights, helps us to distance ourselves from their plight. The dominant conception of rights helps us to feel that we are not responsible.

If we come to focus on the relationships that our rights structure, we will see the connection between our power to exclude and the homeless persons' plight. We might still decide to maintain that right of exclusion, but the decision would be made in full consciousness of the pattern of relationships it helps to shape. And I think we are likely to experience our responsibilities differently as we recognize that our "private rights" always have social consequences.[20]

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[19] Peter Gabel offers an excellent, thoughtful statement of this perspective in P. Gabel, "The Phenomenology of Right-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 *Texas Law Review* 1563.

[20] This seems an appropriate place for a note of response to the allegation that my theory of "rights as relationship" is consequentialist, and that I must therefore enter into the debate over deontological vs. consequentialist theories of rights. A series of questions and the Legal Theory workshop at Columbia helped me to

Thus my response to the critique of distancing is that rights conceived as relationship will not foster the same distancing that our current conception does. Rights *could*, however, still serve the protective function that thoughtful advocates of rights-based distance, like Patricia Williams,[21] are concerned about. Not only does my vision of rights as relationship have equal respect at its core, but optimal structures of human relations will always provide both choice about entering relationships and space for the choice to withdraw.[22]

These, then, are the outlines of my responses to the critiques of "rights-talk" as individualistic, obfuscating, and alienating. Before going on to my constitutional examples, let me reiterate what is novel and what is not about my approach. It is important to my argument to claim that thinking about rights as relationship offers a new and better way of resolving a set of problems about rights. But part of what I think makes the argument compelling is that it is not in fact a radical departure from what is currently entailed in legal decision making, including judicial decision-making. As my earlier examples were intended to show, the novelty lies only in bringing into focus what has always been in the background.

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see why this debate is peripheral to my concerns here. The division between consequentialist and deontological theories is premised on the possibility of a useful conception of human beings whose nature can be understood in abstraction from any of the relations of which they are a part. Once one rejects this premise, the sharp distinction between rights defined on the basis of human nature vs. rights defined in terms of the desirability of the relationships they foster simply dissolves. Since there is no free standing human nature comprehensible in abstraction from all relationship from which one could derive a theory of rights, the focus on relationship does not constitute a failure to respect the essential claims of humanness. The focus on relationship *is* a focus on the nature of humanness, not a willingness to sacrifice it to the collective.

21 P.J. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).

22 There are still some unresolved problems here. We need to figure out both the scope for withdrawal that is optimal and the ways of structuring choice about entering relationships. These are complicated problems once one starts from a framework that treats relationships as primary and in some ways given rather than chosen.

It is important to recognize the *existing* role of relationship in rights in order to see that what I am proposing can happen immediately, without the radical restructuring of our legal system. It is also important to meet the objection that what I am calling for dangerously expands — or creates — a policy-making role for judges. My argument is that recognizing rights as relationship only brings to consciousness, and thus open to considered reflection and debate, what already exists. Here I join a growing chorus of voices that urge that judges will do a better job if they are self-conscious about what they are doing, even if that new self-consciousness seems very demanding.[23]

IV. Applying "Rights as Relationship"

I turn now finally to my sketches of how my approach helps with some specific problems. I begin with the question of whether property belongs in the *Charter*. This question has the virtue of making more concrete the abstract question I began with of how we are to understand the idea of constitutionalizing rights. Once we acknowledge that constitutional rights are collective choices, we not only make the simple "democracy vs. rights" formulation untenable, we make it a great deal more difficult (or we make it more obvious why it is difficult) to explain why some things we call rights (like freedom of speech or conscience) should be constitutionalized in my dialogue of democratic accountability and others, like property, should not.

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[23] See, for example, M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithica: Cornell University Press, 1990).

The strongest argument that I have heard against this position has come from some of my students, in particular black students. The argument is that even if judges are always engaged in what they would call policy making, if they were conscious of it, they should remain unconscious because that constrains them more. Contrary to my claim that we can move forward in the direction I advocate in the absence of radical reform, they say given the current composition of the judiciary, they want the judges to feel as constrained as possible about innovation. They seem to suggest that we should wait until we have a vastly more representative judiciary before we advocate a shift in their understanding of their job.

My idea of constitutionalism is to make democracy accountable to basic values, to have mechanisms of ongoing dialogue about whether the collective choices people make through their democratic assemblies are consistent with their deepest values. Now there is a certain irony to this idea of "deepest values" as what constitutionalism protects. When we choose to constitutionalize a value, to treat it as a constitutional right, we are in effect saying both that there is a deeply shared consensus about the importance of that value *and* that we think that value is at risk, that the same people who value it are likely to violate it through their ordinary political processes. Now, in fact, I think this ironic duality makes sense. There are lots of values like that. Once we recognize the duality, we know that it is not a sufficient argument *against* constitutionalizing a right either to say that it is contested so it does not belong in a Charter of Rights and Freedoms or to say that it is so well accepted that it does not need to be in the *Charter*. Of course, those are both arguments one might make about property.

I think that in Canada, and probably more generally in constitutional democracies, the fundamental premise of constitutional rights is equality. Constitutional rights define the entitlements that *all* members of society must have, the basic shared terms that will make it possible not just to flourish as individuals, but to relate to each other on equal terms. (Which is not to say that the values we protect constitutionally — autonomy, privacy, liberty, security — are themselves identical to or derivative from equality.) Now this sounds at first perilously close to the basic notion of liberal theory: that people are to be conceived of as rights-bearing individuals, who are equal precisely in their role as rights-bearers, abstracted from any of the concrete particulars, such as gender, age, class, abilities, which render them unequal. This conception has been devastatingly criticized by feminist scholars such as Iris Young.[24] My notion is subtly, but I think crucially, different. The question of equality (to be captured in constitutional rights) is the meaning of equal moral worth *given* the reality that in almost every conceivable concrete way we

[24] See I.M. Young, "Impartiality and the Civic Public" in S. Benhabib & D. Cornell, eds., *supra* note 16 at 56.

are not equal, but vastly different, and vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about equal rights, but to ask how we can structure relations of equality among people with many different concrete inequalities.

The law will in large part determine (or give effect to choices about) which differences matter and in what ways: which will be the source of advantage, power, privilege and which the source of disadvantage, powerlessness, and subordination. One might say that whatever the patterns of privilege and disadvantage the ordinary political and legal processes may generate, the purpose of equal constitutional rights is to structure relations so that people treat each other with a basic respect, acknowledge and foster each other's dignity, even as they acknowledge and respect differences. Constitutional rights define indicia of respect and requirements for dignity—including rights of participation. Constitutional rights define basic ways we must treat each other as equals as we make our collective choices.

Property fits very awkwardly here. It is, at least in the sorts of market economies we are familiar with, the primary source of *inequality*. Of course, formally, everyone who *has* property has the same rights with respect to it. Nevertheless, property is the primary vehicle for the allocation of power from state to citizen, and in market economies, the presumption has been that that power must and should be distributed unequally — for purposes of efficiency and prosperity and, on some arguments, merit as well. The result, of course, is an ongoing tension between the inequality of power generated by property through the market and the claims of equal rights. We see this, for example, in debates over free speech and access to the media, in campaign spending debates, and as I will note shortly, in arguments for a social charter.

All of this suggests to me that debates over the meaning of property, of the kinds of power that should be allocated to individuals and the limits on that power (as in my earlier examples of landlord-tenant law, environmental regulation, and minimum wage law) should be part of the ongoing vigorous debate of the most popularly accessible bodies, the legislative assemblies.

1993
Revue d'études constitutionnelles

There is another, more straightforward, argument against constitutionalizing property: property is really a second order value, it is a *means* to the higher values we do treat as constitutional rights — life, liberty and security of the person. It does not really belong up there, treated as a comparable value. This is one more reason why, in the end, property should be held accountable to equality, not vice versa — as would inevitably happen if property were constitutionalized.

We already have in the *Charter* the values we really care about. So much of ordinary governmental decision-making has an impact on property that it becomes extremely awkward and artificial to determine which of these impacts ought to be described as a violation of property rights.[25]

What we really want to know is when the impact amounts to an infringement of one of the basic values that *is* in the *Charter* — most likely liberty or security. For example, arbitrary or punitive confiscations, or confiscations without compensation, would surely be deemed to be an infringement on security of the person not in accordance with fundamental justice. We cannot in fact feel secure or free among our fellow citizens, nor can we feel as though we can count on being treated as an equal, worthy of equal respect, if we feel that we may at any time be capriciously deprived of our material possessions. That kind of insecurity would destroy relations of trust, confidence and equality necessary for a free and democratic society.

This leads me directly into my second example. If property is not in the *Charter*, how do we determine when impacts on property or economic

[25] Some of the proponents of adding property to the *Charter* seem to have odd ideas about just what that would accomplish. In the debate in the Ontario legislature, a whole series of sad stories were related in which people's property was confiscated, and compensated (sometimes at values thought not to reflect the full cost of relocating a home or small business) for various public works projects (some of which never even came to fruition). There was not a single story that I thought would have been prevented by the "takings" clause in the U.S. Constitution (even under the most recent approach). Surely eminent domain would continue to be treated as a legitimate power of the legislature.

interests amount to violations of liberty or security of the person. Of course, in the space remaining, I will do no more than indicate the ways I think a focus on relationship will help.

Take, for example, the British Columbia doctors' case, *Wilson* v. *Medical Services Commission.*[26] In an attempt to make sure that all areas of the province were adequately provided with medical care, the province decided to restrict the number of doctors to whom it would provide billing numbers in popular areas like Vancouver. In effect, doctors could not practice wherever they wished. Does this amount to an infringement of liberty? Suppose we begin by looking at the network of relationships in which these doctors are embedded — public funding for medical school, for hospitals, for their salaries (hence the problem in the first place). We should then consider more broadly the interdependencies we already formally recognize in a wide variety of schemes that limit access to jobs ranging from chicken farming to taxi driving. Of course, constraints on one's livelihood are serious constraints and come close to our understanding of liberty. But we cannot view any case, like the doctors, in isolation. The relationships in society will be different depending on how much scope for individual choice we allow, and how much we constrain that choice by notions of mutual responsibility. In any given case we have to ask whether the alleged infringement is designed to foster or enforce social responsibility in ways consistent with other forms of social responsibility in Canada. Or is the infringement unnecessary, arbitrary or gratuitous? Of course, consistency with other policies might not itself be sufficient. We could ask if the network of mutual responsibility seems to be drawing such a tight net that we cannot imagine those relationships being conducive to individual autonomy — (having recognized, of course, that autonomy is not a matter of *independence*, but of interdependent relationships that foster it). I will not go into any more detail here, beyond saying that I think in this example, as in others, the difference a focus on relationship makes is not stark, but subtle. Many of

[26] (1988), 53 D.L.R. (4th) 171, [1989] 2 W.W.R. 1 (B.C.C.A.) reversing *Wilson* v. *Medical Services Commission of B.C.* (1987), 36 D.L.R. (4th) 31, [1987] 3 W.W.R. 48 (B.C.S.C.), leave to appeal to Supreme Court of Canada, refused, November 3, 1988.

the questions sound familiar and can be generated by other frameworks, but I think the emphasis will be different. Our attention will be drawn to different matters, and the overall result will be better.

Finally, a brief note on what could easily be the subject of another essay – the Alternative Social Charter put forward by a coalition of anti-poverty groups during the recent round of constitutional negotiations.[27] There are two basic connections with my theme. First, the ASC is an effort to carry through a vision of what it would take for all members of Canadian society to be full, equal participants, to be truly treated with equal respect and dignity. I think the ASC grows out of an awareness of the ways the relations of disadvantage in Canada currently preclude that full equality.[28] Conventional rights theory can blind one to the impact of disadvantage. Rights as relationship brings it to the forefront of our attention.

Perhaps most importantly for my purposes here, the ASC comes with an extremely attractive form of my dialogue of democratic accountability: a tribunal that is an alternative to the courts as a mechanism for maintaining this dialogue. The tribunal would hear selected complaints alleging infringements "that are systemic or that have systemic impact on

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[27] See J. Nedelsky & C. Scott, "Constitutional Dialogue" in J. Baken & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on the Social Charter* (Ottawa: Carleton University Press, 1992). For a copy of the Alternative Social Charter [hereinafter ASC] see the Appendix of that volume.

[28] One might say that because the rights of health care, food, clothing, and child care are, like property, second order values, that is means to the end of achieving equality and the other basic values outlined in the *Charter*, it is appropriate for the Social Charter to be a separate document rather than integrated into the *Charter*. There was some disagreement on this among those proposing this form of the Social Charter. In the proposed form, it was/is a separate document, with a provision that the *Charter* be interpreted in ways consistent with the Social Charter. I think health care and food are primary values, although traditional rights discourse has treated them quite differently from liberty or equality — presumably in part because they are more readily seen as "positive" rights rather than negative liberties. It might seem that health care and the other social rights of the ASC are less susceptible of a relational approach. But the meaning of equality needs to be interpreted in light of such social rights and vice versa, all of which requires relational analysis.

vulnerable or disadvantaged groups and their members."[29] It would have wide authority to review federal and provincial legislation, regulation, and policies and order the government to take appropriate measures or ask government to report back with measures taken or proposed. However, the order "shall not come into effect until the House of Commons or the relevant legislature has sat for at least five weeks, during which time the decision may be overridden by a simple majority vote of that legislature or parliament."[30]

This is an imaginative effort to meet the concerns about courts having the power to enforce rights which would often involve the commitment of public funds. This proposal (unlike the one included in the Beaudoin-Dobbie report from the all-party committee of Parliament[31]) would provide an important enforcement mechanism, while giving the final word to the primary forum for democratic decision-making, the legislatures. It seems a promising mechanism for initiating an ongoing dialogue that would make democratic decision-making accountable to the basic values of equality.

The mechanism itself would be highly democratic. The proposal calls for the tribunal to be appointed by the (reformed) Senate, with one third of the members from each of the following sectors: the federal government; provincial and territorial governments; and non-governmental organizations representing vulnerable and disadvantaged groups. Moreover, the Tribunal was structured to provide an ongoing dialogue with the adjudicators, the government. The ASC thus provides an institutional structure that recognizes rights as entailing an ongoing process of definition. It creates a democratic mechanism for that process, without simply giving democracy priority over rights. At the same time, it provides a means of ensuring that democratic decisions are accountable to basic values without treating rights as trumps. In short, the ASC provides us with an outline of a workable model of constitutionalism as a dialogue

29 Section 10(1) ASC.

30 *Ibid.*

31 The Charlottetown accord left unspecified the enforcement mechanisms for the "Social and Economic Union."

of democratic accountability, where the rights to be protected derive from an inquiry into what it would take to create the relationships necessary for a free and democratic society.

V. Conclusion

When we understand the constitutionalization of rights as a means of setting up a dialogue of democratic accountability, we redefine the kinds of justification necessary for constitutional constraints on democratic decision-making. Perhaps even more importantly for the world outside of academia, we provide a conceptual framework that will help us to design and assess workable mechanisms for constitutionalizing rights in modern democracies. This conception of constitutionalism both requires and fosters a new understanding of rights—rights as structuring relationships. This approach to rights, in turn, helps to overcome the most serious problems with the dominant conceptions of our liberal tradition. When we understand rights as relationships and constitutionalism as a dialogue of democratic accountability, we can not only move beyond long standing problems, but we can create a conceptual and institutional structure that will facilitate inquiry into the new problems that will inevitably emerge.

BEYOND THE CHARTER DEBATE: REPUBLICANISM, RIGHTS AND CIVIC VIRTUE IN THE CIVIL CONSTITUTION OF CANADIAN SOCIETY

Andrew Fraser*

The author offers a solution to the recent debate over the legitimacy of Charter *review by removing one of the* Charter *critics chief concerns: the review of Parliament by a non elected and unaccountable judiciary. He suggests a return to republican principles and in particular a recognition of the legal profession's influence and responsibility in interpreting the* Charter. *This, he suggests, would be best accomplished by the election of judges by the legal profession and academia (subject to ratification by the populace). He argues that recognizing power where it really lies will have a positive effect on the legitimacy of* Charter *review and on the legal profession in general. In coming to this conclusion, the author reviews several subsidiary disputes between the critical and republican perspectives.*

L'auteur propose une solution au récent débat portant sur la légitimité de la révision de la Charte en éliminant une des préoccupations majeures des critiques de la Charte : le contrôle du Parlement par un pouvoir judiciaire non élu et non responsable. Il suggère un retour aux principes républicains et, en particulier, à la reconnaissance de l'autorité des juristes et de leur responsabilité en matière d'interprétation de la Charte. La meilleure façon de procéder consisterait à faire élire les juges par les avocats et les juristes (sous réserve de ratification populaire). Il estime que le fait de reconnaître le pouvoir là où il se situe réellement, aura un effet positif sur la légitimité de la révision de la Charte et sur la profession en général. Pour parvenir à cette conclusion, l'auteur examine les différénds qui ont surgi entre les perspectives critiques et républicaines.

I. Introduction

So far, the modest republican revival in the United States, Australia and the United Kingdom has not made much of an impression upon Canadian constitutional thought. Instead, Canadian constitutional discourse has been dominated by a home-grown cult of *Charter* worship. *Charter* enthusiasts usually portray the constitutional entrenchment of fundamental rights as a significant departure from the old-fashioned political theology of parliamentary sovereignty. However, while the *Charter of Rights and*

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Freedoms[1] has been marketed as a sort of constitutional *New Testament*, adherents of the *Charter* cult have never abjured the principal canons of that old-time civil religion. Since the Crown remains in place as the fountain of law and justice, the monarchal essence of the ancient parliamentary regime has been left undisturbed.

From a republican perspective, the dogged debate among Canadian constitutional scholars over the legitimacy of the *Charter* seems to have settled into a well-worn political and intellectual rut. Every law review bulges with articles in which the leading protagonists of the *Charter* debate rehearse new variations on their all-too-familiar themes. Shopworn celebrations of *Charter* rights and freedoms alternate with equally commonplace concerns over the *Charter's* capacity to magnify the powers wielded by an unelected and unaccountable or perhaps even unworthy judiciary.[2] The *Charter* debate has become the black hole of Canadian constitutional thought, absorbing without trace every particle of critical energy that happens to stray in its direction. Almost no one, it seems, can imagine a constitutional order better than that which gave birth to the *Charter*.

It may just be that radical constitutional visions are in short supply everywhere. But it is worth remembering that the British monarchy is an even more deeply entrenched feature of the Canadian constitution than the *Charter*.[3] That monarchy stands for the very special form of sovereignty

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

2 A recent pair of articles is fairly typical of the genre: see J.D. Whyte, "On Not Standing for Notwithstanding" (1990) 28 Alta L. Rev. 347; and P.H. Russell, Standing Up for Notwithstanding" (1991) 29 Alta L. Rev. 293.

3 Section 41 of the *Constitution Act, 1982* requires the unanimous consent of federal and provincial parliaments to any constitutional amendment affecting "the office of the Queen." Amendment or repeal of the *Charter* may be accomplished in accordance with the less stringent requirements of s. 38(1). *Pace, An Act Representing the Royal Style and Titles*, R.S.C. 1970, c. R-12, the monarchy is a quintessentially "British" institution in that it is rooted in a continuing interaction between the people and constitution of England and the legal cultures of the overseas dominions. See J.G.A. Pocock, "The Limits and Divisions of

from above which is built into the parliamentary regime established by the *British North America Act, 1867.* Down to the present day, the metonymic image of the Crown has presupposed and sanctified an ingrained deference to a monarchal authority descending from on high.[4] Certainly one must search long and hard in contemporary Canadian constitutional thought to find explicit appeals to, or even interest in, republican principles of constitutional reformation. Having been treated for so long as mere spectators in the process of constitutional development, few Canadian citizens have much confidence in their collective capacity to create for themselves a stable, prosperous and free republican polity.

My own belief is that a modernized republican jurisprudence could provide us with a definite and highly desirable alternative to the established civil religion manifested both in the *Charter* cult and also in the sovereign majesty of the Crown in and out of Parliament. In defence of that heretical proposition, this essay offers the suggestion that republican lawyers and legal scholars could and should aim to transform not only the constitutional significance of the rights and freedoms enshrined in the *Charter*, but also the nature of the institutions that create, preserve and sometimes destroy that corpus of legal meaning.

British History: In Search of the Unknown Subject" (1982) 87 American Historical Review 311.

4 E.Z. Friedenberg, *Deference to Authority: The Case of Canada* (White Plains, NY: M.E. Sharpe, 1980). On the distinction between the monarchy "as such" and what it "stands for," see T. Nairn, *The Enchanted Glass: Britain and its Monarchy* (London: Radius, 1988). The Fathers of Confederation were fully conscious that the monarchy stood for a hierocratic principle of rule from above. For that reason, they hoped that the monarchy would help them stem the subversive tide of "Yankee republicanism." See, W.L. Morton, "The Meaning of Monarchy in Confederation," in *Transactions of the Royal Society of Canada*, 4th Series, 1963, vol 1, section 2 at 271-82. On the absolutist and authoritarian implications of the Westminster tradition of rule from above as practised in Canada, see P. Resnick, *Parliament vs People: An Essay on Democracy and Canadian Political Culture* (Vancouver: New Star Books, 1984). The Crown continues to stand for sovereign authority standing above the law, see D. Mockle, *Immunity from Execution* (Ottawa: LRCC, 1987).

As a constitutional text, the *Charter* posits a set of self-imposed, formal legal qualifications to the ancient Westminster traditions of rule from above. Enactment of the *Charter* has also had a considerable impact on Canadian political culture; for the first time many individuals and several social groups have come to think of themselves as rights-bearing citizens. Nevertheless, it is arguable that by granting special constitutional status to various racial, ethnic, religious, gender, age and ability groups, the *Charter* has severed citizenship from its republican roots.

Citizenship once signified a right to participate in authority. Nowadays, the citizen is not ordinarily or even imaginably a significant political actor. Instead, each citizen possesses a particular bundle of economic, political and social rights and entitlements to share in the individual or collective consumption of the benefits and services provided by the corporate welfare state.[5] By reviving older, supposedly superseded principles and practices of citizenship and extending them into the associational life of modern Canadian civil society, a republican charter of rights and freedoms could help to lay the foundation of a new constitutional order. Within the federal structure of such a republican polity, we may also find solutions to

[5] For a useful illustration and application of the social democratic and corporatist parameters of citizenship as theorized by T.H. Marshall, see B.S. Turner, *Citizenship and Capitalism: The Debate Over Reformism* (London: Allen and Unwin, 1986). Even the political rights enjoyed by the citizens of the modern corporate welfare state do little to nurture the participatory virtues prized by citizens of the ancient *polis*. That fact was recognized early in the nineteenth century by Benjamin Constant. See, "The Liberty of the Ancients Compared with that of the Moderns" in B. Constant, *Political Writing* (Cambridge: Cambridge University Press, 1988). Constant, like Marshall and his social democratic disciples, concluded that the ancient republican conception of citizenship has been consigned to the dust bin of history. That conclusion is challenged by B. Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984). See also, R. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (New York: Harper and Row, 1986).

many of the problems raised by the populist, progressive and postmodern critics of the *Charter*."[6]

Supporters of the *Charter* have hailed it as an essential bulwark against the ever-present danger of executive tyranny and parliamentary absolutism. While such dangers are real enough, no republican could fail to notice that the *Charter* came into being as an Act of the Imperial Crown in Parliament. Never having been submitted to the Canadian people for ratification, the *Charter* would appear to have failed the most minimal republican test of constitutional legitimacy. Should the current movement towards the convocation of an elected constituent assembly meet with success, an opportunity will arise for the Canadian people as a whole to create its own charter of rights and freedoms as a core element in the constitution of a federal republic.[7]

II. The Virtues of Mixed Government

In the proceedings of an elected constituent assembly possessed of a clear mandate to rewrite the constitution of Canada, the *Charter* no less than the monarchy and the concomitant principle of parliamentary

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6 There has been no shortage of contributors to the *Charter* debate. Among book-length defences of the *Charter*, one must mention P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987). David Beatty has already contributed two books to the *Charter* cult: *Putting the Charter to Work: Designing a Constitutional Labour Code* (Montreal and Kingston: McGill-Queen's University Press, 1987) and *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990). Among the most prolific practitioners of *Charter* criticism are Allan C. Hutchinson and Andrew Petter. See their "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*" (1988) 38 U.T.L.J. 332 and A. Petter, "The Politics of the *Charter*" (1986) 8 Sup. Ct. L. Rev. 473. Among the most significant works of *Charter* criticism is M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989).

7 On the movement to convene an elected constituent assembly see P. Resnick, *Towards a Canada-Quebec Union* (Montreal and Kingston: McGill-Queen's University Press, 1991).

sovereignty will be open to fundamental revision. This is as it should be in a time of new beginnings. The rights and freedoms promulgated by such an assembly would acquire new significance and require new forms of institutional expression within a modern republican constitution.

Indeed, it may well be the case that the constitutional rights and civil liberties of Canadian citizens can *only* achieve stable and coherent juridical meaning through the republican reconstitution of both state and civil society. Certainly the judicial interpretation of the *Charter* to date demonstrates the inherent instability of contemporary constitutional discourse, its tragic susceptibility to deconstruction into a state of hermeneutic chaos. Given the antinomic confusion of contemporary legal discourse, any particular judicial interpretation of the *Charter* can convincingly be cast as an arbitrary imposition of the particular, subjective values held by a narrow judicial elite.

Indeed, raising the spectre of an imperial judiciary has become the main stock-in-trade of most *Charter* critics. If *Charter* rights and freedoms mean whatever judges say they mean, critics are surely on solid ground when they warn that the will of a democratically elected parliament may be overturned or frustrated by an unelected and unaccountable judiciary. Michael Mandel's book on the *Charter* and "the legalization of politics" in Canada highlights that danger.[8] Not only are judges able to shape the legal meaning of the *Charter* to suit themselves, they are also in a position to define the nature and scope of legitimate political activity. As politics become more and more legalized, more and more power is transferred from the hands of Parliament and the people to judges and lawyers.

Doing away with the *Charter*, however, is not necessarily the best solution to the problem identified by Mandel. After all, judges and lawyers exercise enormous power over the creation, preservation and transformation of legal meaning whether or not they have been empowered to administer a charter of rights and freedoms. If the actual power wielded by judges and lawyers cannot be squared with the rhetoric of parliamentary

[8] Mandel, *supra* note 6.

sovereignty, we may be well advised to turn for constitutional guidance to the ancient republican traditions of civic virtue and mixed and balanced government. Republican principles suggest that, rather than seeking to extirpate the hermeneutic power wielded by the legal professions, we should recognize that power as an essential element in the constitution of a federal republic. The spectre of an imperial judiciary may be exorcised by endowing those forgotten republican principles with contemporary institutional significance.

Ancient writers such as Aristotle and Polybius identified the mixed constitution with a civic distribution of authority among the different orders of society.[9] Early modern thinkers such as Harrington and Montesquieu revived the ancient idea that each of the presumptively natural social orders — the one, the few and the many — had its own characteristic virtues and vices. The civic virtues cultivated by the democratic citizen were bound to differ from those characteristic of an aristocratic or monarchal polity. However, it was well known that the participatory virtues essential to a democratic polity might easily be corrupted into mindless mob rule, just as a stable and legitimate monarchy based on the principle of honour could degenerate into a despotism governed by fear.[10] Classical republican thinkers and practical statesmen often sought to combine the competing and contradictory principles of monarchy, aristocracy and democracy in a single polity. The resulting balance, it was hoped, would hold the allied threats of corruption and despotism at bay.

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9 Aristotle, *The Politics*, trans. T.P. Sinclair (Harmondsworth: Penguin, 1962); Polybius, *The Rise of the Roman Empire*, trans. I. Scott-Kilvert (Harmondsworth: Penguin, 1979).

10 J.G.A. Pocock, ed., *The Political Works of James Harrington* (Cambridge: Cambridge University Press, 1977); Montesquieu, *The Spirit of the Laws*, trans. A.M. Cohler et al. (Cambridge: Cambridge University Press, 1989); P. Resnick has drawn our attention to the elements of mixed and balanced government originally incorporated (but since forgotten) into the Canadian Constitution in *The Mask of Proteus: Canadian Reflections on the State* (Montreal and Kingston: McGill-Queen's University Press, 1990).

We need not accept the ancient belief in the existence of a natural hierarchy of social orders to recognize the contemporary relevance of a mixed and balanced constitution. The corporate welfare state has already supplied us with a complex, artificially constituted hierarchy of social groups. Significant legitimation problems are posed by the emergence of corporate and professional associations powerful enough to be regarded as private governments. At least some of those problems might be solved by adapting the republican ideal of the mixed polity to the civil constitution of Canadian society.

But just as contemporary republicans must abandon the idea of natural social orders, modern democrats must make a clean break with the political theology of sovereignty.[11] The notion that an absolute, unitary and uncontrollable authority could or should be vested in any single centre of sovereign power should be rejected as a dangerous illusion. The most obvious beneficiary of the doctrines of parliamentary and popular sovereignty appears to be the massive state apparatus that acts in the name of the Crown for the ostensible benefit of the people. To the extent that the myth of sovereignty presupposes the strict separation of state and society, the people are kept at a safe distance from the conduct of public affairs. However, even when the boundary between public authority and private power becomes blurred, sovereignty does not return to the people. At most, it migrates into the oligarchical structures of the corporate system.

Political, bureaucratic, managerial, professional and intellectual elites have all multiplied within the institutional framework of the corporate welfare state. Both versions of the political theology of sovereignty serve mainly to draw a legal veil over the actual existence of federal distribution of civic authority to social groups such as business corporations and the

[11] See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (Cambridge, Mass: MIT Press, 1985); J.B. Elshtain, "Sovereign God, Sovereign State, Sovereign Self" (1991) 66 Notre Dame L. Rev. 1355.

legal professions.[12] For that reason, democrats interested in expanding the range of popular influence within both the "public" and the "private" centres of constitutional power in Canadian society should abandon their attachment to the monarchal image of sovereignty. Dependence upon the monistic language of sovereignty has compelled the populist critics of the *Charter* to acknowledge, however grudgingly, the Crown-in-Parliament as the only effective seat of legitimate law-making authority in Canada: only the Parliament can claim now to act in the name of the people as a whole. It matters not that, as a matter of constitutional law, Parliament speaks through and by the authority of the Crown.

Most *Charter* critics accept the conventional political equation of parliamentary politics and popular sovereignty. For them, it follows that the *Charter* is less the essential guarantee of the rights of a free people than a limitation on its sovereignty. But sovereignty and rights are mutually dependent ideas. It is almost impossible to imagine the one without the other. Accordingly, every step in the argument made by the *Charter* critics can be countered easily be any competent defender of *Charter* rights. Mandel and others make much of the fact that judges are able to overrule the will of a popularly-elected parliament. Even those who otherwise favour strong constitutional guarantees for civil liberties have expressed concern over the narrow political allegiance of the judiciary now authorized to wield whatever open-ended mandate it may discover for itself in the rubbery language of a charter of rights.[13] Nevertheless, most *Charter* supporters insist that real and effective popular sovereignty presupposes judicially enforceable constitutional limits on the power of the state to override the rights of a free people to life, liberty, and now perhaps even property. So while critics of the *Charter* commonly portray it as an illegitimate fetter on the will of a democratically elected parliament, defenders of the *Charter* present it as a necessary limitation on

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12 See A.S. Miller, *The Modern Corporate State: Private Government and the American Constitution* (Westport, Conn: Greenwood Press, 1974) at 200-9; see also, M. Nadel, "The Hidden Dimension of Public Policy: Private Governments and the Policy-Making Process" (1975) 37 *Journal of Politics* 2.

13 See D. Beatty, "A Conservatives Court: The Politicization of Law" (1992) 41 U.T.L.J. 147.

the absolutist pretensions of parliamentary and bureaucratic elites who would otherwise be subject only to the decaying and disputed conventions of responsible government. But, then, if only because the *Charter* owes its existence to the self-limiting sovereign will of the Crown-in-Parliament, critics may claim that the use of the notwithstanding clause set out in s. 33 of the *Charter* remains a valid constitutional option.

Of course, the populist critics of the *Charter* can only support the exercise of that option by treating parliamentary politics as the practical manifestation of popular sovereignty. *Charter* criticism never challenges the practical or ideological postulates of the established constitutional order. The *Charter* debate calls to mind the image of two scorpions trapped in a bottle. Enclosed within an antinomic discourse of sovereignty and rights, each side of the argument poisons the credibility of the other while remaining unable to establish its own uncontested hegemony. Yet the recently rediscovered Anglo-American tradition of classical republicanism holds out the promise of a new beginning in constitutional jurisprudence throughout the common law world.[14] To realize that hope the sterile antinomies of the *Charter* debate must be left behind.

Certainly, neither the political theology of sovereignty nor the natural jurisprudence of absolute private rights should hold much appeal for

[14] The historical scholarship of J.G.A. Pocock, especially in *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), has stimulated a flood of work on the history of the Anglo-American republican tradition. G. Wood in *The Creation of the American Republic, 1776-1787* (New York: Norton, 1972) and B. Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass: Harvard University Press, 1967) also contributed greatly to that renaissance of interest in republicanism. See also I. Kramnick, *Republicanism and Bourgeois Liberalism: Political Ideology in Late Eighteenth-Century England and America* (Ithaca, NY: Cornell University Press, 1990) and B.J. Smith, *Politics and Remembrance: Republican Themes in Machiavelli, Burke and Tocqueville* (Princeton: Princeton University Press, 1985).

republicans.[15] Unfortunately the imperial language of sovereignty and rights still defines the limit of Canadian constitutional discourse. In that language, the paideic ideal of virtuous citizenship within a republican polity becomes altogether redundant.[16] So long as the effective locus of sovereignty is transported to a majestic space outside and apart from the everyday life of civil society, the citizen comes "to be defined not by his actions and virtues, but by his rights to and in things."[17] Once governments come to monopolize sovereign authority, participation by ordinary people in "affairs of state" becomes largely vicarious. Both the American myth of popular sovereignty and the British fetish of parliamentary sovereignty undoubtedly have a place for malleable voters. They have no real need for virtuous citizens.

Faced with the institutional force of those sovereign authorities, what is it that individuals need in order to act as citizens? To open the door to new forms of civic action, constitutional jurisprudence must break with the monarchal doctrines of parliamentary and popular sovereignty. This can be done by fostering the jurisgenerative capacity vested in a wide range of civil bodies politic. The major task facing a republican jurisprudence is to articulate principles of institutional design appropriate to a modern civil society. There is a pressing need for institutional practices capable of transforming the real power wielded by existing corporate, bureaucratic and professional elites into legitimate sources of constitutional authority.

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[15] Schmitt, *supra* note 11. On the emergence of the tradition of natural jurisprudence, see I. Hont & M. Ignatieff, eds., *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1980). On the distortions produced in the constitutional thought of the early American republic by an obsessive preoccupation with private property rights see J. Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago: University of Chicago Press, 1991).

[16] On the ideal-typical distinction between the world-maintaining, but jurispathic, *imperial* forms of legal ordering and the world-creating, jurisgenerative processes grounded in a *paideic* community, see R. Cover, "*Nomos and Narrative*" (1983) 97 *Harvard Law Review* 4.

[17] J.G.A. Pocock, *Virtue, Commerce and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985) at 43.

That problem can best be solved by extending the principles of republican citizenship into the corporate, professional and associational life of civil society.

Populist and progressive movements have sometimes sought to eliminate dominant classes and entrenched elites by turning the sovereign apparatus of state power into the obedient servant of the people-at-large. Nowhere has that strategy been successful. This essay proposes the republican reconstitution of the legal profession and the judiciary as one key element in an alternative strategy of constitutional reform. At a minimum, this would involve election of high court judges by the legal professions acting as an electoral college. To move beyond the increasingly stereotyped and stalemated limits of a constitutional jurisprudence that is obsessed with the proper role of the judiciary in the interpretations of the *Charter*, radical institutional reforms will be necessary. To be adopted as a model of constitutional reform, the proposals outlined here require a major transformation in the acknowledged constitutional role of the legal professions. Any such program will have to overcome deeply entrenched, historical prejudices against the recognition of professional guilds as civil bodies politic. Those inherited populist resentments must be discarded if the institutional life of modern civil society is to be reconstituted in accordance with republican principles. This constitutional reformation should not be seen as an expression of an elitist ideology hostile to the democratic hope of popular self-government. On the contrary, this essay flows from the conviction that citizenship can never be a realistic option for the many if it is an experience denied or unknown to the few and the one.

III. The Virtues and Vices of the *Charter*

The *Charter* debate has so far been conducted mainly in the stereotyped and increasingly indeterminate language of sovereignty and rights. Arguments over the *Charter* have simply recycled the recurrent conflict between constitutionalism and absolutism that, over the centuries, has generated the core problems of Western jurisprudence. Within the antinomic universe of Anglo-American constitutionalism, the republican language of civic virtue is all but unintelligible. When it is articulated, the

danger is that it will be distorted: in the early American republic, the civic virtues were soon transformed into a privatized preoccupation with the pursuit of prosperity through thrift, hard work and productivity.[18] Republican ideals of freedom too have been deformed within the established paradigm of constitutional discourse. By defining freedom as the negative liberty to pursue one's individual self-interest, the eighteenth century liberal tradition of natural jurisprudence paradoxically ensured the growth and enhanced vitality of the legally despotic sovereign will that alone could preserve order and identify the requirements of collective welfare.[19] In liberal constitutionalism, the positive freedom of the citizen to participate in the active exercise of authority diminishes, while an absolute, unitary and indivisible sovereignty emerges both as "the creature of the rights it exists to protect" and also as the uncontrollable source of those self-same rights.[20]

For a very long time, European jurisprudence has been dominated by the ancient Romanist language of *imperium* and *jus*. It remains to be seen whether the idea of a republican jurisprudence conceived in opposition to the monarchal language of sovereignty and rights can be anything more than a contradiction in terms. Republican constitutional thought revolves around the ancient Greek concepts of citizenship and civic virtue. It also draws on the classical ideal of mixed and balanced government. Just as the ideal of the mixed constitution resists absorption into the discourse of sovereignty, the republican ideal of civic virtue cannot easily be absorbed without remainder into the language of rights. As Pocock has observed, there is "no known way of representing virtue as a right" so long as rights are conceived as a form of dominion over the external things of the world. Civic virtue pertains to "a quality of the relations between persons equal in citizenship, and between them and the republic, *polis* or *vivere civile*, which is the form of that equality." It is true that "citizens grant one another an equality of rights ... but the rights exist for the sake of the

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[18] See especially, Kramnick, *supra* note 14.

[19] L. Krieger, *An Essay on the Theory of Enlightened Despotism* (Chicago: University of Chicago Press, 1975).

[20] Pocock, *supra* note 17 at 45; see also W. Blackstone, *Commentaries on the Law of England*, Vol 1 (Chicago: University of Chicago Press, 1979) at 121-23.

equality and the virtue which is its expression, not the other way around." It may well be that the practice of civic virtue entails "the presence of all manner of rights, but it is neither necessary nor appropriate to premise a right to explain its presence."[21]

If the historians of Anglo-American republicanism are correct, it has been well over a century and a half since the language of civic virtue was last widely spoken among our constitutional ancestors. The language of sovereignty and rights has dominated legal discourse down to the present day. There are now, however, clear signs that the paradigm of liberal legalism may be coming apart at the seams. It is no longer possible to conceive of a property right simply as a relation between a person and a thing. Lawyers have come to treat property rights as a legally enforceable bundle of interests that deal with the relations between persons. Property has expanded to include all sorts of claims to a share in the stream of wealth generated by a vast politically-mediated system of needs.

So long as property was conceived as a relation between persons and things, it was understood as the "precondition of virtue, but not the medium in which it is expressed."[22] But the rise of the modern corporate system has rendered obsolete the traditional logic of property.[23] Property rights have become increasingly contingent and indeterminate. They are now understood as part and parcel of an increasingly complex set of social relationships between persons.[24] Within the modern corporate welfare state, it is now possible to reconceive property as an institutional medium for the cultivation of the civic virtues. There is no doubt that it is in the

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21 J.G.A. Pocock, "Cambridge Paradigms and Scotch Philosophers: A Study of the Relations between the Civic Humanist and Civil Jurisprudential Interpretation of Eighteenth-Century Social Thought" in I. Hont and M. Ignatieff, *supra* note 15 at 248.

22 *Ibid.* at 248.

23 See A.A. Berle and G.C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933).

24 See K. Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 *Buffalo Law Review* 325.

legal and institutional context defined by property relationships that the virtues of citizenship are now most urgently required. In principle, it should be possible to design corporate institutions that foster a close linkage between ownership rights and the civic virtues that might flow from active participation in corporate governance. We would then be able to represent virtue as a *telos* inherent in the exercise of our rights.[25]

In this context, it is significant that the *Charter of Rights and Freedoms* has been credited with an upsurge in citizen participation in public life. At the same time, certain social groups have been recognized as legitimate constitutional actors. Is it the case that the *Charter* has thereby acknowledged the constitutional autonomy of Canadian civil society? Could the *Charter* become the normative nucleus around which a republican jurisprudence might begin to crystallize? The answer to those questions depends upon what one means by both "citizenship" and "civil society."

According to Alan Cairns, the *Charter* "bypassed governments and spoke directly to Canadians by defining them as bearers of rights, as well as by according specific constitutional recognition to women, aboriginal, official language minority populations, ethnic groups through the vehicle of multiculturalism and to those social categories explicitly listed in the equality rights section of the *Charter*." Cairns contends that the *Charter* has contributed to a "participant citizen ethic" by giving citizens "constitutional encouragement to think of themselves as constitutional actors." It could hardly be denied that, by selectively incorporating particular social categories of Canadians into the constitution, the *Charter* "greatly expands the number of actors with explicit constitutional concerns." The constitution has been transformed into "the central arena within which the groups of an increasingly plural society defined, inter alia

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[25] See generally, A. Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: University of Toronto Press 1990); P. Hirst, ed., *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis and H.J. Laski* (London: Routledge, 1989); and D. L. Ratner, "The Government of Business Corporations: Critical Reflections on the Rule of 'One Share, One Vote'" (1970) 56 *Cornell Law Review* 1.

by gender, ethnicity, and language vie with each other for recognition and acceptance."[26] What is not so clear is whether that constitutional transformation reflects or subverts the jurisgenerative capacity of an autonomous civil society.

On balance, the *Charter* probably has less to do with enhancing the capacity of a self-organizing society to participate in the exercise of authority than with a "developing tendency to use the constitution as an instrument of community formation and social management."[27] The rights granted by the *Charter* serve, not to promote and facilitate the exercise of the civic virtues, but to endow particular social groupings with a direct stake in the growth and security of the national state (and vice versa). From the beginning, the *Charter* has been conceived as a nation-building instrument. Its earliest advocates hoped that Canadian citizens from coast to coast to coast would look to the federal government, not to the provinces, to defend their *Charter* rights. The Supreme Court of Canada has been the most obvious beneficiary of that nation-building strategy. By assisting in the organization of *Charter* lobby groups and funding *Charter* litigation, other branches of the federal government also can seek to enhance their status as defenders of popular rights.[28]

Thus, far from guaranteeing the autonomy of civil society, the *Charter* has blurred further the boundary between state and civil society. The *Charter* reaches down selectively into society to grant constitutional recognition to some groups (women, aboriginals, ethnics, official language minorities, the aged and the disabled) while denying that status to others (lesbians, gays, the poor, farmers, workers). *Charter* citizenship has come to be understood in the racial, religious and gendered language of group difference. The universalistic telos of a shared civic culture has given way

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26 A. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" (1988) 14 Can. Pub. Pol. s. 121 at s. 122, s. 124, s. 128, s. 138.

27 *Ibid.* at s. 134.

28 R. Knopff & F.L. Morton, "Nation-Building and the Canadian *Charter of Rights and Freedoms*" in A. Cairns & C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985).

to a postmodern corporatist strategy. Social conflict is now managed by licensing particular social groups that represent the otherness of society within the political, legal and administrative steering mechanisms of the contemporary corporate welfare state.[29]

IV. Postmodern Citizenship and the *Charter*

The postmodern reconstruction of citizenship offers special constitutional or political status to those social groups whose functional significance or conflict potential entitles them to recognition as a "distinct society" in their own right. By asserting its special constitutional status as a "distinct society," Quebec is merely taking advantage of the fragmentation of universal citizenship already implicit in the grant of special constitutional status to certain gender, ethnic, linguistic and religious groups.[30] Growing competition between various groups, each claiming the right to enjoy an artificially constituted corporate status fragments society into a "heterogeneous public." Those who favour this corporatist mode of

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[29] On corporatism generally, see P. Schmitter & G. Lembruch, eds., *Trends Toward Corporatist Intermediation* (Beverly Hills: Sage Publications, 1979); A. Cawson, *Corporatism and Political Theory* (Oxford: Basil Blackwell, 1988); and J. Triado, "Corporatism, Democracy and Modernity" (1984) 9 *Thesis Eleven* 33. The claim of group to inclusion in the corporatist bargaining processes that gives substantive political meaning to the collective welfare goals of the modern nation-state is grounded in one of two features. Either the group can claim functional relevance to the effective development of the system of needs, or it possesses a significant conflict potential. Groups based on gender, ethnicity and language may have a high conflict potential even if they are functionally superfluous to the modern system of needs. The Oka rebellion provides an obvious case in point.

[30] Pierre Fournier attacks the "Trudeauites" who "maintain that the rights of a geographically based ethnic group should not be given the same recognition as the rights of natives or linguistic minorities." In his view, it "is high time to denounce this double standard." See, *A Meech Lake Post-Mortem: Is Quebec Sovereignty Inevitable?* (Montreal and Kingston: McGill-Queen's University Press, 1991) at 12.

interest intermediation do so on the grounds that a common world of shared civic values is neither possible nor desirable.[31]

Iris Marion Young for example asserts that a "general perspective does not exist which all persons can adopt and from which all experiences and perspectives can be understood and taken into account." The distinctive identity of each social group "implies that they do not entirely understand the experience of other groups." It follows that no one "can claim to speak in the general interest, because no one of the groups can speak for another, and certainly no one can speak for them all." Postmodern politics has abandoned the republican experience of citizenship in which the individual rises out of the private realm of necessity to appear before his or her peers in the public realm of freedom.[32]

Young explicitly rejects the ideal "of a unified public realm in which citizens leave behind their particular group affiliations, histories, and needs to discuss a general interest or common good." In her view, the "desire for unity suppresses but does not eliminate differences and tends to exclude some perspectives from the public." So long as we live in a society where some groups are privileged while others are oppressed, the

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[31] See especially, I.M. Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" (1989) 99 *Ethics* 250; and G. Torres, "Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice — Some Observations and Questions of an Emerging Phenomenon" (1991) 75 *Minnesota Law Review* 993. See also, P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 6 McGill L.J. 382. Young's concept of the "heterogeneous public" should be distinguished from the "plurality" that exists within every republican polity. Plurality can be recognized and transcended within the public spaces of the common world. See H. Arendt, *The Human Condition* (Chicago: University of Chicago Press 1958).

[32] Young, *supra* note 31 at 263. This postmodern preoccupation with "difference" is manifested as well in M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca NY: Cornell University Press, 1990). Not surprisingly, given its consistent rejection of any "privileged" standpoint, Minow's is a remarkably inconclusive work. See also, H. Arendt, *supra* note 31 at 28-37.

expectation "that as citizens persons should leave behind their particular affiliations and experiences to adopt a general point of view serves only to reinforce that privilege; for the perspectives and interests will tend to dominate this unified public, marginalizing or silencing those of other groups."[33]

Many of those who support the *Charter* do so precisely because it opens up the polity to group differences. Postmodernist supporters applaud the *Charter's* capacity to ensure "that individuals living in communities are provided with the opportunity and means to define and develop their identities." In their view, the *Charter* seeks "to regulate and to structure the way in which state power could be used, rather than to define the boundary between public and private." For Monahan, the *Charter* posits "a complex and symbiotic relationship between individual autonomy and community values": membership in a distinctive community "is both a prerequisite of individual freedom and a corollary of it." Monahan regards as axiomatic the proposition that society "is primarily a community of hierarchically organized classes or groups, rather than an association of antecedently free individuals."[34] Postmodern citizenship does not entail direct participation in authority. Instead, citizenship is a function of one's particularistic group identity.

Postmodern citizenship also dispenses with the republican principle of political equality. Because not all groups are created equal, the "principle of equal treatment tends to perpetuate oppression or disadvantage."[35] If oppressed and disadvantaged groups are to participate effectively in the formation of public policy, special provision must be made for the representation of such groups. Because privileged groups are already by definition over-represented, they require no special provision.[36]

Many critics of the *Charter* share this postmodern preoccupation with the politics of group difference. Their opposition to the *Charter* flows

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33 Young, *supra* note 31 at 257-58.

34 Monahan, *supra* note 6 at 104, 109, 112, 92.

35 Young, *supra* note 31 at 251.

36 *Ibid.* at 262.

from a conviction that it has opened up the polity even further to the disproportionate influence of wealthy and powerful social groups. Michael Mandel takes the view that the legal profession, in particular, has been a major beneficiary of the *Charter*. Under the *Charter* regime, power has been transferred, not to the people-at-large, but "to the people in the legal profession."[37] Such people are representative only of the upper echelon of Canadian society. Mandel rejects as naive and foolish Monahan's suggestion that the *Charter* enhances the values of democracy and community.

Mandel acknowledges that "the dominant theme in the selling of the *Charter* has been *democracy*." But where, he asks, "could anyone have got the idea that judicial review was democratic?"[38] *Charter* critics complain that there "are few public institutions in this country whose composition more poorly reflects, and whose members have less exposure to, the interests of the economically and socially disadvantaged."[39] Judges are drawn from communities of wealth and privilege. They are simply incapable of understanding the nature of the claims that arise out of the "group-specific experience" of the oppressed and disadvantaged.[40]

The unrepresentative social composition of the Canadian judiciary might not matter if the text of the *Charter* were susceptible to a clear and unambiguous reading. But, as Mandel points out, "the *Charter* is mostly a collection of vague incantations of lofty but entirely abstract ideals, incapable of either restraining or guiding the judges in their application to everyday life."[41] The *Charter* means whatever the judges say it means. Because the judiciary is unrepresentative of and unaccountable to the community at large, the voices of the weak, the powerless and the different will not be heard in the process of endowing the vague language of the *Charter* with juridical significance.

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37 Mandel, *supra* note 6 at 3.

38 *Ibid.* at 35-8.

39 A. Petter, "Immaculate Deception: The *Charter's* Hidden Agenda" (1987) 45 *The Advocate* 857 at 861.

40 Young, *supra* note 31 at 257.

41 Mandel, *supra* note 6 at 39.

Only if the laws applied by the judiciary "are specific and rule out personal discretion" can judicial review be squared with democracy.[42] Mandel denies that an unelected judiciary unaccountable to anyone can legitimately overrule the will of a popularly elected legislature. Together with many other left-wing critics of the *Charter*, Mandel appeals to a surprisingly conservative ideal of "British democracy."[43] So long as it remains armed with an electoral mandate, they say, the sovereign parliament remains the most effective and legitimate conduit for a presumptively enlightened popular will empowered to intervene in the private and social life of the nation. Such intervention can plausibly be justified by the collective welfare requirements of the nation as a whole. While the legitimacy of legislative sovereignty is bound up with the representative function of parliament, the judiciary cannot present itself as a representative body. It is not elected.

Nor can the courts be openly constituted on the basis of regional, ethnic, gender and religious group representation without undermining the judicial aura of impartiality.[44] While the frank and open representation of the perspectives and interests of particular social groups may seem out of place on the bench, it is the meat and drink of electoral politics. In some ways the very unrepresentativeness of the judiciary lends support to its claims to embody an impartial and distinctive form of legal reasoning, superior to the political wheeling and dealing characteristic of the legislative process. Nevertheless, Mandel denies that judicial review involves the exercise of disinterested and disembodied legal reasoning; he seeks instead to establish its "*deliberately anti-majoritarian*" role.[45] Over and over, he insists that judges who have never had to compete with other candidates for electoral support have no business substituting their interpretation of the *Charter* for that of a parliament responsible to the people.

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42 *Ibid.* at 38.
43 *Ibid.* at 4.
44 *Ibid.* at 47.
45 *Ibid.* at 48, 60.

It seems curious that the populist critics of the *Charter* never suggest the obvious remedy for the unelected, unaccountable character of the judiciary. The idea of electing judges is not, after all, entirely unheard of. Of course, it is an American practice. Like the *Charter*, it could be condemned as another step toward the "creeping Americanization" of Canada. For whatever reason, an elected judiciary seems to be literally unthinkable to those defending the Tory traditions of parliamentary sovereignty. However it must be acknowledged that Mandel and other *Charter* critics are not starry-eyed idealists about the state of representative democracy in Canada. Mandel recognizes that elected members of parliament are representative mainly of white, male, and upper middle-class and elite social groups. Elections by themselves have not overcome the deeply entrenched institutions and ideologies reinforcing illegitimate hierarchies of fixed social roles. None of those flaws can justify the subversion of parliamentary government by a powerful and privileged judicial elite. Nevertheless, on the basis of our experience of parliamentary politics, Mandel may have concluded that the election of judges could never make the judiciary fully representative of the social and cultural diversity of community at large.

Postmodernists and populists unite in defence of this proposition: the capacity of rich and powerful social groups to define the common good (in terms consonant with their own interests and world-view) insensibly leads to the marginalization and exclusion of disadvantaged and oppressed groups. For that reason, postmodern populism appears to revolve around demands that special provision be made "for the effective representation and recognition of the distinct voices and perspectives" of disadvantaged and oppressed groups.[46] But not all populists are prepared to abandon parliamentary democracy in favour of the postmodern politics of judicial appointments. In Mandel's view, the politics of group representation cannot and should not be focused on the composition of the judiciary. In the end, every judge is bound to be a lawyer. The legal profession itself is a powerful and privileged social group with its own distinctive identity. For Mandel, enhancing the representation of women, gays and Aboriginals

[46] Young, *supra* note 31 at 261.

on the bench will not work to reverse the anti-democratic implications inherent in the "legalization of politics." For him, the *Charter* belongs ultimately to the legal profession. Left-wing populism takes it as axiomatic that lawyers are, and probably always will be, enemies of the people.[47]

V. The Deconstruction of Parliamentary Sovereignty

Many *Charter* critics want to focus the politics of representation on the single, radiant centre of state authority—the sovereign parliament. Robert Martin contends that the *Charter* has become the vehicle for an anti-democratic process of interest group politics. Well-organized and well-financed corporate interest groups have come to dominate in a realm of legalized politics inaccessible to ordinary citizens. Like Mandel, Martin believes that the citizen, not the *Charter* litigant, should be the subject of democratic politics. The parliament, not the courtroom, is the proper forum for the resolution of political disputes.[48]

But not even the populist paladins of parliamentary sovereignty can escape the deconstructive impact of postmodernism. After all, *Charter* jurisprudence is not the only source of doctrinal indeterminacy. As Walker and Joseph have observed, the texts that purport to convey the authoritative meaning of parliamentary sovereignty are themselves open to a process of contested interpretation.[49] Overriding the *Charter* provides no sure guarantee that judges will fail to find the doctrinal means to stymie the will of an elected parliament in the name of some higher law conception of fundamental rights whenever the black-letter techniques of statutory

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47 Mandel, *supra* note 6. Anti-lawyer sentiment is common as well among left-wing populists in Australia and the United States. See A. Davidson, *Invisible State: The Formation of the Australian State 1788-1901* (Cambridge: Cambridge University Press, 1991); and P. Piccone & G. Ulmen, "Democracy and Federalism: Reply to Fraser" *Telos* 88 (Summer 1991) at 111-19.

48 R. Martin, "The *Charter* and the Crisis in Canada," in D.E. Smith, et al., *After Meech Lake: Lessons for the Future* (Saskatoon: Fifth House, 1991) at 127.

49 P. Joseph & G. Walker, "A Theory of Constitutional Change" (1987) 7 *Oxford Journal of Legal Studies* 155.

interpretation fail to turn up chinks and crannies in the coercive armoury of the state.[50] The idea of parliamentary sovereignty, no less than the *Charter*, remains in the custody of lawyers and judges.

Sir Owen Dixon in Australia was one of the many jurists who have sought to detach the principle of parliamentary supremacy from the political theology of sovereignty. The idea of sovereignty, he claimed, was "too transcendental for a working lawyer."[51] He preferred to speak instead of parliamentary supremacy. That distinction left open the possibility that judges might in some circumstances deny to parliament the right to make a law violating certain fundamental rights presupposed by the very existence of a constitution. According to Dixon, the supremacy of parliament was itself a common law principle. Working with nothing more than the canons of statutory interpretation, Dixon managed to transform even the prosaic terms of s. 92 of the Australian Constitution into a fundamental law of economic liberty.[52] Mr. Justice Rand accomplished similar feats of doctrinal prestidigitation in Canada.[53] Both men could claim that the dubious Diceyan dogma of parliamentary sovereignty flies in the face of "the popular belief that the common law is the protector of their rights."[54]

Judges are part of an "interpretive community" that includes as well other members of the legal professions, legal scholars, law students and

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50 See Mr. Justice Hutley, "The Legal Traditions of Australia as Contrasted with Those of the United States" (1981) 55 *Australian Law Journal* 63 at 66.

51 Sir Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *Australian Law Journal* 240 at 242.

52 For example, Dixon's judgment in the *Bank Nationalization* case: *Bank of NSW* v. *The Commonwealth* (1948), 76 C.L.R. 1.

53 For example, *Winner* v. *SMT (Eastern) Ltd.*, [1951] S.C.R 887; see also W. Conklin *Images of a Constitution* (Toronto: University of Toronto Press, 1989) c. 11.

54 See G. de Q. Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 *Australian Law Journal* 276.

legal journalists.[55] In common law countries lacking a bill of rights, the orthodox dogma of Westminster constitutionalism no longer commands universal assent in the interpretive community. The dominant discourse of parliamentary sovereignty is coming under increasing challenge from a competing discourse of fundamental rights. Walker and Joseph have documented the existence of such doctrinal challenge in New Zealand. They claim that the legal interpretive community there is moving gradually towards a "new constitutional settlement" that may ultimately displace the monarchal image of an omnicompetent legislative power.[56]

That image of the law as the more or less determinate and superordinate will of the legislative sovereign has been thoroughly deconstructed by postmodernist legal thought. Those who locate the source of legal meanings in the continuous dialogue occurring within an interpretive community insist upon the indeterminacy of almost any legal principle. For some, legal interpretation should be understood as a process of "recollective imagination" that can never be just the exposition of an existing principle. In this view, the ideals embodied in legal precedents can only be retrieved through a creative process of interpretation "that releases the power of the 'might have been' through an appeal to the 'should be'."[57]

Drucilla Cornell denies that the normative authority of the law can rest upon "the enforced institutionalized conventions" of the existing community.[58] She goes well beyond Dworkin's suggestion that a judge who reinterprets the principles embodied in precedent constructs the law it *actually was*.[59] Because the legal past has not always been principled,

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55 See S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, Mass: Harvard University Press, 1980).

56 Walker & Joseph, *supra* note 49.

57 D.L. Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" (1988) 136 *University of Pennsylvania Law Review* 1135 at 1145.

58 *Ibid.* at 1163.

59 *Ibid.* at 1164; see also R. Dworkin, *Law's Empire* (London: Fontana, 1986).

Cornell contends that it is legitimate for judges to re-evaluate precedent, not in terms of what was, but rather in the light of what might have been.

For example, precedents upholding the practice of legal segregation, can legitimately be rejected. Dworkin defends that rejection by reference to the actual convictions of the American people.[60] Cornell believes that most Americans in the past, and perhaps even today, would have accepted the "separate but equal" doctrine articulated in *Plessy* v. *Ferguson*.[61] In her view, a more defensible standard of equality would lead to the conclusion that, even if the law had received majority approval, it should have been different. More generally, she claims that it "may better serve the aspiration to be a community-in-principle to condemn a given area of law as irrational and incoherent rather than to pretend that it can be read to meet these standards."[62] If a bill of rights had not existed already in America, it might have been necessary to invent one.

A postmodern interpretive community, therefore, may deconstruct any putatively established legal principle in the name of the higher ideals that it could and should have embodied. Cornell is convinced that a judge "never simply exposes the law as she finds it; she posits the very ideals she reads into the law." Like many postmodern populists, Cornell invokes what she calls "the principle of non-subordination" as the governing ideal of a "properly constituted community." It follows that "No citizen should be systematically relegated to a subordinate status vis-a-vis other citizens because of her gender, race or nationality." Should a democratically-elected parliament enact laws that systematically subordinate certain social groups to others, judicial fidelity to the fundamental ideals of the legal order would justify "infidelity to certain aspects of our democratic tradition as it has been embodied in constitutional precedent."[63]

Such a full-blown deconstructionist critique of parliamentary sovereignty would see no barrier in principle or the cumulative weight of precedent to

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60 Dworkin, *ibid.* at 38.
61 (1896) 163 US 537.
62 Cornell, *supra* note 57 at 1169.
63 *Ibid.* at 1172, 1219-20.

the judicial replacement of one interpretation of the constitutional texts (legislative supremacy) by another (common law supremacy). The question of which interpretation best reflects the embodied ideals of the legal tradition should be decisive. Joseph resists this "radical" conclusion by affirming that the "concept of interpretive community holds that a dominant discourse (for example, parliamentary sovereignty) has an institutional power greater than any individual, so that not even a great writer or judge may, of his own will, banish the Westminster doctrine from our thoughts."[64]

Be that as it may, postmodernists insist that the idea of parliamentary sovereignty implanted into legal consciousness by "great writers" such as Dicey can be deconstructed into a fundamental contradiction. The apotheosis of parliamentary sovereignty amounted to "the rejection of the past in favour of the present." Parliament, acting in the here and now, is absolutely free to make and unmake every law. However, that sovereign will derives its legitimacy from a particular historical event — the passage of the *Septennial Act* — which Parliament could be said to have created itself. As Anthony Carty has shown, by equating the "organic notion of authority implicit in the common law" with "the dead weight of tradition," Dicey cut the "basic or central" forms of English law loose from the historic sources of cultural identity. In this way, the "supposed strength" of constitutional modernity — the quest for autonomy and distinctiveness encapsulated in the doctrine of parliamentary sovereignty — "becomes a mark of aimlessness and, directionlessness." Once that postmodern perception of parliamentary sovereignty begins to circulate widely, the interpretive community of the legal profession will lose its sense of doctrinal direction and consensual cohesion. It will then be possible to make appeals, *inter alia*, to the historical experience of the people as the genetic foundation of constitutional rights superior to those of parliament.[65]

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64 P.A. Joseph, "Beyond Parliamentary Sovereignty" (1989) 18 *Anglo-American Law Review* 1 at 122.

65 A. Carty, "English Constitutional Law from a Postmodernist Perspective," in P. Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991) at 184, 197-203, 206.

Just as the stable persistence of constitutional meaning is a function of interpretive community, so too is the possibility of constitutional change. "Change," according to Joseph, "is a constant of critical interpretation without which there would be no millennia, no history of ideas, and no progress."[66] Because both stability and change are functions of the interpretive community, it may be more accurate to treat the "new" discourse of common law supremacy as the recurrent appearance of one among several interpretive options already available within the paradigm of Westminster constitutionalism.[67]

The constitutional role of the interpretive community that creates, preserves and changes the meaning of authoritative texts now plays itself out in a legal underworld of conventional understandings. So far, that community has not received formal constitutional recognition. At most, the judiciary acts as its surrogate within the internal political order of the state. On the informal level, the importance of that interpretive community has been acknowledged in various schemes to boost the representation of women, aboriginal and other visible minorities in law school admissions and judicial appointments. The objective of such programs was to incorporate the voices of hitherto excluded groups into the social and institutional processes governing the production and diffusion of legal discourse.[68] Unfortunately, no coherent and determinate image of the law as the embodiment of a common set of share civic values can be expected to emerge out of this postmodernist strategy. Members of an increasingly heterogeneous interpretive community enter into legal discourse not as citizens oriented to the common world of the *res publicae*, but as representatives of group-specific perspectives that are ultimately

66 Joseph, *supra* note 64 at 122.

67 On the competing rhetorical strategies associated with the paradigm of Westminster constitutionalism, see Fraser, *supra* note 25.

68 See Madame Justice Bertha Wilson, "Will Women Judges Really Make a Difference" *Canadian Forum* Vol 68, No 787 (March 1990); D. Kennedy, "A Cultural Pluralist Case for Affirmative Action in Legal Academia" [1990] Duke Law Journal 705.

incommensurable with one another. As elsewhere, the arrival of legal postmodernism signals the collapse of the common world.[69]

Perhaps it is time to marry the old-fashioned American idea of electing judges with the sociological reality of a legal interpretive community encompassing the whole range of individuals who possess a law degree or who are otherwise qualified legal professionals. The interpretive community formed by the various legal professions should be recognized, not as a "distinct society," but as a civil body politic with its own distinctive constitutional role. Such a role would involve a special responsibility for the articulation of authoritative norms within the institutional life of civil society and the polity as a whole.[70] That role cannot be performed effectively unless the legal professions are seen publicly to be exercising their collective responsibility for the principled coherence of legal discourse. If the judges who interpret the law are indeed the tip of a sociological iceberg, they should be elected by their professional peers.

There are many ways in which judges could be elected. On one model they could be elected by the people-at-large for either short or long terms. One might also employ the Californian model in which appellate judges are appointed by the state Governor and then confirmed (or rejected) after ten years in an uncontested election in which the sitting judge must be approved by a majority of voters.[71] A modern republican jurisprudence

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69 On the common world, see Arendt, *supra* note 31.

70 Postmodern legal thought, by contrast, now tends toward the rejection of the normativity of legal thought. See the recent symposium on "The Critique of Normativity" (1991) 139 *University of Pennsylvania Law Review* 801.

71 Some people might find this proposal unattractive because they recall the unsuccessful confirmation of Judge Rose Bird in California. But, in California, high court judges are appointed by the Governor. Under the present proposal, high court judges would be elected by members of the legal professions. If the people refused to confirm a judge because of his or her liberal or progressive views while that judge still retained the confidence of the legal professions, it would remain open to the deposed judge to contest the resulting vacancy. If the legal professions have the courage of their convictions it would be equally open to them to re-elect the judge for a further ten year term. This could serve to

might best be served by a system in which lower court and local judges are popularly elected while supreme and appellate court judges are elected by the membership of the legal professions.

VI. Postmodern Republicanism

It is perhaps not very surprising to find that populist critics of the *Charter* overlook the possibility of electing judges. Their appeal to the ideal of parliamentary sovereignty often flows from a typically social democratic approach to politics. Social democracy and left-wing populism have an affinity for older schemes of enlightened despotism that treat the constitution as a way of enhancing rather than limiting the capacity of the state to satisfy the absolute imperatives of development.[72] It is more puzzling when the leading exponents of the republican revival in American constitutional jurisprudence also ignore the idea of an elected judiciary.[73] Curiously enough, the apparent irrelevance of an elected judiciary to a revived American republicanism seems to reflect the pervasive influence of legal postmodernism.

Postmodernist republicanism takes its point of departure from a recognition that constitutional meaning is controlled, not by the popular

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protect the individual judge against retribution for unpopular decisions while forcing the legal professions to bear the burden of explaining and justifying those decisions in the court of public opinion. If a high court judge subject to a confirmation process cannot win the support of a majority of voters either inside or outside the legal professions, perhaps he or she really deserves to be removed from the bench.

72 See generally, Krieger, *supra* note 19; and Fraser, *supra* note 25.

73 The seminal works in the republican revival of American constitutional jurisprudence include F. Michelman, "Foreword: Traces of Self-Government" (1986) 100 *Harvard Law Review* 4; "Law's Republic" (1988) 97 *Yale Law Journal* 1493; "Conceptions of Democracy in American Constitutional Argument: Voting Rights" (1989) 41 *Florida Law Review* 443; C. Sunstein, "Interest Groups in American Public Law" (1985) 38 *Stanford Law Review*; "Beyond the Republican Revival" (1988) *Yale Law Journal* 1539; and S. Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986) 72 *Virginia Law Review* 543.

will as enacted in a statutory text, but rather by a legal interpretive community. The people-at-large cannot possibly participate in the interpretive dialogue over the meaning of constitutional rights. The role of the people-at-large is confined largely to the exercise of the franchise. Frank Michelman acknowledges that "[f]or a citizen of Geneva it was perhaps imaginable that positive freedom could be realized for everyone through direct-democratic self-government, a sovereignless civic process of ruling and being ruled, with no place for legal authority beyond the process itself." However, for modern Americans, national politics is "not imaginably the arena of self-government in its positive, freedom-giving sense."[74] Only in the dialogue among judges can we still find traces of that ancient republican ideal of self-government. The decisive judicial contribution to the creation, preservation and transformation of legal meaning resembles a modern version of the forms of virtual rather than actual representation once typical of eighteenth century Anglo-American politics. The eighteenth century landed paterfamilias was said to represent, virtually, the interests of other disfranchised members of his household—women, children, servants and tenants — even though he was in no way formally elected by or accountable to them. Similarly, judges "cannot owe deference to an other legal authority. The law and its applications are their responsibility."[75]

Michelman is convinced nevertheless that the fact of social plurality in a modern nation-state demands a continuing dialogue between the different interests, groups and communities subject to the law. Unfortunately, that dialogue must be carried out by judicial surrogates for the community-at-large. But, even if the essential dialogue over the nature and meaning of legal order is practically confined to the judiciary, the idea of the republic as the lived experience of self-government is not altogether absent. We of the "reasoning class," or interpretive community, can still find in the practice of self-government by the judges themselves traces of the old republican ideal.[76] If that judicial dialogue is to be legitimate, however, postmodern republicans insist that it must be opened up to the fact of

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74 Michelman, "Traces of Self-Government," *supra* note 73 at 75.

75 *Ibid.* at 76.

76 *Ibid.* at 74.

social otherness. Academically trained intellectuals may be able to identify with the values generated by the judiciary, but the perspectives of the different and the disadvantaged will be excluded.

Postmodern republicanism seeks to create new forms of virtual representation through which the voices of the oppressed, the marginalized and the excluded can be heard. This postmodernist strategy has obvious implications for "the politics of judicial appointments."[77] Indeed it is now clear that those preoccupied with the politics of group representation favour executive appointments rather than elections as a way of filling judicial offices. After all, as Young concedes, somebody must "decide which groups deserve specific representation in decision-making procedures."[78] An appeal to electoral majorities is unlikely to provide an effective means of ensuring minority group representation. The pork barrel process of executive patronage seems in practice better able to reconstitute the judiciary as an artificial surrogate for a heterogeneous public incapable of self-government.

Postmodern republicanism in the United States takes it for granted that governmental institutions are responsive mainly to the majoritarian concerns of dominant and privileged groups. Governments lack any organic connection to the perspectives and experiences of other groups whose particularistic identities negate the hegemonic discourse of the public interest and the common good. This should be a matter of concern not just to minority interests. Even members of the majoritarian groups would be disadvantaged by an electoral process that failed to provide effective representation for minority perspectives. Sooner or later such a political system would lose touch with the social realities existing outside its own self-enclosed boundaries. Michelman declares that the "formal channels" of electoral and legislative politics "cannot possibly provide for most citizens much direct experience of self-revisionary, dialogic engagement" with social otherness and negativity.[79] But that experience of social negativity may become available to decision-making elites if the

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77 *Ibid.* at 77.

78 Young, *supra* note 31 at 266.

79 Michelman, "Law' s Republic" *supra* note 73 at 1531.

judicial and administrative personnel of the state apparatus mirror the entire spectrum of racial, ethnic, religious and gender differences found in the population at large. The postmodern panacea of affirmative action ensures that minority groups that might be excluded by majoritarian electoral processes are given specific representation among those elevated to the bench.

This artificial constitution of social negativity in the judiciary amounts to a new sort of virtual representation.[80] A modernized schema of virtual representation is necessary because exclusive reliance upon electoral majorities and meritocratic elites to define the public interest leads inevitably to the marginalization of those who do not share in the ruling consensus. Legal discourse must open itself up to the pluralist politics of group representation. For Michelman, the "legal form of plurality is indeterminacy — the susceptibility of the received body of normative material to a plurality of interpretive distillations, pointing toward different resolutions of pending cases and, through them, toward differing normative futures."[81] It seems that the incorporation of social otherness into political and legal steering mechanisms has become an essential feature of the corporate welfare state. When Michelman advocates the virtual representation of specific groups, he is claiming that the artificial constitution of social negativity will improve the steering capacity of the state apparatus. He recognizes that there is a pressing systemic need to test the linear logic of majoritarian judges and smug bureaucrats against "understanding from beyond [their] own pre-critical life and experience." In other words, the judiciary, for example, must be constituted "communicatively, by reaching for the perspectives of other and different persons."[82]

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80 See Michelman, "Traces of Self-Government," *supra* note 73 at 50-5. On artificial negativity as political and administrative steering mechanism, see P. Piccone, "The Crisis of One-Dimensionality" (1978) 35 *Telos* at 43-54, and T. Luke, "Culture and Politics in the Age of Artificial Negativity" (1978) 35 *Telos* at 55-72.

81 Michelman, "Law's Republic" *supra* note 73 at 1528-9.

82 *Ibid.* at 1528.

It has not always been necessary to build sources of social negativity into the organizational structure of the judicial and administrative processes. The organic life of traditional, pre-existing communities once provided a spontaneous and natural source of resistance to corporate, bureaucratic and racial domination.[83] Michelman reminds us that the organic negativity of the civil rights movements provided "the judicial agents" of the movement's expanding citizenship with "interpretive possibilities" that the movement's "activity was helping to create."[84] If social otherness and negativity does not present itself spontaneously as an organic feature of everyday life, it may have to be constituted or reconstituted artificially so as to enhance the quality of judicial and administrative decision-making.[85] Sunstein maintains "that deliberative processes will be improved, not undermined, if mechanisms are instituted to ensure that multiple groups, particularly the disadvantaged, have access to the process." Among these mechanisms, he proposes a system of proportional representation designed to "ensure that diverse views are expressed on an ongoing basis in the representative process, where they might otherwise be excluded." That and other forms of artificial negativity are intended, not just to give each group its own "piece of the action," but also to ensure that the political and legal mechanisms of the state do not fall prey to a self-generated illusion of universality.[86]

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[83] See P. Piccone & Gary Ulmen, "Schmitt's 'Testament' and the Future of Europe" (1990) 83 *Telos* at 3-34; C. Lasch, *The True and Only Heaven: Progress and its Critics* (New York: WW Norton, 1991).

[84] Michelman "Law's Republic" *supra* note 73 at 1530.

[85] See C. Offe, "The Theory of the Capitalist State and the Problem of Policy Formation" in L. Lindberg, *Stress and Contradiction in Modern Capitalism: Public Policy and the Theory of the State* (Lexington, Mass: Lexington Books, 1975); R. Stewart, "The Reformation of American Administrative Law" (1975) 88 *Harvard Law Review* 1667; G. Frug, "The Ideology of Bureaucracy in American Law" (1984) 97 *Harvard Law Review* 1277.

[86] Sunstein, "Beyond the Republican Revival," *supra* note 73 at 1588.

VII. Rainbow Republicanism and its Critics

The postmodern vision of rainbow republicanism[87] espoused by Michelman and Sunstein aims to reconcile two competing and potentially contradictory goals. It aims to combine reasoned dialogue about the common good with the nurturance of social plurality. Michelman's early focus on judicial self-government as one of the few available models of republican dialogue has been criticized by those who prefer his more recent preoccupation with the incorporation of social plurality into the legal process. Populists such as James Gray Pope deny that courts "can supply an acceptable representation of the kind of direct self-government that we would practice were our polity small and homogenous enough to make it possible." Judges "who are typically white, male and rich" can never "virtually represent the rest of us."[88]

Pope applauds Michelman's own recognition that a republican dialogue needs to incorporate the whole spectrum of disadvantaged and oppressed groups. Michelman's new focus on social movements of marginalized and excluded group helps to draw him "away from the elitist tradition of republican thought ... toward the popular republican tradition."[89] Pope emphasizes the extent to which the most important transformations in American legal and constitutional history came about as a consequence of direct popular power. The assumption is that progressive legal change in the future will depend upon the spontaneous appearance of new social movements defined in up-to-date terms of race, class and gender.

Pope contends that, by giving expression to direct popular power, social movements serve to reconnect the state to the autonomous life of civil society.[90] In the age of artificial negativity, it may not be altogether accurate to portray social movements as the spontaneous expression of

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87 K. Sullivan, "Rainbow Republicanism" (1988) 97 *Yale Law Journal* 1713.

88 J.G. Pope, "Republican Moments: The Role of Direct Popular Power in the American Constitutional Order" (1990) 139 *University of Pennsylvania Law Review* 287 at 300.

89 *Ibid.* at 303.

90 *Ibid.* at 318-9.

resistance by pre-existing organic communities. The group differences that lend their identities to many modern social movements may be fostered, deepened and strengthened by constitutional recognition and other state subventions.

Affirmative action programs have tended to perpetuate the very racial and gender stereotypes and divisions they were supposed to eradicate. Enmeshed in the one-dimensional logic of bureaucratic decision-making, affirmative action programs assume that the lack of proportional minority representation can be "considered *de facto* evidence of procedural unfairness." Heavy political and administrative pressure emerges to homogenize every realm of social life in terms of the "proper" racial, gender and ethnic balance. In the name of redressing historical injustices, new injustices have been perpetrated "by rewarding members of a group who had not been personally victims at the expense of members of some other group who had not been personally the culprits." By overemphasizing racial, ethnic and gender differences, the politics of group representation becomes an obstacle "to the constitution of new communities based on common interests, free intentions and shared expectations."[91]

Rainbow republicanism could undermine the very possibility of common interests. Those who promote the postmodern politics of group representation insist that the perspective of any one group is incommensurable with that of others. The common good is presented as an illusion fostered by powerful and privileged groups to protect their own particular interests. Rainbow republicanism may be a contradiction in terms. It does not follow that republicanism denies or devalues social plurality. Hannah Arendt has shown us that the republican practice of citizenship presupposes the existence of social plurality.[92] Nor does Arendt's concept of the common world require or imply value homogeneity or value consensus. What emerges as the public interest can

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91 P. Piccone, "Artificial Negativity as a Bureaucratic Tool? Reply to Roe" (1990-91) 86 *Telos* at 132-3; see also, D. Pan, "Ivory Tower and Red Tape: Reply to Adler" (1990-91) 86 *Telos* at 109-116.

92 Arendt, *supra* note 31.

only be "discovered through mutual persuasion and debate." Any given definition of the public interest will always remain contested. Citizens need not subscribe to identical conceptions of the good, but they do share a belief "in the consensual possibilities of deliberative dialogue."[93]

Difference is a fact of life in the modern world. The question is: How should the polity respond to the existence of social plurality? Should social and cultural diversity become an end itself, or should it be another one of those contingencies that can be mastered and overcome in the course of political action? Republicans believe that we should adopt an *expansive* policy that seeks to assimilate differences into a common world. They believe that a separatist or exclusive policy aimed at the magnification and encouragement of differences will undermine the point and purpose of public life in a republic.[94]

Arendt "maintained that one's ethnic, religious or racial identity was irrelevant to one's identity as a citizen" and "that it should never be made the basis of membership in a political community."[95] Cynthia Ward agrees that "Government-enforced special treatment for such groups is fundamentally at war with the most basic purpose of republican community." In her view, postmodern "groupthink" has a pathological effect on the republican polity by undermining "the interconnectedness of all citizens." This is not to suggest that republicans should be indifferent to issues of social justice. Rather republicans need to find "a new way of responding to the disadvantaged."[96] Political action to overcome the problems of social injustice need not necessarily undermine the possibility of public-regarding citizenship.

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93 M.P. D' Entrèves, "Agency, Identity and Culture: Hannah Arendt's Conception of Citizenship" (1989) 9 *Praxis International* 1 at 11, 17; C. Ward, "The Limits of 'Liberal Republicanism': Why Group-Based Remedies and Republican Citizenship Don't Mix" (1991) 91 *Columbia Law Review* 581 at 584-5.

94 Ward, *supra* note 93 at 535.

95 D' Entrèves, *supra* note 93 at 6.

96 Ward, *supra* note 93 at 583-4.

As things stand now, the politics of group representation reflect the emergence of an essentially corporatist process of interest intermediation. Corporatism replaces the democratic principles of universal citizenship and territorial representation with various forms of functional, racial, gender and ethnic representation.[97] The leaders of particular groups licensed or created by the state are given a representational monopoly in exchange for certain limits on the articulation of demands and selection of leaders.[98] Once the leadership of interest groups are incorporated into an accommodative dialogue with the various arms of the state apparatus, they develop a vested interest in corporate particularism. "When separatism becomes profitable, it grows,"[99] according to Ward.

Group representation brings with it "the attendant need to thicken boundaries between citizens." Group leaders reject the worth of interconnectedness. Instead they champion "a view of diversity that refuses to recognize the possibility of general agreement on political goods." We need to take seriously the suggestion that the possibilities of republican citizenship could expand "if political incentive were directed away from fragmentation and toward connectedness."[100] Rainbow republicanism has accommodated itself to the disintegration of political community inherent in the separatist politics of group representation. At the same time, it doubts that the experience of republican dialogue can extend beyond the inner circles of "the reasoning classes." Are the civic possibilities open to us really so limited? Must we choose between virtual representation by an ethnically, religiously, racially and gender balanced judicial elite and yet another appeal to the mythical power of the people-at-large?

VIII. The Civil Constitution of the Legal Professions

Sunstein presents the artificial politics of virtual representation as "a kind of second-best solution for the real world failures" of American

97 Triado, *supra* note 29.
98 Schmitter and Lembruch, *supra* note 29.
99 Ward, *supra* note 93 at 593.
100 *Ibid.* at 593-4.

republicanism.[101] As almost everyone would agree, the American nation-state is practically bereft of republican processes of deliberation and self-rule capable of generating stable and authoritative conceptions of the common good.[102] In settling for second best, the postmodernist republicans overlook the possibility that the legal interpretive community could itself be constituted as a formally recognized element in a modernized republican framework of mixed and balanced government. Postmodernism takes it for granted that every legal and constitutional text is open to a process of interpretation by all members of an increasingly heterogeneous legal community. If so, and if that process of contested interpretation actually does shape the authoritative meaning of the texts, why should the legal interpretive community not be recognized as a constituent element of the polity?

Why should the interpretive community of solicitors, barristers, judges, legal academics and other legal professionals not be expected to shoulder a recognized civic responsibility commensurate with the psychic and material rewards that flow from their ability to influence the pace and direction of legal change? If all legal professionals share, to a greater or lesser degree, in the benefits flowing from a privileged role in the determination of legal meaning, why should they not bear a corresponding civic burden? More specifically, why should the interpretive community not become responsible for electing those appellate and high court judges whose task it is to pass authoritatively upon the meaning of legal texts? Judges whose primary function is to apply a more or less settled understanding of the law to the facts of particular cases (magistrates and district court judges) should probably be popularly elected. But those judges whose explicit province is the authoritative interpretation of the law should be chosen by their peers in the interpretive community of law graduates, practitioners, teachers and scholars.[103] There is no good

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[101] Sunstein, "Beyond the Republican Revival," *supra* note 73 at 1588.

[102] See, especially, Bellah, *supra* note 5 and Barber, *supra* note 5.

[103] Some might be reluctant to support the proposal for the election of high court judges by professional guilds on the basis of their prior experience of Law Society elections. Judges who are elected by such guilds may not be very different from the sorts of people who currently receive appointments to the

reason why the judiciary alone should have access to the republican experiences of deliberative dialogue and corporate self-governance.

If the right of the interpretive community to elect the higher judiciary from within its own ranks were recognized, the various legal professions would acquire the constitutional status of civil bodies politic. To carry out its corporate responsibility, the interpretive community would have to accept responsibility for the task of articulating publicly defensible standards or "good judging." It would also have to cultivate the civic virtues appropriate to that constitutional role.

Judging and citizenship are both social practices. According to Alistair MacIntyre, social practices provide "the arena in which the virtues are exhibited." It is in terms of those social practices that the virtues "receive their primary, if incomplete, definition." Like other social practices, judging and citizenship are socially established co-operative human activities "through which goods internal to that form of activity are realised."[104] In a modern, culturally diverse society, the goods generated within the various legal professions are bound to be contested. The socially embodied and continuing argument over what goods can and should be produced through the practice of law helps to define the purposes and standards by which a virtuous practitioner can be recognized. Virtue can be defined as an acquired capacity to achieve certain goals through the mastery of a social practice.[105] Those practices must be associated with the organized life of an institution such as a legal profession or the judiciary. But not every form of institutional life actually fosters the civic virtues. Indeed, it could be argued that the institutional

bench. This may be the case and, if so, conservatives have nothing to fear in this proposal. But the significant expansion of the constituency to include all law graduates whether or not they practice as barristers and solicitors might well produce a different sort of result. As well, there is a world of difference between elections to positions of power and influence within a provincial Law Society and the public election of judges to sit on the nation's highest courts.

104 A. MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 1981) at 175.

105 *Ibid.* at 174-83.

structure of the legal profession now actively subverts the virtues that might otherwise be associated with the practice of law.

Patrick Glenn has clarified the close relationship between professional structure and professional ethics.[106] That linkage needs to be reinforced by giving formal constitutional recognition to the jurisgenerative role of the legal interpretive community comprising the various legal professions. Ideally each of the legal professions would meet in public to perform its electoral role. Such a procedure would help to encourage awareness both inside and outside the legal professions of their distinctive corporate *telos*. Possession of a law degree would entitle one to membership in one of several legal communities of one's peers, each of which would possess its own distinctive competence and role in the discursive practice of legal interpretation. If every law degree carried with it the right to participate in the selection of high court Judges, one may be reasonably confident that the practice of legal hermeneutics would become a matter of much more widespread public debate, dialogue and concern.

Such a program would provide an institutional foundation for the ethical obligations associated with membership in one of the legal professions. Whatever its decisions as to who should sit on the bench or what should count as good judging, the interpretive community would have to justify its determinations before the public-at-large. To ensure that an acceptable justification is presented to the public, all those elected to high judicial office by their peers should be subject to popular confirmation after they have had chance to demonstrate their fitness. By mixing and balancing the popular and professional roles in the constitution of the judiciary, it may become possible to establish a credible republican alternative to the postmodern politics of group representation. Postmodernists tend to treat both "professional ethics" and the "public interest" as a contradiction in terms.[107] Even Sunstein acknowledges that group representation "threatens to ratify, perpetuate and encourage an understanding of the

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[106] H.P. Glenn, "Professional Structure and Professional Ethics" (1990) 35 McGill Law Journal 425.

[107] See W.H. Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) *Wisconsin Law Review* 29.

political process as a self-interested struggle among 'interests' for scarce social resources." As a consequence, it may discourage political actors from assuming and understanding the perspectives of others" by downplaying "the deliberative and transformative features of politics."[108] To constitute the legal professions as civil bodies politic with a special civic role would provide a new anchorage for the experience of self-government within the institutional life of an increasingly autonomous civil society.[109]

A modernized republican jurisprudence will probably focus on the devolution of the absolute, unitary and indivisible sovereign authority now monopolized by the state. Civil society must acquire its own autonomous jurisgenerative capacity.[110] For that to become constitutionally possible, the judiciary should be seen as a constituent element of civil society rather than as the creature of the sovereign state, especially one still acting in the name of the Crown. "True democrats" will no doubt react with horror to any suggestion that the interpretive community should itself elect judges. One can already hear the cries of "hierarchy," "exclusion" and "elitism." However, the proposal advanced here is infinitely more democratic than the existing practice of executive appointment.[111] It is also far more likely to generate real debate over interpretive issues than the election of high court judges by an atomized electorate largely indifferent to the problems of legal hermeneutics that occupy the minds of those who pursue a life in the law.

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[108] Sunstein, "Beyond the Republican Revival," *supra* note 73 at 1587.

[109] On the relationship between state and civil society, see J. Keane, ed., *Civil Society and the State: New European Perspectives* (London: Verso, 1988); A. Arato & J. Cohen, "Civil Society and Social Theory" (1988) 21 *Thesis Eleven* 40.

[110] See A. Arato & J. Cohen, "Civil Society, Social Movements and the Problem of Sovereignty" (1984) 4 *Praxis International* 266; see also, Cover, *supra* note 16.

[111] See P.H. Russell & J.S. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41 U.T.L.J. 4.

By formally acknowledging the jurisgenerative role of the legal interpretive community, we would take a large step towards the creation of a modern republican polity. Such a modern republic would aim to establish a civic distribution of authority in which "rights" would no longer remain in the gift of an autolegitimating, self-limiting, sovereign state.[112] Rights have their genesis in "claims asserted by groups and individuals in the public spaces of an emerging civil society." Those rights exist for the sake of the civic virtues appropriate to a "modern form of political culture that valorizes societal self-organization and publicity." Courts and the various legal professions have a distinctive constitutional role to play in providing effective juridical expression to the jurisgenerative capacities of an autonomous civil society. Both the orthodox canons of legal positivism and the phoney radicalism of popular sovereignty are often invoked to deny or undercut the particular constitutional rights, powers and duties of the legal professions in the production and transformation of legal meaning. The interpretive community must step out of the constitutional shadows to which it has been relegated by those doctrines. Only then can we begin to develop a charter of rights and freedoms appropriate to the requirements of the good and just life within a self-governing and transnational civil society.[113]

IX. A Right to Virtue?

In both Canada and Australia, the creation of a republic may be in the offing. Citizens of both countries should be aware that a republic could stand for something more than the banal substitution of a president in place of the Queen.[114] A modern republican polity could also establish

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[112] S. Wolin, "Postmodern Politics and the Absence of Myth" (1985) 52 *Social Research* 226.

[113] See, especially, Arato & Cohen, *supra* note 109 at 42-3. On the emergence of transnational civil societies in Europe and North America, see Piccone & Ulmen, *supra* note 83; and G. Teeple, "North American Free Trade: The Last Debate" (1987) 18 *Our Generation*, at 81-98.

[114] The standard nationalist arguments for replacing the Queen with an elected or appointed president are rehearsed in G. Winterton, *Monarchy to Republic: Australian Republican Government* (Melbourne: Oxford University Press, 1986).

new schemas of civic action. Constitutional reform need not be limited to the internal political structures of the state. The institutional life of civil society itself could provide new public spaces for the exercise of the civic virtues.[115] By constituting the legal professions as civil bodies politic responsible for the election of high court judges, the framers of a republican constitution could give fresh meaning to the ancient traditions of mixed and balanced government. A federal distribution of civic authority could be encouraged by making the constituent elements of civil society instead of the sovereign state responsible for the composition of the judiciary.

The devolution of the sovereign power over judicial appointments to the legal professions and the people-at-large would serve two important ends. So long as the people elect lower court judges and retain the power to confirm or reject high court judges, the democratic principle of popular supremacy has been safeguarded. So long as the legal professions acquire their own definite and distinctive constitutional role, they can be seen to be responsible for the creation, preservation and transformation of legal meaning. If the current condition of antinomic confusion and hermeneutic chaos continues to characterize legal and constitutional discourse, the people will know who to blame. Few would deny the importance of the role to be played by the legal profession in the drafting and subsequent interpretation of a republican constitution. It would be folly not to recognize the essential and inescapable role of the legal professions in the civil constitution of Canadian society.[116]

Such a proposal could be rejected on the ground that it violates the foundation principle of popular sovereignty. But popular sovereignty, as distinct from popular supremacy, can never become more than the

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[115] See generally, Fraser, *supra* note 25.

[116] For the foreseeable future, there seems little chance that the francophone citizens of Quebec will be interested in such a republican project. The monarchal language of sovereignty seems to have captured the Quebecois political imagination. For that reason, English Canadian republicans will probably have to choose between a genuine constitutional reformation and the deadening demands of the endless debate over national unity.

"dignified facade" of a modern state. Domination by organized corporate, bureaucratic and professional elites has become the "efficient reality" of every modern society.[117]

This is not to say that the rhetoric of popular sovereignty can be dismissed as politically or constitutionally irrelevant. Far from it. Few republicans would reject the growing demand for a constituent assembly to draft a new Canadian constitution. A vast transformation in Canadian political culture would have occurred were a new constitution to be drafted by a constituent assembly and approved by a popular referendum. "For once in the history of Canada" as Philip Resnick puts it, "our political elites will not be imposing constitutional arrangements over our heads."[118]

Unfortunately, it would probably be all too true that popular sovereignty would make itself effective only "for once" and not on a continuing basis. Popular sovereignty should be recognized for what it is — a constitutional fiction. "The people" does exist and it does have a vital role to play in the creation and maintenance of a representative constitution. However, the people-at-large is not and cannot be an active and self-assertive sovereign power. Almost everywhere the sovereign people have been "constituted so as to be watchers of how their powers are being used rather than participants in those uses."[119]

Ways must be found for ordinary people to be republicans and to act as citizens in the corporate and professional institutions that dominate the landscape of modern civil society.[120] By introducing the practice of citizenship into a wide range of civil institutions, it might become possible

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[117] See W. Bagehot, *The English Constitution* (Glasgow: Fontana, 1963). According to Bagehot the monarchy provided nothing more than the "dignified facade" of the constitution. The "efficient reality" was to be found in cabinet government.

[118] Resnick, *supra* note 7 at 11.

[119] S. Wolin, *The Presence of the Past: Essays on the State and the Constitution* (Baltimore: Johns Hopkins University Press, 1989) at 11.

[120] See H. Arendt, *On Revolution* (Harmondsworth: Penguin, 1977) at 253.

to embed the economy in a coherent sense of civic purpose. Devolution of sovereignty into the associational life of civil society is not simply a matter of restoring checks and balances. Both the invisible hand of the market and the increasingly visible hand of corporate power already provide countervailing forces in competition with state authority. What is needed now is a civil constitution that will generate a sense of ethical obligation and moral discipline in corporate, professional and economic life. Every Canadian should have a right to expect that privileged social and economic elites will conduct their activities in a manner consistent with their obligations as citizens of various professional and corporate bodies politic.

As Durkheim recognized, such a program of constitutional reform must, first of all, overcome a historical prejudice against professional guilds. The medieval guilds lost their influence and finally died out because they failed to adapt to the challenge of modernity. With the growth of large-scale industry, locally organized guilds became the prisoners of their own traditions. Their static and selfish defence of inherited privileges and exclusive rights cost them support in the wider community. It may nevertheless still be true that it "is only through the corporative system that the moral standard of economic life can be raised."[121] If so, perhaps the legal professions can lead the way in regenerating the civic role of the professional associations and corporate bodies politic of modern civil society. Even lawyers may deserve the right to cultivate the virtues essential to the public exercise of a recognized civic responsibility.

X. Conclusion

Most academic critics of the *Charter* accept as "a basic historical fact" the claim that "progressive change follows from mobilization and organization by oppressed and disempowered people."[122] Given that

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121. E. Durkheim, *Professional Ethics and Civic Morals* (London: Routledge & K. Paul, 1957) at 17-29. I am indebted to Alan Hunt for pointing out the relevance of Durkheim's work to the civil constitution of a modern republican society.

122. J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What you Need)" (1991) 70 Can. Bar Rev. 307 at 328.

premise, it is not difficult to reach the conclusion that the legal professions are enemies of the people. As part of a New Class of intellectuals, professionals and managers, lawyers help to contain the capacity of disadvantaged and marginalized people to challenge the interests of powerful and privileged groups.[123] Legal scholars who take this view of themselves and their professional colleagues can hardly escape a certain self-loathing. Even well-intentioned lawyers and judges sympathetic to the interests of the poor and the powerless are seen to be helpless. They cannot break free from the hegemonic ideologies and entrenched institutional practices that preserve the power of privileged elites. We are told that the reinterpretation of "currently dominant conceptions of rights and judicial review" would do little or nothing to destroy the hegemonic structures of law and disciplinary power.[124] In the end, the drive toward progressive legal change must arise from the people.

In Canada, this sort of populist argument now appears in its most developed form in books and law review articles written by legal scholars and addressed to fellow members of an intellectual and academic elite. Few ordinary people can be expected ever to read such esoteric material. One is entitled to wonder therefore why those who purport to speak in the name of the people, the powerless, or the disadvantaged have failed to address a call for renewed civic action to their own professional peers, where it might be more effective. Could it be that by treating "the people" as the sole source of progressive legal change, the populist critics of the *Charter* encourage in their professional audience a particularly demoralizing brand of political passivity and bad institutional citizenship?

In effect, postmodern populism works to relieve lawyers, judges and legal academics of civic responsibility for the condition of their common professional world. By suggesting that even "progressive" lawyers and legal scholars can do little more than beg the courts, on bended knee, "to abandon their conceptions and practices," Joel Bakan implicitly denies our

123. See A. Gouldner, *The Future of Intellectuals and the Rise of the New Class* (New York: Continuum, 1979). See also, A. Fraser, "Populism and Republican Jurisprudence" *Telos* 88 (Summmer 1991) at 85-110; and P. Piccone & G. Ulmen, "Democracy and Federalism" *supra* note 47.

124. Bakan, *supra* note 122 at 327.

own civic agency and political efficacy.[125] To the extent that there is a connection between active citizenship and effective political agency, the self-loathing of the populist intellectual leads to a denial that lawyers, judges, or legal academics can or should act as citizens in the course of their professional lives.

Since, we are told, there is nothing much that can be done by legal professionals to change the way things are, there is no special need for us to accept responsibility for the condition of the legal system. As members of an allegedly powerful and privileged elite we can be blamed by populists for the social injustices that surround us, but only the people who suffer that injustice can realistically be expected to resist and overcome it.

In opposition to that view, I want to argue that legal professionals should hold themselves responsible for the failure of the *Charter* to establish the legal foundation of the good and just life. If the lawyer as litigator or scholar cannot do much to overcome legalized injustice, perhaps the lawyer as citizen could do something to help. Perhaps even the most severe of the *Charter's* academic critics might look upon it in a different light if they were entitled to vote for or against its judicial interpreters. Under such circumstances, reading or writing the latest law review article on the failures and deceptions of *Charter* jurisprudence could become associated with the practice of good institutional citizenship. Entering the debate on the *Charter* could become something more than just another pointless and empty academic gesture. Utopian as it may seem, even critical legal scholarship could become a virtuous and effective form of civic action within the little republics constituted by the legal professions, the courts and the law schools. Even legal scholars have a right to be republicans and to act as citizens. In claiming such a right for ourselves, we may help to secure it for others.

[125] *Ibid.* at 327; see also D'Entrèves, *supra* note 93.

THE DOCTRINAL ORIGIN OF JUDICIAL REVIEW AND THE COLONIAL LAWS VALIDITY ACT

Norman Siebrasse*

Contrary to a substantial group of constitutional academics, the author argues that the origin of constitutional judicial review is found, not in the "doctrine of repugnancy" which is outlined in s. 2 of the Colonial Laws Validity Act (CLVA), *but in the "doctrine of excess of jurisdiction." To justify judicial review in this country, early Canadian courts relied on the doctrine of excess of jurisdiction in order to buttress the supremacy of the Imperial Parliament and limit the authority of the colonial legislatures to amend their own constitutions. The author submits that had the courts seriously examined the* CLVA, *they would have discovered that s. 5 of the Act did apply to the* BNA Act *as an Imperial Act, allowing the colonial legislatures to amend the Constitution simply by passing inconsistent legislation. However, the courts were resistant to this possibility because of their inability to grapple with the notions of representative and responsible government. The author extensively considers the doctrines of repugnancy and excess of jurisdiction, the* BNA Act *and the* CLVA *as possible sources of constitutional judicial review. He also looks to the Australian, New Zealand and Indian experiences to confirm that the Canadian courts took a decidedly different approach to the whole question of judicial review and the applicability of the* CLVA *to the* BNA Act.

L'auteur soutient que l'origine de l'examen judiciaire constitutionnel se trouve, non pas dans la doctrine d'incompatibilité définie dans l'art. 2 de la Loi sur la validité des lois coloniales (CLVA), mais dans la doctrine de l'excès de juridiction. Pour justifier le contrôle judiciaire dans ce pays, les premiers tribunaux canadiens invoquaient l'excès de juridiction afin de soutenir la suprématie du parlement impérial et de limiter l'autorité des législatures coloniales à modifier leurs propres constitutions. L'auteur estime que, si les tribunaux avaient sérieusement examiné la CLVA, ils auraient découvert que l'article 5 appliquait l'Acte de l'Amérique du Nord britannique comme une loi impériale, ce qui permettait aux législatures coloniales de modifier la Constitution en adoptant simplement une législation incompatible. Cependant, les tribunaux résistaient à cette possibilité à cause de leur incapacité de composer avec les notions de gouvernement représentatif et responsable. L'auteur effectue une étude exhaustive des doctrines d'incompatibilité et d'excès de juridiction, l'Acte de l'Amérique du Nord britannique et la CLVA en tant que sources possibles de contrôle judiciaire constitutionnel. Il examine l'expérience de l'Australie, de la Nouvelle-Zélande et de l'Inde pour confirmer que les tribunaux canadiens ont adopté une approche tout à fait différente sur la question du contrôle judiciaire.

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I. Introduction

Section 2 of the *Colonial Laws Validity Act*[1] provides that

> Any colonial law, which is... repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate...shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

This provision is widely considered to be the doctrinal basis for constitutional judicial review. Strayer, for instance, has said that "When a Canadian court struck down a statute for constitutional invalidity, it was inarticulately applying the *Colonial Laws Validity Act*...,"[2] and Hogg states that "Before the Statute of Westminster the supremacy of the *B.N.A. Act* was derived from the fact that it was an imperial statute protected from alteration by the *Colonial Laws Validity Act*."[3] The following essay will argue that this view is historically and doctrinally incorrect. I will begin with a survey and critique of the judicial treatment of the various possible bases for judicial review, namely the text of the *B.N.A. Act*,[4] the necessity of a neutral referee in a federal system, repugnancy of local legislation to imperial statute, and excess of jurisdiction. Historically, the argument of excess of jurisdiction was clearly the prevalent justification for judicial review.

Doctrinally, I conclude that neither the *B.N.A. Act* itself nor the fact of a federal system provides a firm basis for judicial review. Turning to repugnancy and excess of jurisdiction, I note that these are distinct doctrines. The jurisdiction of a representative legislature turns on the

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1 (1865) 28 & 29 Vict., c. 63 [hereinafter *CLVA*].

2 B.L. Strayer, *The Canadian Constitution and the Courts*, 3rd ed. (Toronto: Butterworths, 1988) at 7.

3 P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 42.

4 (1867) 30e 31 Vict. c. 3. The title of the Act was changed to the *Constitution Act, 1867* by the *Constitution Act of 1982*. As this is a historical essay and the authorities cited uniformly refer to the Act as the *B.N.A. Act*, I will also use the old title in order to avoid confusion.

source of its legislative power which is determined by the political *grundnorm* of the constitution, "the basic rule accepted as a political fact from which flows the legitimacy of our laws."[5] Repugnancy, on the other hand, is a creature of statute, exhaustively defined by the provisions of the *CLVA*. In Canada, it is implicit in the conventional view of judicial review that despite a conceptual difference between repugnancy and excess of jurisdiction, in practice they amount to the same thing. From the point of view of repugnancy, the *B.N.A. Act* is an Imperial Act extending expressly to Canada and so falls within the scope of s. 2 of the *CLVA*; and with regard to jurisdiction, "the *grundnorm* of the Canadian constitution is...that the laws of the *United Kingdom* Parliament are supreme,"[6] which also, and independently, gives primacy to the *B.N.A. Act*.

This coincidence between repugnancy and excess of jurisdiction was not inevitable. For instance, the Imperial Parliament, in its supremacy, might have conferred upon the Parliament of Canada and the Provincial Legislatures (acting in combination) the power to amend the *B.N.A. Act* by simply passing subsequent inconsistent legislation. In a detailed examination of the *CLVA*, I argue that on the best interpretation at the time of Confederation, this was precisely the effect of s. 5 of the Act, which gave representative legislatures "full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature...." It is possible to interpret the *CLVA* as not allowing the local amendment of the *B.N.A. Act*, but such an interpretation is driven not by the Act itself. Rather, it is premised on other theories such as excess of jurisdiction or federalism which, if accepted, would provide a sufficient basis for judicial review without invoking the *CLVA* itself. In other words, contrary to the usual view, judicial review in Canada is legitimate not because of the *CLVA*, but in spite of it.

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5 *Supra* note 2 at 42.

6 *Ibid.* at 42.

This conclusion that Canadian legislatures can amend the *B.N.A. Act* runs contrary to a century of constitutional practice,[7] and for this reason, it cannot be accepted. Rather, I would press the point that this interpretation of the *CLVA* is a viable one, ignored not for strict doctrinal reasons, but because of the colonial mindset of the post-Confederation judiciary. This colonial mindset is implicit in the doctrine of excess of jurisdiction which views the Imperial Parliament as the sole legitimate source of authority, ignoring the representative nature of the local legislatures.

II. Historical Basis for Judicial Review

A. The Text of the *B.N.A. Act*

The first place to look for determining the correct interpretation of an act is to the act itself. The preamble of the *B.N.A. Act* recites that the newly constituted Dominion shall have "a Constitution similar in Principle to that of the United Kingdom." However, parliamentary supremacy is a fundamental tenet of the English constitution. Is it possible to interpret the *B.N.A. Act* in a manner which precludes judicial review, or must we dismiss the preamble's implication of parliamentary supremacy as "official mendacity?"[8]

One way to give sense to the *B.N.A. Act* without allowing for judicial review is to posit that the Act is a purely political document, a suggestion

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[7] Judicial review was not entirely uncontroversial in its origins, as is often thought; see G. Bale, "The New Brunswick Origin of Canadian Judicial Review," 40 U.N.B.L.J, forthcoming. See also the opinion of Judge Steadman, a New Brunswick county court judge who offered extensive reasons for refusing to exercise the power of judicial review, reprinted as an appendix 1 to G. Bale, *Chief Justice William Johnstone Ritchie* (Ottawa: Carleton University Press, 1991).

[8] Dicey, the great proponent of parliamentary supremacy, did not fail to notice this contradiction, and in the earlier editions of his work on constitutional law, he termed the preamble "official mendacity" partly for this reason. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 3d ed. (London: Macmillan, 1889) at 155.

often made in the American context in criticism of *Marbury* v. *Madison*.[9] This might mean either that its provisions are merely directory or that the legislatures, and not the courts, are the authoritative interpreters of the Constitution. The most important internal support for the view that the legislatures, or more specifically, Parliament, are to be the authoritative interpreters of the *B.N.A. Act* is the power of disallowance of provincial legislation by the federal government[10] which provides a political mechanism for policing the division of powers.

This theory was judicially considered in *Severn* v. *The Queen*,[11] the first case on the division of powers to reach the Supreme Court of Canada where it was argued that in the United States, "the Courts alone have power to declare when the States have usurped the higher powers of Congress, whilst here ample power is given to the Dominion Parliament of protecting itself."[12] Richards C.J. disagreed:

> Under our system of government, the disallowing of statutes passed by a Local Legislature after due deliberation, asserting a right to exercise powers which they claim to possess under the *B.N.A. Act*, will always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the Act is so clearly beyond the power of the Local Legislature that the propriety of interfering would at once be recognized.[13]

Richards C.J.'s response begs the question: disallowance will only be considered a harsh exercise of power by the federal government if it is assumed that the primary responsibility for policing the division of powers will rest with the courts. The contrary assumption, that the federal government should police the division of powers, would lead to the

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9 (1803) 1 Cranch 137, 5 U.S. 87. See for example Van Alstyne, "A Critical Guide to *Marbury* v. *Madison*" (1969) Duke. L.J. 1.

10 By the operation of s.90 in conjunction with ss. 55-7.

11 (28 June 1878), 2 S.C.R. 70, 1 Cart. 414. Hereinafter all case are cited to Cartwright unless otherwise noted.

12 *Ibid.* at 424.

13 *Ibid.* at 440.

conclusion that it is judicial review, and not disallowance, which is "a harsh exercise of power."

Fournier J. responded in much the same vein as Richards C.J. He termed the power of disallowance an "extraordinary prerogative" and said that, "[i]t will always be very difficult for the Federal Government to substitute its opinion instead of that of the Legislative Assemblies in regard to matters within their province, without exposing themselves to be reproached with threatening the independence of the Provinces."[14] Here Fournier J. offered argument rather than implicit assumption, but the argument is the overtly political one that the federal government cannot be trusted to decide "correctly" questions of the division of powers. This also begs the question to the extent that it assumes that the correct interpretation of the division of powers is one which is arrived at by the courts on the basis of purely textual considerations. That is, if the drafters of the *B.N.A. Act* intended that the division of powers be policed politically, some political "bending" of a strict textual interpretation may well have been implicitly intended.[15] Fournier J.'s assumption was not surprising in light of the prevailing positivism of the judiciary, but it could be argued that as the division of powers was politically determined in the first place, it might be most appropriately maintained in the same manner. To some extent, Fournier J. has argued that judicial policing of the division of powers is necessary in a federal system, an argument which will be considered in the next section of this article. For the moment, we may consider the suggestion that the federal government will be overly reluctant to declare provincial legislation *ultra vires* as contrary to the usual argument that without the neutral umpiring of the courts, the federal government would use its greater power to trench on provincial rights: if it is not clear in which direction the division of powers would be misinterpreted by Parliament, perhaps it is not so clear that it would be misinterpreted at all.

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[14] *Ibid.* at 476.

[15] While this essay does not deal with the intentions of the drafters, it would appear that Macdonald may have originally envisaged a one-sided judicial review of only provincial legislation. See G. Bale, *Chief Justice William Johnstone Ritchie*, *supra* note 7, c. 10 *passim*.

Nonetheless, it is true that while disallowance may allow for a political means of policing the division of powers, it by no means requires it. Burton J.A. of the Ontario Court of Appeal characterized disallowance as an "additional check" likely to be used in cases "where a Provincial Act is supposed to affect the whole Dominion, or to exceed the jurisdiction conferred on Local Legislatures, or even where jurisdiction is concurrent, but clashes with the legislation of the general Parliament...."[16] Harrison C.J. of the Ontario Court of Queen's Bench also raised a powerful point regarding the effect of disallowance, saying "it is not to be expected that the Governor-General in Council will be so far able to examine all Acts passed by the Provincial Legislature as to foresee all possible constitutional difficulties that may arise on their construction, and therefore omission to disallow is not to be deemed in any manner as making valid an Act, or part of an Act, which is essentially void as against the Constitution."[17] This point is particularly telling in light of the time limitation on the power of disallowance. However, if the reason for the one year limit on disallowance is to allow for certainty in the operation of the laws, a finding of invalidity by a court is as objectionable as disallowance.

While the text of the *B.N.A. Act* does not rule out the possibility that the Act was intended to be a purely political document, one great fact stands in the way of this conclusion: the *B.N.A. Act* is an Act of British Parliament, and the colonial courts had always had the power and duty to construe Imperial Acts. The argument that the Constitution is a purely political document is much more forceful in the American context, given the novel nature of its Constitution.

B. Necessity of Judicial Review in a Federal System

The fact that the *B.N.A. Act* is an Imperial Act does not, in itself, rule out an alternative theory by which judicial review might be precluded; namely, the view that the *B.N.A. Act* could be amended by subsequent inconsistent colonial legislation. The authority of the colonial legislature

16 *Leprohon* v. *City of Ottawa* (1878), 2 App. Rep. (Ont.) 522, 1 Cart. 592 at 621.
17 *Leprohon* v. *City of Ottawa* (1877), 1 Cart. 644, 40 U.C.Q.B. 478.

to effect such amendments will be considered in more detail during the discussion of the *CLVA*. First, we should consider the distinct argument that the federal nature of the Canadian Constitution precludes amendment by the local legislatures. The power of disallowance plays an important role in rebutting this argument, for it provides a means by which both levels of government can signify their approval of the amendment.

The view that refereeing by a "neutral" judiciary is necessary in a federal system was first expressed judicially in the case of *Pope* v. *Griffith*,[18] handed down on 14 March 1872, by Ramsay J. of the Quebec Court of Queen's Bench:

> I have no doubt that it is competent for this court, or indeed for any court in this Province, incidentally to determine whether any Act passed by the Legislature of the Province be an act in excess of its powers. This is a necessary incident of the partition of the legislative power under the B.N.A. Act, without reserving to any special court the jurisdiction to decide as to the constitutionality of any of the Legislatures.[19]

Similar views were expressed in 1985 by Sanborn J., also of the Quebec Court of Queen's Bench, in *Ex parte Dansereau*,[20] although with some reluctance. He said that the power of judicial review "was contemplated being placed in a Supreme Court created by the Parliament of the Dominion; but so long as no such court has been created, it seems that the ordinary courts are under the necessity of declaring any Act *ultra vires* when they find it to be so."[21] These examples serve mainly to show the very limited use made of the argument that the structure of federalism requires judicial review. Necessity is not argued for but asserted as a premise with the only real question being that of which court should undertake the review.

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18 2 Cart. 291, 16 L.C.J. 169.

19 *Ibid.* at 293.

20 2 Cart. 165, 19 L.C.J. 210 (Que. Q.B.).

21 *Ibid.* at 200.

More substantial argument was provided in the case of *L'Union St. Jacques* v. *Belisle*.[22] The first judgment of the full bench of the Quebec Court of Queen's Bench to deal with the power of judicial review, it contained the most extensive treatment of the subject in any superior court of the time. The opinion of Drummond J. was the most comprehensive and will be reviewed at greater length later. For the moment, his argument regarding federalism is of interest. He quoted extensively from Austin, and the main argument is contained in the following extract:

> [S]ince the general government, and also the united governments, are subject to that aggregate body, the respective Courts of Justice which they respectively appoint, ultimately derive their powers from that sovereign and ultimate Legislature. Consequently those Courts are ministers and trustees of that sovereign and ultimate Legislature, as well as of the subject Legislatures by which they are immediately appointed; and consequently those Courts are empowered, and are even bound to disobey, wherever those subject Legislatures exceed the limited powers which that sovereign and ultimate Legislature has granted or left them.[23]

This argument illustrates the danger of applying a general rule without sufficient attention to the details of the individual case. The argument applies only to federations in which there is no power of disallowance. If a province passes an Act, and the Dominion grants implicit approval by not disallowing it, then it would seem that the aggregate Canadian sovereign has approved it. The theory that the court must obey the aggregate sovereign thus undermines, rather than supports, the power of review in Canada.

There is, however, a different problem with this view; how can the sovereign approve of an amendment when it is a federal Act which, it is claimed, trenches on the provincial sphere? One possibility is that the provincial governments would be understood to have implicitly agreed to federal legislation unless they had petitioned the Imperial authorities to disallow it. An alternative suggestion is that there is no need for the

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22 1 Cart. 72, 20 L.C.J. 29 [hereinafter *L'Union St. Jacques* cited to Cartwright].

23 *Ibid.* at 88, quoting Austin, to be found in *Lectures on Jurisprudence* (London: John Murray, 1885) Lecture VI, Vol. I at 260-1.

provincial legislature to approve the amendment as Canada is not a true federation wherein sovereignty is divided. As Justice Gwynne of the Supreme Court stated:

> [T]he Provinces of the Dominion of Canada, by the wise precaution of the founders of our constitution, are not invested with any attribute of National Sovereignty. The framers of our constitution, having before their eyes the experience of the United States of America, have taken care that the B.N.A. Act should leave no doubt upon the subject.
>
> Within this Dominion the right of exercise of National Sovereignty is vested solely in Her Majesty, the Supreme Sovereign Head of the State, and in the Parliament of which Her Majesty is an integral part....[24]

Admittedly, Gwynne J. was the most centralist of the Supreme Court judges of the time,[25] and in current practice Canada is a true federation. Nonetheless, the text of the *B.N.A. Act* itself lends considerable support to his view: the residual legislative power belongs to the Dominion; it has the power of disallowance; as noted by Gwynne, the head of state of the provinces is appointed by the Dominion government; even the name of the legislatures suggests that sovereignty rests with the Parliament of the Dominion rather than with the Legislative Assembly of the provinces.[26]

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[24] *Citizens and Queen Insurance Companies* v. *Parsons* (1881), 1 Cart 265 at 348-49.

[25] See F.M. Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890's" 9 U.B.C.L.R. 244, Table II.

[26] Two plausible views of the power of disallowance then, are firstly that it is a way for the federal government to interpret the division of powers, and secondly that it was to be used to override the division of powers in unusual circumstances. For completeness, we should note a still more restrictive interpretation which was raised in the context of the possible disallowance of New Brunswick Schools Acts of 1873, namely that disallowance should never be used politically but only in cases where the provincial legislation was clearly *ultra vires*. This view seems to have little textual basis, but it was urged by the colonial secretary, Earl Carnarvon, on the basis that to allow the federal government to disallow acts that were not *ultra vires* would be tantamount to a repeal of s. 92 of the *B.N.A. Act*. In his view, the power of disallowance was

Arguments of necessity were not always framed in such theoretical terms, but were sometimes buttressed with examples of practical difficulties which might arise if the power of judicial review did not exist. In *Ex parte Dansereau*, Dorion C.J. argued that the court must hold void *ultra vires* legislation, "otherwise we might come to have two Acts upon the same subject and contrary to each other, the one emanating from the Dominion and the other from the Local Parliament, in which case it would be absolutely necessary to determine which of those two Acts was law and emanated from the proper authority."[27] Of course, we know now that under the "dual aspect" doctrine, such a situation can occur even with judicial review. The courts have been ingenious at avoiding findings of actual repugnancy, but when it does occur, rules such as federal paramountcy can be applied. Alternatively, on a less centralist view, the

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to be used at the discretion of the Governor but not on the advice of his responsible ministers. This position is best dismissed as a remarkable abandonment of the principle of responsible government, as was pointed out by Mr. Blake, the Canadian Minister of Justice. In so doing, we are reminded that the exclusive sphere of s.92 can be trenched upon through an affirmative use of the power of disallowance; this makes it more plausible that an omission to disallow might have a similar effect. See A. Todd, *Parliamentary Government in the British Colonies* (Boston: Little Brown, 1880) at 332-40. Before dismissing Earl Carnarvon's view out of hand, we should note that the *South Africa Act, 1877* (40 & 41 Vict., c. 47), a permissive act designed to allow the union of the South African colonies which expired without having been acted upon and which was based largely on the *B.N.A. Act*, specifically provided in s.11 that the power of disallowance was to be exercised by the Governor-General acting without his Privy Council. This was presumably in light of the dispute on the subject in Canada. It is particularly noteworthy that the colonial secretary was of the opinion that the dispute over the correct use of the power of disallowance could only be authoritatively resolved through a judgment of the Judicial Committee of the Privy Council. Mr. Blake pointed out that the matter was very unlikely ever to go before the courts unless the governor should take it upon himself not only to refuse to disallow a provincial Act, but to disallow an Act without the advice of his ministers. If ever a dispute arising from an Act of Parliament could be purely political, this would seem to be it, but such was the magic of the judiciary that the colonial secretary wanted to turn to the courts for a resolution.

[27] *Supra* note 20 at 190.

later statute would prevail over the earlier,[28] especially as the federal Parliament could be seen as having agreed to the implied repeal of its own earlier Act by not disallowing a later inconsistent provincial Act. Thus, Dorion C.J. posed a valid problem, but not an insurmountable one.

A corollary of the premise that judicial review is necessary to a federal system is the view that federalism is impossible without judicial review. This is clearly not correct. Of course, without judicial review our system would not be what it is now. This does not mean that judicial review is necessary to give substance to the division of powers or to the Constitution generally. As has been suggested in criticism of *Marbury* v. *Madison*, "written limitations serve as a conscientious check on the legislators, admonishing each and advising each concerning the responsibility he has to respect the limitations laid down....[W]ritten limitations may be useful politically; they may figure in congressional debates, furnishing argumentative force as well as a personal conscientious restraint...."[29] Even at the time of Confederation, there were written constitutions which could not be judicially enforced, such as the French Constitution of 1789.[30]

However, we need not go so far afield to find an example of federalism without judicial refereeing. In the debates on Confederation in the Canadian Parliament, Sir John A. Macdonald advocated federation in the following terms:

> We, in Canada, already know something of the advantages and disadvantages of a Federal Union. Although we have nominally a Legislative Union in Canada, although we sit in one Parliament, supposed constitutionally to represent the people without regard to sections or localities, yet we know, as a matter of fact, that, since the Union in 1841, we have had a Federal Union; that, in matters affecting Upper Canada solely, members from that section claimed, and generally exercised, the right of exclusive

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28 This was suggested by Judge Steadman, *supra* note 6, in his early attack on judicial review.

29 Van Alstyne, *supra* note 8 at 18-19.

30 Title 3, Ch. 5, Art. 3 states that "the tribunals cannot interfere in the exercise of legislative power, nor suspend the execution of the laws...."

> legislation, while members from Lower Canada legislated in matters affecting only their own section. We have had a Federal Union in fact, though a Legislative Union in name, and in the hot contests of late years, if, on any occasion a measure affecting any one section was interfered with by the members from the other, — if, for instance, a measure locally affecting Upper Canada were carried or defeated against the wishes of its majority, by one from Lower Canada,— my Honourable friend the President of the Council and his friends denounced with all their energy and ability such legislation as an infringement of the rights of the Upper Province—just in the same way, if any act concerning Lower Canada were pressed into law, against the wishes of the majority of her representatives, by those from Upper Canada, the Lower Canadians would rise as one man, and protest against such a violation of their peculiar rights.[31]

From this statement, it would appear that an effective federalism was in place in pre-Confederation Canada, even without a written document to define rights and legitimate the process. The addition of a constitutional division of powers would strengthen this process both by making it the part of the duty of the Members of Parliament to police the division and establishing an authoritative document upon which to found objections to exercises of federal power.

The effectiveness of political restraint in a federal system is also demonstrated by the fate of the power of disallowance. While some critics were afraid that the political use of the power would defeat the separation of powers in the *B.N.A. Act*,[32] the opposite has happened and, for political reasons, disallowance fallen into disuse. As an example, the New Brunswick *Common Schools Act, 1871*[33] deprived the Roman Catholic population of many concessions of a practical, albeit not a strictly legal nature which they had previously enjoyed. This case presented a strong structural argument for the federal government to use disallowance to prevent the oppression of a local minority whose interests were not effectively expressed at the provincial level. Despite petitions to the Governor that the Act be disallowed, the Minister of Justice recommended

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31 Debates of Parliament of Canada, 3 February 1865 at 35.

32 *Supra* note 26.

33 34 Vict., c. 21.

that it be allowed to go into force since it was clearly within the competency of the provincial government.[34]

C. Repugnancy

The text of the *B.N.A. Act* and the argument of necessity in a federal system may or may not serve to ground judicial review. The arguments on both sides are abstract and theoretical. In contrast, s. 2 of the *Colonial Laws Validity Act*[35] appears to provide a firm basis for judicial review. It provides that:

> Any colonial law, which is, or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

The *B.N.A. Act* was certainly an Act of Parliament and it "extended" to Canada in the sense defined by s. 1 of the *CLVA*, and so the latter seems to provide a firm statutory basis for judicial review. However, in the immediate post-Confederation period, the *CLVA* and the doctrine of repugnancy which it formalized were rarely mentioned.

Repugnancy did surface in what appeared to be the first superior court case to address the propriety of judicial review, *R.* v *Chandler*,[36] handed down by Ritchie C.J. of the New Brunswick Supreme Court in 1868, but the *CLVA* was not specifically cited. In response to the point raised in argument that the court had no power to question an Act which had been duly passed and given assent, Ritchie C.J. said: "We are now called upon to elect between two statutes. Where an Act of the British Parliament conflicts with our own, the latter must give way."[37] As a general

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34 Todd, *supra* note 26 at 346-52, especially at 352.

35 *Supra* note 1.

36 (1868), 2 Cart 421, 1 Hannay 556.

37 *Ibid.* at 422-23.

proposition, this is not correct. The colonial Act must give way only in the specific circumstances set out in the *CLVA*. It is possible that Ritchie C.J. did in fact have the *CLVA* and those limitations in mind, but it seems more likely that he was relying on his own intuitive view of the doctrine. This suspicion is reinforced by the fact that, as we shall see, counsel raised a version of the repugnancy doctrine which was clearly without foundation in the *CLVA*, but Ritchie C.J. did not refer to the *CLVA* in order to rebut him.[38]

Chief Justice Ritchie's judgment in *Ex parte Renaud*,[39] delivered in February of 1873, is the first reported judgment to explicitly mention the *CLVA*. Ritchie C.J. stated, "We have never doubted that, when a Provincial Act and an Imperial Statute are repugnant, so far as such repugnancy extends, but no further, the Provincial Act is void," but maintained that he would address the question as "we observe that in the neighbouring Province of Quebec the question has been much discussed, and the Court divided in their opinions on the subject, though the majority arrived at the same conclusion as that which has hitherto governed this Court."[40] He continued:

> We have always thought it a constitutional principle, too clear to be seriously questioned, that the subordinate legislative power of a Colonial Legislature must succumb to the supreme legislative power and control of the Parliament of Great Britain, and therefore have heretofore considered it wholly unnecessary to cite any authority; but as there is a clear statutory recognition, as well as the highest judicial declaration in support of the accuracy of the view we have acted on, we think it as well now to name them.[41]

He then proceeded to quote the entirety of s. 2 of the *CLVA*.

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38 See *infra* note 48 and accompanying text.

39 1 Pugsley 273, 2 Cartwright 445.

40 *Ibid.* at 446. The Quebec judgment referred to is almost certainly *L'Union St. Jacques* v. *Belisle*.

41 *Ibid.* at 447.

It is true that the supremacy of Imperial Parliament was a universally applied legal principle. However, the *CLVA* was a liberating document, freeing the colonial legislatures from some of the more extravagant uses of the repugnancy doctrine and, in particular, the highly inconvenient rulings of Boothby J. of South Australia.[42] In limiting the extent of the doctrine of repugnancy, the Act of course recognized its existence; at the same time, since the Act did not establish the repugnancy doctrine, but rather limited it, it would be wrong to use the Act as the basis for any generalization which would expand the doctrine. The appropriate generalization must be in the direction of according more, rather than less, independence to the colonial legislature.

Further, the doctrine of repugnancy is not so obvious as Ritchie C.J. suggests; it was the uncertainty over its scope, prompted by Boothby J.'s holdings in South Australia, which had made the *CLVA* necessary. Chief Justice Ritchie's profession of the obviousness of repugnancy, plus the fact that he neglected to cite the *CLVA* in *Chandler*, suggests that he was relying on his intuitive understanding of the doctrine in the earlier case. In the subsequent case of *Renaud*, Ritchie C.J. was not examining the *CLVA* to determine the true scope of the repugnancy doctrine. He was simply citing the Act in support of what was, to him, a forgone conclusion.

This is not a very significant objection to Ritchie C.J.'s decision if a closer scrutiny of the *CLVA* reveals that it did apply to the division of powers. Certainly the *B.N.A. Act* fulfils all the conditions set out in s. 2 of the *CLVA*. However, s. 5 of the *CLVA* gives to "every Representative Legislature... full power to make laws respecting the constitution powers and procedure of such Legislature." While there is a respectable argument that s. 5 does not apply to the *B.N.A. Act*, it is hardly obvious on the face of the statute, especially in view of the very recent enactment of the *CLVA* and the consequent absence of precedent. At the very least, Ritchie C.J.'s failure to mention s. 5 supports the view that he was not actually looking to the *CLVA* itself.

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[42] See Swinfen, *Imperial Control of Colonial Legislation* (Oxford: Clarendon Press, 1970) c. 11 *passim* for a discussion of the origin of the *CLVA* and Mr. Justice Boothby's role.

In summary, while Ritchie C.J. relied on repugnancy as a ground for the power to hold legislation *ultra vires*, his notion of repugnancy rested directly on his belief in the supremacy of the Imperial Parliament and not on that Parliament's will as expressed in the *CLVA*.

D. Excess of Jurisdiction

Ex parte Renaud is the only early case to rely specifically on the *CLVA*. *Chandler* and *Cotte's Case*[43] appear to be the only additional cases to mention repugnancy or conflict with Imperial laws in order to justify judicial review. Much more frequently invoked was the argument of excess of jurisdiction, and of course this doctrine is implied by the very phrase "*ultra vires*."

It bears repeating that the arguments of excess of jurisdiction and repugnancy are conceptually distinct. A Dominion Act dealing with bankruptcy, for instance, might have been perfectly valid, and yet could have been superseded by subsequent conflicting Imperial legislation on the subject (so long as such legislation expressly applied to Canada). Clearly the Dominion was not initially exceeding its jurisdiction in passing the Act and it would strain language to say that the exact subject matter of the Imperial Act had suddenly become *ultra vires* the Dominion. Rather, the Dominion had jurisdiction in the area but bowed to the superior authority of the Imperial Parliament. In the *B.N.A. Act*, the matters of concurrent jurisdiction illustrate this principle. Conversely, an attempt at extra-territorial legislation, or an attempt to remove the Crown as the Head of State) would be in excess of the jurisdiction of the local authority without being repugnant to an Imperial Act.[44] This distinction was judicially

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43 (9 Feb. 1875), 2 Cart 220, 20 L.C.J. 210, discussed below at notes 46 and 58.

44 The second example can be tied to the *B.N.A. Act* through the words in the preamble "under the Crown of the United Kingdom...," but it is difficult to turn the words "for the Peace Order and Good Government of Canada" into a territorial limitation. Sir Berriedale Keith, *Responsible Government in the Dominions*, 2d ed., vol. 1 (Oxford: Clarendon Press, 1928) at 312, suggests that "the true limitation on the authority of Parliament is that it cannot by its own action alter vitally the status of the territory for which it legislates. It is created

recognized in the two objections of Henry J. of the Supreme Court of Canada to the argument that the courts must take the law as they found it: "The first is, that by such a conclusion the Act of Imperial Parliament would be extended, if not in part repealed. Second, if the local Act be *ab initio* void, it cannot become law merely by assent of the Sovereign."[45] These objections are the arguments of repugnancy and excess of jurisdiction respectively. The point was made even more clearly by an early British constitutional writer, Sir Henry Jenkyns, who said "...the enactment of a colonial legislature may be treated, even by the courts of the colony, as of no effect either because it is beyond the competence of the legislature to enact, or because, though within the competence of that legislature, it is repugnant to an Imperial statute which applies to that colony."[46]

While there is a conceptual difference between repugnancy and excess of jurisdiction, the fact that Canada was created by an Imperial Act, and more particularly, the fact that ss. 91 and 92 were explicit statutory grants of jurisdiction may have made this distinction so fine as to be invisible. Certainly the view that the *CLVA* was the source of the power of judicial review rests on such an identification of the two doctrines, but this was rarely made explicit in early judicial pronouncements. Perhaps the nearest statement to this effect was in *Cotte's Case* where it was argued before the Quebec Court of Queen's Bench that "no court can decide as to whether an Act is constitutional or not unless there is a conflict of legislation." Ramsay J. replied that, "The exception appears to me to destroy the main proposition. The limitation of the powers of a dependent Legislature by

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for a definite purpose; within the terms of that purpose it can effect its aims by what means it thinks fit, but it cannot frustrate that purpose or convert to wholly different ends its powers."

45 *Lenoir* v. *Ritchie* (1879), 3 S.C.R. 575, 1 Cart. 488 at 519.

46 Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Oxford: Clarendon Press, 1902) at 69. See also Keith, *supra* note 44 vol. I, Part III, c.I, §2, wherein excess of jurisdiction is divided into two types, that stemming from non-sovereign nature of the colonies, and from the territorial limitation on colonial legislation.

an Imperial Act gives rise to a conflict of legislation the moment the Local Legislature exceeds its powers."[47]

However, it is not entirely unproblematic to identify repugnancy and excess of jurisdiction in this way. A practical effect of the distinction is illustrated by the following exchange between counsel and Ritchie C.J. in *Chandler*:

> [Counsel] Formerly this Court had no power to say that an Act of the Legislature to which the Lieutenant-Governor had given his assent was not in accordance with the royal instructions.
>
> [Ritchie C.J.] That case does not apply here; we are now called upon to elect between two statutes. Where an Act of the British Parliament conflicts with our own, the latter must give way.
>
> [Counsel] I contend that would only be where the interests of the people of the United Kingdom were in question. Here the Provincial Act has been approved by the Governor-General and by the Minister of Justice, the legal adviser of the Government, whose duty it is to advise upon the proceedings and the Acts of the Legislatures of the Province.
>
> [Ritchie C.J.] You surely do not contend that the assent of the Governor-General would make an Act law, where there was no right to legislate."[48]

Initially, Ritchie C.J. asserted the repugnancy doctrine, and counsel challenged its applicability to the particular case, thereby reminding us that repugnancy was a technical doctrine with limitations and conditions concerning its use. As it happened, the distinction between local and Imperial affairs suggested by counsel had no basis in the *CLVA* itself but

47 *Supra* note 42 at 224.
48 *Supra* note 36 at 422-3.

there was no way of knowing this without looking at the Act itself since as the distinction was certainly a plausible one.[49]

If the Imperial/local distinction had been found in the Act, as suggested by counsel, the *CLVA* would not apply to the *B.N.A. Act*. As the *CLVA* provided an exhaustive, limiting definition of repugnancy, this would have meant that repugnancy could not be relied on to ground judicial review. Ritchie C.J. implicitly recognized this fact and rather than debate whether the technical requirements for repugnancy were satisfied, he ultimately relied on a clear expression of the theory of excess of jurisdiction:

> The *B.N.A. Act* entirely changed the legislative constitution of the Province; the Imperial Parliament has intervened, and by virtue of its supreme power, has taken from the subordinate body of this Province the plenary power to make law, which it formerly possessed....[I]f [the Dominion or Provincial Legislature] do legislate beyond their powers, or in defiance of the restriction placed upon them, their enactments are no more binding than rules or regulations promulgated by any other unauthorized body.[50]

If the grant of powers by the Imperial Parliament was the sole source of the legislative authority of the local legislatures, then to enact any legislation which did not fall under a head of power granted by the *B.N.A. Act* would simply have been a futile assertion of a non-existent power. This is why the courts so rarely referred to the *CLVA* in cases on the division of powers; excess of jurisdiction was an independent doctrine which obviated any need to do so.

Before settling on the conclusion that the inherent limits to the jurisdiction of the colonial legislatures did in fact ground judicial review, it is important to note that the validity of the argument of excess of

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[49] The draft constitutions submitted by some of the Australian colonies in the 1840s and 1850s contained distinctions between "local" and "Imperial" affairs. These provisions were considered objectionable and were excised before the constitutions were approved by the Imperial Parliament. Consistently, no such distinction is found in the *CLVA*. See Swinfen *supra* note 42 at 167-8, and Keith, *supra* note 44 at 24.

[50] *Supra* note 36 at 436-37.

jurisdiction requires that the *B.N.A. Act* be the *sole* source of the local legislature's authority. This is in contrast with the repugnancy doctrine which requires only that the Imperial authority be supreme. If there is an independent source of power to legislate, then any local Act would be *prima facie* valid and it would be necessary to determine whether the local Act was repugnant to the *B.N.A. Act,* according to the terms of the *CLVA*. To suggest that the Imperial Parliament might not be the sole source of legislative authority in a colony is not to deny its supremacy, which continues to be expressed in the *CLVA*.

The colonial courts were consistent in this respect since the view that the *B.N.A. Act* was the sole source of local legislative power was frequently and unequivocally expressed. Ritchie C.J.'s clear statement in *Chandler* was relied upon by Meredith C.J. of the Superior Court of Quebec in *Valin* v. *Langlois*, who also quoted Hamilton to the effect that "every act of a delegated authority contrary to the tenor of the commission under which it is exercised is *void*" and therefore "no legislative act, therefore, contrary to the constitution can be valid."[51] It was echoed by Dunkin J. of the Quebec Court of Queen's Bench in *Ex parte Duncan* who described the *B.N.A. Act* as "the fundamental law of the land, which only the Imperial Parliament can repeal or alter, to which the Parliament of Canada and the Local Legislature must alike refer for their authority to legislate at all...."[52] More picturesquely, in *L'Union St. Jacques* Drummond J. said that arguments for judicial review derived from *Marbury* v. *Madison*

> ...seem to acquire, if possible, more force when applied to exorbitant Acts which English Colonial Legislatures assume to pass in defiance of the restricted charters granted to them, not by mutual concessions, but by the behest of the Imperial Parliament,— the source of all power,— executive, legislative and judicial, within the realm. And that sovereign power, in its supremacy, has said to each of the Legislatures of this Dominion: "Thus far shalt thou go, and no farther."[53]

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51 1 Cart. 219 at 231.

52 (29 April 1872), 2 Cartwright 297, 16 L.C.J. 188 (Que. Q.B.) at Cart. 300.

53 *Supra* note 22 at 90.

In *Leprohon* v. *The City of Ottawa*, Hagarty C.J. of the Ontario Court of Appeal said: "Our Province is the creation of the Imperial Parliament....Our present legislative powers have their origin from the [*B.N.A. Act*],"[54] and Patterson J.A. said that "the *B.N.A. Act* is the source to which we must appeal for a declaration of the powers of each of our governments, central and local."[55] In the Supreme Court of Canada, Henry J. said: "the Local Legislatures have, as I have already stated, a prescribed and limited jurisdiction, and, if the subject in question is beyond their legislative limit, the mere sanction of the Queen would not validate the Act passed in reference to it."[56] Taschereau J. stated that "a Provincial statute, passed on a matter over which the Legislature has no authority or control, under the *B.N.A. Act*, is a complete nullity a nullity of *non esse*....No power can give it vitality....The Legislatures have the powers conceded to them by the *B.N.A. Act* and no others."[57]

Was this widely held opinion correct? The elected and representative nature of the local legislatures presents an obvious alternative as an independent source of legislative authority. No doubt a lay person today would consider this a much more legitimate source of authority than the Imperial grant of power. While the colonial legislatures no doubt considered themselves subordinate, the relationship was hardly akin to that of God and His creations, as suggested by the language of Drummond J. The fact is that the charters of the united Canadian legislatures *were* passed by mutual concessions. It was not the awesome power of the Sovereign which set limits to the colonial legislatures, but those legislatures themselves. It had long been a political fact that the legislation of the colonies relied for its legitimacy on the fact that the local legislatures were elected representatives; the introduction of responsible government was recognition of this fact. More than twenty-five years before Confederation, the recalcitrant Governor of Nova Scotia was advised by Earl Grey, the Colonial Secretary, that "it cannot be too distinctly acknowledged that it is neither possible nor desirable to carry on

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54 *Supra* note 16 at 608.

55 *Ibid.* at 634.

56 *Lenoir* v. *Ritchie* (1879), 1 Cart 488 at 518.

57 *Ibid.* at 531.

the government of any of the British provinces in North America in opposition to the opinion of the inhabitants."[58]

While the quasi-sovereign nature of the local legislatures was an established political fact, it was not nearly so well established legally. The introduction of responsible government was a political process, and as such was accomplished extra-legally by advising the colonial Governors to select advisors who were responsible to the elected representatives.

The local judiciary were not inclined to take account of such political changes. In *Cotte's Case*, Ramsay J. asserted that the Quebec legislature was limited in jurisdiction using "an illustration from our own history...."

> The Act of 1774 appointed a Governor and Council, with power to make ordinances for the peace, welfare and good government of the Province of Quebec; but one power, that of levying duties and taxes, was reserved. Now I take it to be incontrovertible that if the Governor and Council, acting under the provisions of the Act of 1774, had imposed a tax on the real estate of the people of Lower Canada, the courts would not have hesitated to declare the ordinance to be illegal, null and void.[59]

This historical analogy completely ignores the distinction between an appointed Governor and Council and a representative one.

More vividly illustrative of the judicial uncertainty regarding the status of the colonial legislatures were the opinions given by the Quebec Court of Queen's Bench in *L'Union St. Jacques de Montréal* v. *Belisle*.[60] This was the most extensive discussion of the propriety of judicial review in a superior court, but the debate was notable primarily for its confusion.

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58 Commons Papers, 1847-48, vol. xlii, 56, quoted from Todd, *supra* note 26 at 63.

59 *Supra* note 42 at 224.

60 Handed down 20 Sept. 1872, 20 L.C.J. 29, 1 Cart. 72 (Q.B.), rev'd (1874), L.R.6 P.C. 31, 1 Cart. 63 (P.C.). The Privy Council was of the opinion that the act was not *ultra vires* the Province, and there was no discussion whatsoever of the power of judicial review, although since the lower Court was not censured for striking down the Act, it seems to have been assumed that such power existed.

In his judgment, Monk J. affirmed that "we have the right, and that in fact it is our duty, to disregard a law of the Local Parliament if it be in conflict with the Imperial Act which confers a Constitution upon the Dominion."[61] He also clearly indicated that Badgley J. dissented from this proposition. However, examination of Badgley J.'s judgment reveals no such disagreement. Badgley J. was at pains to establish that, if not disallowed, "the legislative Acts of the Provincial Legislature, *within the enumerated local matters for their action*, are supreme and coercive upon all within the extent of the Province."[62] While he considered the Act in question *intra vires* (and so he did not have to address the question of the supremacy of the local legislature outside their sphere), his consistent and careful qualifications, such as that in the emphasized passage, imply that he did consider the enumerated powers to restrict legislative power.

The confusion seems to have arisen because the Act in question allowed the Union St. Jacques, a private benevolent society which found itself in financial difficulties, to amend the terms of a private contract which it found onerous. It was argued that the Act was "repugnant to morality"[63] in that it trenched on the existing rights of the members of the society,[64] and that it should be overturned for that reason. It was this doctrine which Badgley J. argued against so extensively. Indeed, far from questioning the doctrine of review for excess of jurisdiction, he accepted it so thoroughly that he offered no support for the proposition other than simple assertion.

It would appear that Badgley J.'s argument was directed primarily against the views of Duval C.J. In a short but confusing judgment, the Chief Justice adhered rigidly to the view that the powers of the local legislatures flow from the positive grant in the *B.N.A. Act*. He held that the powers of the provincial government were set out in s. 92 of the *B.N.A. Act* and that "no power is given to it to impair the obligation of contracts — a power which has ever been considered as contrary to every principle

61 Per Monk J., Cartwright at 85.
62 *Ibid.* at 75.
63 *Ibid.* at 93., per Drummond J.
64 See also Caron J. at 82.

of sound legislation."[65] Duval C.J. was not simply relying on an unreasonably narrow reading of s. 92 in order to avoid giving effect to a law of which he disapproved. He believed in a fundamental difference between the limited local legislatures and the Imperial Parliament. Duval C.J. rejected the "opinion" of Blackstone, "'that *if* Parliament will positively do what is wrong' he knows of no power...to control it,"[66] to state that in the first place: "Admitting that the judicial power in England cannot interfere, but must blindly submit to superior and unlimited authority, can the same be said of a Legislature whose powers are defined and expressly limited?"[67] There is no mention of the division of powers; in Duval C.J.'s view, the simple fact that the local legislatures are limited gives the court the authority to refuse to acknowledge unjust legislation. The depth of Duval C.J.'s feeling was such that he felt it appropriate to censure Blackstone, saying:

> Judges are not to reason and lay down rules on suppositions, gratuitously made, for the purpose of creating embarrassment in the administration of justice. Mr. Justice Blackstone says: "If Parliament does wrong, he knows of no power that can afford relief." I ask when has the Imperial Parliament interfered with private contracts? When State necessity has compelled such an interference, has not the contracting party been fully indemnified? Instead, therefore, of indulging in suppositions never realized, it is prudent for judges to reserve their opinions to be pronounced when the Legislature has committed the injustice and not until then.[68]

Having put Blackstone in his place, Duval C.J. concluded: "From the above remarks, it is evident to me that the legislature of Quebec has exceeded the boundary of legislation prescribed to it."[69] Having come to his conclusion, Duval C.J. belatedly introduced the division of powers, saying that the courts must intervene or they would find themselves enforcing compliance with a local Act in a matter delegated to the federal Parliament. This remark seems to be quite at odds with, or at least

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65 *Ibid.* at 83.
66 *Ibid.*
67 *Ibid.*
68 *Ibid.* at 84.
69 *Ibid.*

completely unrelated to, the views originally expressed; after all, s. 91 did not confer the power to impair contracts any more than did s. 92.

The misconceptions as to the status of the colonial legislatures were to some degree clarified by the judgment of the Privy Council in *R.* v. *Burah*[70] in 1878. There the Privy Council argued that the Indian Legislature was a delegate of the Imperial Parliament and, as such, could not delegate its legislative power. The Privy Council rejected this view, saying that the Legislature "is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself."[71] This doctrine was applied to the Canadian provincial legislatures by the Privy Council in *Hodge* v. *The Queen*[72] in 1884 where these bodies were said to be "in no sense delegates of or acting under any mandate from the Imperial Parliament."[73] These judgments do not explicitly endorse the representative nature of the legislatures as an independent source of legislative authority but indicate rather that the Imperial Parliament had "intended" to bestow such plenary powers on the local legislature. However, we should note that this "grant" was not an explicit grant of power such as is found in ss. 91 and 92. Rather, the Privy Council in *Hodge* stated that

> ...when the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province...it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and ample...as the Imperial Parliament in the plenitude of its power possessed and could bestow.[74]

The simple fact that the Legislative Assembly was given an explicit grant to make laws for the province is not determinative of the nature, plenary or otherwise, of that authority. If the local assemblies had been given the

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70 (1878), 3 A.C. 889.
71 *Ibid.* at 904.
72 (1883), 9 A.C. 117, 3 Cart. 144.
73 *Ibid.* at 162.
74 *Ibid.*

sole authority to make laws in the province, it could be argued that this authority must be plenary or there would be some laws which no body at all would have had the authority to make. However, the Imperial Parliament retained the supreme legislative authority. The text of the *B.N.A. Act* is therefore not determinative of the nature of the powers of the local legislature, from which it follows that the reason for choosing the interpretation that assigned plenary powers to the colonial legislatures was their representative character. Lord Watson's remark in *Dobie* v. *The Temporalities Board*[75] that "...the Legislature of Quebec is not supreme; at all events, it can only assert its supremacy within those limits which have been assigned to it by the Act of 1867,"[76] also hinted in this direction.

Despite this argument, it cannot be suggested that the Privy Council had abandoned the theory that the representative colonial legislatures were bodies with limited jurisdiction. The ellipses in the above quotation from *Hodge* hide the proviso that the Ontario legislature has plenary power "within the limits prescribed by s. 92."[77] The practical purport of this is clear enough: the local legislature is not restricted by the rules of morality, as was suggested in *L'Union St. Jacques*, nor subject to the maxim *delegatus non potest delegare* in matters set out in s. 92 (as suggested in *Hodge*), but it was completely powerless in matters outside of those listed in s. 92. This practical clarity hides theoretical obscurity; the question remains whether the local legislatures had plenary powers stemming from their representative characters which were limited in some ways by the exercise of superior Imperial legislation, or whether the local legislatures were limited because the original grant of power was a limited one. If the plenary nature of the power of the local assembly did flow from its representative nature, it is contradictory to say that nonetheless its power was determined by the grant of Imperial Parliament.

It is of course possible to avoid this contradiction by simply insisting, as did the local courts, that all local power flowed from the Imperial

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75 (1882), 1 Cart. 351.

76 *Ibid.* at 364.

77 *Supra* note 71 at 162.

Parliament and that a representative legislature had no inherent right to legislate for those it represented. While this did seem to be the widespread view of the courts of the time, it was not always embraced without difficulty. In *R.* v. *Taylor*,[78] Draper C.J. sitting in Appeal from the Court of Queen's Bench held for the four member court[79] that the exclusive legislative authority of the Parliament of Canada was exclusive, not with respect to the provincial legislatures, but was "rather intended as a more definite or extended renunciation on the part of the Parliament of Great Britain of its powers over the internal affairs of the New Dominion." Draper C.J. added: "I see no inevitable inconvenience to arise from each Government possessing the power of granting a licence in this matter," and noted that if the Ontario Assembly used its power injuriously, "the power of disallowance is ample to prevent such an interference with the policy of the Dominion Government."[80]

While my suggestion that the division of powers was to be authoritatively interpreted by the legislatures and not the courts was probably an untenable argument because the *B.N.A. Act* was in form an Imperial Act, a variation on this idea is worth exploring before we turn to a detailed examination of the doctrine of repugnancy. An independent objection to allowing the legislatures to interpret the *B.N.A. Act* was simply that they might get it wrong. This view appeals to an intuitively attractive concept of jurisdiction: it seems clear enough that a provincial legislature, not to mention a Liquor Board, would be acting in excess of its powers passing rules regarding murder. Such clear cut cases, however, are rare and in the administrative law context, the distinction between acting in excess of jurisdiction and simply advancing an alternative interpretation of a statute is notoriously problematic. An inferior tribunal will rarely admit to acting without jurisdiction but would rather advance arguments, generally cogent ones, as to why the issue in question falls within its jurisdiction.

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78 (1875), 36 U.C.Q.B. 183.

79 Including Strong and Patterson JJ., both later appointed to the Supreme Court of Canada.

80 *Ibid.* at 224.

The judgment of Duval C.J. in *L'Union St. Jacques* provides a good illustration of a similar tension in the context of the division of powers. To assert the necessity of jurisdictional review he asked rhetorically:

> ...would any judge sentence a man to the Penitentiary in virtue of an Act of the Local Legislature [of Quebec]? Further, would the Courts acknowledge the binding obligation of an Act of the Local Legislature, on bankruptcy or insolvency; or an Act conferring on a foreigner the rights of a natural-born subject? Decidedly not. Then, where is the line of distinction to be drawn? What Acts of the Local Legislature are the Courts of Justice of this country bound to enforce, and what not? Their duty, in my opinion, is clearly and distinctly pointed out in the [*B.N.A. Act*].[81]

Of course, the problem is that the divisions of the *B.N.A. Act* are not "clear and distinct"; this no doubt explains why Duval C.J. chose to make his point with clear hypotheticals, while nowhere in his judgment did he refer to the competing clauses of the *B.N.A. Act* which were actually in issue in the case. He established the principle of judicial review with reference to imaginary clear cases, then generalized this conclusion to justify his intervention in the case at hand where the substantive issues were much less clear cut.

The existence of clear hypotheticals makes the concept of excess of jurisdiction effectively unshakeable. The judicial objection to the notion that the legislatures are to be the authoritative interpreters of the *B.N.A. Act* argued that even if, in theory, the view of the legislatures is by definition correct, there may be instances where that judgment is textually insupportable. On the other hand, Duval C.J.'s opinion demonstrated that the courts may have made similarly insupportable conclusions, although they might have been less likely to acknowledge their own errors. The truth is that the mere existence of a text gives little guidance as to who will best interpret it. We might expect, recalling the remarks of Fournier J. in *Severn*, that the legislatures, driven by self-interest, will be more likely to make judgments with little regard for the text. While this is a legitimate argument that legislative interpretation is more likely to diverge

[81] *Supra* note 22 at 85.

from the strictly textual than judicial interpretation, it is only an objection if a textual interpretation is taken as the "neutral" standard. This recalls an argument made earlier in the context of the power of disallowance; on a political theory of the interpretation of the division of powers, the text of the *B.N.A. Act* would serve as a guideline for the legitimate political reinterpretations of the text. Such political "bending" would surely be more legitimate than similar judicial distortions. Of course, the primacy of the text is the basic tenet of the prevailing judicial positivism, which explains in part the appeal of the theory of excess of jurisdiction to the post-Confederation judiciary.

While the existence of clear cases supports judicial review, the prevalence of borderline cases makes strict judicial scrutiny unpalatable. In administrative law, strong privative clauses, purporting to deny entirely the power of judicial review, have clashed with the primacy of the text. On the one hand, there is the irresistible impulse to say that in clear cases, the tribunal "just is" acting outside its limits, no matter what the opinion of the tribunal itself. On the other hand, there is the clear direction in the privative clause that the opinion of the tribunal is to be authoritative. For a time, this tension has been soothed (albeit not resolved) by a compromise standard of review of patent unreasonableness.

Is a similar concept of deference applicable to constitutional judicial review? The *B.N.A. Act* has no privative clause purporting to oust the courts, but could not the principle of parliamentary supremacy have the same effect? In *Ex parte Dansereau*, Sanborn J. of the Quebec Court of Queen's Bench showed considerable reluctance to undertake review of an Act of the provincial legislature for constitutionality because of the "incongruity in a court's deciding upon the powers of a Legislature to which it owes its existence." He emphasized that the Provincial Legislatures were more than mere delegates, or large municipal corporations, saying: "The very court which enables us to determine the matter now under consideration, holds its existence by the will of the

Provincial Legislature. No such powers were ever conferred upon mere municipalities in their ordinary sense."[82]

In the landmark administrative law case of *C.U.P.E.* v. *New Brunswick Liquor Corp.*,[83] Dickson J. of the Supreme Court of Canada warned: "The question of what is and is not jurisdictional is often very difficult to determine. The Courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."[84] Compare this with the words of Strong J. in *Severn* v. *The Queen*, the first case challenging the constitutionality of an Act to reach the Supreme Court of Canada. He suggested that as a general principle,

> It is, I consider, our duty to make every possible presumption in favour of [impugned] legislative Acts, and to endeavour to discover a construction of the *B.N.A. Act* which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking it upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not belong to it...."[85]

The view that Parliamentary supremacy requires at least that the courts be deferential to the views of the legislature as to the constitutionality of an act is entirely consistent with the view that the local legislatures have no intrinsic power but derive all their power to legislate from the Imperial grant. It simply interprets the principle of Parliamentary supremacy as the basis of a legitimate claim by the legislatures to interpret the division of powers. Strong's salutary deference was an internally consistent view which was, unfortunately, ahead of its time.

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82 *Supra* note 20 at 199. Curiously, in *R.* v. *Taylor* (1875), 36 U.C.Q.B. 183 at 192, Wilson J. of the Ontario Court of Queen's Bench used a similar argument to justify judicial review, saying that "there can be no restraint put upon the due exercise of the judicial power by any authority, Dominion or Provincial, for that would be to place these bodies above the law which created them...." There seems to be some confusion as to who created whom.

83 (1979), 97 D.L.R.(3rd) 417.

84 *Ibid.* at 422.

85 *Supra* note 11 at 447.

III. The Colonial Laws Validity Act

A. Introduction

The argument of excess of jurisdiction is logically independent from that of repugnancy and, as we have seen, denies that the representative nature of the local legislatures forms any part of the basis of their authority. If we question this premise, then we must turn to repugnancy to ground judicial review. This means we must do what the early courts failed to do and look closely at the *CLVA* itself. In the following section, I will argue that not only does the *CLVA* not ground judicial review, but it undermines the theory of excess of jurisdiction. Even if we grant that the Imperial Parliament is the sole legitimate source of authority, as the theory of excess of jurisdiction requires, the *CLVA* may be interpreted as an express grant of jurisdiction to amend the *B.N.A. Act*.

For convenience I will repeat s. 2 of the Act which sets out the basic repugnancy doctrine:

> Any Colonial Law, which is, or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under the Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

As the *B.N.A. Act* is an Act of Parliament extending to Canada, s. 2 would therefore seem to apply.[86] However, s. 5 of the *CLVA* expressly grants full power to every "colonial legislature" over the establishment of courts of judicature, and further provides:

> ...every Representative Legislature shall, in respect to the Colony under its Jurisdiction have, and be deemed at all Times to have had, full Power to make Laws respecting the

[86] Section 1 of the *CLVA* set out that an Act "extends to" a colony when it is made applicable to the colony "by express words or necessary intendment."

> Constitution, Powers and Procedure of such Legislature, provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required, by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

Does s. 5 of the *CLVA* apply to make the *B.N.A. Act* exempt from the repugnancy doctrine set out in s. 2? The "plain meaning" answer is in the affirmative. The words of s. 5 state clearly that the local legislature has the power to change its own Constitution and its powers. There is no express statement that this does not apply when the constitution and its powers are set out in an Imperial Act.

B. Applicability of Section 5 of the *CLVA* to the *B.N.A. Act*

The most obvious argument that s. 5 cannot apply to the *B.N.A. Act* is that a colonial legislature does not have the authority to alter an Imperial Act. While it is true that a colonial legislature has no intrinsic authority to do so, there is no doubt that the Imperial Parliament could give colonial legislatures such a power. For instance, the Australian federal Constitution, an Imperial Act, provided a formula for amendment by the Australian Parliament with ratification by the Australian electors,[87] while s. 92(1) of the *B.N.A. Act* gave the provinces the power to amend their own constitutions. It is not necessary for the Imperial Parliament to provide for local amendment of a particular act in that same act. In 1857, in a short amending Act,[88] the Imperial Parliament gave the General Assembly of New Zealand wide powers to amend its existing Constitution, also an Imperial Act,[89] with some provisions explicitly excepted.[90] Academic commentators clearly believed that the *CLVA* could also serve the same purpose. While Sir Henry Jenkyns felt that s. 5 of the *CLVA* did

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87 *Commonwealth of Australia Constitution Act, 1900*, 63 & 64 Vict., c. 12, s. 128.

88 20 & 21 Vict., c. 53, s. 2.

89 15 & 16 Vict., c. 72.

90 It bears emphasizing that, as noted by Dicey, "This power, derived from imperial statutes, is of course in no way inconsistent with the legal sovereignty of the Imperial Parliament." A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 10th ed. (London, Melbourne, New York: MacMillan, 1967) at 110.

not operate to remove the limitations found in the 1857 Act (thus broadening the power of the New Zealand Assembly to change its constitution) on the ground that "the *Colonial Laws Validity Act* is an Act to remove doubts, not to make changes,"[91] Sir Berriedale Keith felt that "the better opinion seems to be in favour of the wider power."[92] They implicitly agree that the *CLVA could* operate to allow the New Zealand Assembly to amend an Imperial Act; their point of difference was as to the effect of a later, more general Act on a prior, more specific Act.

A second argument is based on the *CLVA* itself. If s. 5 applies to constitutions which are Imperial Acts, it could be argued that an inconsistency would arise between s. 5 (which allows some colonial legislature to amend at least one Imperial Acts) and s. 2 (which provides that any such contrary colonial legislation would be void). Section 5 must therefore be read as implicitly extending only to those constitutions which are not Imperial Acts. However, it is equally plausible to say that s. 5 applies to all constitutions, thus implicitly excepting those which are Imperial Acts from the effect of s. 2. This accords with the principle of statutory construction that the more specific provision prevails over the more general provision. As well, the nature of the disagreement between Jenkyns and Keith shows that both implicitly accepted the view that s. 5 applies to all constitutions.

Further support for the view that s. 5 is an exception to s. 2 (that is, that it applies to all constitutions regardless of whether they are in the form of local or Imperial Acts) comes from the Australian High Court in the case of *McCawley* v. *R.*,[93] which concerned the power of the Queensland legislature to change its Constitution. Due to its genesis in the judgments of Boothby J. in South Australia, there can be no doubt that s. 5 of the *CLVA* applies to the Constitutions of the Australian colonies. Four of the seven High Court judges held that the Queensland *Constitution Act, 1867* "having been...enacted by virtue of an Order in Council issued under an Imperial Act extending to the Colony of Queensland, clearly comes within

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91 *Supra* note 45 at 75.

92 *Supra* note 44 at 355.

93 (1918), 26 C.L.R. 9.

the express provisions of s. 2 [of the *CLVA*]."[94] If the Australian High Court is correct, and the state Constitutions fell within the words of s. 2, then s. 5 must be read as an exception to s. 2.[95]

Thus, we see that the Imperial Parliament can provide that a colonial legislature can repeal specified Imperial legislation, either by so providing in the affected Act itself, or by a separate authorizing Act, and further, that the text of the *CLVA* itself is consistent with such an interpretation. The question remains as to whether the *CLVA* was in fact such authorizing legislation with respect to the *B.N.A. Act*.

In one of the few specific discussions of this point, Jenkyns denied that s. 5 applied to Canada on the ground that "[t]he powers of the Dominion Parliament to amend the constitution are limited to changes of small importance..."[96] which are set out explicitly in the *B.N.A. Act* itself. This argument would be a strong one in, for instance, the case of the Australian federation, whose Constitution contains an explicit amending formula. There, the later Act must be taken to supersede the amending power given in the *CLVA* as the two are necessarily in conflict. However, there is no such necessary conflict in the case of the *B.N.A. Act*, and the better course is to interpret the statutes harmoniously. The sections in the *B.N.A. Act* which confer explicit amending power are concerned with the matters

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94 *Ibid.* per O'Connor J. at 1329. On the same point and to the same effect, see *ibid.* at 1315 per Griffith C.J., *ibid.* at 1331 per Higgins J. Barton J. did hold that the Constitution could not be altered impliedly, but did not refer to any authority in support. Alternatively, it was held that s. 106 of the Imperial *Commonwealth of Australia Act, 1900* (63 & 64 Vict., c. 12), which provided for the continuance of the state Constitutions, gave the Constitutions the force of an Imperial Act: per Griffith C.J. at 21-2.

95 The decision of the High Court was reversed on appeal to the Privy Council. Unfortunately, while their Lordships based their decision in part on s. 5 of the *CLVA*, they did not make clear whether s. 5 was an exception to s. 2, as implicitly held by the High Court, or whether s.2 was simply not applicable because, contrary to the view of the High Court, the Queensland Constitution was not an Imperial Act. See below for a discussion of the Privy Council decision.

96 *Supra* note 46 at 75.

affecting only one level of government: Parliament can change the quorum in the Senate, electoral districts, election laws, and the rules applying in the case of an absence of the Speaker of the House of Commons, and the provincial legislatures can alter similar provincial provisions.[97] It was necessary to make the amending power explicit in these cases in order to allow amendment by Parliament or the Legislative Assembly, as the case may be, acting alone in matters which were of no concern to the other level of government.

Other explicit consideration of the effect of s. 5 of the *CLVA* on the *B.N.A. Act* is difficult to find. In his chapter on the alteration of the Constitution of the colonies, Keith discusses the powers of constitutional change given to the provinces by the *B.N.A. Act* but makes no mention of the applicability of the *CLVA* to the *B.N.A. Act* as a whole,[98] presumably because, for some unstated reason, he considered it obvious that the *B.N.A. Act* could not be altered. Todd appears to have considered s. 5 of the *CLVA* to be essentially similar to s. 18 of the *B.N.A. Act*, and therefore redundant.[99] This view is difficult to sustain on the language used: s. 18 of the *B.N.A. Act* speaks of "privileges, immunities and powers to be held, enjoyed and exercised by the senate and by the house of commons and by the members thereof..." a far cry from the "constitution, powers and procedures of such [representative] legislature." Dicey did not address this question directly but held that in a federal state, the "[t]he law of the constitution must be either legally immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the constitution."[100] This is a more dogmatic version of Austin's argument, which was discussed earlier, and is subject to the same criticisms.

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97 Sections 35, 40, 41, 47, 83, 84, 87. There are also several bridging provisions which provide for the continuance of various offices and usages until otherwise provided for.

98 V. 1, Part III, Chap. IV.

99 *Supra* note 26 at 688-89.

100 *Supra* note 89 at 146-47.

C. Substantive Content of Section 5 of the *CLVA*

In *McCawley* v. *R.*,[101] on appeal from the Australian High Court, the Privy Council gave an authoritative interpretation of the substantive content of s. 5 of the *CLVA*. Before considering the Privy Council's judgment, we should consider *Cooper* v. *Commissioner of Income Tax for Queensland*,[102] a decision of the Australian High Court which is a significant precursor to *McCawley*.

In *Cooper*, the Chief Justice of the Queensland High Court contended that the levying of income tax on his salary violated the terms of s. 17 of the Queensland *Constitution Act, 1867* which provided that judges' salaries were to be settled during their term of office. Three of the opinions, attracting four of the five judges, specifically considered the question of the power of the legislature to amend its Constitution by means of inconsistent subsequent legislation which makes no reference to the Constitution.

The language used in finding that the legislature did not have the power to pass legislation inconsistent with the Constitution was markedly similar to that used by the Canadian courts. Griffiths C.J. noted that:

> The Parliament of the United Kingdom is supreme, and can make any laws it thinks fit, and the question whether a law once passed is beyond the competency of the legislature cannot arise. If, therefore, a later is inconsistent with an earlier law, that later must prevail. But in States governed by a written Constitution this doctrine has no application. The powers of the Queensland legislature, like those of the other Australian States, are derived from the grant contained in the Order in Council by which it was established.[103]

This is a very clear expression of the doctrine of excess of jurisdiction which was prevalent in Canadian courts. It was on the strength of this reasoning that Griffith C.J. held that "if the legislature desires to pass a

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[101] [1920] A.C. 691.
[102] (1907), 4 C.L.R. 1304.
[103] *Ibid.* at 1314.

law inconsistent with the existing Constitution, it must first amend the Constitution."[104] Barton J. agreed with this finding, also relying on the jurisdictional argument. He referred to "attempted legislation," saying "an implied repeal is not within the power to alter or repeal, and is not valid because it is not an exercise of legislative power."[105] O'Connor J. came to the same conclusion through a direct application of repugnancy, citing s. 2 of the *CLVA* to conclude that "a law of the Queensland Parliament which is repugnant to any provision of the Queensland *Constitution Act 1865* is, by virtue of the *CLVA* 1865, void and inoperative."[106]

The doctrine set out in *Cooper*, that a prior amendment of the Constitution was required to give force to an inconsistent statute, was relied upon by a majority of the High Court in *McCawley*[107] which questioned the power of the Queensland legislature to appoint a judge to the newly formed Industrial Court. The terms of McCawley's commission provided that he would hold office for seven years and that he would exercise the power and jurisdiction of a Supreme Court judge during that time. This was clearly contrary to s. 15 of *Constitution Act, 1867*[108] which provides that the commission of judges should continue in full force during their good behaviour. The issue was therefore once again the power of the legislature to amend its own Constitution by the necessary implication of an ordinary statute, and without express words in the amending statute.

Griffith C.J. first stated that "all Constitutions granted to British colonies have been conditional, that is, they have contained conditions and limitations upon the legislative powers granted by them."[109] He noted that a general legislative power was also usually granted but said that "it is, of course, impossible to contend that in such a case the general terms

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104 *Ibid.* at 1315.
105 *Ibid.* at 1317.
106 *Ibid.* at 1329.
107 (1918), 26 C.L.R. 9.
108 31, Vict. No. 38 (Qld.).
109 *Supra* note 107 at 20.

must prevail, and that the limitations may be disregarded."[110] This is an assertion of the view that by "necessity" and by the nature of a constitution, courts must pay heed to the limitations contained therein. He relied on s. 2 of the *CLVA* to support a repugnancy doctrine, and continued:

> I think that the doctrine of implied amendment by subsequent inconsistent legislation is not applicable to the case of an Act which is forbidden by an Order in Council or other equally authoritative instrument, and which does not purport to amend that instrument, or to deal with it as the subject of legislation. S. 5 of that Act does not carry the matter any further. It cannot, in my opinion, be construed as overriding the express provisions of a colonial Constitution....[111]

These by now familiar sentiments were shared by a four person majority of the court, with three judges dissenting. Isaacs and Rich JJ. gave one of the two dissenting opinions, and on appeal to the Privy Council, it was said of this judgment that "with it their Lordships find themselves in almost complete agreement; indeed, if it were not for the general constitutional importance throughout the Empire of the matters under discussion, they would have been content to leave the matter where these learned judges left it."[112] This decision therefore merits examination, the more so because it deals extensively with the *CLVA*.

In an important passage, Isaacs and Rich JJ. used s. 5 of the *CLVA* to deal neatly with the jurisdictional argument:

> [The respondents contended that] the local Legislature cannot legislate on any given subject until it has already the power to do so. And it cannot at one and the same moment pass an Act for acquiring the power, and also legislate as if it already had the power....The truth of this proposition may be readily conceded. Its application, however, is foreign to this case....If, as s. 5 [of the *CLVA*] says, every colonial legislature shall be deemed at all times to have had the full power therein described, the Courts must so

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110 *Ibid.*

111 *Ibid.* at 25.

112 *Supra* note 44 at 701.

"deem," whatever conclusion they might otherwise form on the law as theretofore existing.[113]

Regarding any inherent rigidity in a constitution, they noted:

> [T]here is nothing sacrosanct or magical in the word "Constitution"; the expression itself not indicating how far, or when, or by whom, or in what manner the rules composing it may be altered. All those things must depend upon the rules themselves. S. 5 of the *CLVA*, quite consistently with these considerations, uses terms that have a clear legal meaning, and are therefore capable of definite judicial interpretation.[114]

This was a reminder of the technical nature of the repugnancy doctrine, even as applied to constitutions.

Isaacs and Rich JJ. also addressed the question of the intent behind the *CLVA* with reference to the report of the Imperial Law Officers who had recommended the implementation of the *CLVA* (noting that such intent was not determinative). Rather than judicial speculation, they quoted from the report of those law officers who said "we think it will be very expedient to pass an Imperial Act for the purpose of empowering the Legislature of [South Australia] (and of any other Colonies or Colony which be in like circumstances) to alter its own constitution."[115] They commented on this observation as follows:

> One of the technical objections alluded to in the report was that an Act, if at variance with a provision in the *Constitution Act*, must appear to have been passed "with the object" of altering that provision. The observations quoted indicate the evil which existed and needed to be cured....
>
> The cure for the evil which we have referred to was s. 5 of the Act. *And it was extended to all colonies irrespective of their special Constitutions, and irrespective of whether those Constitutions were effected by Imperial enactments or by colonial legislation ultimately authorized by some Imperial enactment or other Imperial warrant.*

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[113] *Supra* note 107 at 53.
[114] *Ibid.* at 52 [emphasis in original].
[115] *Ibid.* at 49.

> The words of that section are so ample and unqualified as really to stand in no need of historical explanation.[116]

The judgment of the Privy Council was an expansion on this theme. Lord Birkenhead first considered the distinction "between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered by some special formality, and in some cases by a specially convened assembly."[117] Significantly, in view of the argument that judicial review was necessary in a federal state, they noted that this "is not a distinction which depends in the least upon the differences between a unitary and a federal form of Government."[118] Further, it was said that:

> It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned judges in the Court below said that, according to the appellant, the constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document of documents which defined it occupied precisely the same position as a Dog Act, or any other Act, however humble its subject-matter.[119]

Their Lordships noted that if the Queensland Constitution was in fact controlled, the respondents "would have no difficulty in pointing to specific articles in the legislative instrument or instruments which created

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116 *Ibid.* at 50 [emphasis added].

117 *Supra* note 101 at 703.

118 *Ibid.* at 703-04.

119 *Ibid.* at 704. The reference to the "Dog Act" may stem from the case of *Symons* v. *Morgan* in Van Diemen's Land in 1847-8. The defendant challenged the constitutionality of the local *Dog Act* which required him to pay a licence fee of 5-10s. The Act was held invalid, with significant consequences for the revenue raising power of the colony.

the constitution, prescribing with meticulous precision the methods by which, and by which alone, it could be altered."[120]

As well, their Lordships appealed to the intent of Parliament as revealed by the trend of colonial policy:

> It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people what was given was given completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation.[121]

This amounted to a legal recognition of the political independence of the advanced colonies. In view of this ringing endorsement of the constitutional independence of the responsible legislatures, arguments that the Imperial Parliament "intended" to hamper the constitutional development of Canada were difficult to sustain. This was emphasized when their Lordships undertook to examine whether any fundamental restrictions had been imposed, not by the constitutional nature of the Queensland *Constitution Act, 1867*, but by any specific provision contained therein. Their Lordships first remarked that if it were intended that the Constitution should be controlled, "one would naturally have expected that the Legislature would have given some indication, in the very lengthy preamble of the Act, of this intention."[122] Their Lordships could find no such indication in the preamble to the *Queensland Act*; in the Canadian context, the preamble to the *B.N.A. Act* suggests, if anything, that the Canadian Constitution be uncontrolled, as is that of the United Kingdom.

Having established the power of the colonial legislature to alter its own Constitution, they dealt with the manner of so doing. Their Lordships noted the confusion prevalent prior to the enactment of the *CLVA*, and referred to the report of the law officers.

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120 *Ibid.* at 705.
121 *Ibid.* at 706.
122 *Ibid.* at 711.

> These distinguished lawyers were of the opinion, and the Board concurs in their view, that when legislation within the British Empire which is inconsistent with constitutional instruments of the kind under consideration comes for examination before the Courts, it is unnecessary to consider whether those who were responsible for the later Act intended to repeal or modify the earlier Act. *If they passed legislation which was inconsistent with the earlier Act, it must be presumed that they were aware of, and authorized such inconsistency.* The law officers, however, recognizing that in fact these doubts were genuinely felt by many colonial judges, prudently advised that an attempt should be made finally to solve these difficulties by explanatory legislation. The *Colonial Laws Validity Act*, 1865, in Imperial history *clarum et venerabile nomen*, had its origin in this opinion. The present litigation has established only too plainly that it has not achieved its purpose. Their Lordships cannot refrain from expressing the opinion that it ought to have done so.[123]

IV. Conclusion

To justify judicial review, the Canadian courts of the Confederation period relied on a doctrine of excess of jurisdiction which implied that the Imperial Parliament was the sole source of legislative authority. Repugnancy, as set out in the *CLVA*, was occasionally adverted to but not relied upon. Had the courts seriously examined the *CLVA*, judicial review would have been undermined, not supported. With the example of the New Zealand Constitution most directly on point, it is evident that the s. 5 of the *CLVA* does apply to constitutions which are Imperial Acts. The Privy Council indicated in the most unequivocal terms that the power of amendment granted by s. 5 of the *CLVA* can be exercised simply by passing subsequent inconsistent legislation, unless the constitution in question expressly provides to the contrary. To avoid the conclusion that s. 5 of the *CLVA* applies to the *B.N.A. Act*, we must rely either on the nature of federalism or on Jenkyns' suggestion that the local powers of amendment are sufficiently precisely set out in the *B.N.A. Act* as to circumscribe the wider grant found in the *CLVA*. If either of these theories is accepted as sufficient to modify the effect of s. 5 of the *CLVA*, it would also be sufficient to sustain the theory of excess of jurisdiction which

[123] *Ibid.* at 709 [emphasis added].

holds that legislation is void, not because it is contrary to the *B.N.A. Act* but because the legislature in question has not received the positive grant of power allowing it to legislate in the area. Therefore, if the *CLVA* does provide a basis for judicial review, it is a redundant basis; conversely, if it is not redundant, it cannot ground judicial review at all. The real difficulty concerns not the power to amend the *B.N.A. Act* but the mode of exercise of that power; unless the power of disallowance is conceived as a means of signalling the assent of Parliament to constitutional change initiated by the provincial legislature, there is no mechanism whereby the entire Canadian sovereign can agree to a constitutional amendment. Absent such a mechanism, the question of whether the *CLVA* permits constitutional amendment is moot. That the power of disallowance should be so conceived is supported by the notion of Parliamentary supremacy, as well as by Austin's theory of federalism. The main problem with this view is that there is no obvious mechanism by which the provinces can approve of Dominion legislation, and it is certainly not plausible that the courts should review only federal legislation. It is possible, though, that if the courts had decided, on the basis of the *CLVA*, that provincial legislation could not be reviewed, this principle would have carried over to federal legislation, and the theory that the federal government was sovereign might have emerged by default.

The reason these avenues were not explored was the colonial mentality of a judiciary which had not grasped the import of representative and responsible government and which continued to view the Imperial Parliament as the sole source of legitimate authority. The converse of Austin's theory, that the constitution of a federal state must be rigid because the sovereign cannot authorize change, is that in a federal state (where the entire sovereign *can* authorize change) there is no impediment to a flexible constitution. This was lost in Dicey's dogmatic over-generalization regarding federalism. Lord Birkenhead summarized the conclusion of the Privy Council in *McCawley* by saying "the Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted."[124] There is no reason why

[124] *McCawley* v. *R.*, *supra* note 101 at 714.

the Canadian legislatures should have been any less masters in their household.

NEGOTIATED SOVEREIGNTY: INTERGOVERNMENTAL AGREEMENTS WITH AMERICAN INDIAN TRIBES AS MODELS FOR EXPANDING SELF-GOVERNMENT

David H. Getches*

Constitutional issues related to First Nations sovereignty have dominated Aboriginal affairs in Canada for a considerable period. The constitutional entrenchment of Aboriginal self-government has, however, received a setback with the recent failure of the Charlottetown Accord in October of 1992. Nonetheless, day-to-day issues must be accommodated, even while this more fundamental constitutional question remains unresolved. This paper illustrates the American experience with negotiated intergovernmental agreements between tribes and individual states. These agreements have, for example, resolved jurisdictional disputes over taxation, solid waste disposal, and law enforcement between state governments and tribal authorities. The author suggests that these intergovernmental agreements in the United States provide a useful model to resolve lingering issues, effect practical solutions and expand First Nations self-government in Canada.

Les questions constitutionnelles relatives à la souveraineté des premières nations dominent les affaires autochtones canadiennes depuis fort longtemps. L'enchâssement de l'autonomie gouvernementale des autochtones dans la constitution a subi un revers avec l'échec de l'Accord de Chartottetown en octobre 1992. Il faut cependant continuer à traiter des problèmes quotidiens. Cet article examine l'expérience américaine relative aux accords intergouvernementaux négociés entre les tribus et les États membres. Ces accords ont par exemple permis de résoudre les conflits de compétence en matière de taxation, d'élimination des déchets solides, et de maintien de l'ordre public entre les autorités de l'État et les autorités tribales. L'auteur estime que les accords intergouvernementaux américains fournissent un modèle utile à la résolution des problèmes évoqués ci-dessus, à la mise en œuvre de solutions pratiques et à l'expansion de l'autonomie gouvernementale des premières nations au Canada.

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I. Introduction

In the United States, intergovernmental agreements close the gap between concepts of sovereignty and the necessities of governance. They are used to give practical meaning to broad legal principles, to effectuate court decisions and legislative delegations of authority, and to clarify ambiguous laws. In some cases, agreements resolve disputes that would otherwise be mired in costly, protracted, and sometimes inconclusive litigation.

Intergovernmental agreements have become a device of necessity for United States Indian tribes and their neighbouring governments. The necessity stems from the legal complexity of the field of Indian law and policy and the diversified land tenure situation on Indian reservations. Recent litigation and assertions of sovereignty by revitalized tribal governments have forced lingering issues to be resolved with practical solutions.

Case law, treaties, and statutes have created a bizarre jurisdictional arrangement. The question of which government has responsibility over an infraction on any Indian reservation may turn on the ownership of the land where it occurs, the race of the victim, the race and tribal affiliation of the actor, and a determination of whether the law controlling the behaviour is "prohibitory" or not. Jurisdiction to impose civil regulations entails extensive and imprecise case-by-case analysis of the relative interests of the state, federal and tribal governments. The fact that much, and in some cases most, land on Indian reservations is owned by non-Indians compounds the problem. The situation creates bewildering challenges to tribal and state officials charged with administering justice and performing governmental responsibilities. Thus, current policies ostensibly respecting Indian self-determination and the tribes' governmental status are frustrated.

Intergovernmental relations with United States Indian tribes are further defined by federal and state statutes enabling tribes to assume and exercise powers of self-government, on proclamations of state governors acknowledging a government-to-government relationship with tribes, and

on a mutual desire to arrange the conduct of governmental affairs between states and tribes. In the first half of 1992, state legislatures in the United States considered 291 bills involving state relations with Native Americans, of which, some 106 were enacted. Included among those that were passed were authorizations for cooperative agreements between state agencies and tribes in a variety of policy areas such as law enforcement, hazardous and solid waste disposal, allocation of tax revenues, economic development, and allocation of water rights.[1]

Because the day-to-day problems of governance in the context of federal Indian law have become increasingly difficult, the governments involved are turning less to the courts and to Congress and more to the negotiating table. In the United States, the use of intergovernmental agreements to give meaning to tribal sovereignty is a relatively recent phenomenon. It has been successful as far as it has gone, though its potential has not been fully realized. Much of the future of tribal relations lies with states and local governments in the United States, however, and therefore the practical meaning of tribal sovereignty will be written in intergovernmental agreements. These agreements can be superior to litigation or to the unilateral decisions of one sovereign's legislative body.

The thesis of this article is that the United States experience demonstrates promise for intergovernmental agreements with tribes that may be transferable to Canada. In the United States, intergovernmental agreements with tribes have been used as remedial measures to cope with murky or unworkable doctrines. In Canada, doctrine remains essentially undeveloped. The United States' experience with intergovernmental agreements —both successes and failures— can be relevant as Canadian governments seek to clarify the self-governing powers of First Nations.

Native peoples in the United States and Canada are similar statistically[2]

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[1] J. Reed, *1992 State Legislation Relating to Native Americans*, State Legislative Report, National Conference of State Legislatures 1 (1992) [forthcoming].

[2]

	Canada	United States
Native/Indian Population:	2,000,000(1992)	1,960,996 (1990)
Tribes and Bands:	633	497

and in their economic, social, and health concerns.[3] However Indian policies in the two countries have followed different traditions.[4] While United States' policy has vacillated between assimilation and isolation, Canada has pursued the unwavering policy of assimilation.[5] There is less interaction by Aboriginal people with non-Indians than in the United States, however. This is because of the relative isolation of many reserves and the smaller numbers of non-Indians living within those reserves. Consequently, Aboriginal people are, on balance, less assimilated in Canada than in the United States.

United States law early recognized tribal sovereignty, but has varied its definition through statutes and treaties that reflect the policies of their respective eras. Tribes governing their territories have come into frequent conflict with state and local governments. By contrast, "the centralization of Indian management has created a much clearer doctrine of Province/tribe relationships in Canada than has evolved in the United

Reservation Population:	309,000 (1990)	1,001,441
Birthrate:	2x Canada's	2x United States'
Funding to Reservations:	$3.5 billion	$3.5 billion
Per Capita Expenditures:	$11,264	$3,495
Treaties in Force:	11	370

Canadian data compiled from M.S. Serrill, "Struggling to be Themselves" *Time*, 9 November 1992 at 52; R.H. Bartlett, *The Indian Act of Canada* 2d ed. (Saskatoon: University of Saskatchewan Native Law Centre, 1988); "Something New Under Canada's Frozen North" *The Economist*, 4 January 1992 at 33; L. Belsit, "Canada's Native Uprising" *The Christian Science Monitor*, 18 October 1990 at 10-11; and S. O'Brien, "The Medicine Line: A Border Dividing Tribal Sovereignty, Economies, and Families" (1984) 53 Fordham L. Rev. 315 at 341. (A total of 67 treaties were entered into with Indians in what is now Canada between 1680 and 1929. See R.W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 Wash. L. Rev. 643 at 666, n. 110, of which 11 remain in force.)

Data for the United States compiled from Indian Service Population and Labour Force Estimates (Bureau of Indian Affairs, Jan. 1991), and relate BIA "Fact Sheets;" and from Belsit and O'Brien, *supra*.

3 *Ibid.*

4 Johnson, *supra* note 2.

5 Bartlett, *supra* note 2 at 23.

States."[6] In short, Canada's *Indian Act* leaves most governance of Aboriginal people to provincial law and standards.[7] Since the mid-19th century, Aboriginal governments have been supplanted by organizations under the close supervision of government agents; most self-governing authority was suspended.[8] Band councils are constituted in this framework. They have power to make by-laws in a realm similar to the law-making of a rural municipality. Though the powers are subject to being disallowed by the Minister of Indian Affairs, their full limits, under a supportive Minister, have not been fully tested.

A 1983 Canadian government report recommended entrenchment of Indian rights, including self-government, in the Constitution.[9] The report anticipated negotiation of agreements with First Nations to spell out their jurisdiction over a variety of subjects. The agreements were to implement proposed national legislation to be enacted even before a constitutional amendment was adopted. The legislation would remove provincial authority over broad subject matter on reserves. The legislation was not passed because activity since the report has largely concentrated on pursuing an amendment to the *Constitution Act*.

Whether or not Canadians ultimately choose to entrench the sovereignty of the First Nations in the Constitution, they face immediate pressure to define the extent and effect of Indian sovereignty. Because the constitutional recognition of inherent tribal sovereignty was proposed only

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6 R.N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs" (1989) 69 B.U. L. Rev. 329 at 386.

7 Bartlett, *supra* note 2, is a leading source on the *Indian Act*. The 1876 Act consolidated prior Indian laws. (See S.C. 1876, c. 18.) The assimilation policy reflected in the Act traces to the *Civilization of Indian Tribes Act* Prov. C.S. 1857, c. 26. The *Indian Act* has been amended and appears in its present form at R.S.C. 1985, c. I-5.

8 R. Bartlett, "*Indian Act of Canada*" (1978) 27 Buff. L. Rev. 591 at 594-603.

9 Canada, House of Commons, The Special Committee on Indian Self-Government in Canada, "Indian Self-Government in Canada: Report of the Special Committee" (Ottawa: Queen's Printer, 12 October, 1983) (Chair: K. Penner) at 44.

in general terms,[10] it would have had little practical meaning without further interpretation by the courts, by Parliament, or by mutual agreements. Thus, a constitutional amendment may have given a moral and political boost to Native sovereignty, but it would not have resolved issues of implementation. Further legislation or negotiated agreements would be required in any event. The recent decision of Canadian citizens not to pursue a proposed constitutional revision that included recognition of First Nations' sovereignty[11] leaves First Nations and their neighbours no less in need of practical approaches to governance. An obvious approach would be to renew efforts to pass federal legislation curtailing provincial jurisdiction over reserves and enabling First Nations to assume it.[12] However, some agreements with the federal and provincial governments recognizing tribal authority over matters now within the authority of each may be possible even without national legislation.[13]

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[10] The referendum on which Canadians voted in November, 1992 was based on the Charlottetown Accord (Consensus Report on the Constitution, August 28, 1992), a 20 page document covering a variety of issues. At least one-third of the 60 items addressed in the Accord related directly to aboriginal peoples. Items 41-44 elaborate on the "inherent right of self-government." In addition to constitutional entrenchment of an explicit recognition of this right, the proposal would have delayed judicial interpretation of the provision for five years. Item 45-46 committed all governments to negotiate agreements implementing the right of self-government, "including issues of jurisdiction, lands and resources, and economic and fiscal arrangements."

[11] See C. Trueheart, "Leaders Face Fallout From Canada Vote; Quebec Questions Left Unresolved," *Washington Post* (28 October, 1992) A18.

[12] There is growing recognition that the most effective approach to fuller sovereignty is through "negotiated self-government." See I.B. Cowie, "Future Issues of Jurisdiction and Coordination between Aboriginal and Non-Aboriginal Governments" (Paper No. 13) in *Aboriginal Issues and Constitutional Reform* (Kingston: Institute of Intergovernmental Relations, 1987).

[13] Intergovernmental agreements are an integral element of Canadian federalism and are encompassed within the rubric of "cooperative federalism." See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1985) at 106-109. For example, one author asserts that the very nature of Canadian federalism requires that regulatory proposals made by the National Energy Board be preceded by intergovernmental agreements with the three major natural gas producing provinces. See D.C. Steckler, "Toward the Integration of Canadian and United States Natural Gas Import Policies" (1990) 25 Land & Water L. Rev.

The conditions may now be right for employing intergovernmental agreements to determine jurisdictional responsibilities between First Nations and Canadian federal and provincial governments. Canada is at a watershed in Aboriginal rights law and First Nations are moving inexorably toward fulfilment of their sovereignty and land rights. Professor Ralph Johnson observes that the Canadian Supreme Court's decisions are tending toward "greater judicial protection of First Nations and Aboriginal rights" which he characterizes as a "remarkable turnaround."[14] Perhaps the most important of all legal developments was the inclusion of s. 35(1) in the 1982 *Constitution Act* by which all "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed."[15] This effectively "constitutionalized" Aboriginal rights making any involuntary extinguishment unlawful without a constitutional amendment.[16] Professor Johnson discusses the extensive Aboriginal claims to land that are being negotiated in recognition of these Aboriginal rights "in a process with all the earmarks of earlier treaty negotiations."[17] This has resulted in several major recent settlements.

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335 at 369.

14 R.W. Johnson, *supra* note 2 at 643, 675, 718. In Johnson's comparative analysis of Native law in the United States and Canada, he traces a new judicial approach in Canadian aboriginal rights beginning with the 1973 case of *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313, aff.'g (1970) 74 W.W.R. 481 (B.C.), and culminating in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075. See also M.D. Wells, "Sparrow and Lone Wolf: Honouring Tribal Rights in Canada and the United States (1991) 66 Wash. L. Rev. 1119.

15 *Constitution Act, 1982*, being schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11, s. 35(1).

16 Johnson, *supra* note 2 at 683.

17 *Ibid.* at 681. See, for example, *The Act Concerning Northern Villages and the Kativik Regional Government of 1978*, discussed by Cowie, *supra* note 12 at 32-34; *The Cree-Naskapi (of Quebec) Act of 1984*, S.C. 1984, c. 18, discussed by Bartlett, *supra* note 2 at 32-35, and by Cowie, *supra* 12 at 30-31; the *Sechelt Indian Band Self-Government Act of 1986,* S.C. 1986, c.27, discussed by Bartlett *supra* at 33-35, and by Cowie, *supra* 12 at 31-32; the Dene/Metis Agreement in Principle, described by J. Keeping, "Dene/Metis Agreement in Principle" (Winter 1989) 25 Resources: The Newsletter of the Canadian Institute of Resources Law 4; the Gwich'in Agreement of 1991, described by L. MacLachlan, "The Gwich'in Final Agreement" (Fall 1991) 36 Resources: The Newsletter of the Canadian

Taken together, recent legal developments create a base for substantial future gains by First Nations.[18] Furthermore, there appears to be momentum building among First Nations to achieve those gains.

The constitutional debate, accompanied by recent legal activity by some First Nations, especially land claims, has raised the consciousness of Indians and non-Indians to the point that they may press for clarification of many questions relating to administration of justice, regulation, education, child welfare, services, and taxation on Indian reserves throughout the country. Presumably, a host of issues were deferred until the constitutional question could be decided.

The constitutional basis for self-government agreements was attractive because it would acknowledge the principle that First Nations retain inherent sovereignty. In the practical world of governance, however, it may be more important to secure the prerogatives of self-government now and defer the theoretical question of how much inherent sovereignty is retained by First Nations. The question need not be specifically answered before government responsibilities now exercised by the federal or provincial governments are turned over to First Nations.[19]

Institute of Resources Law 7; and the Inuit Settlement of 1992, described by Serrill, *supra* note 2 at 52 and in "Canada's Unfinished Business" *The Economist* (14 November 1992) at 48. As Cowie makes clear, these settlements include explicit recognition of indigenous peoples' capacity for self-government, including the authority to enact by-laws pertaining, for example, to zoning and land use, public safety, health and hygiene, taxation, and a variety of other municipal functions.

[18] A less optimistic view of the state of aboriginal law in Canada is expressed in P. Mecklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L. Rev. 82. (He identifies the laws of property, sovereignty, treaties, and the constitution impediments to self-government that must be reformed before true progress can be made).

[19] I understand the argument that delegation of power from another government is inferior to a recognition that those powers reside inherently with First Nations. To be sure, there is a vigorous debate over whether aboriginal sovereignty of First Nations survived European contact, and I respect the view that affirmance of the inherent nature of aboriginal sovereignty should be a fundamental objective of Native people in Canada. See M. Asch, "Aboriginal Self-

If the *Constitution Act* is not amended in the foreseeable future, governments at all levels may find it timely to pursue Aboriginal governance issues through other means. Defining the limits of Aboriginal sovereignty will send them to Parliament, to court, and ultimately to the negotiating table. Negotiation has a potent role in an overall strategy for perfecting First Nations sovereignty. It requires no party to surrender its principles to the other; it enables practical allocations of governing authority over vital issues on which parties are most likely to agree without confronting the largely theoretical issues that separate them.[20]

After a brief discussion of the nature of sovereignty, this paper reviews the development of Indian law in the United States, then surveys examples of the use of cooperative agreements between state or local governments on the one hand and tribal governments on the other. The article concludes with comments on how the device of negotiating intergovernmental agreements can fit into a strategy of pursuing the sovereign rights of Aboriginal people.

The utility of intergovernmental agreements for Canada and its provinces should be at least as great as in the United States. Observations on experiences in the United States are humbly offered in the hope that they may be germane. Both nations strive for good, efficient government as well as moral legitimacy for their policies and laws. It is the quest for

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Government and the Construction of Canadian Constitutional Identity" (1992) 30 Alta L. Rev. 46. Yet I do not believe that explicit acknowledgment of inherency needs to precede the important business of actual governance. At bottom, the best acknowledgment of sovereignty comes through the practice and acceptance of governance. Every agreement vesting a tribal government with specific governing authority is an implicit recognition of its sovereignty. Indeed, a "delegation" of governing authority to other than a sovereign seems anomalous and may be illegal. Congress's delegation of authority over liquor regulation to an Indian tribe was upheld by the United States Supreme Court because the tribe was an independent government, while such delegation to a mere private, voluntary organization would be unlawful. *United States* v. *Mazurie*, 419 U.S. 544 (1975). See also Belsie, *supra* note 2.

20 See R.L. Jamieson, "The Aboriginal Fact: A New Opportunity for Canada" (1991) 25 *Law Society Gazette* 81.

grounding Indian policy in these principles that animated the exploration of how to allocate sovereign power between tribes and neighbouring non-Indian governments. Judging the relevance of the ideas and legal tools discussed in this paper, however, is left to the First Nations themselves and to experts in Canadian law.

II. Defining Sovereignty

Intergovernmental agreements can provide fuller, more precise definitions of the authority of states and tribes by attaching practical meaning to the abstract legal concept of sovereignty. As such, agreements are both alternatives to and a component of other methods of defining sovereignty that historically have included litigation, legislation (and enforcement) by a more powerful government, treaties, and even war. The results of each of these methods — even war — have required further legal interpretation and articulation.

The idea that sovereigns must coexist is not novel. It is especially challenging, though, where Aboriginal peoples have been surrounded and effectively dominated by an immigrant society. Recognition and respect for continuing sovereignty of Aboriginal peoples in this setting depends on legal systems, first, to embody certain fundamental values and, second, to recognize the advantages of self-determination.

The legal traditions of the United States and Canada incorporate ideals of consent and participation. Both countries have struggled with how to achieve the essential unity needed to satisfy the obligations of nationhood while preserving the cultural diversity that gives individuals identity in a large, multi-cultural nation. At times, it is difficult to ensure racial equality without squelching ethnic pride, yet the countries of North America are politically and legally committed to success.

The conundrum of assuring self-determination for Aboriginal people is especially challenging. Its benefits and its moral importance are less understood than comparable issues under the rubric of pluralism. When the question is couched in terms of the rights of tribes as separate sovereigns, it sometimes alienates people reared in a tradition of equal

rights. Sovereignty, however, is the ultimate "civil right." It is the collective authority people concede to a government. The link between cultural integrity as a basic right and achieving a level of self-governance surely has been made in the debates over the appropriate level of independence of ethnically identified Canadian provinces. This has facilitated an understanding of the argument of First Nations for recognition of their self-government.

The fact that Native American cultures have survived with such tenacity is powerful evidence of the distinctiveness of tribal societies. For nearly 500 years, the insistent forces of European culture have pressed in on Native peoples suggesting, coercing, legislating, and mandating change. The remarkable resilience of Indian cultures enabled tribal peoples to maintain their cultural integrity in spite of seemingly insuperable influences to homogenize them with the larger society.

There is a quickening self-determination movement throughout the world. An indigenous independence movement is especially apparent in the Americas. The sophistication, and perhaps the conscience, of the dominant governments of the Americas has grown, easing the repression that historically made self-determination movements fruitless, if not suicidal. The passing of some of the harshest regimes in Latin America has lifted the heel of repression from indigenous groups whose past survival was possible only through isolation. Groups in those countries are now arguing out the components of their legal sovereignty with the national governments that incorporate their territory.

The United States, where a modicum of inherent self-government of tribes has always been recognized as the legal norm, has never settled what self-government really means in terms of practical applications like mineral severance taxes, land use zoning, pollution regulation, or adoptions of children. Typically, these questions have been addressed in a jealous tug-of-war for control of jurisdictional turf. They arise in the contexts of emotionally or politically charged facts of a specific case. Legal principles are announced and later tortured.

In its healthiest incarnation, the debate over tribal sovereignty will be resolved by determining an arrangement that produces effective governance. That requires looking at whom and what are to be governed. Which entity can make the most effective judgments about control of particular people, land, and resources? Which entity will make and enforce laws that will have the respect and allegiance of the people subject to them? What resolution is most compatible with the moral and legal traditions of the affected peoples? The famous legal scholar, Karl Llewellyn, together with anthropologist E. Adamson Hoebel wrote in their landmark study, *The Cheyenne Way*:[21]

> The success of any legal system depends upon its acceptance by the people to whom it applies. Insofar as the system is an integrated part of the web of social norms developed within a society's culture ... it will be accepted as a part of the habit-conduct patterns of the social heritage of the people. The eternally primary functions of law in any society being to close any breach which has opened between grievance-bearers, and meanwhile to restrain individuals from the breach of certain norms of either initial conduct or adjustment which are deemed of vital importance by the society concerned, it follows in the main that the fewer the demands that are made upon the law, the greater good for the society.

Ideally, then, the governmental decisions and activities that cut deepest into the fibre of Indian culture should be left to Indian self-government. Tribes have much to gain or lose in the allocation of recognized sovereign powers. For instance, the future of their societies may depend on issues like how freely Indian children can be adopted by families far away from the reservation, or a tribe's ability to provide basic government services may rise or fall on whether they can tax a coal mine on their reservation. So too it is with other jurisdictional issues concerning control of water, lands, fish and wildlife. Indian religion is profoundly implicated in many of these decisions as well. The transcendent spiritual significance of land and nature is affected by every mine and every dam, every barrel of toxic waste laid in the ground, and every ton of SO_2 poured into the atmosphere.

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[21] K. Llewellyn & E. Hoebel, *The Cheyenne Way: Conflict and Case law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) at 239.

Beyond legal, political, and economic concerns in allocating sovereign prerogatives to tribes, the dominant society may be obliged to heed moral forces that eschew crippling or exterminating another people's life-ways, culture, health and religion. There is a benefit for all peoples, non-Indian as well as Indian, in allowing Indian cultures to thrive. Just as we are coming to appreciate that our biological survival is linked to maintaining the diversity of species, we are learning that our cultural health may be strengthened by sustaining cultural diversity. As a California state court judge observed in one Indian case: "The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty."[22]

III. A History of Intergovernmental Tensions

United States' Indian policy is characterized by a three-way tension among the federal government, the several states, and the tribes. Historical roots of the tension predate the United States Constitution. The complicated jurisdictional situation in United States Indian law traces to early judicial rationalizations used to explain the relationship of the tribes to the United States government. Statutes, hundreds of treaties, and a host of judicial decisions are based on a special relationship between tribes and the federal government. These laws and decisions appear inconsistent with one another but tend to track vacillations of public policy in the dominant society.

The law has weaved together principles from threads spun by particular cases or particular eras. Indian policy has, indeed, been schizophrenic, sometimes pursuing assimilation of Indians, at other times favouring their isolation. The first reservations effectively spared Indians from the melting pot in a nation of immigrants, but other aspects of Indian policy, including the establishment of later reservations, were designed to stir Indians into the melting pot, assimilating them with the rest of the population.

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[22] *People* v. *Woody*, 61 Cal. 2d 716; 40 Cal. Rptr. 69; 394 P.2d 813 (1964).

The allocation of authority over Indian affairs as between the states and the national government was contentious from the start. After declaring independence from England, the thirteen colonies organized under the Article of Confederation. Under Article IX, the Congress had primary authority over Indian affairs so long as it did not impinge upon or violate the "legislative right of any state within its own limits."[23]

One of the compromises that made possible the adoption of the United States Constitution was resolution of this issue in favour of federal supremacy. The Constitution of 1789 included a "commerce clause" giving Congress exclusive authority to "regulate Commerce with foreign Nations and among the several states and *with the Indian tribes.*"[24] Since another provision of the Constitution makes that instrument the supreme law of the land, any state laws inconsistent with federal statutes, treaties or the Constitution itself are overridden.[25]

The Constitution with its commerce clause assigned full responsibility to Congress for the governance of Indian affairs. United States representatives negotiated treaties with tribes and set boundaries for reservations. The federal government was to prevent violation of those boundaries by non-Indians. The states continued to resist and generally resent what they considered to be an incursion of federal authority into their territory whenever federal control of Indian affairs seemed in conflict with state goals. Often those goals were as simple and base as owning and controlling lands possessed by the Indians. For states to take possession or control of Indian lands without the participation of the federal government was contrary to the general idea of the commerce clause of the

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23 D. Getches & C. Wilkinson, *Federal Indian Law*, 2d ed. (1986) at 36. For a full text of the Articles of Confederation see C.C. Tansill, *Documents Illustrative of the Formation of the Union of American States* (Washington D.C.: Government Printing, 1927) at 27-37.

24 U.S. Const. art. I, § 8, cl. 3 [emphasis added].

25 U.S. Const. art. VI, cl. 2.

Constitution (one of only two mentions of Indians in the entire document[26]). Even more specifically, state meddling in Indian affairs also contradicted one of the earliest federal statutes. The *Trade and Intercourse Act of 1790* demanded federal approval of the transfer of Indian land to non-Indians and put other restrictions on trading with Indians.[27]

Conflicts over the integrity of Indian country as against state control in the face of an apparently supreme federal power was typified by the early attempts of the state of Georgia to exert authority over the lands and resources of the Cherokees. Three famous cases decided by the United States Supreme Court left no doubt about the primacy of federal law in Indian affairs, at least as a legal formality. Two of the cases dealt with attempts of Georgia to extend its laws over Cherokee territory. Another declared invalid land titles that had been obtained directly from Indian tribes without the participation of the United States government. The three cases, in opinions by Chief Justice John Marshall known as the "Marshall Trilogy," create the foundation of American Indian law.[28] These early opinions of the Supreme Court defined the three-way relationship among the federal government, the states, and the tribes but the decisions were to

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26 The other provision is art. I, §2, cl. 3, which apportions legislative representation and direct tenation among the states by population but excludes "Indians not taxed." Because of subsequent legal developments, this phrase is essentially an anachronism. See F. Cohen, *Handbook of Federal Indian Law*, 1982 ed. (Charlottesville, Va.: Bobs-Merrill, 1982) at 388-389.

27 F. Cohen, *supra* note 26 at 110.

28 *Johnson* v. *MacIntosh*, 21 U.S. (8 Wheat.) 543 (1823), explored the origins of "Indian title" to land, defined the nature of that title, and reaffirmed the requirement of federal participation in Indian title transfers. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), denied the Cherokee Nation's ability to bring suit in the courts of the United States as a *foreign* nation because it had become a "domestic dependent nation" a government dependent on the United States. In *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court affirmed the tribe's sovereignty, defining it as being extraterritorial to the state, and holding that the laws of Georgia could have "no force" there, because to allow them would conflict with the superior federal authority and therefore be "repugnant to the Constitution, laws and treaties of the United States."

mean more in terms of their long-term wisdom than their immediate practical effect.

President Andrew Jackson refused to enforce the decision in *Worcester* v. *Georgia*, the most important of the three cases.[29] Instead, Jackson acceded to Georgia's desire to expel the Cherokees from their land and to relocate them to different territory hundreds of miles away in what is now Oklahoma. This removal policy marked the zenith of the isolationist approach in Indian affairs. It represented a political concession to the original states and, particularly as non-Indians were claiming most of the lands and resources, a genuine inability to protect reservations from outsiders.

Federal courts generally proclaim their adherence to the principles in *Worcester*. There has certainly been some erosion and several departures from the arrangement of sovereignties in that case but, as the Supreme Court has reiterated, "the basic policy of *Worcester* has remained."[30] Nevertheless, conflict has swirled around that basic policy. There is a continuing dialectic between the Marshallian view and what Professor Richard Collins calls the "Francisco Pizarro view" (after the vicious conquistador who destroyed the Inca empire in the course of conquering Peru) represented historically by Andrew Jackson's refusal to enforce the Court-recognized dignity and autonomy of the Indian tribes.

The *Worcester* decision has been applied in a long line of cases that: 1) impose strict limits on the governmental authority of states within Indian reservations; 2) recognize broad federal authority in Indian affairs; 3) assert commensurate federal responsibility for Indians; and 4) preserve a realm of Indian tribal sovereignty.[31] However, tensions persist.

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29 See J.C. Burke, *The Cherokee Cases, A Study in Law, Politics, and Morality* (1969) 21 Stan. L. Rev. 500.

30 *Williams* v. *Lee*, 358 U.S. 217, (1959).

31 *Worcester* is one of the most cited of all U.S. Supreme cases, more so than all but three pre-Civil War decisions. Getches & Wilkinson, *supra* note 23 at 51.

The Supreme Court originally invoked Congress's legislative authority under the commerce clause primarily to reinforce the exclusion of state authority over Indians in enclaves where tribes were sovereign. As conflicts with states became more frequent and a diminishing tribal land base was increasingly threatened, Indian dependence on the federal government grew. Several cases coupled the federal constitutional power over Indian affairs with the apparent dependence of the tribes and read into it expansive congressional powers. The Court said in 1886: "From [the Indians'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the power."[32]

Once asserted, the great power of the federal government was not always beneficially used for Indians. The plenary power of Congress was used to uphold federal legislation limiting tribal sovereignty by making certain crimes punishable in federal court,[33] and eventually by allowing Congress to abrogate unilaterally Indian treaties with the United States.[34] By using federal legislation to curtail tribal sovereignty and to reduce tribal land holdings, Congress increased the dependence of tribes. If greater dependence gave rise to greater power, each exercise of power provided the basis for even more power. Nevertheless, tribal governments survived with substantial prerogatives intact.

Exercises of state power have continually come into conflict with tribal self-government, calling into play early doctrines. In case after case, states and municipal governments as subdivisions of the states, have stretched to assert their governmental authority over Indians and their territory. Repeatedly, courts have been called upon to adjust tribal-state relations, usually laying down limits on state criminal jurisdiction, state taxing power, state regulatory authority, and state court jurisdiction in Indian

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32 *United States* v. *Kagama*, 118 U.S. (1886) at 384.

33 *Ibid.* (upholding the Major Crimes Act, 18 U.S.C. § 1153).

34 *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

country. Indians, in turn, have resisted. One early decision characterized state-tribal relations as follows:[35]

> These Indian Tribes are wards of the nation... they owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies.

A series of modern cases in the United States Supreme Court have reiterated the basic principles of the Marshall Trilogy, whittling away at them in a few situations, particularly where non-Indians are involved. The modern cases, when taken as a whole, are largely respectful of Indian self-government.[36]

As Indian tribes won successive victories insulating their reservations from state authority, they began enacting their own legislation to deal with taxation and regulatory issues as well as criminal jurisdiction. They sometimes imposed these laws over all people and property within their reservations. Individual non-Indians and companies owned by non-Indians located on reservations resisted the imposition of tribal jurisdiction. Non-Indian complaints about tribal jurisdiction fell on increasingly sympathetic ears in the Supreme Court, which often seized on the land tenure situation on many reservations as a reason to curb the exercise of tribal power.

Non-Indian ownership and population of reservation land trace to now-discredited policies that were designed to eliminate the reservation system and tribal governments. Near the turn of the century, reservation lands held by the tribes were carved up into allotments—parcels of 160 or 320 acres

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35 *United States* v. *Kagama*; *supra* note 32 at 383-84.

36 The jurisprudence of modern Indian law is masterfully traced by C.F. Wilkinson in *American Indians, Time and the Law: Native Societies in a Modern Constitional Democracy* (New Haven: Yale University Press, 1987). The "modern era" described by Professor Wilkinson began in the 1960s. The Court's solicitude for tribes and their governments, however, seems to have waned with changes in Court membership. Cases since the early 1980s have shown at best confusion and at worst retreat from precedent, suggesting that the modern era has ended.

that were conveyed to individual Indians.[37] The government then believed it was appropriate to convert Indians, who in many cases lived off the land as hunters, into farmers. By making pastoral people of them and confining them to smaller tracts, there would be surplus land that could be distributed as homesteads to non-Indians. Today, on many Indian reservations there are large non-Indian populations as a result of government homestead programs that opened "surplus" lands on the reservations to non-Indians. On some reservations, most of the land is owned by non-Indians.

Furthermore, after a period during which the allotments were held in "trust" for the Indians by the government, those lands became alienable by the Indians. Allotted lands were then transferred to non-Indians by individual Indians who were inveigled to sell or whose lands were taken from them for unpaid taxes or debts. Although the *Allotment Act* was repealed in 1934 as a part of the *Indian Reorganization Act*, it accounts for about 100 million acres changing hands from Indians to non-Indians.[38]

Land tenure on reservations is in a checkerboard pattern. Non-Indian owned parcels are scattered among Indian lands. Many non-Indian owners consider it unfair or improper to subject them to laws made by the Indian tribes. Responding to their concerns, the modern United States Supreme Court has denied Indian tribes the authority to arrest and punish non-Indians who commit crimes within the reservation.[39] In a remarkable recent decision, that precedent was extended even to non-member Indians.[40] Thus, tribes also now lack jurisdiction to arrest, try, and punish Indians who are members of another tribe for crimes they commit

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37 See D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* ed. by F.P. Prucha (Norman: University of Oklahoma Press, 1973).

38 See Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 16-18 (1934). Commissioner of Indian Affairs John Collier concluded that over 90 million acres were lost to Indians between 1887 and 1934 owing to Allotment Act programs and policies. He contends that the lands lost were the best, resulting in a loss of 80 percent of the land value belonging to Indians in 1887.

39 *Oliphant* v. *Suquamish Indian Tribes*, 435 U.S. 191 (1978).

40 *Duro* v. *Reina*, 495 U.S. 676 (1990).

on reservations. Thousands of Indians are on reservations other than their own as a result of intermarriage, employment opportunities, or intertribal ceremonial, social, and business activities. Under the decision, they would be subject to state laws for most crimes. Because Congress long ago enacted special laws making all Indians (not just tribal members) subject to federal laws concerning certain crimes on the reservation,[41] these non-member Indians would be subject to federal jurisdiction for major crimes and crimes against non-Indian but would escape prosecution for crimes against other Indians.[42] Congress quickly acted to mend this tear in the jurisdictional fabric by restoring the tribal jurisdiction over non-members that the Court had removed.[43]

The spread of non-Indian landholdings on reservations has created complications in the area of civil regulatory jurisdiction. The complexity of the jurisdictional scheme over Indian country in the United States arises from the Court's struggle with the application of what it has called "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members."[44] Those two barriers are: 1) preemption (the supremacy of federal law in Indian affairs over state law); and 2) tribal self-government (where it would cause interference with tribal sovereignty, application of state laws is precluded).

The preemption analysis is informed by tribal sovereignty notions because federal laws are often vague or silent on jurisdiction. Thus, a treaty that creates an Indian reservation is considered a federal law intended to secure a traditionally self-governing enclave against intrusions

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41 *Major Crimes Act*, 18 U.S.C. § 1153; *Indian Country Crimes Act*, 18 U.S.C. § 1152.

42 *The Indian Country Crimes Act* specifically excepts crimes by one Indian against another. In absence of federal legislation, crimes among Indians are solely within tribal jurisdiction. Ex Parte *Crow Dog*, 109 U.S. 556 (1883). *Duro* v. *Reina*, *supra* note 40 found tribes lacked this jurisdiction over non-member Indians.

43 A temporary measure was hastily enacted to restore tribal jurisdiction over non-member Indians. Public Law 101-511, 104 Stat. 1892 (Nov. 5, 1990). It was made permanent in 1991. Public Law 102-137, 105 Stat. 646 (Oct. 28, 1991).

44 *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, (1980) at 142.

by states. As to Indians, then, reservation status may end the inquiry: state jurisdiction is excluded.[45]

Reservation status alone is not sufficient to bar application of state law to non-Indians since "self-government" is not automatically involved. Instead, the courts make a "particularized inquiry" into the relative interests of the respective governments. The question is whether, on balance, tribal self-government would be infringed by the imposition of state law.[46] Because federal interests are considered, the court asks whether the imposition of state law offends some federal law or policy with respect to Indians. If so, the latter interests may tilt the scales against applying state law to non-Indians on a reservation. In a number of cases this analysis has barred state taxation and regulation of non-Indians based largely on various federal Indian policies. In one case, state taxes on a non-Indian company with whom a tribe had contracted to carry out logging operations in the tribal forest were precluded.[47] The Court found that the federal government had enacted a regulatory scheme concerning harvesting and sale of tribal timber which gave it a strong interest while the state's interest was merely in raising revenue. The Court was also influenced by the fact that the economic burden of the taxes would fall on the tribe giving it an interest in resisting the taxes.

The other side of the jurisdictional coin is the ambit of tribal jurisdiction. To the extent state jurisdiction is precluded, tribal jurisdiction should be able to flourish, though the Court has not reasoned that tribal jurisdiction applies wherever state jurisdiction does not. Several recent challenges were incited as reinvigorated tribal governments imposed their regulations over non-Indians on the reservation. The Supreme Court has recognized the sovereign authority of tribes, holding that tribes generally can regulate or tax non-Indian activity on Indian-owned reservation lands

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45 See *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164 (1973) at 172.

46 *White Mountain Apache Tribe* v. *Bracker*, *supra* note 44 at 145.

47 *Ibid.* at 150. See also *Central Machiner Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Ramah Navajo Sch. Bd.* v. *Bureau of Revenue of New Mexico*, 458 U.S. 408 (1989).

(owned by a tribe or an individual Indian).[48] The imposition of a tribal tax, however, may or may not preclude a state tax on the same subject. The outcome depends on a consideration of governmental interests and at times both sets of laws may apply.[49]

In cases when a non-Indian is on land owned in fee by a non-Indian, the Court has developed a special test for tribal jurisdiction. It holds that the tribe has no regulatory authority unless it can show that these non-members have entered into "consensual relations with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," or if it can demonstrate that the exercise of "civil authority over the conduct of non-Indians on fee lands within its reservation... threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[50] Needless to say, this latter Supreme Court test (the so-called "*Montana* test") for when tribal civil jurisdiction can be applied to non-Indians adds another level of uncertainty calling for case-by-case litigation. Indeed, there has been considerable litigation, but the Supreme Court has yet to find the *Montana* test satisfied sufficiently to allow tribal jurisdiction except where contractual or consensual relations were involved.[51]

The difficulties of applying the special laws concerning Indian jurisdiction in the United States should be apparent from this brief review. Congress has legislated piecemeal and the Court has elaborated law that leaves little certainty, especially where non-Indian activity or property is involved.

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48 *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico* v. *Mescalero Apache Tribe* 462 U.S. 324 (1983).

49 *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

50 *Montana* v. *United States*, 450 U S. 544 (1981) at 565-66.

51 See e.g., *Merrion* v. *Jicarilla Apache Tribe*, *supra* note 48; *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195 (1985).

A complex, and at times bizarre, set of rules has emerged leading some scholars to call Indian criminal jurisdiction a "maze"[52] and a "crazy-quilt."[53] Consider the consequences. Indians on a reservation are subject to federal law when they commit a major crime or a crime against a non-Indian. They are subject to tribal law in other cases. Non-Indians are subject to federal law only when the crime is against an Indian and otherwise are subject to state law. An Indian who is not a member of the tribe of a particular reservation is subject to federal law for major crimes, state law if the victim is a non-Indian, but escapes criminal prosecution if the victim is a member of the tribe whose reservation it is.

The civil area is more complicated. The complications have grown out of a judicial concern for the presence of large numbers of non-Indians and non-Indian property within reservations. In the area of regulation and taxation, tribes control activities and property of Indians. However, in the case of non-Indian activities and property, the outcome depends on a variety of factors. Because the Court has demanded a "particularized inquiry" and a balancing of tribal, state, and federal interests, there is uncertainty that can only be resolved on a case-by-case basis in absence of some negotiated arrangement. Thus, courts have held that tribes can tax oil production by non-Indians on reservation land, but the tribe cannot restrict non-members fishing on fee land within the reservation. States cannot tax gasoline sold to a non-Indian timber contractor who works on tribal land and whose trucks use state highways, but states can tax the sale of cigarettes to non-Indians by an Indian-owned store on the reservation and so may the tribe.

The legal morass created by Indian jurisdiction decisions has reached the point of the ridiculous. Particularly absurd results were reached in the Supreme Court's decision in a recent case involving land use regulation on

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52 R.N. Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze" (1977) 18 Ariz. L. Rev. 503.

53 T. Vollmann, "Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict" (1974) 22 U Kan. L. Rev. 387, n.1.

the Yakima Reservation in the state of Washington.[54] A divided Court decided that state and local zoning laws applied to non-Indian lands on one part of the reservation while tribal zoning laws applied to non-Indian lands on another part of the reservation. To be effective, zoning schemes must extend over an area of sufficient size and contiguity. The consistency and comprehensiveness needed for successful land use planning and regulation is defeated if regulatory authority depends on the ownership of particular parcels of property. The situation becomes even more unworkable when the rule is different for different parts of the reservation. In the *Yakima* case, there were three different opinions, no one of which had a majority of the Court's members signing it. The result does not seem consistent with the Court's own precedents in the field.

Neither tribes nor states gain much satisfaction from decisions like the one in the Yakima land use case. That case portends that litigation before today's Court is likely to produce further confusion. Tests and principles are announced only to be followed with exceptions or another rule. Even the "rules" tend to require case-by-case analysis of each situation, and this requires a look at highly variable demographic facts produced by a mix of past policies and historical accidents. Fulfilment of present goals of reservation and neighbouring communities is rarely achieved by the superimposition of legal rules, especially rules as incoherent as those that have emerged in the area of Indian country jurisdiction. The resulting uncertainty leaves tribes, state governments, and local governments to act at their peril, not knowing whether assertions of jurisdiction will be upheld or not.

IV. Intergovernmental Agreements With U.S. Indian Tribes

Negotiated arrangements among governments concerning jurisdiction and the provision of government services on Indian reservations can give certainty and avoid the necessity of litigation. Thus, they have become especially attractive to all levels of government in the United States. Not

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[54] *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

only do all parties save litigation costs, but they can tailor the results to fit practical needs. The results of "successful" litigation typically provide rules applicable to the particular case. However, even in an individual case, the announced "rules" may not create a workable jurisdictional scheme. The court decision may have to be followed by negotiations to develop a practical way to apply (or avoid) the rules.

Another reason for pursuing intergovernmental agreements is that recent federal legislation calls for tribes and states to negotiate the allocation of certain governing authority between them. For instance, the *Indian Child Welfare Act of 1978*[55] vests tribes with primary jurisdiction over children of its members in adoption, foster care, and custody proceedings. It grants authority to states and tribes to negotiate agreements or compacts concerning jurisdiction over Indian child welfare proceedings.[56] The *Indian Gaming Regulatory Act of 1988*[57] requires states to negotiate compacts with tribes concerning the regulation of gaming activities on Indian reservations.[58] More than 20 tribes and eight states have negotiated gaming compacts under the Act. Negotiations are underway in other states.[59]

A 1953 law allows Indian tribes to regulate the introduction of liquor into Indian country so long as they have the approval of the Secretary of Interior and state laws are not violated.[60] The stipulation that state laws not be violated has led to conflict and litigation over the shared responsibilities of state and tribal governments in regulating liquor sales in Indian country.[61] Surely this area is ripe for negotiation though the statute does not specifically authorize state-tribal agreements.

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55 25 U.S.C. §§ 1901-1963.

56 25 U.S.C. § 1919.

57 25 U.S.C. §§ 2701-2721.

58 25 U.S.C. § 2710(d)(2)(D)(iii)(I)(3)(A).

59 Governor (of New Mexico) Bruce King, Testimony before the U.S. Senate Select Committee on Indian Affairs, March 18, 1992.

60 18 U.S.C. § 1154; see *United States* v. *Mazurie*, *supra* note 19.

61 *Rice* v. *Rehner*, 463 U.S. 713 (1983).

The federal government also now routinely delegates some of its authority and functions in providing services to tribes through contracts. Under the *Indian Self-Determination and Education Assistance Act of 1975*,[62] tribes regularly contract to conduct programs and provide service within their own reservations that were formerly carried out by the Bureau of Indian Affairs. There are now many Indian-controlled schools on reservations as well as tribal agencies performing a variety of services.

Functions like road maintenance and education often interface with state and local government activities. Agreements for sharing responsibilities with these governments can lead to greater efficiency and better services. Such agreements are rare, however, and are not apparently encouraged by the Bureau of Indian Affairs.

Neither federal permission nor federal approval is generally required for interjurisdictional agreements. There are some circumstances, however, where federal participation is necessary. If more than one state is involved, the United States Constitution may require congressional approval. Congress must consent to interstate compacts even if the United States is not itself a party.[63] The federal government also must participate in any contractual arrangement that attempts to alienate Indian property or other Indian rights that are generally subject to restraints on alienation. Absent a statute delegating approval authority to the Secretary of Interior, congressional approval is necessary for any such agreement.[64]

Though federal sanction is not strictly necessary, Congress has considered a "Tribal-State Compact Act," that would give statutory authority and encouragement to states and tribes to enter into voluntary interjurisdictional arrangements.[65] The subject matter of the proposed

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62 25 U.S.C. §§ 450a-450n.

63 U.S. Const. art. I, § 10, cl. 3.

64 See *Trade and Intercourse Act*, 25 U.S.C. § 177; see also statutes granting contractual approval authority, 25 U.S.C. § 71.

65 On several occasions bills were introduced for such an Act. See legislative history summarized in 1977-78 Congressional Index, 95th Congress (CCH) S. 2502, §§ 14,261 and 20,515; 1979-80 Congressional Index, 96th Congress (CCH)

legislation included enforcement or application of civil, criminal or regulatory laws within the respective jurisdictions of the parties, allocation or determination of governmental jurisdiction by subject matter or geographic area, concurrent jurisdiction between states and tribes, and procedures for the transfer of individual court cases between state and tribal courts.[66] In addition to enabling allocation of jurisdiction between tribes and states, the Act would have exempted parties from any limiting effects of *Public Law 280* (a federal law that gives some states certain jurisdiction over criminal and civil adjudications in Indian country).[67] The bill provided that tribal members (not just the tribal council) must vote to approve any agreement extending for more than five years. It also encouraged the creation of local planning and monitoring boards to oversee agreements and to promote their more effective use. Federal funds would have been authorized to encourage and facilitate agreements that would ultimately save federal money.

Although the proposed Tribal-State Compact Act was favoured by the Department of Interior and the Department of Justice, it was not enacted. One reason for the Act's defeat was a perception by tribes that it was a vehicle for state encroachment on tribal sovereignty.[68] Senator Slade Gorton of Washington and some states also objected because the bill would not have provided for the consent of non-Indians living on reservations but only required Indian approval. Philip S. Deloira, director of the Indian Law Center at the University of New Mexico School of Law, believes that the tribes were fortunate that the Act did not pass into law

S. 1181, §§ 14,201 and 20,505; 1981-82 Congressional Index, 97th Congress (CCH) S. 563, §§ 14,171 and 21,005.

66 See S. 563, *supra* note 65 § 101.

67 18 U.S.C. § 1162(a) (criminal jurisdiction); 28 U.S.C. § 1360(a) (civil jurisdiction). See generally, C.E. Goldberg, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians" (1975) 22 U.C.L.A. L. Rev. 535.

68 See testimony of James F. Canan, reprinted in *Mutual Agreements and Compacts Respecting Jurisdiction and Governmental Operations: Hearing Before the Select Committee on Indian Affairs*, U.S. Sen., 97th Cong., 1st Sess., May 11, 1981.

because it would have imposed procedural limitations on the exercise of tribal sovereignty.[69]

Several states have enacted enabling legislation for negotiation and execution of agreements with tribes. Absent some particular aspect of state law that would make such legislation necessary, states appear to have the power to negotiate such agreements whether or not they are specifically authorized by state legislation. Nevertheless, the enactment of such legislation tends to encourage cooperation by a variety of state government agencies that otherwise might be recalcitrant or reluctant to negotiate.

States that have passed enabling acts for state-tribal cooperative agreements have produced generally positive results. The Montana act is simply a policy statement encouraging cooperation between the state and tribes.[70] Nevertheless, in the opinion of lawyers working on Indian reservations in that state, it has been useful in several situations.[71] In one case, there was a dispute over the ownership of state-owned section of land located within the boundaries of the Flathead Indian Reservation of the Salish and Kootenai Tribes. An agreement negotiated between the state and the tribes provides for joint state and tribal licensing of off-reservation use of the water without either party relinquishing its claims. In another case, the tribes reached an agreement with the state fish and game department recognizing tribal jurisdiction over hunting on trust lands and Indian-owned allotments within the reservation and state jurisdiction over hunting on non-Indian owned allotments within the reservation. The state also agreed to pay all revenue derived from on-reservation license fees and fines to the tribe to support a reservation-wide wildlife management program.

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69 Interview with Philip S. Deloria, March, 1992.

70 Mont. Code Ann. § 18-11-101.

71 Interview with John Carter, Attorney, Legal Services Office of the Flathead Indian Reservation, March, 1992.

The Nebraska State-*Tribal Cooperative Agreements Act of 1989* is similar to the Montana law but specifically authorizes state agencies to perform any service or activity of any other public agency or of the tribal governments entering into the compact.[72] The Nebraska statute was motivated by the refusal of state officials to place incorrigible delinquents and chronic mental health patients from Indian reservations into state facilities on the grounds that they lacked authority to provide such services with other sovereign entities.[73]

Though its implementation has been stalled in some respects because of disputes over interpretation of statutory language, the Nebraska Act has been useful in some circumstances. For instance, the state social services agency has reached agreements with the Winnebago and Omaha Tribes to make payments to them under Title IV of the *Federal Social Security Act*[74] (providing for child abuse and foster care programs).[75] The state Game and Parks Department has also reached agreement with the Nebraska tribes on allocating hunting and fishing regulatory responsibilities and recognizing tribal regulations on trust lands. In return, the tribes recognize state regulation on non-Indian fee lands. The Winnebago and Omaha Tribes have joined in an agreement among several northeast Nebraska counties for the general operation of a juvenile holding facility.

72. Neb. Rev. Stat. § 13-1501.

73. Interview with James Botsford, Esq., former Director, Legal Aid Society, Walthill, Nebraska March, 1992.

74. 42 U.S.C. § 601-687 (West 1991).

75. Interview with Deborah Brownyard, Esq., Director, Legal Aid Society, Walthill, Nebraska, March, 1992.

State-tribal cooperation has also been encouraged by proclamations of governors of some states, announcing that the state would deal with Indian tribes directly on a government-to-government basis.[76] The Governors of Arizona, New Mexico and Utah, along with the President of the Navajo Nation which has lands in each of the three states, recently co-signed a "Statement on Government to Government Policy."[77]

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76. Wisconsin was one of the first to promote tribal state cooperation by Wis. Executive Order #31 (13 October 1983). Washington Governor Booth Gardner signed the "Centennial Accord" of 1989. South Dakota announced a "Year of Reconciliation" by Executive Proclamation in 1990. Oregon recognized intergovernmental relationships between tribes and states by executive proclamation on April 10, 1990. See F. Pommersheim, "Tribal-State Relations: Hope for the Future?" (1991) 36 S.D. L. Rev. 239 at 262-65 and 265 n. 181.

77. Statement of Government-To-Government Policy Navajo Nation, Arizona, New Mexico and Utah:

> There are mutual issues which face the parties hereto concerning both Navajo and non-Navajo citizens living within Navajo Nation and State jurisdictions, and the parties recognize and agree that a procedure setting out a cooperative joint effort shall be coordinated to address these mutual issues; and
>
> The Navajo People are citizens of the Navajo Nation as well as the State of Arizona, the State of Utah, or the State of New Mexico and possess all the privileges and rights afforded citizens of these States, are entitled to the same services and benefits afforded by these states to their citizens, consistent with law; and
>
> Because of the sovereign status of the Navajo Nation and its geographical location in three (3) states, the States and the Navajo Nation have taken adverse positions over issues such as taxation, water rights, state services to the Navajo people, and where the extent of jurisdiction of the parties are not clearly or judicially defined; and
>
> Coordination and cooperation between the parties will improve the delivery of services to all people within the respective jurisdictions.
>
> It is hereby agreed by the President of the Navajo Nation, The Governor of the State of Arizona, the Governor of the State of New Mexico and the Governor of the State of Utah that:

The subject matter of tribal intergovernmental agreements is wide-ranging. A 1981 survey by the Commission on State-Tribal Relations documented such agreements in thirty topical areas. Some of the most active areas for such agreements were: wildlife management, environmental protection, education, social services, taxation and law

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The interactions of the State of Arizona, the State of Utah, and the State of New Mexico with the Navajo Nation shall be predicated on a government-to-government relationship.

The relationship will be carried forward in a spirit of cooperation, coordination, communication and goodwill.

The parties hereto agree to meet together on a regular basis to insure that the intent of this Statement is carried out.

Issues of mutual concern to the respective governments shall be addressed through the following structure;

A. Initial contact and negotiations shall be conducted by the appropriate Division or Department of the Navajo Nation and the State;

B. The President and each Governor will designate an individual to their staff with whom the Divisions and Departments will consult as needed;

C. The President and the Governors shall be kept informed of issues of potential conflict by their designated staff person and shall provide such direction as necessary to resolve those conflicts as early as possible;

D. The Attorney General of the Navajo Nation and the Attorneys General of the respective states will consult with one another, prior to the filing of any litigation or adverse claim involving the Navajo Nation and the respective state governments as opposing parties.

The parties hereto shall do all things necessary and proper to inform and direct their respective governments to implement the provisions and intent of this Statement.

Executed, this 6th day of January, 1992.

Bruce King, Governor of New Mexico; Fife Symington, Governor of Arizona; Norman H. Bangerter, Governor of Utah; Peterson Zah, President, The Navajo Nation.

enforcement.[78] A more recent survey documents 99 agreements covering these areas, as well as other jurisdictional and public services issues.[79]

A. Hunting and Fishing

A pioneering intergovernmental agreement was reached between the Leech Lake Band of Chippewa Indians and the State of Minnesota after the tribe won a major court victory affirming its right to hunt, fish and gather wild rice in its reservation. The agreement was incorporated in the court's decree and subsequently ratified by the Minnesota state legislature.[80] In the agreement, the state acknowledged what the court had already said: that the Indians were free of all state regulation while hunting, fishing, trapping or gathering wild rice on the reservation. The tribe agreed to prohibit commercial taking of game, fish, or rice and to adopt a conservation code. The agreement also went farther and covered hunting, fishing and rice gathering by non-Indians.[81] In lieu of a tribal licensing program, the state charged an additional fee imposed by the tribal council to non-tribal members seeking to hunt on the reservation. The special fee was rebated to the tribe for use in the support of resource management. As discussed above, both Montana and Nebraska reached accords on game and fish regulation and the revenue derived from the licensing of those activities. Similar cooperative agreements have been negotiated in other states.[82]

78. Commission on State-Tribal Relations, *State Tribal Agreements: A Comprehensive Study* (1981).

79. Pommersheim, *supra* note 76 at 66.

80. See *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (Minn. 1971); Minn. Stat. § 97.431.

81. Getches & Wilkinson, *supra* note 23 at 729.

82. Colorado (Southern Ute and Ute Mountain Ute Tribes); Minnesota (Grand Portage Band of Chippewas); Montana (Fort Belknap Community Council and Fort Peck Indian Tribes); Oregon and Washington (Nez Perce, Confederated Tribes of the Umatilla Reservation, Confederated Tribes of the Warm Springs Reservation, and Confederated Tribes and Bands of the Yakima Indian Nation); South Dakota (Cheyenne River Sioux Tribe); Washington (Hoh and Quinault Tribes, the Nisqually Tribe and the Port Gamble Klallam, Skokomish and Suquamish Tribes); and Wisconsin (Winnebago Tribe). Getches & Wilkinson,

B. Law Enforcement

Where substantial non-Indian communities have grown up within a reservation, the problem of law enforcement can raise practical difficulties and create hostilities that impede effective law enforcement. State, municipal, and tribal authorities are especially interested in the problem of criminal arrest jurisdiction within Indian country. Even reservations with small non-Indian populations may have highways passing through them where traffic law enforcement is a problem.

One device to deal with the problem of overlapping law enforcement jurisdiction is cross-deputization by mutual agreement. This allows the police of either sovereign to arrest both Indians and non-Indians for violating the law of either the tribe or the state. The state of New Mexico has codified the process for cross-deputization.[83] The statute authorizes the chief of the state police to deputize pueblo or tribal officers who meet statutory criteria if the pueblo or the tribe can show proof of sufficient liability and property insurance.

In addition to cross-deputization, state and tribal courts have also reached agreements on subjects such as service of process, full faith and credit for judgments, and extradition from one jurisdiction to another.[84] Some local law enforcement authorities have gained respect for the fairness of tribal courts, but it has taken a long time for many of them to overcome a racist reaction to the idea of Indian justice systems.

supra note 23 at 730.

83. N.M. Rev. Stat. § 29-1-11. See *Ryder* v. *State*, 648 P.2d 774 (N.M. 1982).

84. O. Olney & D. Getches, *Indian Courts and the Future, Report of the National American Indian Court Judges Association Long Range Planning Project* (Washington: National American Indian Court Judges Association, 1978).

C. Zoning and Land Use Regulation

The Supreme Court's decision in *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*,[85] concerning zoning authority on the Yakima Reservation is discussed *supra*. The Court decided that there were different allocations of responsibility over zoning in two parts of the same reservation. Applications of the Court's decision is difficult on the Yakima reservation and virtually impossible on others. This creates a strong motivation for counties and their Indian neighbours to reach intergovernmental agreements on land use control. Without collaboration between the two governments, effective comprehensive land and resource use regulation is defeated.

Before *Brendale*, the Swinomish Tribe and Skagit County in Washington were already working toward coordinating land use planning in and around the Swinomish Reservation. On the Reservation 46% of the land is owned by non-Indians and 20% of the Indian trust land is leased to non-Indians for their use.[86] The foundation for the Swinomish-Skagit County cooperative process was a memorandum of understanding signed in 1987 that established a procedural framework to allow subsequent negotiations. The memorandum did not actually allocate jurisdiction; it was essentially an "agreement to agree" in that it was non-binding. Yet, it quelled concerns of both governments with an express disclaimer of any intention to "limit or waive the regulatory authority or jurisdiction of either party."

Agreements about land use can focus on the needs of specific sites. The Tulalip Tribe and San Juan County, Washington have an agreement concerning the use of Barlow Bay on Lopez Island where the tribe purchased four acres for use as a seasonal fishing camp.[87] The tribe, with

85. *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, *supra* note 54.

86. S. Solomon & N. Zaferatos, "Cooperation Between the Swinomish Tribe and Skagit County on Zoning," Proceedings of the Second Annual Western Regional Indian Law Symposium (September 1988) Univ. of Wa. Sch. of Law 175.

87. Gover, Stetson & Williams, P.C. "Tribal-State Dispute Resolution — Recent Attempts" (1991) 36 S.D. L. Rev. 277 at 296.

little land of its own and substantial treaty fishing rights adjudicated by the federal courts, needed the fishing camp so its members could exercise treaty rights. After purchasing the land the tribe applied to the federal government and requested the Bureau of Indian Affairs to accept the land in trust under the *Indian Reorganization Act*.[88] The effect of putting land in trust was to exempt it from taxation by local governments and to make it non-alienable without the agreement of the federal government. It is treated essentially as part of the Indian reservation and therefore no local regulation is applicable. San Juan County objected, fearing inappropriate use of the land by the tribe.

After the tribe and the county began negotiating, the Bureau of Indian Affairs deferred ruling on the application to take land in trust, advising both parties that it would prefer to base the decision on a negotiated agreement. The county finally withdrew its objection to trust status when the tribe agreed to abide by various county regulations and to pay the equivalent of the property taxes that would be lost in consideration of services provided by the county.

D. Environmental Regulation

As with land use, environmental regulation needs to be administered comprehensively. Ideally, it should be based on standards that extend over a large area and not be inhibited by the existence of interlocking or overlapping political boundaries. That is one reason the federal government enacted a system of national environmental statutes. Federal laws concerning air pollution, water pollution, toxic chemicals and disposal of hazardous waste maintain uniform standards throughout all the states. In deference to a strong tradition of federalism in the country, almost all of those statutes provided for the states to administer programs to implement the national standards within their boundaries. This provision for state "primacy" depends on states satisfying certain requirements for program funding and demonstrating competence to administer the laws.

88. See 25 U.S.C. § 465.

Virtually all the federal pollution control acts now provide that Indian tribes are to be treated as states and under most of these laws tribes may assume primacy within their territory.[89] At least one major environmental statute, the *Solid Waste Disposal Act*, does not specifically mention Indian tribes.[90] Nevertheless, commentators have concluded that delegation of authority by the Environmental Protection Agency (EPA) to tribes under the Act would be upheld in court. Analogous cases suggest that result.[91]

In 1991, EPA Administrator, William K. Reilly, announced a policy for implementing tribal primacy under the federal pollution statutes stating that "consistent with the EPA Indian policy and interests of administrative clarity, the Agency will view Indian reservations as single administrative units for regulatory purposes."[92] In accordance with this common sense principle of territorial integrity, EPA has adopted regulations concerning the implementation of water quality standards on Indian reservations.[93] The new regulations indicate that a single government should have jurisdiction over the reservation. Unless and until a tribe applies for and receives approval according to the conditions in the regulations for assuming primacy within the reservation, the EPA will retain regulatory jurisdiction over that geographic area of the state. Once primacy is granted, the tribe will have complete jurisdiction and no portion of the reservation will fall under state jurisdiction. Only if the tribe and the state enter into consensual, cooperative agreements will state environmental

89. E.g., *Clean Water Act*, 33 U.S.C §§ 1251-1377, at 1377(e); *Safe Drinking Water Act*, 42 U.S.C. §§ 300f-300j-26, at 300j-11 (added by 1986 Amendment); *Federal Insecticide, Fungicide and Rodenticide Act*, 7 U.S.C. §§ 136-136y, at 136u; *Clean Air Act*, 42 U.S.C. §§ 7401-7642 at § 7474(c) and (e); *Comprehensive Environmental Response, Compensation, and Liability Act* (Superfund), 42 U S.C. §§ 9601-9657, at § 9626 (added by 1986 Amendment).

90. 42 U.S.C. §§ 6901-6991(i).

91. D. Getches, "Management and Marketing of Indian Water: From Conflict to Pragmatism" (1988) 58 U. Colo. L. Rev. 515 at 535-36; see *Nance* v. *EPA*, 645 F.2d 701 (9th Cir. 1981).

92. U.S. Environmental Protection Agency (EPA), *Federal, Tribal, and State Roles in the Protection and Regulation of Reservation Environments*, signed and distributed by EPA Administrator William Reilly, July 10, 1991.

93. 52 Fed. Reg. 64876 (Dec. 12, 1991).

regulatory authority extend onto the reservation. This provides a special incentive for states to pursue negotiated agreements where their interests are strong.

Prior to the new EPA policy clarifying the government's approach to granting primacy, some agreements had been reached between tribes and states concerning the administration of environmental laws. The Shoshone-Bannock Tribe agreed with the state of Idaho that the tribe would regulate air quality on Indian lands while the state would administer it on fee lands. This agreement avoided a fight but did little to advance the sound administration of the law. Perhaps the EPA policy described above will remedy such problems.

Several areas of environmental regulation are not covered by federal statutes. In these cases, the jurisdictional ambiguities created by federal Indian law loom large, particularly as to non-Indian activities and lands within reservations. One of the most troubling areas is solid waste disposal. The federal *Solid Waste Disposal Act* deals primarily with hazardous wastes. It includes only limited provisions covering ordinary (non-hazardous) waste dumps.

Indian reservations are increasingly targeted as sites for waste disposal. This has heightened interest in negotiated agreements between states and tribes to resolve questions concerning solid waste management. In some cases, tribes seek to use their inherent sovereignty over their reservations to regulate such facilities on the reservation. Under no circumstances can they be forced by state or local governments to locate dumps on their own lands. However, a non-member owning land on the reservation who wants to develop it as a dump could resist and test the extension of tribal land use restrictions. Under the muddled principles of the *Brendale* case,[94] there would be at least an argument that the tribe lacked jurisdiction to prevent or regulate the activity.

94. *Supra* note 54.

On some reservations the reverse situation has arisen. A tribe, despairing the lack of economic activity, may concede that it will locate a dump within its boundaries or, in some cases, actively seek location of the facility. In these circumstances, local or state governments may object because of the off-reservation effects on neighbouring communities. As in the case of a tribe resisting an unwanted dump on non-Indian land on the reservation, cooperation between the tribal and local governments may be necessary to resolve the issues satisfactorily.

When the Campo Band of Mission Indians decided to allow a solid waste disposal plant to be located on its reservation, state and local authorities objected. The band had concluded that the waste disposal facility would be the most fruitful of the few options it had for economic development. The band proceeded to develop its own environmental regulations and expertise but asserted that it was free of any state regulation. The state was concerned with the political and environmental consequences of failing to exert whatever authority it had. Negotiations between the governments ensued. The tribe maintained its position that only tribal and federal regulations were applicable on the reservation but agreed to prepare environmental impact statements requested by the state and to adopt strict regulations. In addition, the tribe agreed to provide all requested information to the state and to allow full access by state officials to the site. In return, the state agreed to furnish technical assistance but did not abandon its argument that it had jurisdiction over the site. Litigation was avoided and a practical solution was developed under which responsibility for regulation was satisfactorily allocated so that the site would be operated reasonably.[95]

E. Water Rights

Under principles announced by the United States Supreme Court as early as 1908, Indian tribes have extensive rights to use water on their reservations. They are not subject to the state law requirement that water

95. See Western Governors' Ass'n, *Cooperation on Solid Waste Management: Tribes and States* (1991).

must be put to a "beneficial use" in order to establish and maintain a water right. Instead, they are considered to have "reserved" sufficient water to fulfill the purposes of the reservation.[96] States find the presence of such reserved water rights to be disruptive because it creates uncertainty as to how much water has been allocated to the tribes and how much is available for non-Indian uses. Accordingly, the states try to adjudicate the specific quantities of water to which tribes are entitled and then integrate the Indian rights with all other (non-Indian) rights.

A federal law allows for the federal government, otherwise immune from suit, to be joined as a defendant in state adjudications of water rights.[97] The consent has been construed to extend to Indian water rights because they technically are held by the United States in trust for the tribes.[98] Litigation of federal and Indian water rights has proved to be excruciatingly lengthy and expensive. The parties may spend tens of millions of dollars trying to deal with the complex technical problems as well as the legal issues. Only one case, involving rights to water in the Big Horn River on the Wind River Reservation, has gone all the way through the court system and determined quantities of Indian reserved water rights.[99] The decision has not resolved all the problems, however.[100]

Matters not decided in quantification litigation, even when it is brought to a conclusion, may have to be negotiated. In the Big Horn River case, which was adjudicated and appealed to the United States Supreme Court, it was necessary to return to the state trial courts to deal with the question

96. *Winters* v. *United States*, 207 U.S. 564 (1908).

97. 43 U.S.C. § 666.

98. *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976).

99. *In Re General Adjudication of All Rights to Use Water in Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd by equally divided court*, 492 U.S. 406 (1989).

100. There has also been extensive litigation over whether the tribe could use a portion of its water rights to maintain streamflows for fish and whether state or tribal officials have authority to administer water rights on the reservation.

of whether the state water engineer had authority over non-Indian water administration on the reservation. The lower state court decided that the tribal water officials were responsible for administering water of both Indians and non-Indians on the reservation, subject to court review. That decision was reversed on appeal.[101]

Because water, like wildlife management and land use control, needs to be managed on as unified a basis as possible, it is an area particularly susceptible to negotiated resolution. In the long run, the administrative details of managing water on the Wind River Reservation will have to be settled by agreements of the governments in question.

Many of the negotiated settlements that quantify Indian water rights include components allocating jurisdictional authority over water administration and management. For instance, in the settlement of the water rights of the Fort Peck Reservation Indians with Montana in 1985, the tribe recognized state jurisdiction over rights created under state law and agreed to administer on-reservation rights itself but under federal Department of Interior guidance. In return for these agreements, the state agreed not to object to the tribe's leasing some of its water off the reservation. Tribal water marketing is a means of raising needed revenues; it would potentially have been delayed and frustrated by lengthy litigation of the tribe's legal right to allow off-reservation uses.[102]

Practical water rights issues that the parties might negotiate include whether state or tribal water law will apply, whether state or tribal personnel will administer headgates, provision of technical information, access to lands and water facilities, management of reservoirs and canals,

101. *In Re General Adjudication of All Rights to use Water in the Big Horn River System*, 835 P. 2d 273 (Wyo. 1992).

102. See J. Thorson, *Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements*, Indian Water, Collected Essays 42 (1986); J.A. Folk-Williams, "The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Water Rights" (1988) 28 Nat. Res. J. 63 at 82-86; Mont. Code Ann. § 85-20-201, codifying the Fort Peck-Montana Compact.

allocation of planning responsibilities, and dispute resolution among individual water users.

F. Taxation

Historically, taxation has been one of the most litigated areas of United States Indian law. Recently, cases have focused on tribal jurisdiction over taxation of non-Indians on reservations. As discussed earlier, few areas of the law are more confusing. One thing that is clear is that states and tribes will continue to seize upon their own interpretations of existing law in order to reach revenues from taxable incidents wherever they are found. Given the ambiguity of the law in the jurisdiction area, and the Supreme Court's own invitation to subject each case to a "particularized inquiry" by the judiciary, it is not surprising that the litigation proliferates. Better results may be possible through negotiations.

Though the usual expectation in litigation is a "winner take all" outcome, another possible outcome in tax cases is that both the state and the tribe may be able to impose their taxes on the same subject.[103] This can cause administrative problems for the merchants who are required to collect the taxes, and it can discourage customers who may take their business elsewhere as a result of the economic impact of dual taxation. The problem of dual taxation can become even greater where taxes on a business become a major factor in the decision whether to do business on the reservation.

A lower court has held that, where state taxes would interfere with tribal economic development and autonomy, tribal taxes are exclusive.[104] However, the Supreme Court has held in one recent decision (which could be limited to its circumstances) that severance taxes can be imposed by

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103. See *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Indian Reservation*, 42 U.S. 463 (1976). Cf. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163 (1989).

104. *Crow Tribe of Indians* v. *Montana*, 819 F.2d 895 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988); *Hoopa Valley Tribe* v. *Nevins*, 881 F. 2d 657 (9th Cir. 1989).

both the state and the tribe.[105] In this milieu, taxing entities may prefer to develop their own joint plans for collection and administration of taxes rather than subjecting questions to judicial decision.

The state of New Mexico and the Pueblos of Santa Clara and Pojoaque have agreed to coordinate collection of gross receipts taxes.[106] The Pueblos exercise their inherent power to tax and regulate a broad range of non-Indian activities on the reservation that are either consensual or that the tribe believes satisfy the test of *Montana* v. *United States* of threatening or harming "the political integrity, economic security, or health or welfare of the tribe."[107] Before the agreement, the state taxed only sales made by non-Indian firms to non-Indians on the reservations while the Pueblos taxed all sales. This is generally allowed under Supreme Court rulings,[108] but results in inconvenience as well as dual taxation of non-Indian sales. The Pueblos wanted a resolution of the sales tax issue. They first raised potential legal problems with a part of the state tax and also argued that they were not exercising the full extent of tribal taxing powers. The Pueblos then required all the affected businesses on the reservation to obtain a federal Indian trader's license. They demanded that merchants pay tribal taxes but offered to offset any state taxes the merchants paid against the tribal tax if the merchants agreed to protest the state tax and to apply for a refund from the state and assign the refund to the tribe. After being deluged by refund requests, the state agreed to negotiate with the tribes. The parties agreed to exchange confidential taxpayer information and establish a basis for equitable apportionment of taxes collected. This opened the way for a unified tax collection system with revenues to be shared by the state and the Pueblos.

105. In *Cotton Petroleum, supra* note 103, a state oil severance tax was found to be specifically authorized by a federal statute, and state interests were relatively substantial.

106. Gover, Stetson & Williams, P.C., *supra* note 87 at 277-81.

107. *Supra* note 50.

108. E.g., *Moe*, *supra* note 103.

In New York, the state and the Seneca Indian Nation reached a complex agreement on gasoline and cigarette tax collection.[109] After an initial victory in the highest state court, the matter proceeded to the United States Supreme Court.[110] In the course of litigation, the tribe and the state negotiated a settlement under which the state would collect the tribal tax on the reservation for the tribe. In return, the tribe agreed to maintain its tax at nearly the same rate as the state. The state's concern was that by undercutting the state tax, the tribe would put itself in a particularly advantageous position relative to off-reservation businesses. The state's interest, then, was less in raising revenue than in preventing the tribe from gaining too great a competitive advantage over non-Indian merchants located off the reservation. The state conceded that it could not impose its taxes on the reservation because they were effectively preempted by tribal taxation. Still, the tribe agreed to minimize "marketing its tax advantage" but gained an agreement that the tribe would receive the benefit of any settlement (from the tribal standpoint) that the state might negotiate with another tribe. The parties were to be subject to binding arbitration of any disputes that arose under the agreement. The entire deal, however, fell apart when the New York legislature failed to approve it because of objections raised by businesses on the reservation.

G. Land Claims

Land claims present an appropriate context for resolving inevitable conflicts beyond simply compensation. A land claims settlement reached by the Puyallup Tribe and the United States included resolution of tough jurisdictional issues.[111] Vestiges of the tribe's ancestral lands were located within the industrial area of the city of Tacoma and extended to submerged lands in Puget Sound. Complex and lengthy negotiations dealt

109. Gover, Stetson & Williams, P.C. *supra* note 87 at 290-93.

110. *Milhelm Attea & Bros., Inc.* v. *Dep't. of Taxation and Finance of State of New York*, 164 A.D. 2d 300, 564 N.Y.S. 2d. 491 (1990), cert. granted and judgment vacated subnom. *Dep't. of Taxation and Finance of New York* v. *Milhelm Attea & Bros., Inc.*, 112 S. Ct. 926 (1992).

111. *Washington Indian (Puyallup) Land Claims Settlement Act*, Public Law 101-41, 103 Stat. 83 (June 21, 1989), codified at 25 U.S.C. § 1973.

with fishery protection, use of submerged lands, as well as jurisdiction over these lands. The tribe got clear title to certain lands, jurisdiction over trust property, provision of social services, and $46 million in cash. The state of Washington retained jurisdiction over non-trust land and extinguished certain other potential claims.[112]

V. Strategies for Successful Negotiation of Intergovernmental Agreements

The conditions for negotiation must be right.[113] Above all, Indian

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112. Gover, Stetson & Williams, P.C., *supra* note 87 at 293-96.

113. There are numerous sources of advice available to potential negotiators of intergovernmental agreements. See e.g., S.B. Goldberg, *Dispute Resolution: Negotiations, Mediation, and Other Processes* (1992); E.F. Lynch, *Negotiation and Settlement* (Rochester: Lawyers Co-operative, 1992); L.L. Teply, *Legal Negotiation in a Nutshell* (St. Paul: West Publishing, 1992). The applicability and utility of these sources vary from case to case, though there are some especially apt observations and suggestions concerning interjurisdictional negotiations. Conditions that tend to lead to a successful conclusion of a negotiated intergovernmental agreement with Indian tribes can be summarized:

1. A mutual sense of urgency
2. An opportunity for mutual gain
3. Uncertain results if the outcome must be litigated
4. Outside force of leadership or a personality who will keep the parties talking

See Thorson, *supra* note 102 at 42-45. Potential obstacles to the success of such negotiations have been identified as:

1. Problems of communication that may be complicated by cultural differences in perception of nonverbal signals;
2. Problems of emotional baggage and residual distrust as to genuine motives of the parties;
3. Interposing strategic bargaining and adversarial winner-takes-all attitudes into the dispute;
4. Existence of a "settlement gap" based on differing good-faith perceptions of facts, the law, technical issues, or possible outcomes of litigation;
5. Circumstances that change during the bargaining process.

See Proceedings, Tribal State Relations: Hope for the Future, Symposium sponsored by the University of South Dakota School of Law (1990).

governments and their non-Indian counterparts must be motivated to solve a problem. Parties can influence conditions that motivate their counterparts. In the United States, negotiations have frequently grown out of litigation or the threat of it. Often the prospect of a long and expensive court battle is enough to bring the parties to the negotiating table. An issue can be precipitated by assertions of tribal jurisdiction in conflict with neighbouring governments, or of state jurisdiction that impacts heavily on a tribe or its individual members.

Even without a ripe conflict, governments may be sufficiently uncomfortable with a confusing regulatory, taxation, or law enforcement regime to seek a negotiated resolution. States, like tribes, are troubled by the unpredictability of Indian law. Although tribes have fared badly in the courts for the last few years, they generally prevailed in cases during the 1960s and 1970s. More than any other factor, the bold and effective assertions of sovereign tribal authority during the last ten or fifteen years built on an episode of supportive court decisions have convinced non-Indian governments to negotiate with tribes as peers.

The recent interest in intergovernmental agreements in the United States, however, is owing to more than the legal and geographic complexities of Indian jurisdiction. There has been a generally heightened level of attention to Native American issues. The National Conference of State Legislatures attributes this to four factors. First, the diminishing judicial protection of Indian interests evidenced by recent decisions of the U.S. Supreme Court has forced the tribes to focus their energies on influencing the political process. Second, the number of Native Americans holding public office is increasing. (There are at least 30 Indian legislators in 13 states.) Third, as discussed earlier, the federal government has explicitly empowered the tribes to receive certain delegations of authority. Fourth, "a growing sense is emerging among enlightened policy-makers that Indian tribes deserve respect as legitimate partners in the governance of America."[114]

114. *Supra* note 1.

In Canada, intergovernmental negotiation could be triggered by judicial actions, federal and provincial legislation such as delegations of responsibility to First Nations, land claims settlements, and ad hoc attempts to solve particular problems. As discussed earlier, recent court decisions tend to favour aboriginal rights and First Nations' activism is growing. Committed aboriginal leaders and non-Indian political figures can play vitally important roles in focusing issues and facilitating negotiations that reach practical solutions. Public awareness and information is also an essential component.

First Nations jointly or individually may decide to pursue a strategy of vindicating their aboriginal sovereignty. As they do, negotiation may appropriately emerge as a powerful mechanism.[115] It may be as attractive to non-Native neighbours as it is to the First Nations themselves because of the relative efficiency and certainty that agreed solutions can produce.

Negotiation is not simple or easy, though it can be effective. As in litigation, there are especially serious problems of representation, funding, and enforcement that should be considered. The first two problems must be considered in advance of negotiations. Enforcement is one of the most important issues to be addressed throughout the process.

The parties need to know who represents whom and to trust their own representatives (leaders, attorneys, officials, etc.). In particular, tribes should have their own competent, independent counsel. Although the U.S. government has a fiduciary relationship as "trustee" for Indian tribes and resources, experience has shown that the credibility of an agreement may depend on having counsel separate from the federal attorneys. A resolution favourable to tribes may be unfavourable to the United States because of cost conflict with a federal project or program, or because of

115. A development which Ian Cowie has ably documented and illustrated with a flowchart. See *supra* note 12 at 19.

politics.[116] Independent representation involves the expense of hiring lawyers. It will be fruitless, however, to attempt negotiation of major agreements implementing tribal sovereignty without professional counsel.

Parties should not underestimate the importance of having funds available to conduct and later implement a settlement. Beyond paying for attorneys, there are costs of travel and perhaps hiring a facilitator. Research and expert help may be necessary. Negotiation is usually cheaper than litigation, but it is not without substantial costs.

The actual agreement coming out of a settlement may require considerable funding. Administrative costs and other expenses may be necessary to carry out the terms of the agreement. Virtually all of the one dozen water rights settlements successfully negotiated with Indian tribes in the United States have had an ingredient of substantial federal funding. Monies were made available for construction of water facilities, purchase of water rights administration, and for general economic development needs of Indian tribes.

Because most agreements are sought in order to avoid or end litigation or other contentious confrontations, enforcement issues should be anticipated. In negotiated settlements of litigation like water rights claims, a common way of resolving disputes is for the court to approve the settlement and retain continuing jurisdiction over matters that arise later. Disputes about the terms of an agreement unrelated to pending litigation could lead to a lawsuit and proceed to court just as a contract matter would. Treating the agreement as a contract may be inappropriate, however. First, the parties are themselves sovereigns and the adjudication would presumably be in the courts of one or the other. Second, the rules of construction and the approach taken by a court to an ordinary commercial contract may be different from those that ought to apply to an interjurisdictional arrangement.

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116. Indeed, the United States government has often found itself in a conflict-of-interest situation with Indian tribes. See, e.g., Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians" (1975) 27 Stan. L. Rev. 1213.

One method of dealing with enforcement and dispute resolution is to specify in the agreement that such issues will be subject to arbitration or mediation. Binding arbitration was agreed upon by the state of New York and the Seneca Nation in the example discussed earlier. That agreement, however, was never implemented. The use of professional mediators has been rare in formulating Indian-tribal interjurisdictional arrangements and so it is not surprising that they almost never refer enforcement disputes to mediation. The nuances of different dispute resolution techniques are not well understood by governments at all levels.[117] Parties should consider the utility of incorporating these in alternative dispute resolution mechanisms.

To the extent that agreements anticipate and address contingencies, they can avoid most of the need for enforcement. Thus, a goal of negotiation should be to reach a self-executing agreement that resolves predictable problems in advance. Of course it is difficult to do this where new activities, such as taxation, control of environmental pollution, or adjudication of child custody cases will be undertaken by the tribe. The parties may want to consider entering into an interim agreement. After an initial term, during which issues can be identified, the parties can negotiate a modified final agreement based on a review of the original assumptions, facts, and any changed conditions.

Enduring agreements most often result from negotiations based on free and open communications between parties who treat one another as equals. Even "unsuccessful" negotiations may be necessary steps toward creating an atmosphere of respect and free exchange of ideas that becomes the basis for later success in reaching an agreement. The first negotiation may, in time, open the door to other accords. This argues for a strategy that starts with relatively manageable problems and conflicts and escalates later to the more difficult ones as the parties become more confident, competent, and mutually successful in working together as colleagues. Agreeing on an agenda and a ranking of issues to be negotiated is an important first step.

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117. *See* Folk-Williams, *supra* note 102 at 93-95.

VI. Conclusion

The great potential for state-tribal interjurisdictional agreements has not been fully realized in the United States. The number of attempts is large while the number of reported agreements relatively low. Yet, a statistical assessment is not entirely indicative of success. More than ever, state and tribal governments are resorting to negotiation and cooperative agreements. Given the historical bitterness of conflict between states and tribes, not all of which has been confined to the courtroom, it is not surprising that some negotiations and attempts at reaching intergovernmental agreements do not succeed. Perhaps it is more remarkable that so many have been successful.

Canadians may be able to glean lessons from the United States experience. Whether or not Canada moves toward a constitutional declaration of aboriginal sovereignty, interjurisdictional agreements will be useful mechanisms as the First Nations assert their sovereignty more emphatically in the courts, in Parliament, with provinces, and in land claims settlements. Of course if constitutional status is ultimately given to sovereignty of tribes, it will require definition and that can come through negotiation.

In absence of a constitutional sovereignty declaration, Canadian bands may be reluctant to anticipate in negotiation if they must operate under by-laws pursuant to the Indian Act that characterize their status as tantamount to a rural municipality.[118] They will be negotiating with provinces and the national government over issues far more momentous than the concerns of a municipality. Without the constitutional declaration of sovereignty, their dealings could remain subject to the determination by the Minister of Indian Affairs that they have reached a sufficient stage of development to deal with certain matters. Presumably, however, these questions are themselves within the competence of the parties to negotiate and resolve.

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118. Bartlett, *supra* note 2 at 23.

The Minister may be able to delegate some of his authority to a band.[119]

It is possible that Section 35(1) could be construed to recognize implicitly traditional aboriginal governments and governing powers.[120] This avoids the unseemly and possibly distasteful aspects of other governments "delegating" authority to bands as if they did not already have authority. Though suspended by the *Indian Act*, aboriginal governments arguably have been only inchoate and can be revitalized simply by their beginning to exercise the aboriginal powers. In any event, the existence of theoretical questions need not impede progress in actualizing self-government.

The absence of formal constitutional ratification of the sovereign status of First Nations should not be an obstacle to negotiation of agreements with and by them. An essential purpose of the agreements is, after all, to help define sovereignty. In the United States we are still struggling with the meaning of inherent tribal sovereignty, though it was proclaimed by the Supreme Court 160 years ago. Thus, the United States' version of tribal sovereignty, no matter how venerable and rooted in judicial precedent, does not necessarily create a foundation superior to the opportunity Canada has today for confronting issues of aboriginal self-government through negotiation.

A variety of conditions favour a movement toward intergovernmental agreements with First Nations. Unresolved land claims create political leverage and attract considerable popular attention and support. Canadian courts have shown a recent willingness to entertain and adjudge Indian

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119. Certain authority, e.g. taxation of reserve land interests, can be authorized to bands that have "reached an advanced stage of development." See the *Indian Act* R.S.C. 1970, c. I-6, s. 83(1). Apparently the provision is rarely used. See Bartlett *supra* note 8 at 600.

120. It has been argued that First Nations still retain their aboriginal sovereignty. See House of Commons, *supra* note 9. A bill to broaden the Minister's authority to confer greater authority on bands through negotiations failed. See R. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at 162.

claims fairly. Most importantly, the bands have actively participated in negotiations leading to the proposal for constitutional entrenchment of their sovereignty. The bands have informed leaders, available expertise, and the attention of national and provincial politicians as well as the public.

With the shelving of constitutional reform, First Nations are likely to redirect their energies and adopt new strategies to vindicate their sovereignty. Intergovernmental negotiation can play a central role in those strategies. Likewise, Canadian national and provincial governments can pursue negotiated agreements as a source of predictability, efficiency, and equity.

CHARTER VERSUS FEDERALISM: THE DILEMMAS OF CONSTITUTIONAL REFORM

by Alan C. Cairns (Montreal & Kingston: McGill-Queen's University Press, 1992)

The work of Alan Cairns, familiar to all students of Canadian politics, is perhaps especially well-known to students of constitutional affairs. Throughout Canada's interminable constitutional struggles, Cairns has been one of this country's leading academic contributors to these debates. His contribution rests in a commitment to fulfil his version of the scholarly role — to offer detached objective analysis. In this respect, Cairns stands apart from many of his contemporaries in political science and law who choose instead the mantle of direct participant, appearing as advocates of one constitutional reform position or another. The product of Cairns' orientation towards constitutional politics is a holistic view of the Constitution. This view, this interest in developing a broad interpretive framework for understanding the relationship between the Constitution and Canadian society, animates the four essays contained in *Charter versus Federalism: The Dilemmas of Constitutional Reform*. The first three essays, prepared initially during his tenure as the Kenneth R. MacGregor Visiting Lecturer at Queen's University in 1987, examine the international influences on the *Charter of Rights and Freedoms*, the role of the Constitution in shaping citizens' conceptions of community, and the conflicting interpretations of sovereignty contained in the *Constitution Act 1982*. The final essay searches for the lessons for constitutional change offered by the Meech Lake experience.

Years ago, when this reviewer struggled to conceptualize a Master's thesis Professor Cairns suggested that my difficulties might be eased by reading "The Hedgehog and the Fox"—Isaiah Berlin's famous study of Tolstoy's view of history. In this essay Berlin ascribes different intellectual personalities to the hedgehog and fox mentioned in the poetry of Archilochus. Hedgehogs strive to understand their world according to a single coherent vision, a single organizing principle. By contrast, foxes "entertain ideas that are centrifugal rather than centripetal, their thought is scattered or diffused, moving on many levels, seizing upon the essence of a vast variety of experiences and objects for what they are in themselves,

without... seeking to fit them into ... any one unchanging, all-embracing... unitary inner vision."[1] In this collection, as he has for much of his academic career, Cairns brings the perspective of the fox to his subject. His essays challenge those of us who are accustomed to viewing constitutional struggles through the lens of federalism. In always forceful, often elegant, prose Cairns argues that the politics of constitutional reform has become the scene for a battle between two constitutional logics. The first logic, the longstanding one of federalism, has been challenged by a newcomer embodied in the *Charter of Rights and Freedoms*. Throughout these essays, Cairns urges the reader to recognize the importance of the *Charter* to the contemporary course of constitutional politics, advice premised upon his belief "that the Charter represents a more pronounced change in our constitutional culture than we generally appreciate."[2]

The perspective of the fox clearly guides the discussion in the first chapter, "International Influences on the *Charter*." There Cairns explores the importance of the international dimension upon the course of Canadian constitutional politics — a relationship I believe he first came to appreciate during his work for the Macdonald Commission on the Economic Union.[3] Post-World War II Canada has been shaken by an explosion of group self-consciousness. The politicization of more and more cleavages in Canadian society — among them language, ethnicity, race, gender, disability, and sexual preference — is generally regarded as instrumental to the adoption of the *Charter*. Cairns argues that students of Canada's Constitution have been too preoccupied with the importance of domestic forces to this politicization of society and the resulting birth of the *Charter*. This preoccupation has blinded us to the stimulus international developments

1. Isaiah Berlin, "The Hedgehog and the Fox," in Isaiah Berlin, *Russian Thinkers*, (New York: Penguin Books, 1979) at 22.
2. A. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform*, (Montreal & Kingston: McGill-McQueen's University Press, 1992) at 9 [hereinafter *Charter versus Federalism*].
3. A. Cairns and C. Williams, "Constitutionalism, Citizenship and Society in Canada: An Overview," in A. Cairns and C. Williams eds., *Constitutionalism, Citizenship and Society in Canada*, (Toronto: University of Toronto Press, 1985) at 6-8.

such as the resurgence of ethnic nationalism following the disintegration of European empires in Africa and Asia, the *United Nations Charter*, and the *Universal Declaration of Human Rights*, provided to the growing enthusiasm for entrenching a Bill of Rights into the Canadian Constitution. Since Cairns regards the international dimension "as inducing, conditioning, and influencing, rather than controlling or determining,"[4] the chapter serves at the very least as a salutary reminder that societies, as well as economies, have become globalized in the mid to late twentieth century.

The second chapter, "Constitutional Refashioning of Community," examines the influence of constitutional change upon the identities of citizens and the nature of citizenship. In this essay, as in his earlier works on federalism and competitive governments, Cairns attributes a powerful molding power to political institutions.[5] This power inspires the advice "to think of constitutional change as the master instrument of community transformation."[6] Three unconsummated proposals for constitutional change — sovereignty-association/Canada without Quebec, intrastate federalism, and the 1980 federal Charter and amending formula — are examined to illustrate the very different visions of community and citizenship which may animate constitutional revisions.

This chapter also provides the clearest evidence of the author's sympathy for the *Charter*. In light of the explosive growth in the number of politicized cleavages in society we can no longer rely upon the identities recognized and created through federalism to ensure a healthy, stable political future. Canada's increasingly multiracial and multicultural character demands constitutional adaptation. In this respect, the *Charter* is represented as an important, but certainly not sufficient, instrument for creating the sense of common citizenship needed to sustain the Canadian political community.

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4. *Supra* note 2 at 15.
5. See for example A. Cairns, "The Governments and Societies of Canadian Federalism" (1977) 10 *Canadian Journal of Political Science* 695.
6. *Supra* note 2 at 38.

The third essay, "The Charter and the Constitution Act, 1982," offers an interpretation of the Constitution in terms familiar to those acquainted with Cairns' earlier article, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake."[7] Cairns draws our attention to the instability of the compromise contained in the *Constitution Act, 1982*, an instability attributed to the coexistence of two competing visions in the Constitution. One vision is found in the *Charter*, the second vision is institutionalized in the amending formula. Each vision offers a very different constitutional perspective on the issue of where sovereignty should reside. For those who championed the *Charter*, sovereignty rested in the citizenry; for those who argued on behalf of the government-dominated amending formula, sovereignty was an affair of state. The consequences flowing from government-centred and citizen-centred visions sharing the same constitutional document are certainly not presumed to be benign: "The larger written constitution that contains them both is threatened with paralysis by the lack of agreement on the relative roles of governments and citizens in constitutional change."[8] Such disagreements must certainly bear some of the responsibility for the defeat of Meech Lake.

The final essay, "The Lessons of Meech Lake," revisits some of the terrain covered previously by Cairns in "Passing Judgement on Meech Lake."[9] In addition to offering an explanation for the failure of this effort at constitutional change, Cairns suggests that this experience offered lessons for the academic community and for future constitutional engineers. His explanation for failure focuses upon the competing constitutional visions noted previously. A tremendous chasm separated the norms of executive federalism from the expectations of citizen participation typical of the constitutional culture stimulated by the *Charter*, a chasm which the formal rules for amendment only served to widen. His lesson for the academic community —"the scholarly role should not be

7. (1988) 15 *Canadian Public Policy*.
8. *Supra* note 2 at 93.
9. A.C. Cairns, in D.E. Williams, ed., *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto: McClelland and Stewart Inc., 1991) [hereinafter *Disruptions*].

entirely sacrificed on the altar of direct participation"[10] — is strikingly similar to the message he delivered some ten years earlier at the University of Alberta. With the ashes of the Charlottetown Accord not yet cool to the touch, I am skeptical whether enough members of the academic community are prepared to return to an earlier time when "scholars gave evidence as scholars."[11]

The lessons for constitution-making focus upon reconciling government amendment responsibilities with public involvement. While Cairns does recognize the possibility that a more brutal "hit-and-run" version of government unilateralism might deliver a successful result it is clear that, in his view, better prospects for success depend upon a genuine effort at accommodating these two visions. To cite an argument from the third essay: "It is, accordingly, a task of the highest priority to find a *modus vivendi* between the *Charter* and the amending formula. The site of that resolution can be only in revised criteria, formal and/or informal, to govern the amending process in ways that do not assume that the *Charter* never happened."[12] Consequently, Cairns urges modifications to the practice of executive federalism which would sensitize governments to the concerns of *Charter* Canadians.

Since we may now conduct post-mortems of the Charlottetown Accord, as well as Meech Lake, it is appropriate to ask if the process that produced this second ill-fated agreement respected this fundamental lesson. Arguably, the post-Meech process went a considerable way in the direction recommended by Cairns. The twenty-eight month period separating the deaths of Meech Lake and Charlottetown was a time when a very inclusive brand of constitutional politics was practised in this country. Without succumbing to the delusion that governments lost all interest in manipulating public sentiment during this period, the battery of conferences, task forces, and commissions which criss-crossed this nation was impressive and represented an important participatory avenue for the

10. *Supra* note 2 at 98.
11. A. Cairns, "An Overview of the Trudeau Constitutional Proposals," in *Disruptions*, *supra* note 9 at 59.
12. *Supra* note 2 at 93.

public. An equally significant development on the participatory front was the admission of the Aboriginal and territorial leaderships to the process of executive federalism. Finally, the use of national and provincial referenda to decide the fate of the Charlottetown Accord likely signals that, as has been our constitutional custom, an informal addition to our constitutional practices may compensate for flaws in the formal constitution.

The greater inclusiveness of the last round of constitution-making did not produce either a coherent document or a document which a majority of Canadians was prepared to endorse. This should not have surprised us given the sharp differences in the constitutional visions held by the expanded cast of actors entrusted with the task of negotiating constitutional change. On the substantive front, the inclusiveness of Charlottetown did produce, however, an accord which through the Canada Clause and the aboriginal self-government provisions addressed, at least in part, the objections raised during Meech Lake by the *Charter* groups.

There is much to recommend in this volume. The writing is lively and the arguments are both pointed and meticulously documented. Without question, Cairns has identified an important sea change in Canadian constitutional politics and those of us who have taught Canadian constitutionalism primarily from the vantage point of federalism must admit the *Charter* to our interpretive frameworks.

Notwithstanding the general persuasiveness of these essays, several points in Cairns' argument invite controversy. Some may object to the formative relationship Cairns establishes in these essays between constitutional arrangements and the self-conceptions of citizens. Does he have the causal arrows of this formative relationship pointed in the right directions? Others, as is this reviewer, may be sympathetic to an institutionalist perspective but remain hungry for evidence that ordinary citizens, as opposed to socio-political elites, respond to the cues contained in constitutional arrangements generally, the *Charter* in particular. The observation that, ten years after Patriation, we still know quite little about mass public attitudes to the *Charter* speaks to the need for supplementing the general institutional approach to constitutional scholarship in Canada

with the talents of behavioural social scientists.[13] This knowledge is especially important if, as I suggested above, the use of referenda is likely to become a customary, if informal, mechanism for consulting the public about constitutional change in this country.

For now, I swim against the current of Cairns' analysis and remain unconvinced that the *Charter* has taken root in the mass public of English Canada to the extent that it has in the leadership of *Charter* Canadians. Some of the polling data gathered in 1991 for the Alberta Select Special Committee on Constitutional Reform, for example, suggests that the public is quite ambivalent about the *Charter*. While more Albertans surveyed in late 1991 concluded that the *Charter* had a positive (43 percent) rather than a negative (35 percent) impact, a more contradictory profile emerged when this same sample was asked whether *Charter* rights should be expanded or limited. Forty-seven percent felt that *Charter* rights should be limited; 39 percent felt that *Charter* rights should be expanded.[14] In Alberta, at least, the public's mind may not be made up yet regarding the importance of the specific constitutional vision articulated by the *Charter*.

One may also criticize Cairns for an omission he acknowledges at the outset of these essays — the volume does not give federalism the pride of place it customarily enjoys in discussions of constitutional politics. In this respect my complaint is not that insufficient attention is paid to executive federalism. Rather, my concern is that too little consideration is given to the possibility that federalism remains fundamental to the way the mass public, not the leaderships of *Charter* groups, views the Constitution. This possibility merits additional attention since any future use of referenda ultimately places our constitutional future in the hands of the public, not the elites. This tendency to dismiss federalism too easily as a key to the responses of citizens to constitutional proposals is evident, for example, in

13. An example of this type of collaboration is found in P.M. Sniderman, J.F. Fletcher, P.H. Russell, and P.E. Tetlock, "Political Culture and Double Standards: Mass and Elite Attitudes Towards Language Rights in the Canadian Charter of Rights and Freedoms" (1989) 22 *Canadian Journal of Political Science* 259.

14. Angus Reid Group, "Attitudes Toward Constitutional Reform in Alberta Presentation of Results" (January 3, 1992).

the following passage: "In a February 1990 poll, 71 percent of respondents disagreed or strongly disagreed with the statement that 'Quebec should have the right to pass laws affecting the distinctive culture and language of Quebec — even if those laws conflict with the *Charter of Rights and Freedoms*.'"[15] The depth of this disagreement is attributed to the clash between distinct society and the *Charter*. It is also plausible, however, to attribute this result to clashing visions of federalism — provincial equality versus special status for Quebec. During the 1992 referendum campaign when a newspaper's pollsters asked a sample of Canadians outside Quebec to respond to the statement "Quebec needs special laws in order to protect its language and culture," 66 percent of the respondents disagreed.[16] In the absence of any mention of the *Charter*, two-thirds of the respondents opposed the notion of giving Quebec special powers. The absence of the *Charter* context does not prove, of course, that enthusiasm for the *Charter* was not responsible for this response. However, its absence does increase the plausibility of attributing responsibility for this pattern to an alternative perspective that stresses the importance of competing visions of federalism.

The vitality of federalism in the mass public's response to constitutional packages is also suggested in several polls taken in the aftermath of the referendum's defeat. The Maclean's-Decima poll reported that, among respondents outside Quebec, the most popular reason (27 percent) among the No voters surveyed for their decision was the belief that Quebec got too much.[17] In a similar vein, an Angus Reid-Southam News survey reported that 37 percent of the respondents from outside Quebec who claimed to have voted No did so because Quebec got too much.[18] These data suggest that federalism remains vital to understanding both the citizens' and the governments' view of the constitution.

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15. *Supra* note 2 at 120.
16. See "Some of the Questions" *Globe and Mail* (9 October 1992) A6.
17. R. Laver, B. Wallace and M. Nemeth, "The Meaning of No" 105 *Maclean's* (2 November 1992) 17.
18. J. Beltrame, "Canadians take a stand for unity in wake of referendum poll" *Edmonton Journal* (7 November 1992) A1.

In conclusion, *Charter versus Federalism* is an important, provocative addition to the scholarship on Canadian constitutionalism. Readers who have followed Professor Cairns' intellectual career closely over the years will recognize some of the arguments encountered in this collection of essays as old friends or foes from earlier writings. This should be regarded as a strength, not a weakness, of this volume for as Cairns noted in his introduction to an earlier collection of essays, "later repetitions, at least in intention, are more subtle and refined."[19] In *Charter versus Federalism*, this intention is fulfilled admirably.

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19. A.C. Cairns, "Author's Introduction: The Growth of Constitutional Self-Consciousness," in *Disruptions*, *supra* note 9 at 32.

CARDOZO: A STUDY IN REPUTATION

by Richard A. Posner (Chicago: University of Chicago Press, 1990)

Benjamin Cardozo began establishing himself as a leading judicial figure in the common law world when, in 1913, he was first elected to the New York Supreme Court. He rose to that state's Court of Appeals in 1917, becoming Chief Judge in 1927. His lustre grew when President Hoover appointed him to the United States Supreme Court in 1932. He resigned from the bench in 1938 and died later the same year. In the development and rewriting especially of private law doctrine, Cardozo was masterful.[1] His published legacy also included an extensive body of extrajudicial material.

During and after his lifetime, Cardozo was a judicial luminary revered by many lawyers, academics, and fellow judges. His writing on and off the bench was impressively learned, philosophically sharp, and distinguished by a style that has been characterized variously as literary or poetic. To Cardozo we owe numerous sparkling aphorisms. "Danger invites rescue."[2] "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end up by enslaving it."[3] "If liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[4] He appears to have been fastidious, uncommonly kind, moderate, and eloquent. He exuded integrity and utterly dedicated himself to his calling. He has often been held up to law students as a paragon of professional craft and deportment.[5]

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1. During his brief tenure on the U. S. Supreme Court, Cardozo adumbrated his understanding of how a hierarchy of values was contained in the Constitution. This was the major area in which his constitutional opinions proved influential: see John T. Noonan, Jr., "Ordered Liberty: Cardozo and the Constitution" (1979) 1 Cardozo L. Rev. 257.
2. *Wagner* v. *International Ry.*, 133 N.E. 437 (1921) at 437.
3. *Berkey* v. *Third Avenue Ry.*, 155 N.E. 58 (1926) at 61.
4. *Ultramares* v. *Touche*, 174 N.E. 441 (1931) at 444.
5. See Charles McCarry, *Citizen Nader* (New York: Saturday Review Press, 1972) at 50 for a description of Cardozo's status at Harvard Law School as an icon or a role model.

Against this "hagiographical" tradition have been assessments that are not so approving. Some of them have been dismissive. His critics have pointed out that Cardozo's decisions could be oversubtle, even casuistical. They are selective in recounting the salient facts. Occasionally they manipulate the existing precedents and principles.[6] Moreover, it has been argued that they are not, from an ideological perspective, uniformly "liberal". Under his direction, the path of the common law could become tortuous, even though Cardozo viewed himself as upholding the "logic" and coherence of the common law system.[7] Moreover, some commentators have belittled Cardozo for cultivating a style that often proved baroque, precious, and quaintly florid.

For his 1989 Cooley Lectures at Michigan, Judge Richard Posner attempted to reassess Cardozo's reputation, particularly in light of the widely disparate opinions that have been offered. *Cardozo: A Study in Reputation* is a published version of those lectures. Posner was a professor of law at the University of Chicago before his appointment to the Seventh Circuit Court of Appeals in 1982. Although best known for his analysis of law from an economic point of view, Posner has lately written texts on legal theory generally, and on law and literature.[8] He has brought his various talents and his judicial experience to bear in providing a fresh look at Cardozo's achievements. In the process he investigates the very nature of an eminent judge's reputation: how it is formed, how it might be quantified, and what difference it makes for the evolution of the common law.

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6. For criticisms in this vein, see G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges*, 2nd ed. (New York: Oxford University Press, 1988) at 276-84.

7. Contrast this with the ideals described in Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) at 40:

> By and large English lawyers and writers have tended to think of it as almost a virtue to be illogical, and have ascribed that virtue freely to their law; 'being logical' is an eccentric continental practice, in which commonsensical Englishmen indulge at their peril.

8. See his *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990) and his *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard University Press, 1988).

Posner's book is not a full-scale biography. That project has been undertaken by others.[9] Nor is it a complete intellectual portrait. Only about two dozen of Cardozo's decisions are discussed. Posner briefly traces Cardozo's career, but only in sufficient detail to set the background for his analysis of why Cardozo became a towering figure in the law. According to Posner, a primary reason for this was Cardozo's rhetorical skills. These included not just his flair for turning a lively and memorable sentence that sums up the fundamental legal principle at the heart of a case. Also noteworthy was the way Cardozo structured his judgments, so that the logic of the previous common law was brought to the surface and made to justify the incremental, progressive change that Cardozo favoured. He was neither a diehard conservative, nor a radical judge in service of a particular social program. These features made Cardozo greatly influential in his day. Posner's evaluation of Cardozo along these lines is far from novel. Other writers have emphasized the extent to which Cardozo, like Mansfield, Kent, and Story, used his great store of learning to adapt the law to contemporary concepts and conditions.[10]

Another reason for Cardozo's eminence was his commitment to changing the law through internal, incremental processes. Posner adroitly exposes the subtle methods by which Cardozo was able to re-channel the law, for example, by abolishing such barriers to liability as the requirement of privity in products liability cases.[11] This change was not revolutionary: precedents from within and outside New York pointed in the direction of removing the concept traditionally imposed by contract law. Cardozo's genius lay in accomplishing his pragmatic goal while treating

9. A biography with limited insights into the intellectual life of its subject, published soon after Cardozo's death, is George S. Hellman, *Benjamin N. Cardozo: American Judge* (New York: Whittlesey House, 1940). Another compact source of biographical information is Andrew L. Kaufman, "Benjamin Cardozo" in Leon Friedman and Fred L. Israel, eds, *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions*, vol. 3 (New York Chelsea House: 1969) at 2287-2317.

10. See Bernard Schwartz, "The Judicial Ten: America's Greatest Judges" [1979] So. Ill. U. L. J. 405 at 427.

11. *MacPherson* v. *Buick Motor Co.*, 111 N.E. 1050 (1916).

precedents respectfully. He was scrupulous in pointing out that one of his decisions represented ". . . no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before."[12] This aspect of his reputation was enhanced by those cases where Cardozo refused to let his reasoning be guided by "practical politics", the phrase used by his colleague, Judge Andrews, in *Palsgraf* to distinguish his approach from Cardozo's.[13]

Posner also ascribes Cardozo's reputation to the state court on which he sat for fifteen years. During this period, the New York Court of Appeals was the most important commercial tribunal in the United States. The court heard a great volume of tort and contract cases as transportation and business expanded in that state. Cardozo had ample opportunity to deal with disputes which demanded that the law recognize and entrench or, in some cases, revise commercial practices.

Another factor contributing to Cardozo's stature was the quality of his extrajudicial writing. The foremost example of this was *The Nature of the Judicial Process*.[14] In this book, Cardozo promised to expose the different methods actually employed by judges to decide a case. Posner acknowledges that, while the book contains an admirable statement of some basic precepts of legal realism, it now seems dated and stale.[15] The

12. *Palko* v. *Connecticut*, 302 U.S. 319 (1937) at 328.
13. See *Palsgraf* v. *Long Island R. Co.*, 162 N.E. 99 (1928) at 103.
14. (New Haven: Yale University Press, 1921). Many of his other off-the-bench publications are reprinted in Margaret E. Hall, ed., *Selected Writings of Benjamin Nathan Cardozo: The Choice of Tycho Brahe* (New York: Fallon Publications, 1947).
15. It should be noted that, on some accounts, Cardozo did not qualify as a realist. For example, his name was omitted from the bibliography appended in Karl N. Llewellyn, "Some Realism About Realism Responding to Dean Pound" (1931) 44 Harv. L. Rev. 1222 at 1257-59. Jerome Frank was also critical of Cardozo, claiming that "he gave much aid and comfort to the devotees of legal magic": see Jerome N. Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949) at 56. Recently, such scornful treatment of Cardozo has been characterized as seriously underestimating his contributions to "Progressive jurisprudence": see Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*

dragon of "formalism" had perhaps already been slain by the time Cardozo took up the cudgels. The book's strength lies in the elegance with which Cardozo expounds the methods of "philosophy", "history", and "sociology". His insights on each perspective made Cardozo the darling of law professors of the 1920's. Looking back, Posner, as have other judges who read the book in search of instruction on how to perform their judicial duties, finds the discussion disappointing.

The most innovative part of Posner's discussion is his attempt to reduce the vagueness that surrounds talk of "reputation". While much of his analysis is devoted to Cardozo's "normative" reputation, Posner has tried also to introduce an empirical element into our understanding of why some judges rate more highly than others. "Citation studies" have been used in the social sciences to determine the influence attained by writers or their work. Few comparable systematic studies have been used to ascertain influence in the legal profession. The data relied on by Posner derive from subsequent case law and from law review articles. He investigates the number of times that Cardozo's opinions were cited by courts in New York and in other jurisdictions. He also draws on statistics that show the frequency with which Cardozo is cited in law reviews during the period 1982 to 1989, when access to computerized materials makes such a count feasible. Another source of comparative data is the relative frequency with which Cardozo's opinions crop up in law school casebooks. On all these dimensions, Posner's statistics confirm that Cardozo was an unusually influential figure, even before his elevation to the Supreme Court.

Not all of Cardozo's cases show him in the best light. Posner suggests that, in such cases as *Hynes* v. *N.Y. Central R. Co.*,[16] Cardozo's judgment ranks more highly for its "aesthetic" virtuosity than for its "accuracy". In addition, some of Cardozo's conclusions were plainly wrong and were subsequently reversed. For example, in *Ultramares* v. *Touche*[17] the Supreme Court dealt with a suit against a firm of accountants which had conducted an audit to certify the financial soundness of a client. The

(New York: Oxford University Press, 1992) at 189-92.

16. 131 N.E. 898 (1921).

17. *Supra* note 4.

pivotal issue was whether the defendants owed a duty of care to the plaintiffs who had entered into a transaction with the client in reliance on the auditor's report. Cardozo held that the defendants owed no such duty to the plaintiffs in this case. His language is striking, but the result has been rejected both in later U. S. cases and in Canada.[18]

Posner does not attempt a thorough examination of Cardozo's philosophy of law. Instead, the reader is referred to *The Nature of the Judicial Process* as the primary source for Cardozo's views. To supplement Posner's regrettably brief treatment, it is necessary to resort to Edwin Patterson's discussion, which appeared in 1939, or to the more contemporary analysis by Edgar Bodenheimer.[19] While Posner repeatedly describes Cardozo as adopting a "pragmatic" point of view, these references fail to disclose or illuminate the full range or texture of the assumptions, conceptions, and policies that underpinned Cardozo's judicial practice. As an aside, it should also be mentioned that what Posner has to say about "pragmatism" perhaps reinforces Richard Rorty's characterization of that theory as "banal in its application to law".[20] Posner does not attempt to defend Cardozo against Ronald Dworkin's general condemnation of pragmatism, but does note correctly that Cardozo represents an important model for Dworkin's own recommended approach to problems of jurisprudence.[21]

Posner's re-evaluation of Cardozo emphasizes the usefulness of treating some judges as key cultural figures and as important writers contributing

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18. See *Haig* v. *Bamford*, [1977] 1 S.C.R. 466.
19. See Edwin W. Patterson, "Cardozo's Philosophy of Law" (1939) 88 U. Pa. L. Rev. 71 and 156 and Edgar Bodenheimer, "Cardozo's Views on Law and Adjudication Revisited" (1989) 22 U. Calif. Davis L. Rev. 1095.
20. Richard Rorty, "The Banality of Pragmatism and the Poetry of Justice" (1990) 63 So. Calif. L. Rev. 1811 at 1811.
21. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 111 and 116, where Cardozo is mentioned in the context of describing the approach of "Hercules" to hard cases, and Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 10, where a "romantic" portrait of the judge's vision is expressly attributed to Cardozo.

to the temper of their times. In this sense, Posner's book coincides with recent discussion of other leading American judges, such as Holmes or Learned Hand.[22] Posner's treatment also purports to be "critical", though he does not intend this to mean polemical or political. Rather, in his attempt at evaluating Cardozo he uses techniques from literary interpretation and social science, as well as doctrinal analysis. Has Posner indeed created a fresh, exciting new genre of academic writing? Although he has aimed at forging a new type of monograph, it is debatable whether Posner has achieved his goals. Many of his statements of interpretation, appreciation, and criticism are sketchy or merely suggestive. The attempt to outline a respectable "social scientific" method, predominantly involving frequency of citations, offers a meagre basis by which to rank the relative "greatness" of a judge. The method is crude and calls for further normative analysis of the numerical results that, by themselves, reveal little. There is no guarantee of objectivity here.

How has Cardozo's reputation filtered into Canadian law or judicial thinking? One manifestation of such influence has been Cardozo's comment on the significance of freedom of expression. In *Irwin Toy*, Chief Justice Dickson invoked Cardozo to the effect that free expression is "the matrix, the indispensable condition of nearly every other form of freedom".[23] This statement has often been bracketed with the similar *dictum* of Justice Rand in *Switzman* v. *Elbling*.[24] The association of Cardozo with Ivan Rand, in this context and in others, goes beyond mere coincidence, since Rand has often been recognized as an intellectual heavyweight and distinguished stylist in his own right. Cardozo's authority has also been cited in Canada in numerous tort, contract, and trusts cases. When teaching corporate law, I have found Cardozo's pronouncements particularly useful when trying to convey the high-minded

22. For samples of this literature, see Robert A. Ferguson, "Holmes and the Judicial Figure" (1988) 55 U. Chi. L. Rev. 506; Thomas C. Grey, "Holmes and Legal Pragmatism" (1989) 41 Stan. L. Rev. 787; and Carl Landauer, "Scholar, Craftsman, and Priest: Learned Hand's Self-Imaging" (1991) 3 Yale J. L. & Hum. 231.

23. *A.G. Quebec* v. *Irwin Toy Ltd.*, [1989] 1 S.C.R. 927 at 968.

24. [1957] S.C.R. 285 at 306.

tenor and exacting standards of the courts in, for example, the context of fiduciary duties owed by business partners to one another.[25]

Personally, intellectually, and professionally, Posner finds Cardozo an attractive figure. Cardozo's tempermental balance and restraint appeal to Posner's conception of what a judge ought to be. While Cardozo did not elaborate a coherent legal philosophy that receives its full exposition in a single treatise, his judicial writing displays an array of qualities admired by Posner: vivid and dramatic recitations of the factual background; pithy statements of the relevant cases; deft interweaving of academic commentary; and summaries of policy that often, as excerpts, have become marmoreal standards in the literature of the law.

In the end, Posner's monograph saves Cardozo's reputation from those who treat him as an unexamined saint, and also from the critics who have tried to depose Cardozo from the pedestal that the man himself, in his modesty, certainly would have disdained. Along the way, Posner has made an interesting attempt to adopt socio-empirical methods in making a "critical" assessment of his subject's place in American law. Though this quantitative material is supposed to add an "objective" element to the general debate about how judges rank, the most fascinating part of Posner's treatment remains his sensitive interpretation of Cardozo's own words. One might have feared, before reading the book, that Posner would simply portray Cardozo as engaged in "proto-economic" analysis, or in legal pragmatism, both of which reflect Posner's own predilections. This fear is dispelled by Posner's actual discussion, which does not bend Cardozo to such narrow purposes.

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25. See *Meinhard* v. *Salmon*, 164 N.E. 545 (1928) at 546.