Constitutional Politics

in Canada and the United States

STEPHEN L. NEWMAN
EDITOR

CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES

EDITED BY

Stephen L. Newman

State University of New York Press

Published by
State University of New York Press, Albany

© 2004 State University of New York

All rights reserved

Printed in the United States of America

No part of this book may be used or reproduced in any manner whatsoever without written permission. No part of this book may be stored in a retrieval system or transmitted in any form or by any means including electronic, electrostatic, magnetic tape, mechanical, photocopying, recording, or otherwise without the prior permission in writing of the publisher.

For information, address State University of New York Press,
90 State Street, Suite 700, Albany, NY 12207

Production by Diane Ganeles
Marketing by Jennifer Giovani

Library of Congress Cataloging-in-Publication Data

Constitutional politics in Canada and the United States / Stephen L. Newman, editor.
p. cm. — (SUNY series in American constitutionalism)
Includes bibliographical references and index.
ISBN 0-7914-5937-3 (alk. paper) — ISBN 0-7914-5938-1 (pbk. : alk. paper)
1. Constitutional law—Canada. 2. Civil rights—Canada. 3. Judicial review—Canada. 4. Constitutional law—United States. 5. Civil rights—United States. 6. Judicial review—United States. I. Newman, Stephen L. II. Series.

KDZ548.C665 2004
342.71—dc21

2002045250

10 9 8 7 6 5 4 3 2 1

Contents

Acknowledgments vii

Introduction 1
Stephen L. Newman

1. Can the Canadians Be a Sovereign People? The Question Revisited 9
Peter H. Russell

2. Constitutional Interpretation from Two Perspectives: Canada and the United States 35
Sheldon D. Pollack

3. Constitutional Rights Jurisprudence in Canada and the United States: Significant Convergence or Enduring Divergence? 63
Ran Hirschl

4. The Civil Rights Movement Comes to Winnipeg: American Influence on "Rights Talk" in Canada Before the Charter 89
Robert Vipond

5. The Politics of Comparative Constitutional Law: Implications for Theories of Justice 109
Ronalda Murphy

6. "I Know It When I See It": Pornography and Constitutional Vision in Canada and the United States 133
Samuel V. LaSelva

7. American and Canadian Perspectives on Hate Speech and the Limits of Free Expression 153
Stephen L. Newman

Constitutional-FM 6/9/03 4:27 PM Page vi

8. Affirmative Action as a Way to Overcome Disadvantage: Inspiration from Canadian Law 175
Sandra Clancy

9. Do the "Haves" Still Come Out Ahead in Canada? 199
Ian Brodie and F. L. Morton

10. For the Love of Justice? Judicial Review in Canada and the United States 223
Raymond Bazowski

11. Constitutional Amendment in Canada and the United States 249
Ian Greene

Contributors 273

Index 277

CHAPTER 2

Constitutional Interpretation from Two Perspectives: Canada and the United States

Sheldon D. Pollack

Introduction

Canada and the United States both have written constitutions and independent judiciaries that possess the exclusive legal authority to interpret those constitutions. The origins and nature of this important political power to interpret the constitutional text is the subject of this chapter.

Prior to achieving independence from Britain, the American colonists already had experienced a long history of written constitutions (or "charters"). However, the Canadian experience with constitutions and English colonialism was quite different. Canada never experienced a radical break from Britain, only a long evolutionary movement toward independence. The British North America Act of 1867 (renamed the "Constitution Act, 1867" in 1982) is the closest thing Canada has to a written constitution in the nature of that ratified by the American states. The drafters of the Constitution Act, 1867 had a very limited concern—creating a governmental superstructure (the "Dominion of Canada") for the three English colonies in North America. Accordingly, the Constitution Act, 1867 did not include a bill of rights. Under the federal system adopted, the provincial governments retained considerable autonomy, and the Dominion as a whole remained under the authority of the English Crown until independence in 1982.

Because the United States and Canada took such divergent historical routes to independence, it is not surprising that two different constitutional regimes should have evolved. Nonetheless, there are striking similarities. Most notably, both have federal structures and have long struggled with the problems that arise when local constituent governments remain semiautonomous. Indeed, strife between the federal and local governments has been a hallmark of the histories of Canada and the United States. It has fallen to the judiciaries of both countries to delineate the boundaries between the two levels of government, as well as to define the rights of national citizenship. To this end,

the Supreme Courts of Canada and the United States have performed the important role of interpreting and enforcing their respective constitutions.

Interpreting a constitution would seem to involve the same basic activity wherever there is a written constitution. Where the text is indeterminate, the courts are called upon to fashion a meaning. How the highest courts in these two liberal democracies came to assume this role in interpreting the constitutional text was greatly influenced by the seminal decisions of John Marshall, chief justice of the U.S. Supreme Court from 1801 to 1835. Marshall's approach to textual interpretation and the political implications that follow from a high court's exercise of the power of judicial review are explored below. Thereafter, the contemporary academic debate over theories of textual interpretation is examined.

Constitutional Interpretation as Political Choice

In the United States, with its written constitution that delineates the institutional boundaries within the federal structure and defines the rights and privileges of U.S. citizenship, interpreting the constitutional text has been the preeminent activity of the Supreme Court for nearly two hundred years. Indeed, the Supreme Court interpreting the written constitutional text *is* the essence of constitutional law in the United States. In Canada, which did not have a constitutional bill of rights until the entrenchment of the Charter of Rights and Freedoms in 1982, the Supreme Court traditionally was concerned with cases involving the federal structure: "Historically, federalism cases have been the heart and soul of Canadian constitutional law."[1] However, significant changes were made to the Canadian constitution in 1982. Since then, the Supreme Court of Canada has undergone a radical transformation, actively developing a jurisprudence of rights under the authority of the Charter. Changing the constitutional text had important repercussions for the judiciary, as well as for the entire political system. Accordingly, the starting point of this inquiry is to ask, What does it mean to organize a political regime around a written constitution? This in turn leads to the question of how a court should read or interpret the constitutional text.

Very early in its history, the American judiciary adopted and advanced a very peculiar understanding of "constitutionalism" founded upon the singular premise that the political regime shall be organized and governed by a written constitution—the meaning of which, when called into question, shall be determined by the judiciary. This view has its roots in Chief Justice John Marshall's seminal decisions. Notwithstanding widespread acceptance of this unique understanding of the relationship between the constitution and the judiciary, there always remains deep disagreement over *how* courts should

Constitutional-Ch. 2 6/9/03 4:27 PM Page 37

interpret the text. The depth of this disagreement can be seen in the clash of opinions in recent years among constitutional jurists and political elites regarding the tenability of a jurisprudence of "original intentions." Much the same issues are raised in the recurring debate over judicial restraint versus judicial activism. There has been comparable disagreement in Canada over how active a role, and to what purpose, the Supreme Court should play in divining and articulating rights under the authority of the Charter. The divergence of opinion is reflected in the ongoing and lively debate within the academic community concerning the nature of constitutional interpretation. These disagreements share an underlying misperception of the problem as one of method and interpretation, rather than as a conflict of political choices.

Within the American constitutional tradition, which has as one of its fundamental goals limiting governmental power (and hence "tyranny") by way of a written text, this conflict of political visions is often cast deceptively as a dispute over interpretative methodology. The mainstream constitutional tradition regards the text as the source of all legitimate political authority, and hence as establishing the organizational principles of the regime. The predominance of this perspective on the bench and in the law schools provides the basis for a judicial ideology that seldom questions the theoretical justification of its own enterprise. As one political scientist has observed with a critical eye: "American constitutional interpretation takes for granted the elemental preposterousness of its subject, namely the presumption that a political world can be constructed and controlled with words."[2] This skepticism is justified in terms of the capacity of a written text to contain raw political power. However, such a judicial ideology can and does have a strong impact on politics. To the extent that judges believe they are bound by the text of a constitution, they behave differently than where they feel no such constraint. The judiciary's tenuous position as a political institution within the political system necessitates that the Supreme Court cling to the constitutional text as the source of legitimacy of its own authority. Consequently, the text and how it is interpreted are crucial in determining how the judiciary functions as a political institution.

One of the main objectives of liberal constitutionalism is to restrain political elites by imposing a structure of imperatives on them through law. Regardless of the theoretical possibility of controlling the judiciary and politics by way of a written text, the impact of this widespread view as a vital ideological tenet has been significant in shaping political practice. Conversely, if justices no longer feel impelled to adhere to the written text of a constitution and embrace an interpretive approach that facilitates the creation of new meanings by the judiciary, then the power of that constitution as a body of fundamental organizational principles will be greatly diminished. Of course, this is precisely the intention of those who promulgate new theories of interpretation in pursuit of

their own political agenda. They would recast the constitutional regime through a rereading of the constitutional text. This is possible because constitutional interpretation involves political choices with serious consequences for the regime. The constitutional text establishes the rules and principles that govern the legitimate uses and goals for the exercise of political power—the "metalaw," as Lawrence Tribe has called it.[3] Pursuit of an alternative method of textual interpretation will necessarily reshape this metalaw, thereby reconstituting the extant constitutional regime. Inevitably within the context of a functioning political regime, the words of the constitutional text will give rise to specific practices and procedures that are shaped by the meanings attached to the text by the legal system. Adopting a new method of textual interpretation will transform those established practices, and hence will have important political consequences.[4]

Of course, it is not possible to permanently freeze political practice through adherence to a written text. One of the most mystifying self-delusions of the American constitutional tradition is the notion that it is possible to pronounce as final and permanent certain values and principles simply by codifying them in a constitutional text, which elevates them beyond the political realm. This position is untenable. Constitutional decision-making always involves an active and present choice among various meanings for the text. Likewise, different approaches to textual interpretation inevitably enhance or diminish the role of the judiciary in the political process. For this reason, the more extreme political attacks on the judiciary (from both the Left and the Right) take as their goal the reconstitution of the constitutional text itself. Such a reconstitution may be achieved through textual (re)interpretation, avoiding the much more difficult task of building a broad political consensus in favor of an outright change of the text. Although a constitutional amendment is always possible, a subtle rereading of the text is considerably easier and achieves much the same result. This approach was followed by mainstream liberals in the United States in the 1960s and 1970s in pursuit of an agenda of civil rights. For their part, political conservatives have been anxious to limit the jurisdiction of the courts in certain areas of constitutional law despite strong textual and historical foundation for a more active judicial role in those areas. An example of this can be found in attacks by conservatives in the 1960s on the liberal Warren Court's expansion of the rights of accused persons. Likewise, conservatives in Canada have been highly critical of the lack of judicial restraint of the Supreme Court of Canada since entrenchment of the Charter in 1982.[5]

Both sides of the political spectrum recognize the attractiveness of using textual interpretation to work subtle political changes that otherwise cannot be achieved through the political process. In this way, a battle that is essentially political in nature is recast in the language of methodology and textual interpretation.

Judicial Review as Political Power

Textual interpretation from the bench is very different from literary or academic interpretation. The difference lies in the position of the *interpreter*—namely, the role of the judiciary as a political institution. To the extent that a court's meanings are accepted as legitimate and authoritative by other political actors, any exercise of the power of interpretation enhances the role of the judiciary.

The Origins of Judicial Review

Whatever the intentions of the drafters and adopters of the U.S. Constitution, the Supreme Court's first successful exertion of the power of judicial review had a significant influence upon the development of the federal system as a whole. Of course, this was precisely Alexander Hamilton's argument in *The Federalist Papers*. Hamilton justified a judicial power derived from the capacity to pronounce an authoritative textual meaning on the grounds that this would strengthen the Supreme Court vis-à-vis the legislative branch and its presumed self-aggrandizing tendencies.[6] Hamilton's argument for a power to interpret the text was actually an instrumental tactic intended to limit *legislative* power, as he assumed an aristocratic judiciary endangered by an unchecked democratic legislature.

It was not until Chief Justice John Marshall supplied his justifications of the power of judicial review that the potential was fully revealed for utilizing the authority to interpret the text as a powerful political tool.[7] In the course of claiming this power of judicial review for the Court in *Marbury v. Madison*,[8] Marshall established the foundation for the American constitutional tradition in which the written constitutional text is regarded as the source of a "supreme law," and it is the Supreme Court's exclusive responsibility to interpret the text. Marshall's claim was that the necessity for judicial interpretation is inherent within the very notion of constitutionalism as adherence to a written text. According to Marshall, for the Supreme Court to exercise its delegated authority under Article 3, the power to review and interpret the Constitution was necessarily a judicial function. Marshall asked, more rhetorically than not, "Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?"[9] On the weak logic of this argument, Marshall rested a broad structural theory of the judiciary and its role vis-à-vis the other branches of government.

In *Marbury*, Chief Justice Marshall relied on a peculiarly limited conception of textual interpretation in defining the judicial role. Obviously, Marshall

recognized the tenuousness of claims for judicial power in relation to Congress and the president, and he treaded carefully. Marshall implied that the art of interpretation involves a literal application of standards clearly evident in the Constitution. The examples he uses in *Marbury* to illustrate the act of interpretation are the kind of "easy cases" that give rise to the view that a text can be determinate. These examples entail such a literal application of standards that virtually no interpretation is even required. For instance, Marshall notes that conviction for treason demands the testimony of "two witnesses" in open court. Presumably, it is a relatively straightforward affair to "look into" the text here and apply the prescribed constitutional standard. To apply the rule, just count the number of witnesses. Marshall implies that applying the prohibition against bills of attainder and ex post facto laws similarly involves a literal invoking of the text—although subsequent cases suggest that these terms are a good deal more elusive than that.

In *Marbury,* Marshall portrayed textual interpretation as involving a nearly literal application of an express constitutional standard. However, he later showed that he was quite capable of employing a far more expansive reading of the text. In *McCulloch v. Maryland,*[10] Marshall demonstrated how a theory of interpretation could support a different political vision as he read the words "necessary and proper" from Article 1, Section 8, in a much broader fashion to sustain a significant extension of federal power over state government. Marshall's change in his approach to reading the Constitution was not unprincipled; rather, he knew that reading the text cannot be divorced from broader political questions. Marshall's political vision distinguished between exercising the judicial power *within* the federal government vis-à-vis the other two branches and the use of judicial power on behalf of the federal government *against* the state governments. Marshall's description of the art of textual interpretation in *McCulloch* supports an expansion of the federal government, even without stating that as an explicit goal. Obviously, such a method of textual interpretation supports and reflects an underlying political vision and is simply the same view of politics articulated in a different language—the language of constitutional law.

In Canada, the judiciary had the opportunity to emulate Marshall's broad reading of the "necessary and proper clause." The preamble to section 91 of the Constitution Act, 1867 grants the federal government the authority to enact all laws for the "peace, order and good government" of the country. This broad language would seem to grant the federal government a good deal of discretion over the provincial governments. Arguably, the preamble creates a catchall power justifying federal intrusion into any policy area not expressly reserved to the provincial governments. This reading of the text follows Marshall's interpretation of the "necessary and proper" clause as bestowing on the federal government broad and expansive powers to carry out its plenary pow-

ers. There was one problem with this interpretation of the "peace, order and good government" clause. Nothing in the Constitution Act, 1867 expressly states the supremacy of federal law over provincial law, or even of the constitution itself over statutory law. This flaw in the structure of the federal system was not rectified until the entrenchment of the Constitution Act, 1982, which provides that: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, null and void."[11] To deal with the uncertainty prior to 1982, the federal courts developed the judicial doctrine of "paramountcy."[12] Echoing Marshall in *McCulloch*, the federal courts took the position that in cases of conflict between federal and provincial law, "the federal law is paramount and the provincial law is inoperative to the extent of the conflict."[13] The text itself does not expressly state this, but the courts discerned this result in the overall structure of the Canadian constitution.

Textual indeterminacy such as this can also be resolved by reference to an implicit political perspective, such as the nationalist vision that supports Marshall's decision in *McCulloch*. An interesting example of such an approach is found in the U.S. case of *Missouri v. Holland*.[14] In litigation, the state of Missouri challenged the enforcement of the Migratory Bird Treaty Act of 1918, a statute implementing a treaty negotiated by the president and Great Britain. The treaty and statute were challenged as unconstitutional infringements upon the powers reserved to the states under the Tenth Amendment of the U.S. Constitution. The Supreme Court was forced to consider how two specific clauses of the text interact—or, in this case, decide which clause would dominate in providing a coherent meaning for the document as a whole. Article 6 provides that treaties made under the "Authority of the United States" are to be regarded as the "supreme Law of the Land," along with the Constitution itself. However, Missouri argued that the traditional state power to regulate wildlife within its domain had been guaranteed by the Tenth Amendment. The question was, Can a treaty (which is part of the "supreme law of the land") and the statute enacting it cut back the powers seemingly reserved to the states by the Tenth Amendment?

The majority opinion of Justice Oliver Wendell Holmes Jr. in *Holland* illustrates how interpretation requires much more than merely defining terms and often slides into broader constitutional "construction." Construction is the "drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit though not the letter of the text."[15] The Constitution itself provides no method of determining how two clauses at issue should be integrated, and no historical investigation into the framers' intentions or legislative history could reveal the unforeseen contradiction. Holmes could have read the conflict out of the text by simply locating the power to

regulate migratory birds under an established federal power (such as the Commerce Clause), thus preempting state regulation and rendering moot the Tenth Amendment claim. Instead, he constructed a broader meaning of the Constitution that would resolve this textual contradiction or ambiguity. Holmes invoked the now familiar metaphor of the Constitution as a flexible, "living" document (which inevitably precedes an expansion of the traditional meanings of the text). He described the text as a "constituent act" that "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[16] The text is incomplete and indeterminate on this question, and the issue could only be resolved by reference to some external political principle. This Holmes willingly supplied.

Echoing the nationalist sentiments of Marshall, Holmes saw the U.S. Constitution as a document that "created a nation," and thus must be understood in "the light of our whole experience and not merely in that of what was said a hundred years ago." The national experience as well as Holmes's personal experience included the Civil War, which had cost "much sweat and blood" resolving the balance of power between nation and state. Holmes refused to read the Tenth Amendment as preserving forever whatever powers the states exercised in 1787. Since the treaty did not "contravene any prohibitory words to be found in the Constitution," Holmes answered the easier question of ambiguity by resolving it in favor of the federal government. "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . It is not sufficient to rely upon the States."[17]

The *Holland* case neatly illustrates how a court confronts a multiplicity of political choices in resolving constitutional conflicts. The text often does not provide a clear standard or any derivative result. In light of ambiguity, contradiction, a conceptual gap, or simply "open-ended" language, the interpreter is free to actively construct any number of solutions by appeal to sources external to the text. Sources such as the framers' "intent" or historical practice offer the interpreter the opportunity to fashion a result almost without restraint (other than the negative check of other justices who may pursue an alternative vision). The absence of any textual guidance as to specific procedures and patterns of interbranch relations may invite a so-called structuralist approach to constitutional interpretation, but this is really a political decision.

Under a structuralist approach, a court supposedly interprets the indeterminate constitutional text in light of the justice's understanding of the nature of the constitutional regime as a whole. "Structural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures. They are to be distinguished from textual and historical arguments, which construe a particular constitutional passage and then use that construction in the reasoning of an opin-

ion. . . ."[18] As such, structural arguments are largely devoid of fact and depend on deceptively simple logical inferences derived from the interpreter's understanding of the entire constitutional regime. Of course, those possessing very different political philosophies will likely arrive at very different conclusions employing a structuralist approach in interpreting any individual clause in the constitutional text.

This is not to say that the individual justice is free to impose his or her own subjective political preferences on the text. Rather, there is more than enough room and occasion to make choices regarding how to construe the constitutional text through the expression of a logically consistent political worldview. Within the inevitable ambiguities of the text, sufficient space is provided for the construction of an "unwritten constitution" reflecting the judicial ideology that can currently muster a majority on the Supreme Court. Of course, this power would be extended far beyond anything that Marshall and Holmes would have tolerated, to the extent that justices on the bench no longer feel *any* restraints in exercising their political power to interpret the constitutional text.

Judicial Review and Canadian Federalism

In 1867, the drafters of the new Canadian constitution had before them the prime example of the United States—especially with respect to its federal system of government. The drafters were familiar with John Marshall's conscious effort to read the constitutional text to justify the supremacy of federal law over that of the states. It appears that the drafters were consciously attempting to locate greater powers with the federal government, although it is difficult to discern the "original intent" of the drafters, as very little is known of their motives and there is no record of most of the discussions at the conferences held in Charlottetown, Quebec, and London that led up to the British North America Act of 1867.[19] With such scant historical evidence of the original intent of the drafters, the constitutional text provides the only real guidance for courts attempting to delineate the boundaries between the federal and provincial governments.

Unlike the U.S. Constitution, the Constitution Act, 1867 provides quite specific lists of apparently limitless and "exclusive" powers for *both* levels of government. Unless otherwise stated, these powers are mutually exclusive, rather than concurrent or shared.[20] Section 91 grants the federal government exclusive authority over issues of national importance.[21] At least on paper, the drafters of the Canadian constitution created a stronger federal government than had their counterparts in the United States. For instance, the Canadian federal government has jurisdiction over all "trade and commerce," not just interstate commerce—the more limited power granted to the U.S. Congress.

Likewise, criminal law and family law was federalized in Canada, rather than retained as a power of the local governments, as in the United States.

Section 92 in turn grants the provincial governments "exclusive" authority in a number of broadly defined legislative areas. These include management of natural resources, land, conservation, education, the family and social institutions, "property and civil rights," and all other matters of a "merely local or private nature." The provincial governments were granted shared jurisdiction over agriculture, and they too were authorized to borrow and incorporate companies "for provincial objects" (e.g., roads, bridges, public works, etc.). Whatever the drafters may have had in mind when they allocated these "exclusive" powers to the respective legislatures, many areas of public policy inevitably fall within the domain of *both* the federal and provincial governments. For this reason, Canadian courts were forced to wrestle with the inevitable conflict between jurisdictions, as if nothing had been learned from John Marshall and the American experience. While the constitutional text would suggest that the new Canadian federal structure was considerably more centralized than in the United States, the provincial governments actually retained a good deal more autonomy in practice. This left the Canadian federal courts and the Law Lords of the Privy Council with the task of drawing boundaries between the federal government in Ottawa and the provincial governments. Prior to 1982, the basic question to ask with respect to particular legislation was whether the policy addressed by the statute actually fell within the jurisdiction of the legislative body that enacted it. If not, it would be pronounced unconstitutional.

Understandably, the federal courts were reluctant to interpret the Canadian constitution to mean that federal powers *always* trump those of the provincial governments. This certainly was not the line taken in the early federalism cases, in which the courts struggled to discern where and when the federal power trumps the powers of the provincial governments. For example, in the 1896 case of *AG Ontario v. AG Canada*[22] (also known as the "Local Prohibition Reference" case), the Privy Council wrestled with competing claims of jurisdiction—specifically, as to whether a provincial legislature had the power to impose prohibition. To complicate matters, also at issue was the power of the government in Ottawa to legislate on liquor control. In considering the limits to the power of the federal government, Lord Watson emphasized that "the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92." Nevertheless, Lord Watson acknowledged that there are instances when the national interest requires that federal power take priority over the powers reserved to provincial governments: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Par-

liament in passing laws for their regulation or abolition in the interest of the Dominion." The difficulty lies in developing clear legal standards and rules for identifying such instances.

Not until after the entrenchment of the constitution of 1982 did the Supreme Court of Canada expressly articulate the implications of the "peace, order, and good government" clause for the balance of power within the federal structure. In 1988 case of *Crown Zellerbach,*[23] the Supreme Court developed a test of "rationality" and "proportionality" to be followed in delineating the boundaries between federal and provincial powers. At issue was a challenge by a private logging company to a federal statute regulating marine pollution. The Supreme Court took the position that in deciding whether Ottawa's power to provide "peace, order, and good government" trumps an express power of a provincial government (namely, environmental management) depends upon whether there is a rational reason for giving the national power priority and whether it can be demonstrated that the exercise of such power does not unnecessarily invade provincial powers.

In *Crown Zellerbach,* the Court balanced the competing claims of sovereignty of the two levels of government. This political decision becomes a *judicial* function in the absence of any ordering rules provided in the constitution itself. Just as Justice Holmes could find no such ordering rules in the U.S. Constitution, but nevertheless discerned them in the overall "structure" of the regime, so too has the Supreme Court of Canada discerned within the structure of the Canadian federal system when national priorities take precedence over provincial powers. The Court enunciated purportedly neutral rules for determining when such national priorities trump local sovereignty. In fact, what the Court did was supply its own interpretation of an indeterminate aspect of the text, thereby influencing the development of the Canadian constitutional regime—a political role for the judiciary, if ever there was one.

Theories of Constitutional Interpretation

Any constitutional theory entails a normative understanding of how the polity should be organized in accordance with those principles deemed to be "fundamental." Chief Justice Marshall laid the foundation for a peculiarly American formulation of constitutionalism based on the premise that fundamental principles of politics can be given lasting expression in a written text. The idea that a constitution is vital to organizing a political regime became the dominant view within the liberal political tradition. However, the American constitutional tradition adopted several other tenets as well—in particular, the notion that the written constitution is the supreme text and the belief that it is the unique responsibility of the judiciary to give meaning to that text.

The notion that the judiciary is the sole legitimate body to interpret the constitutional text necessarily expresses a normative political philosophy. Likewise, any theory of textual interpretation necessarily reflects an underlying political vision. For this reason, contrasting theories of textual interpretation invoke differences of political theory. There is a rich literature that has developed in the last two decades among constitutional jurists, both Canadian and American, to describe these competing theories of textual interpretation.

Originalism, Intentionalism, and Interpretivism

The underlying political implications of the various conceptions of textual interpretation can be best understood by focusing on the most extreme and diametrically opposed views. These theories of textual interpretation, along with the broader theories of politics with which they are associated, reflect the limits and boundaries of a liberal politics committed to a notion of constitutionalism in which a written text is the source of legitimacy for the exercise of political power.

At one extreme is an understanding of constitutionalism rigidly committed to a judicial doctrine embracing an "originalist" theory of textual interpretation.[24] From this perspective, the constitutional text must be read *only* in light of its "original meaning." The commitment to originalism is manifested in several forms and variations, although they are underscored by related political objectives. Sometimes the objective is the search for the original meaning of the text. Sometimes the goal is to find the original intentions of the drafters or "Founding Fathers." For this reason, the theory is occasionally referred to as intentionalism, rather than originalism.[25] In cases where the text itself betrays no discernible original meaning, historical research may be required to discern the authentic meaning of the text.[26] As in cases of statutory ambiguity, "intent" may be found in the legislative history accompanying the enactment of the text.

Most proponents of originalism share a common political concern: limiting the impact of the judiciary by imposing a restrictive method of textual interpretation upon the federal courts, thereby limiting the discretion afforded the courts within the arena of constitutional politics. The most sophisticated advocates of originalism recognize that the discretion of judges in interpreting the text can never be wholly eliminated. They understand that originalist interpretation is not easy and requires that judges make reasonable and persuasive arguments in favor of their interpretations of the text. Originalism also may require an active judiciary striking down acts of the legislature and executive as contrary to the original meaning of the text, showing "deference only to the Constitution and to the limits of human knowledge, not to contemporary politicians."[27]

One thing is certain: Imposing an "original" meaning upon the text will curtail the Supreme Court's role in discovering new constitutional rights. Indeed, this is the intention of advocates of originalism. Specific political issues will be expelled from the arena of constitutional law, and either will be left by default to other political institutions or excluded from consideration altogether. In some cases, it is difficult to distinguish between originalist rhetoric aimed at an overly active judiciary and a politically motivated attack on the federal courts for actively pursuing the "wrong" (i.e., liberal) agenda. Clearly, some conservative partisans would employ originalism selectively. Thoughtful critics recognize that there are serious problems in expanding judicial power to embrace an overly optimistic and utopian effort to read our "highest" contemporary moral sensibilities into the constitutional text—the utopian quest for perfection and progress in constitutional law. The best objections to such a judicial moral crusade should reflect a cautious view of the possibilities of politics, as well as a fear of law (both judicial and legislative) intruding too far into our private lives.

Originalism can be a potent weapon as a judicial doctrine from the bench. To the extent that it is followed by the relevant political actors themselves, its impact on the direction of the federal judiciary will be important. Several conservatives currently on the U.S. Supreme Court have expressed adherence to an originalist position.[28] The impact on the judiciary as a political institution of an emergent majority supporting some version of originalism would be comparable to stacking the Court with "strict constructionists."[29] The level of activity of the judiciary and the kind of issues brought into the arena of the federal courts would be greatly affected by a shift on the Court toward a jurisprudence of originalism.

Accepting that originalism is a viable judicial doctrine, the question remains whether it is a coherent theoretical position. Its basic premises have been significantly challenged at a number of levels.[30] As a guiding principle of textual interpretation, originalism suggests that the courts should apply only those "plain" meanings explicitly evident in the text. This position resembles the politically instrumental portrait of textual interpretation that Chief Justice Marshall laid out in *Marbury*. In the academic debate, such a theory of textual interpretation is known as "clause-bound interpretation" or strict interpretation, following the terminology of John Hart Ely in his influential book *Democracy and Distrust*.[31] According to Ely, strict interpretivism is an unworkable approach to textual interpretation in all but the most literal cases, such as a court applying a clear constitutional standard like the thirty-five-year age requirement for U.S. presidents. Ely thus rejects the simplistic premise that the text possesses an "objective" or "plain" meaning that the court has merely to uncover in interpreting a constitution. He tries to salvage an originalist position by turning to a revised version in which the meaning of the text is

derived by reference to "an inference whose starting point, whose underlying premise, is fairly discoverable" in the constitution.[32]

Ely searches for a middle ground between the impracticality of originalism and the dangerous conclusions implied by a judicial realism that declares that the text means only what the Supreme Court says it means.[33] Unfortunately, it is difficult to sustain the middle ground. On the one hand, Ely concedes the theoretical impossibility of strict interpretivism; on the other, he concludes that the open-ended nature of portions of the text invites and justifies the exercise of judicial discretion in applying constitutional standards. While highly critical of the U.S. Supreme Court for the kind of judicial review exercised in the so-called privacy cases, Ely's own reading of the open-ended language in the text tends to support the Court's most blatant "noninterpretivist" approach. In the end, Ely must acknowledge that the problem is really one of adequately defining the role of the Supreme Court as a *political* institution.

Noninterpretivism

Ultimately, Ely's constitutional jurisprudence must be judged at odds with the method and political motives of originalism and interpretivism. Peculiarly, it also offers little comfort or support for the noninterpretivist school. Noninterpretivist judicial doctrine is entirely opposed to the methods and intentions of originalism and its related theory of constitutionalism. For example, Michael Perry's pursuit of noninterpretivist review in his well-known treatise *The Constitution, the Courts, and Human Rights*[34] serves up a constitutionalism hell-bent on institutionalizing the U.S. Supreme Court as the infamous "bevy of Platonic Guardians"—Justice Learned Hand's euphemism for unbridled discretionary rule by judges.[35] Perry's defense of this constitutional theory, which is the logical result of noninterpretivist judicial review, might be too readily dismissed because of this criticism, especially given the lack of any theoretical support for his vision of the Supreme Court as an oracle of human rights. However, other sophisticated theories of textual interpretation point to essentially the same political outcome as recasting the judicial function. This position is very much evidenced in the writings of Ronald Dworkin, who suggests that justices find the content of their jurisprudence in moral philosophy and the shared values of contemporary society.[36] Certain Canadian jurists have portrayed constitutional jurisprudence as the enterprise of expressing the ideal goals or "visions" of Canadian society through the constitution.[37] Of course, those who would apply such a method to constitutional interpretation conceive of their goal precisely in terms of expressing contemporary conceptions (usually moral in content) through constitutional adjudication, rather than as an effort to preserve any original constitutional position.[38]

To noninterpretivists, legal interpretation, no less than any other kind of textual interpretation, has a responsibility to translate archaic concepts into socially meaningful structures. From this perspective, there can be no permanent or fixed text any more than there can be a recovery of an "original" understanding, precisely because such an approach denies the possibility of transhistorical meaning. The text is a forum for pronouncing contemporary values as constitutional values, to be born anew with each successive progression of human experiences. Of course, this is the ultimate expression of the "living" or "unwritten" constitution, bound by nothing other than the contemporary conceptual and moral framework of "living" justices.

Such a theory of constitutional interpretation is yet another judicial doctrine—an ideological position inherently political in nature, expressed in the language of legal discourse revolving around constitutional interpretation. The nature of such a judicial function can be located at the opposite end of the political spectrum from originalism. It is no coincidence that this vision of constitutionalism focuses on constitutional adjudication involving the rights of citizenship.[39] The text itself is most open-ended in this area, allowing the courts greater discretion. Also, in pursuing a jurisprudence of rights, the judiciary is least restrained by competing political pressures from the other political institutions (i.e., Congress or Parliament). When defining rights under the cover of documents such as the Bill of Rights and the Charter, a court's action is more often perceived as a legitimate judicial function than as an intrusion into other substantive areas that may be deemed off-limits as "political" matters to be confined within the legislative branch,[40] or as simply "nonjusticiable."[41] In rights adjudication, there often is no original meaning that can be discovered in the text or history, and thus a court is relatively free to engage in noninterpretivist review.

Noninterpretivists champion a vision of the Supreme Court as the primary enunciator of rights and moral values. The justices are seen as mediators between the constitutional text, its attendant historical meaning, and contemporary society. While the words of the document remain constant, its meaning must be continually re-created for successive generations. The Court is supposed to interpret the text for and by reference to the present needs and values of the citizenry. The late Justice William J. Brennan most forcefully expressed this vision from the bench. Brennan recognized the power attached to the capacity to pronounce the authoritative interpretation of the text, but he cast the debate in the language of methodology and textual interpretation, thereby obscuring the political nature of such judicial power. As Brennan put it: "Because judicial power resides in the authority to give meaning to the Constitution, the debate is really a debate about how to read the text, about what is legitimate interpretation."[42] Unfortunately, Brennan misses the point that the authority to interpret the text, the source of judicial power, is inherently a political power, and thus the debate is really a debate about politics, not interpretation.

The Mixed Nature of the Constitutional Text

The judicial doctrine of originalism and the rhetoric of the "living constitution" represent the polar opposites located within the narrow confines of the moderate Lockean liberalism that maintains hegemony over American political thought. It can be said that constitutionalism is driven by a dialectic of opposing impulses expressed within the narrower confines of moderate liberal jurisprudence. The judicial doctrines of originalism and noninterpretivism are manifestations of these dual impulses. Historically, one strain expresses an "institutionalist" concern, stressing the principles of the rule of law, limited government, and a generally conservative ("Whig") vision of the limits of politics, while the other essentially expresses an antinomian, egalitarian, democratic, and populist strain through the radical language of natural rights theory.

Insofar as natural rights theory is most suited to providing an external vantage point for challenging the legitimacy of an extant regime, it is a historical anomaly that it should find expression in the inherently conservative vehicle of a constitution. Ironically, the triumph of natural rights theory and its entrenched position in American political thought create an uneasy tension between rhetoric and reality. The institutionalization of natural rights theory within the constitutional text in the United States, and more recently in Canada, creates an implicit tension between democratic values and government by the judiciary. This accounts for the constant need of intellectual defenders of judicial review to "reconcile" democracy with the pursuit of a rights-based jurisprudence from the admittedly undemocratic institution of the federal judiciary.[43]

These two opposing expressions of constitutionalism were present during the 1780s as dissatisfaction with the Articles of Confederation mounted and informed the subsequent debates at the Constitutional Convention, as well as the processes of constitutional amendment and adjudication by the Supreme Court over the next two centuries. The dominant strain of constitutionalism looks to institutional solutions to the problem of the undue concentration of political power by establishing a limited federal government within fixed boundaries. This position ironically views the federal government as both a prerequisite to the preservation of liberty *and* as a danger, requiring a system of institutional checks and constraints. The other strain of constitutionalism, natural rights theory, is equally ambiguous regarding political power. Here the ambiguity lies in expressing a theory that is inherently antinomian and anti-institutionalist through the constitutional decision-making of an entrenched legal system. Grafted onto the institutionalist (Madisonian) text of the U.S. Constitution, the (Jeffersonian) natural rights theory of the Bill of Rights creates a source of uneasy tension in American constitutional law. Canada has more recently experienced this kind of constitutional schizophrenia with the entrenchment of the Charter.

Constitutional-Ch. 2 6/9/03 4:27 PM Page 51

Because neither the institutionalist nor natural rights position triumphed in American history, neither intellectually nor politically, elements of both have remained within the mainstream tradition of liberal constitutionalism. Indeed, both positions found expression within the U.S. Constitution as amendments were subsequently added. The resulting text is sufficiently "mixed" in nature as to facilitate either constitutionalist tradition in reading its position into the document. This mixed nature of the text explains the "ironic" argument of John Hart Ely when he observes that by a strict interpretivist reading of the text, noninterpretivism is suggested by virtue of the open-ended language in sections of the Bill of Rights.[44] The inability to settle on a particular method of reading the text reflects the historical absence of consensus regarding the nature of constitutionalism.

Sources of the Mixed Text

Grafting a natural rights document onto an institutionalist blueprint for limited government renders a constitution a mixed document that is all things to all judicial ideologies. The open-ended language of constitutional documents such as the Charter of Rights and Freedoms and the Bill of Rights of 1791 invites a broad exercise of judicial review. Even if the invitation does not extend to creating entirely new rights, there is certainly a wide range of possibilities for the extension of old rights under the headings of equal protection and due process.

Whatever the merits of the originalist or interpretivist positions as to the political reasons for restraining the capacity of the judiciary to subsume the entire arena of politics under the guise of judicial review, the actual language used by the drafters of these sections of the text justifies a much broader review than the originalists will concede. For instance, nothing in the text of the Eighth Amendment of the U.S. Constitution suggests that a phrase such as "cruel and unusual" must be restricted to its "original" late-eighteenth-century meaning—although there is also no reason why a court may not so narrowly construe its meaning. While the absence of textual specificity does not sanction the legitimacy of any single interpretation of such a phrase, it does justify a good deal of leeway in giving specific content and meaning to particular judicial interpretations. Theoretically, it is possible to imagine a constitutional text that would fully express a single theory of constitutionalism and an attendant method of textual interpretation. The particular constitutions adopted in the United States and Canada, however, do not resolve the matter in favor of any particular approach. Several features of the constitutional texts contribute to the uncertainty.

First, the absence within both constitutional texts of any procedure or method (or even authorization) for a particular method of textual interpretation

denies an absolute victory for either originalism or noninterpretivism. Even if the exercise of the power of judicial review is now taken as a given, a court cannot exercise this power too strongly in favor of either form of interpretation without triggering immediate protests of illegitimacy. Neither an unrestrained noninterpretivism nor a clause-bound interpretivism is politically feasible on the bench, although academics are unfettered by such constraints. Because the text authorizes neither option, the resulting jurisprudence exercised from the bench is inevitably a mixture. No court could survive politically if it pursued in unrestrained fashion either a pure noninterpretivist articulation of natural rights rhetoric or the straightjacketed jurisprudence of originalism. The limits of noninterpretivist review were most clearly revealed by the U.S. Supreme Court's decision in *Roe v. Wade.*[45] Similarly, conservative challenges to the doctrine of "incorporation" may be historically correct, but fall on deaf ears in the legal and political community, as the question was essentially rendered moot decades ago.[46] The constitutional text dictates neither originalism nor noninterpretivism.

A second source of ambiguity in the constitutional texts stems from of the lack of organizing principles. In order to resolve inconsistencies, ambiguities, and unanticipated situations, the interpreter must turn to *some* guiding principles. Where the text itself provides no specific, determinate answer, some broader principle such as federal supremacy or the preservation of state autonomy may offer substantial guidance. However, neither constitution clearly explicates such principles. On the contrary, both texts provide support for a multitude of positions. This lack of general guiding principles should be distinguished from the use of general terms (or "concepts," in Ronald Dworkin's terminology)[47] in a constitution without specifying their particular applications. For example, there is clearly some general theory of federalism inherent within the U.S. Constitution and the institutions it establishes. The problem lies in discerning *what* theory of federalism is implied. Without such a statement of principle, a proponent of states' rights on the bench could justifiably have taken a position contrary to those of Marshall and Holmes.

This absence of internal principles has given the judiciary much discretion in generating its own guiding principles. Undoubtedly, the clearest such example is the creation by the judiciary through case law of a theory of "separation of powers." Given the wide range of separation theories in contemporary eighteenth-century political thought (including mixed-government theory and corporatist theories of functional representation), the organizational principles of the U.S. Constitution are not easily discovered. Sources such as *The Federalist Papers* offer some extratextual statements of principle, but to a large extent the Supreme Court has fashioned its own theory of "checks and balances" that it has applied in significant constitutional decisions.[48]

Constitutional-Ch. 2 6/9/03 4:27 PM Page 53

Canada's New Jurisprudence of Rights

Obviously, a different constitutional text will necessarily generate different constitutional law. For example, a constitution that includes a very narrow bill of rights will necessarily limit the capacity of the courts to pursue an expansive jurisprudence of human rights. Likewise, where a constitution establishes a federal structure and provides a very specific and clearly enunciated allocation of power between the national and local governments, a body of constitutional law will likely develop along entirely different lines than where there is only a vague and loose allocation of powers. This is to say that constitutions matter.

Where a constitutional text is amended or augmented, the opportunity arises for a change in the role of the judiciary—for example, in pursuing a jurisprudence of rights. This has been the case in Canada. The Canadian constitution changed dramatically in 1982 when a formal constitutional bill of rights was adopted. With the entrenchment of the Charter of Rights and Freedoms, the Supreme Court began to address entirely new issues involving the balance between governmental power (that of Ottawa as well as the provincial governments) and the rights of individuals or groups of citizens.[49] This is distinct from the traditional federalism cases in which the Court has drawn boundary lines strictly between governmental entities.

As in the U.S. Bill of Rights, constitutional rights are stated in the Charter in broad and sweeping language (e.g., freedom of "conscience," "religion," "thought," "association," etc.). Not surprisingly, the Canadian federal courts have been called upon to flesh out the meaning and extent of these rights in practical terms. The Charter itself includes one very substantial limit on the breadth of constitutional rights. Such rights as are granted under the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[50] Of course, this provision inevitably meant that the courts would be required to hear cases in which laws of Parliament or provincial legislatures are challenged for excessively limiting some right provided for in the Charter. The Supreme Court is the ultimate authority in deciding when a law effects an unreasonable intrusion into the protected sphere of an individual or group.

The first Charter case reached the Supreme Court within two years of entrenchment. At the time, scholars and constitutional lawyers generally assumed that the scant pre-1982 constitutional scheme with respect to human rights had been preempted by the Charter.[51] The Supreme Court agreed. The Court realized that its own prior jurisprudence on human rights under the statutory bill of rights, as well as the long history of civil rights litigation under the U.S. Bill of Rights, was not directly applicable in construing the meaning of the newly granted rights under the Charter.[52] This left the Court relatively

Constitutional-Ch. 2 6/9/03 4:27 PM Page 54

free to develop its own case law and determine on a case-by-case basis whether a particular statute or governmental regulation imposes unreasonable limitations on the rights of an individual or group.[53] The new Supremacy Clause of the Constitution Act, 1982 made clear that the judiciary would have the responsibility and power to interpret the constitutional text and to decide whether a particular law or governmental action was consistent with the Charter. Unlike in America, there never was a question as to the propriety of the Canadian Supreme Court's exercise of the power of judicial review.

In the case of *Regina v. Oakes*,[54] the Supreme Court developed a two-prong test under which an individual or group must first demonstrate that their constitutionally sanctioned right or freedom is in some way curtailed by the statute or governmental action. Upon making such a factual showing, the burden shifts to the government to "demonstrably" prove that a bona fide public interest is furthered by the statute or governmental action and there is no other less restrictive means for achieving that goal. Under this "proportionality" test, the government has a very strict burden of proof with respect to sustaining any measure that limits or restricts a protected constitutional right.[55] In subsequent cases, the Court has applied a broad interpretation of what rights are protected under the Charter—much as the Warren Court did in the 1960s with the U.S. Bill of Rights. The values of the Court (liberalism, egalitarianism, and democracy) have informed its interpretation of the text: "The expansive definitions that the Court has given to [freedom of expression and religion] and other human rights shows clearly how reading a constitution purposefully promotes the fundamental values on which it is based."[56] As in the United States, constitutional interpretation inevitably draws the Supreme Court of Canada into the political sphere.

In interpreting the Charter, the Supreme Court has been even more aggressive than the U.S. Supreme Court in promoting a jurisprudence of rights.[57] Of course, in cases raising alleged violations of freedom of speech or the press, or in cases arising under the Fourteenth Amendment involving claims of racial, religious, or sexual discrimination, the U.S. Supreme Court can be quite aggressive itself in protecting the rights of individuals. Here the U.S. Supreme Court applies a "strict scrutiny" test that requires the defendant (i.e., the government) to prove a "compelling state interest" that justifies the abridgment of the right at issue. Usually, the government will be unable to satisfy such a strict burden. However, in many other areas raising "lesser" constitutional rights, the Court applies a much weaker test, requiring only that the government prove a "legitimate state interest" that justifies the abridgement of the right. In this respect, the Court has taken a much more aggressive approach to limiting *any* governmental action that "unreasonably" infringes upon *any* right that can be plausibly read into the open-ended language of the Charter.[58] This has dramatically changed the Court's role: "[T]he Supreme

Court . . . has inverted the traditional understanding of constitutionalism and judicial review as conserving forces, and transformed them into instruments of social reform. Rather than serving as a prudent brake on political change, the judiciary has become a catalyst for change."[59]

Mind you, nothing in the constitutional text prescribes such doctrines to the courts. The Charter certainly does not mandate this. This is all court-made doctrine. The terse and scant language in both the Canadian and American constitutional texts grants the judiciary broad discretion in deciding whether to pursue a jurisprudence of rights. The Supreme Court of Canada has accepted the challenge, while the more conservative post-Reagan Supreme Court in the United States has backed off from the role it played during its more activist days in the 1960s. This reflects the different temperament and political philosophy of those justices who sit on the bench today.

Conclusion

The political debate over constitutional interpretation reflects the many contrasting positions expressed in the abstract (and often mystifying) academic discussions of textual interpretation. However the inquiry is framed, political commitments can be readily detected lurking beneath the surface. This is not unexpected. Within the boundaries imposed by mainstream liberalism and the dominant constitutional tradition, which emphasizes the importance of a written, binding text, such debate, when expressed in the judicial sphere, reflects much the same concerns as are expressed elsewhere in political discourse.

That the peculiarities of constitutionalism dictate that political issues be cast in a distinct judicial language when conducted in the arena of constitutional politics does not mean that genuine issues of interpretation or construction do not exist in constitutional law. Nor is it to impute hidden, underlying political motives to all judicial opinions and scholarship. It is only to recognize that any theory of constitutional interpretation will inevitably reflect an underlying commitment to a particular theory of politics. The belief that law, be it constitutional or otherwise, is some neutral ground situated outside the realm of ideology is one of the worst illusions of the liberal tradition. Quite the contrary, the very commitment to a written text—to *this* written text, as opposed to some other text—and to any understanding of how it should be "read" reflects a commitment of the highest order to a particular vision of politics. Viewing textual interpretation as the primary concern is to misperceive the nature of the disagreement and suppress its inherently political character.

The American constitutional tradition is premised upon a powerful commitment to the written text and a judicial tradition in which the opinions of

the Supreme Court are necessarily framed in reference to the constitutional text. This is true in Canada as well, although the written constitution is comprised of documents of a different nature. On the one hand, any theory of interpretation (at least, one that is to be taken seriously) *must* yield a determined result in those cases where the text is specific (e.g., concerning the age requirement for the executive). On the other hand, all theories of interpretation must acknowledge the indeterminacy and open-ended quality of such constitutional standards as "equal protection," "due process," and "peace, order, and good government." The very fact that originalists must appeal to the framers' original intentions is a clear indication that the text is indeterminate with respect to the particular matter at hand.

Within the boundaries of a constitutional tradition committed to a written text that is manifestly indeterminate in particular instances, there is ample room for a struggle over competing theories of textual interpretation. Here, within the gaps of indeterminacy, underlying political commitments shape and inform theories of textual interpretation. The text itself offers no rules of interpretation, and thus does not legitimize any particular approach to reading the text. When the debate is conducted at such an abstract level (rather than through fairly disagreeing over the definition or usage of a particular word or phrase), it should be conducted in terms of competing visions of politics, rather than cloaked in the guise of a judicial doctrine. One important consequence of the current system of education and training, as well as the long-standing traditions of the American and Canadian legal communities, is that justices must necessarily speak in the language of *some* judicial doctrine rather than in overtly political discourse. Echoing a more general disdain for the "political," the legal tradition finds the apparently neutral, nonpolitical language of a scientific methodological debate inviting because it preserves the illusion of constitutional law as an objective realm outside of politics.

Obviously, one main motive for having a written constitution is to take certain decisions "outside of politics" by codifying them in the text and making it hard for future generations to alter or amend them. Where there is a sufficiently strong consensus behind fundamental values (e.g., a commitment to majority rule, electoral politics, equal protection under the law, etc.), it is possible to so constitutionalize them. Where there is no such consensus (as in the case of the deep divisions over the legal and moral standing of slavery in the United States in the 1850s), then politics quickly intrudes into the realm of constitutional law. Invariably, this produces unsatisfactory results. Fortunately, this is not the common constitutional case before the courts. As Morton and Knopff put it with respect to Charter cases: "[L]egal determinacy and judicial discretion emerge not with respect to core values, about which consensus exists, but with respect to second-order questions, about

Constitutional-Ch. 2 6/9/03 4:27 PM Page 57

which dissensus prevails. . . . The Charter supplies few obvious answers to the second-order questions that actually come before the courts."[60] The same can be said of the U.S. Bill of Rights. There is no serious disagreement over whether citizens should be afforded "due process of law" and "equal protection." But there are legitimate disagreements over how these general standards should be applied in a wide range of individual cases. It is these "second-order" questions that require the courts to interpret the constitutional text. This is where courts formulate new doctrines, make new constitutional law, create new rights, and generally intrude into the political realm, deciding issues that ought more properly be left to legislatures elected by, and accountable to, the citizenry.[61]

Because there are genuine disagreements over what specifics a constitution dictates, some scholars question the very possibility of being governed by a written text expressing an objective, transhistorical meaning. Such portends ominously for the very idea of a constitutional regime. A loss of faith in the possibility of adjudication based on a stable text is the provocation to the current debate over textual interpretation. Calls for a return to a "principled" approach to constitutional law or denunciations of rampant "nihilism" in the law schools only miss the point. Ultimately, where consensus over fundamental values is lacking, a constitutional regime is not even possible. Fortunately, that is not the problem that we face. The broad liberal consensus has not yet given way. However, there is considerable dissension over second-order questions, and that is precisely where courts ought to tread most carefully. Where the politics is too divisive, it remains judicious for courts to defer to representative bodies better equipped for addressing these issues. In the end, no written constitution or method of textual interpretation can resolve such political conflict.

Notes

1. David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995), 2.

2. William F. Harris, "Bonding Word and Polity: The Logic of American Constitutionalism," 76 *Am. Pol. Sci. Rev.* 34 (1982).

3. Laurence Tribe, *Constitutional Choices* (Cambridge: Harvard University Press, 1985), 246.

4. As Tribe puts it: "Constitutional choices must be made . . . Judges must make them whenever choosing among alternative interpretations of the Constitution . . . [T]he constitutional choices we make are . . . constrained and channeled by a constitutional text and structure and history, by constitutional language and constitutional tradition, opening some paths and foreclosing others." Ibid., vii–viii.

5. A forceful conservative critique of the "new" activist Supreme Court of Canada in the post-Charter era is F. L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000). See also F. L. Morton and Rainer Knopff, "Permanence and Change in a Written Constitution: and the Living Tree Doctrine and the Charter of Rights," *Supreme Court Law Review,* 2d ser., 1 (1990): 533–46.

6. *Federalist No. 78* (Alexander Hamilton), in *The Federalist Papers,* ed. Clinton Rossiter (New York: New American Library, 1961), 464–72.

7. For a history of American judicial review from 1776 through the end of Marshall's long tenure on the Court, see Sylvia Snowliss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990).

8. 5 U.S. (1 Cranch) 137 (1803).

9. *Marbury,* 5 U.S. at 179.

10. 17 U.S. (4 Wheat.) 415 (1819).

11. Section 52(1) of the Constitution Act, 1982.

12. For a discussion of the paramountcy doctrine, see Peter W. Hogg, *Constitutional Law of Canada,* 4th ed. (Toronto: Carswell Company, 1997), chap. 16.

13. P. Macklem, K. E. Swinton et al., *Canadian Constitutional Law,* 2d ed. (Toronto: Emond Montgomery Publications, 1997), 207.

14. 252 U.S. 416 (1920).

15. *Holland,* 252 U.S. at 433.

16. Id.

17. Id. at 435.

18. Philip Bobbit, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), 74. See also Charles Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969). An example of a Supreme Court case decided in some measure on the basis of an underlying structuralist interpretation is *National League of Cities v. Usery,* 426 U.S. 833 (1976).

19. Hogg, *Constitutional Law of Canada,* § 1.2. See also G. P. Browne, *Documents on the Confederation of British North America* (Toronto: McClelland & Stewart, 1969).

20. Sections 92(3) and 95 of the Constitution Act, 1867 make clear that the drafters recognized that in some cases, jurisdiction would be concurrent.

21. These national powers are enumerated in twenty-nine specific paragraphs, and include the unlimited power to tax and borrow, and provide for the national "defence," as well as the authority to regulate "trade and commerce," Indians and their lands, currency, banking, bankruptcy, marriage and divorce, criminal law, and so on.

22. *A.G. Ontario v. A.G. Canada* (Local Prohibition Reference) (1896) AC 348 (PC), 360–61.

Constitutional-Ch. 2 6/9/03 4:27 PM Page 59

23. *R. v. Crown Zellerbach Canada Ltd.* 49 DLR (4th) 161 (1988).

24. Associate Justice Scalia argues for an originalist approach to reading the text. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 44–47. For a discussion of Scalia's development of textualist principles, see Bradley C. Karkkainen, "'Plain Meaning': Justice Scalia's Jurisprudence of Strict Statutory Construction," 17 *Harv. J.L. & Pub. Pol'y* 401 (1994). See also William J. Michael, "The Original Understanding of Original Intent: A Textual Analysis," 26 *Ohio N.U.L. Rev.* 201 (2000); Frank H. Easterbrook, "The Role of Original Intent in Statutory Construction," 11 *Harv. J.L. & Pub. Pol'y* 59 (1988).

25. The leading academic proponent of intentionalism is Raoul Berger. See Raoul Berger, *Government by Judiciary* (Cambridge: Harvard University Press, 1977); idem, *Federalism: The Founders' Design* (Norman: University of Oklahoma Press, 1987).

26. See Paul Finkelman, "The Constitution and the Intentions of the Framers: The Limits of Historical Analysis," 50 *U. Pitt. L. Rev.* 349 (1989); Robert N. Clinton, "Original Understanding, Legal Realism, and the Interpretation of 'This Constitution,'" 72 *Iowa L. Rev.* 1177 (1987).

27. Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 1999), 4.

28. Chief Justice Rehnquist has made reference to a jurisprudence of original intent and has been critical of the rhetoric of the "living constitution." William H. Rehnquist, "The Notion of a Living Constitution," 54 *Tex. L. Rev.* 693 (1976). Justices Thomas and Scalia have also been critical of the notion of a living constitution.

29. The reference is to President Nixon's attempt to appoint "strict constructionists" to the Court. President Reagan appointed adherents of some modified expression of originalism.

30. See Sotirios A. Barber, *On What the Constitution Means* (Baltimore: Johns Hopkins University Press, 1984), chap. 2; Brest, "The Misconceived Quest for Original Understanding," 36.

31. John H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).

32. Ibid., 2.

33. See Charles Evans Hughes, speech to the Elmira Chamber of Commerce, New York, 3 May 1907: "We are under a Constitution but the Constitution is what the judges say it is." Charles Evans Hughes, *Addresses and Papers* (New York: G. P. Putnam's Sons, 1908), 139.

34. Michael J. Perry, *The Constitution, the Courts, and Human Rights* (New Haven: Yale University Press, 1982). See also Perry, *The Constitution in the Courts* (New Haven: Yale University Press, 1994).

35. Learned Hand, *The Bill of Rights* (Cambridge: Harvard University Press, 1958).

36. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); A *Matter of Principle* (Cambridge: Harvard University Press, 1985); idem, *Law's Empire* (Cambridge: Harvard University Press, 1986); idem, *Freedom's Law: The Moral Reading of the Constitution* (Cambridge: Harvard University Press, 1996).

37. The leading proponent of "visionary" jurisprudence, wherein a constitution is viewed as an "image" that is the "product of the legal community's imagination," is William E. Conklin, *Images of a Constitution* (Toronto: University of Toronto Press, 1989).

38. This is the basic theme of Sotirios Barber. See Barber, *On What the Constitution Means.*

39. For example, see Perry's discussion of the privacy cases. Perry, *The Constitution, the Courts, and Human Rights,* 73. But see Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L.J. 1* (1971) (an attempt to constrain judicial decision-making in this realm).

40. See, e.g., *Powell v. McCormack,* 395 U.S. 486 (1969).

41. For a discussion of the doctrine of "justiciability" (i.e., which matters courts may decide and which are moot, hypothetical, political in nature, or not yet ripe for a decision) as it has evolved in Canada, see Lorne Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont.: Carswell, 1999).

42. Associate Justice William J. Brennan Jr., speech delivered at Georgetown University on 12 October 1985 (reprinted in *N.Y. Times,* 13 October 1985, 36, col. 1).

43. Peter Hogg and Allison Bushell have defended the role of the Supreme Court of Canada against claims that judicial review under the Charter is undemocratic. They argue that judicial review is best understood as "part of a 'dialogue' between the judges and the legislatures." This is because when the Court holds an act unconstitutional under the Charter, the legislature is free to reenact the statute under section 33, which allows for an express legislative "override" of the Court with respect to decisions under sections 2 and 7–15 of the Charter. Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures," 35 *Osgoode Hall L.J.* 75 (1997). Manfredi and Kelly argue that Hogg and Bushell overstated the extent of "dialogue" between the Court and legislatures. Christopher P. Manfredi and James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell," 37 *Osgoode Hall L.J.* 513 (1999).

44. Ely, *Democracy and Distrust,* 13.

45. 410 U.S. 113 (1973).

46. The applicability of the Bill of Rights to the states was first raised in *Barron v. Mayor and City Council of Baltimore,* 31 U.S. 464 (1833), in which the Marshall Court held that the Bill of Rights restricted only the national government and not the states. By the 1930s and 1940s, the majority of the court followed Justices Cardozo and Frankfurter in arguing for a "selective" incorporation. See *Palko v. Connecticut,* 302 U.S. 319 (1937) (Cardozo, J.); *Adamson v. California,* 332 U.S. 46 (1947) (Frankfurter, J., concurring). In his dissent in *Adamson,* Justice Black, joined by Justice Douglas, argued

Constitutional-Ch. 2 6/9/03 4:27 PM Page 61

for the "total incorporation" of the Bill of Rights, claiming that such was the "original purpose" of the Fourteenth Amendment. Id. at 89 (Black, J., dissenting).

47. Dworkin, *Taking Rights Seriously,* 134–36.

48. In recent decades, the Supreme Court has articulated a theory of separation of powers in a number of significant cases. See *Immigration and Naturalization Serv. v. Chadha,* 462 U.S. 919 (1983); *Buckley v. Valeo,* 421 U.S. 1 (1976); *United States v. Nixon,* 418 U.S. 683 (1974); *Powell v. McCormack,* 395 U.S. 486 (1969); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

49. Unlike the U.S. Bill of Rights or the Canadian Bill of Rights enacted by the Canadian Parliament in 1960, the Charter explicitly recognizes human rights *and* group rights (e.g., those of the "aboriginal peoples," including the Indian, Inuit, and Métis tribes). In addition, the special status of the French-speaking minority is expressly recognized and protected under the Charter.

50. Schedule B to Canada Act 1982, Constitution Act, 1982, Part 1, sec 1.

51. Luc B. Tremblay, *The Rule of Law, Justice, and Interpretation* (Montreal: McGill-Queen's University Press, 1997), 9.

52. Beatty, *Constitutional Law in Theory and Practice,* 63. Beatty takes a particularly optimistic view of the Charter as expressing a clear set of liberal, democratic preferences that require little "interpretation" from the judges sitting on the Court.

53. This view is expressed in Paul Bender, "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison," 28 *McGill L.J.* 811 (1983); Peter W. Hogg, "The Charter of Rights and American Theories of Interpretation," 25 *Osgoode Hall L.J.* 87 (1987).

54. 26 DLR (4th) 200 (1986).

55. "The state must establish that the objective of any law that infringes a Charter right is in conformity with the rights-protecting regime. Moreover, the state must prove that the impugned law is rationally connected to its permissible objective and minimally impairs the right as well. Finally, the state must establish that the impugned law's objective, as well as its beneficial effects, outweighs its deleterious effects on the rights guarantee." Lorraine Eisenstat Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State," 33 *Israel L. Rev.* 13, 33 (1999).

56. Beatty, *Constitutional Law in Theory and Practice,* 68.

57. For a historical overview of the Court's decision-making under the Charter, see James B. Kelly, "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982–1997," 37 *Osgoode Hall L.J.* 625 (1999). See also F. L. Morton, P. H. Russell, and T. Riddell, "The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982–1992," 5 *N.J.C.L.* 1 (1994).

58. For a critical analysis from the Left of the Canadian Supreme Court's "liberal" jurisprudence of rights under the Charter, see Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995). See also

Andrew Petter and Alan Hutchinson, "Private Rights/Public Wrongs: The Liberal Lie of the Charter," 38 U. Toronto L.J. 278 (1988); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada,* rev. ed. (Toronto: Thompson, 1994).

59. Morton and Knopff, *Charter Revolution and the Court Party,* 41.

60. Ibid., 17.

61. With great foresight, Peter Russell warned that the sentiment behind the Charter movement was for "transferring the policymaking focus from the legislature to the judicial arena," and that this represented a "flight from politics." Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts," 25 *Canadian Pub. Ad.* 1, no. 32 (1982).