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Judging and Equality: *Quis Custodiet Ipsos Custodes?*

*Edward J. McBride**

Like the historian and political theorist, (the constitutional lawyer) needs often to straddle but not, for that reason, to blur, the boundary line between law and politics.—*Geoffrey Marshall*[1]

One of the abiding interests of political scientists who study judicial review should be to discover exactly where pure legal analysis ends and value judgments, which cannot themselves be determined by such analysis, begin.—*Peter H. Russell*[2]

. . . Political considerations are . . . only one set of factors that weigh with the justices . . . They are also the most visible and prestigious members of the legal fraternity . . . . For the Court, it should be remembered, is still a court, and its members judges, however political the consequences of its decisions may be.—*Richard Hodder-Williams*[3]

1. INTRODUCTION

"Equality," like law, politics, and life itself, displays myriad aspects. Reflections on equality, therefore, must take many different

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1 *Constitutional Theory* (Oxford: The Clarendon Press, 1971), p. 12.

2 *Leading Constitutional Decisions*, 3rd ed. (Ottawa: Carleton University Press, 1982), p. 17.

3 *The Politics of the U.S. Supreme Court* (London: George Allen & Unwin Ltd., 1980), p. 91.

forms, as this volume will subsequently demonstrate. Now that Canada has entrenched equality as a constitutional value, facets of the issue seem to proliferate, almost without end. Questions abound: Will the equality guarantees be confined to public action only? What constitutes public action? Will the enumerated categories protected against discrimination be supplemented by incorporation of unenumerated categories? Will a conventional liberal point of view inform the development of equality under the *Charter*? What part will a crystallizing feminist perspective play in the process? For women, what mixture of problems, opportunities, advantages, and dilemmas will ensue from implementation of the guarantees of equality under the *Charter*? How will the *Charter* affect public policy on contentious social issues involving prostitution, pornography, and homosexuality? Will it remain constitutionally admissible for an income-based pension system to deprive women of economic security and personal dignity in the fullness of their years? Number, variety, and intricacy obviously characterize the questions raised by entrenchment of equality.

One topic, however, transcends all the rest. To constitutionalize equality is, to a greater degree than heretofore, to judicialize the process of its realization in actual practice. Accordingly, reflections on the complex craft of constitutional judging might well precede reflections on equality. Such will be the case in this instance, since all else on equality may become grist for the judicial mill. At the threshold of analysis, it appears almost anomalous to confide the interpretation and application of equality provisions to a separate caste of high officials, themselves exempt from the electoral process, with its egalitarian premise of one person, one vote. The unusual, though, is common enough in the constitution field. Judge-made constitutional law does, indeed, represent a special category, a branch of law of unique dimension and distinctive character. Not least because of its transcendent claims, constitutional law, in an ecclesiastical analogy, seems quite nearly a denomination unto itself. The denomination comes complete with rites, dogmas, schisms, and clergy.

2. CONSTITUTIONAL LAW: "A CHURCH DIVIDED"

In the Church of Constitutional Law, a political scientist rather resembles a lay deacon, neither fully ordained nor totally laicized. But this neither-fish-nor-fowl character conforms to the nature of the "sect" itself. In essence, constitutional law has ever been a curious hybrid. To many an observer, it must seem part law, part politics, and all confusion. Granting the first two points—indeed, assuming

them—but not necessarily conceding the third, this political scientist takes his theme from Charles L. Black, Jr.:

> The highest interests of constitutional law are enfolded in its name . . . . The term "constitutional law" symbolizes an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law, thinking as lawyers think.[4]

One addendum, by way of redressing an ostensible imbalance in emphasis, does seem in order. If persons so schooled, shaped, and employed, as Black thus asseverates, do decide "issues of political power," then they inevitably play an essentially political role. In logical consequence, therefore, whereas the form remains legal, the function becomes political. The apparent asymmetry will always prove problematical. Not least would this be the case when the enterprise is that of judging the judges themselves, in the performance of their compound office of constitutional adjudicators and public-policy makers. Judging judges hence is a task as demonstrably difficult as it is increasingly imperative.

More then ever, the focus of such concerns in Canada would be the Supreme Court. Now that the Supreme Court, in the words of Professor Gerald A. Beaudoin, "is the guardian of the Constitution," the nation's final appellate tribunal, especially in its elaboration of an expanding corpus of public law, should attract "more exacting scrutiny," "more searching inquiry." There is little reason to doubt that this contemplated "review of judicial review" in Canada will take place. Sharply in question, however, is whether it will have any systematic character. That depends, at least partially, upon the degree of intellectual coherence in the process itself. Establishing ways to conceptualize the work of constitutional judgment might well afford the best prospect for the desired analytical cohesion. The instant effort represents a modest start in that direction. A return to fundamentals, which enjoys something of a general pedagogical vogue these days, has the additional merit, in this particular context, of being sound. Accordingly, constitutional adjudication warrants analysis in terms of its fundamental importance, its basic nature, and its essential lines of development.

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4 *Perspectives in Constitutional Law*, rev. ed. (Englewood Cliffs, New Jersey: Prentice Hall, Inc., 1970), p. 1.

First, one should never scant the impact of constitutional litigation. It is a game played for high stakes, with risks, costs, and results of the greatest magnitude. There are big winners, big losers, and profound social consequences. A constitutional course once set is not easily arrested, let alone readily reversed. In the wake of constitutional decisions, public attitudes can polarize, as well as coalesce, social conflict can sharpen, as well as subside, and the cohesive force of the law can weaken and diminish, as well as gain and grow. It is the polity itself that can falter, as well as prosper.

At the most elementary level of inquiry, law is a profession, governance is an art, and constitutional law, given that it partakes of both, continuously displays an unwrought tension between the two halves of its very nature. It should not escape our notice that the term "professional lawyer" is a redundancy, while that of "professional politician" is a misnomer. Supreme Court justices reside at the summit of a profession, on a height not as "chill and distant" as some suppose, but one still not altogether purged of the arcana, deference, and mystique conducive to "the cult of the robe." On the other hand, constitutional judges share with elective officials (and nonelective ones as well) the power to set the course of public policy and thus *pro tanto*, to shape society. It is a task at once exalted and earthy, possibly too much the latter for personages perpetually addressed as, "My Lord," in the meditative ambiance of a final appellate court.[5]

The exercise of such sweeping social power by a professional elite—arguably a "discrete and insular" one, to switch from the original context[6]—properly poses questions of responsibility, accountability and, especially, sensitivity to the public good. A Cardozo can magisterially pronounce that "the final cause of law is the welfare of society."[7] But an Estey can plaintively maintain that "it is hard for appellate judges to know what is good for society."[8] Perhaps it would be just as well if Olympian serenity and practical compunction both

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5 See, *e.g.*, Beryl Harold Levy, *Cardozo and Frontiers of Legal Thinking*, rev. ed. (Cleveland: The Press of Case Western Reserve University, 1969), p. 7.

6 The original context, of course, was the famous "footnote #4", in the opinion of Mr. Justice (as he then was) Harlan Fiske Stone, in *United States* v. *Carolene Products*, 304 U.S. 144 (1938), 152–154. Stone called for special protection of "discrete and insular minorities" by a judiciary with, in effect, similar properties of separation and isolation.

7 *The Nature of the Judicial Process* (New Haven, Connecticut: Yale University Press, 1921), p. 66.

8 From remarks made at *Law Hour*, Dalhousie University School of Law, March 9, 1984.

were characteristics of the judicial mind. In particular individuals, they are likely, at best, to coexist in uneven degrees.

Felix Frankfurter, who immoderately preached the gospel of judicial moderation, was right in one respect. The courts are not a reliable reflex of social action.[9] The reason why seems clear enough: one can be learned in the law, even wise in the ways of the world, without being particularly astute in the affairs of state. In brief, legal capacity does not automatically equal political sagacity.

Notwithstanding the limitations of its judicial participants, the fact remains that constitutional adjudication requires statecraft.[10] The superiority of a constitution, considered as codified higher law, and the generality of its provisions, derived from deliberately political drafting, combine to so ordain.[11] A constitution that enjoins the judiciary to apply and interpret terms that are neither self-executing nor self-explanatory, renders the courts political forums as well as legal tribunals. In a jurisidiction of notable instance and probative comparability to the Canadian, the system has faced the fact squarely. On the American Supreme Court, from John Marshall onward, there has been a "high incidence of politicians concealed beneath the judicial robes of the High Court. Indeed, . . . given the policy functions of the Supreme Court, this is both inevitable and wise: to paraphrase Clemenceau, the meaning of the Constitution is far too important to be left in the hands of legal experts."[12]

Nevertheless, even where the political character of the constitutional judiciary reigns strongest, a certain uneasiness persists and countervailing trends emerge. There have been Marshalls, and Earl Warrens, and Frank Murphys, but there have been, by the same token, Frankfurters and Robert Jacksons and Lewis Powells. For every politician in black robes, "disdaining the tortuous paths of the law,"[13] there appears to have been an opposite on the American Court, a proudly self-proclaimed, "lawyer's lawyer."[14] On the latter, the charge—in

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9 See, *e.g.*, Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, Publishers, 1970), p. 29.

10 Bickel, *supra*, note 9 at pp. 87–88. See also Howard E. Dean, *Judicial Review and Democracy* (New York: Random House, Inc., 1966), p. 53.

11 Dean, *supra*, note 10, p. 153.

12 John P. Roche, "The Utopian Pilgrimage of Mr. Justice Murphy," in *Shadow and Substance: Essays on the Theory and Structure of Politics* (London: Collier-MacMillan Ltd., 1964), pp. 164–165.

13 Roche, *supra*, note 12 at p. 188.

14 See, *e.g.*, Alice Fleetwood Bartee, *Cases Lost, Causes Won: The Supreme Court and the Judicial Process* (New York: St. Martin's Press, 1984), p. 127.

more than one sense of the term—of "judicial legislation" would not rest comfortably. As one constitutional scholar has pointedly suggested, "it may be true that when the black-letter lawyer contrasts the vagueness and generality of the Constituion with the law of real property or negotiable instruments, constitutional law may seem remarkably unlawyerlike."[15] Conversely, of course, the tangle of precedent and the "tyranny of words" that mark the profession, may seem remarkably far removed from statecraft.

In deciding constitutional cases, judges make both law and policy. Some justices are suited to do both, some to do one or the other, and some, alas, to do neither. The present line of inquiry, even in the rudimentary form it has thus acquired, evinces a presumption in favour of those who would warrant inclusion in the first category. To write in praise of such judges is not, therefore, iconography,[16] any more than a censure of the unfortunate few who would fall into the last category, amounts to iconoclasm. Once again, Frankfurter, who talked a better game than he played, made the definitive pronouncement:

> Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. . . . [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.[17]

3. TYPES OF JUDICIAL CRITICISM

Political decision-makers, whether in scarlet and ermine or otherwise, will never lack for critics, if only among those whom they have failed to favour. If politics is, indeed, "the slow boring of hard boards," then it is also the swift grinding of sharp axes. But disgruntled partisanship, as a form of criticism, has drawbacks. It tends to be intermittent and inconsistent, fugitive and fitful. Disinterested professionalism, however, might afford the prospect of something superior. One person's professionalism, of course, could well seem another's partisanship. All the same, professionalism in the criticism of high

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15 Dean, *supra*, note 10 at p. 155.

16 The notion that to write about judges is to apotheosize them seems a quaintly diverting one, but surely no more than that.

17 (1962), 3 The Supreme Court Review ii.

courts—or, at any rate, the appearance of it—should weigh more heavily with the judges.

What would mark this professionalism? If, following Bentham, "law is made by Judge and Company," and if that company is to bear a relation to the polity it purports to serve, then number and variety must count among its leading characters. Practitioners and academicians, lawyers and non-lawyers, intellectuals and non-intellectuals, have their proper place in the ranks. The Church of Constitutional Law must be a proselytizing denomination. To encompass the requisite diversity, however, is to incur certain costs. Chief among them would be the classic tension between unity and diversity. To be credible as a community sanction, in contradistinction to special pleading, criticism of the judiciary must stem from a multiplicity of sources. To be intelligible, and thus to have cumulative shape and effect, such criticism must achieve a measure of internal consistency. There is, obviously, no pat way to reconcile the conflicting demands of multiplicity and consistency. Heuristically, one suggests a wide scale effort to frame a coherent code of judicial criticism.

In a small contribution to such a vast and intricate project, one would adumbrate a framework for judicial analysis. The context, origin, nature, function, limits, advantages, and possibilities of judicial review are all worthy of methodically related inquiry. As the elements, in practice, are not severable, one from the other, or from the whole of which they are parts, so should they remain connected for purposes of analysis.[18] According to this standard, criticism of the constitutional judiciary that is selective, rather than comprehensive, is both ill-founded and unfair. To clarify the point, take the following example. Cavils about the compatibility of judicial review with "an otherwise self-governing polity,"[19] can be alternately expressed and suppressed by partisans, depending upon the play of advantage or disadvantage to their cause. Viewed in a broader light, irrespective of particular decisions, judicial review is less a usurpation of power by the courts than it is a recourse of necessity, dictated by the exigencies of federalism and pluralism, and ratified by longstanding, widespread community acquiescence in its exercise.[20]

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18 See *e.g.*, Robert H. Jackson, *The Supreme Court in the American System of Government* (Cambridge, Massachusetts: Harvard University Press, 1955).

19 Alpheus Thomas Mason, *The Supreme Court from Taft to Warren* (New York: W.W. Norton & Company, Inc., 1958), p. 186. See also Dean, *supra*, note 10 at pp. 161–162.

20 See, *e.g.*, Dean, *supra*, note 10 at pp. 33 and 158.

Even criticism that transcends specific cases can be misinterpreted as to the precise nature of its argument. A comprehensive approach might be a reminder, for instance, that the charge of judicial bias, from a force such as feminism, is systemic, rather than institutional. In other words, when the quarrel is with the system as such, the judicial institution is a secondary, not a primary, cause. From this perspective, reform of the institution, even if feasible, would avail little, absent an overhaul of the system itself. The sequence of wider indictment, sterner challenge, stronger reaction, thus may become more evident all round. Both feminism and Critical Legal Studies, to cite salient examples, sweep beyond a conventional critique of law formation and development. They will continue to provide a bracing affirmation that a complex interaction of constitutional and social factors forms the real matrix of the many equality issues raised under the *Charter*. Of the *Charter*'s manifold provisions, section 15 has the amplest potential to reach the heart of daily living in Canada. It may cause us, as members of a single, organic political community, to contemplate how we view one another, how we treat one another, and what we are willing to share with one another. Foremost among our common "reflections upon equality" ought to be this question: What kind of society do we want Canada to become in the future? No narrow and parochial viewpoint can supply an adequate answer. Nor, just as surely, can any astringent legal scholasticism suffice.

A significant contribution of systemic criticism is the contention that there exists a functional harmony even among differently constituted, and thus seemingly disparate, governing institutions. If a select company of privileged persons disproportionately finds its way to the high bench, then this is also true, *mutatis mutandis*, of the cabinet room, the legislative chamber, and the bureaucratic labyrinth. Although the entire pattern may well stand in need of reform, it is worthy of note that any single established entity, such as a Supreme Court, most often operates, not counter to, but in conformity with, the overall design. In the highest councils of statecraft—elective or appointive—Ed Broadbent's "ordinary Canadians" seem in strikingly short supply. This is the way of the world—an imperfect and imperfectible universe, but nonetheless real.

Comprehensively, then, the power of judicial review belongs to an elite corps of constitutional experts, set in, derived from, and hence consonant with, an essentially elitist context. In a sense, this circumstance forms no drastic departure from the norm for the exercise of governmental authority, here or elsewhere. To comprehend the congruity of the institution and the system is not to condone the way in

which either works. It is, rather, to provide a more stable platform for sustained criticism. For instance, the question of why a polity should entrust a court of last resort with stewardship for a bill of rights flows from a more fundamental inquiry. That query is, why have such a charter of liberties in the first place? Presumably, the answer here would reflect reservations about the indefectible wisdom and fairness of current majorities as determinants of public policy.

Given its context, therefore, the legitimacy of judicial review is not an issue of surpassing perplexity. Indeed, it originates in a plain need to mark the limits of political authority under law. The exact terms of origin may differ from system to system, but the presiding impulse subsists. In the United States, "history and wisdom"[21]—with a little encouragement from the subtle agency of John Marshall—have answered the question, "Who guards the Constitution?", in favour of the courts. The answer has proved no less emphatic and enduring for all of the fact that "this august, awesome, and altogether revocable authority"[22] is nowhere mentioned in the United States Constitution. On the other hand, in Ireland, to cite a pre-World War II adoption of the judicial review, the Constitution expressly confers the power.[23] Here at home, "it was precisely that power which, from the outset, the Canadian judiciary, without explicit acknowledgement and despite the incompatibility of judicial review with the tradtional British practice of parliamentary sovereignty, assumed with respect to the B.N.A. Act."[24] With the passage of the *Constitution Act, 1982*, the Canadian judiciary's role in this regard has been codified and enlarged by virtue of sections 24 and 52.

A clear line threads from Alexander Hamilton's essay in *Federalist #78*, through Marshall's opinion in *Marbury* v. *Madison*, through *Severn* v. *the Queen*, through section 24, on through to Estey's opinion in *The Law Society of Upper Canada* v. *Skapinker*. This unifying theme is one which stakes a claim for Supreme Courts, ultimately, as special custodians of the constitutional consensus. The critical question is not who shall have this custody, but, rather, who, and what, shall guard the guards themselves?

"Quis custodiet ipsos custodes?"—that ancient question will always abide. Considerations appertaining to the context and origin of

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21 Hodder-Williams, *supra*, note 3 at p. 182.

22 Edmond Cahn, quoted in Dean, *supra*, note 10 at p. 32.

23 Constitution of Ireland, Article 34(3)2.

24 Russell, *supra*, note 2 at p. 3.

judicial review can supply a frame and a focus, but they will bring us no nearer than hailing distance to an adequate response. As intimated earlier, the real key lies in the nature of the office performed by the red-robed "cardinals" in the Church of Constitutional Law. Theirs is a calling both worldly and transcendent. They decide both issues of power and matters of principle. Consonant with Duncan Kennedy's exhortation "to break down the sense that legal argument is autonomous from moral, economic and political discourse,"[25] let one make bold to say that Canadian judges, in pronouncing upon equality under the *Charter*, will play politics as well as make law. This duality of function is ineluctable. But is it, in fact, a duality at all? The answer in the negative represents more than a contribution to academic discourse; more importantly, it is a practical challenge to review and reconsider longstanding "liberal" assumptions about the distinction between politics and law, power and principle, public service and self-interest, personal prepossessions and official norms.[26] Notwithstanding the considerable value of such an exercise, there remains the need to resist reductionism.

There are judges, and then there are judges; there are politicians, and then there are politicians; all is not one. There is a difference between Warren Earl Burger and Earl Warren, just as there is a difference between Thomas Berger and Warren Earl Burger. A Maurice Duplessis is not an Ivan Rand; a Governor Wallace is not a President Kennedy; a Leonard Jones is not a Brian Mulroney. More comprehensively, there is a difference between the appeal to Uncle Sam (or Johnny Canuck) drunk, and the appeal to Uncle Sam (or Johnny Canuck) sober. Having said that much, one would be content, for the nonce, to make three points, in the form of, respectively, an observation, an admonition, and a question. First, on the table in the general game of governance, there is always something of a stacked deck. Second, as to particulars, however, beware lest the game you name become the game you are compelled to play. Third, if we get the government we deserve, why do we deserve the government that we get?

Parenthetically, to those who aver that the distinction between power and principle in constitutional law amounts to nothing, one can but cite the perennial danger of self-fulfilling prophesy. Irony of

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25 See Lief H. Carter, *Reason in Law* (Boston: Little, Brown and Company, 1979), p. 214.

26 See Roberto M. Unger, *Law in Modern Society* (New York: The Free Press, 1976), Chapter 3.

ironies, denial of the distinction in question could have the unintended and undesirable effect of turning some highly-placed feet away from the fire. Heresy rarely serves the cause of reform and empirical oversimplification can lead to normative dereliction.

Simply on this score, it seems the better part of prudence to heed Frankfurter's double-edged, distinguishing proposition that constitutional law is "applied politics, using the word in its noble sense."[27] Put another way, it can be both more and less than either politics or law, as each are routinely perceived. When one hears it said that "law is the transposition of philosophy onto another plane," the stock question is, "Whose philosophy?" But if constitutional law is the transposition of politics onto another plane, then the interrogatory might become, "What plane?" For as there are levels of law, so there are planes of politics. Moreover, there are different ways of regarding constitutions, which ways comport with the projected tiers of politics.

4. FORMS OF POLITICS

Politics can be variously a tawdry, middling, or exalted exercise. To an extent, it depends upon one's point of view. That there are several versions, however, is no mere illusion. One version marries ancient political philosophy and modern social pyschology. In classic terms, "the nature of a state is to be a plurality": an entity essentially encompassing divergent interests, manifold opinions, and a matching multiplicity of organizations, groups, and factions. Political association, thus cast, invariably induces a restless, contentious quest to satisfy diverse personal impulses with scarce social resources—a Lasswellian contest to determine "Who Gets What, When and How." On this level, the human appetitive drive—the force of unruly passion over gentle reason—controls the course of politics. A constitution strictly and exclusively considered as "a structure of power" neatly—all too neatly—fits this brand of politics.

But what de Tocqueville deemed "enlightened self-interest" points to something better. From this vantage, a power struggle is, well, a power struggle; and politics, while not an altogether different affair, is at least a distinguishable one. That which distinguishes politics is the bridling of the power struggle by means of conciliation, as enunciated in this basic definition:

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27 Bickel, *supra*, note 9 at p. 20.

> Politics is the activity by which differing interests within a given unit of rule are conciliated by giving them a share in power in proportion to their importance to the welfare and survival of the whole community.[28]

Instead of perceiving politics as power, "this perspective sees 'politics as conciliation', as a process for accommodating diversity within the political order."[29] Looked upon in this light, constitutions are, accordingly, compacts of conciliation, whether they be an American "bundle of compromises", or a Canadian "hybrid".[30]

Above and beyond the first two planes of politics, there is a topmost third tier. From this elevated angle, the view vaults over "power", or even "conciliation", to fasten upon "the common good". In loftiest perspective, thusly, the practice of politics—authentic politics, normatively considered—is not power-centred or self-interested; it is high-minded and public-spirited. According to this demanding standard, neither "the struggle for power" nor "the process of conciliation" will suffice; what alone will do is the cultivation of civic virtue in a principled pursuit of the public interest. By the way, it is as easy to scoff at such moral claims upon politics as it is dangerous to dismiss them. The mere appearance of settling for less is, after all, a guarantee of getting it. In any event, the optimal politician transcends the mastery of power and the brokerage of interests alike, becoming, instead, the servant of the common good, trustworthy to promote unity amidst diversity, and to protect diversity amidst unity. The matching constitutional outlook envisions the fundamental law as "a charter of learning,"[31] from which both governors and governed receive tuition in the everlasting and evolving lessons of liberty, equality, and community.

By way of summary, the various versions of politics and their concomitant constitutional visions, are as follows:

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28 Bernard Crick, *In Defence of Politics* (Chicago: The University of Chicago Press, 1962), pp. 16–17.

29 Ronald G. Landes, *The Canadian Polity* (Scarborough, Ontario: Prentice-Hall Canada Inc., 1983), p. 41.

30 Douglas V. Verney, "Reconciling Parliamentary Supremacy and Federalism in Canada," in *Canadian Politics: A Comparative Reader*, Ronald G. Landes, ed. (Scarborough, Ontario: Prentice-Hall Canada Inc., 1985), p. 20 at 29.

31 Robert M. Hutchins, the noted educator, so depicted constitutions. See Noel Lyon and Ronald Atkey, *Canadian Constitutional Law in a Modern Perspective* (Toronto: University of Toronto Press, 1970), p. 434.

1. politics is a struggle for power, and a constitution is simply a structure thereof;
2. politics is a process of conciliation, and a constitution is essentially a compact therefor;
3. Politics is *res publica pro bono publico*—the public entity for the public good—in which a constitution is an educational charter, a formative influence for the inculcation of the requisite public virtue.

In the practical order, of course, these theoretical combinations would range along a continuum, with one sliding into another. Furthermore, any well-realized polity, at different times, in different ways and in widely varying proportions, will exhibit not one set, not two sets, but all three sets.

The pursuit of power, for instance, has its proper place; it is a legitimate recourse for any group, but it is especially compelling for those who are deficient in social leverage. Unless, however, the contest for power, even in a free and democratic society, is tempered by conciliation, let alone leavened by principle, the relatively powerless are unlikely to overcome their disadvantage. When politics remains depressed at its lowest level, power to the powerless becomes, to borrow from Mr. Justice Robert Jackson, "a teasing illusion, like a munificent bequest in a pauper's will."

The gradations of constitutional politics readily admit of illustration by example. There is, unfortunately, no dearth of instances of the worst sort. In this category one would find *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), in which the United States Supreme Court affixed the constitutional seal of approval, via the dishonest "separate but equal" doctrine, to an American system of *apartheid*. Of lesser historic magnitude, there would be *Christie* v. *York Corporation*, [1940] S.C.R. 139, in which the Canadian Supreme Court chose to regard the denial of service to a black in a Montreal Forum beer garden as an issue, not of racial prejudice, but of commercial liberty. Similarly, *Korematsu* v. *United States*, 323 U.S. 214 (1944), and *Co-operative Committee on Japanese Canadians* v. *Attorney General for Canada*, [1947] A.C. 87, upheld harsh treatment of innocent people of Japanese descent by American and Canadian authorities, respectively, in World War II. All four of these judicial abominations

1. endorsed inequality;
2. conformed to the then current fashion; and
3. exemplified the politics of expediency.

At the other end of the scale, one could place *Brown* v. *Board of Education*, 347 U.S. 483 (1954), in which Earl Warren's Supreme Court, by disallowing official segregation (in public education), effectively overruled *Plessy* v. *Ferguson*, and thereby tolled the death knell of *legalized* racism. In a burst of generosity, perhaps, one would bracket at this top level the celebrated case of *R.* v. *Drybones*, [1970] S.C.R. 282. The latter, at least, deserves full marks as the Canadian Supreme Court's "one brief shining moment" in respect to the Bill of Rights of 1960. Both *Brown* and *Drybones* stood foursquare for, not against, equality, and they confirmed the role of principle in constitutional politics. One hopes that this combination will become the paradigm for judicial development of section 15.

In the "middle-distance" view, where the focus is upon the balancing function of constitutional politics, the examples, by definition, neither rise to the heights nor plunge to the depths. The careful weighing of interests and values, and an evidently judicious striking of a balance, however tipped it might be in the event, are hallmarks of the second level, the middle tier, of judicial statecraft. An instance, along classic lines, might be *Harrison* v. *Carswell*, [1976] 2 S.C.R. 200. An instance, of cosmic importance, would be *Reference re Amendment of the Constitution of Canada*, [1981] S.C.R. 753. In the former case, "the legal issue at stake . . . was the conflict between the traditional rights of property (protected by the law of trespass) and the right to strike,"[32] as supported by the practice of picketing. In the latter example, the overall effect of the Court's complex, "two-majorities" approach, was to balance the federal and provincial interests in the process of constitutional amendment.

5. THE TWO SIDES OF THE COIN

Whether politics be viewed as "the authoritative allocation of the scarce values and resources of society," or "the accommodation of divergent interests," or "the formulation and implementation of public policy for the common good," it remains but one side of the coin of constitutional law. That the other side is its legal dimension requires no reminder here. More demanding of demonstration, perhaps, is the proposition that the two sides actually are distinct. The point need not detain us overly long, however, if we acknowledge that proximity

32 F.L. Morton, ed., *Law, Politics, and the Judicial Process in Canada* (Calgary, Alberta: The University of Calgary Press, 1984), p. 38.

is not identity, and that legal doctrines and social values are both logically and empirically distinguishable, as are, possibly more patently, litigation and legislation, the judicial function and the political process.

As argued above, politics admits of different varieties. In a sense, if only a symbolic one, you cast your vote and you make your choice: for power, for conciliation, for the common good. Law, one would gingerly submit, is less protean. By common accord, constitutional law, *qua* law, entails certain things. The forms and methods of judge-made law leave a distinctive impress upon the entire enterprise. Lawyers perpetually let loose among the trees of cases and controversies, of appeals and adversary proceedings, of formalities in attire and argument, of precedents and citations, of judgments rendered and opinions delivered, sometimes need a non-lawyer to declare the whole place a forest. Compared with the thickly-implanted turf of law, the pathways of ordinary, day-to-day politics, convoluted as they undoubtedly are, can seem like four-lane highways.

In an evident admission against interest, the late Alexander M. Bickel, one of Frankfurter's most able acolytes, once conceded, with added emphasis of his own, that "constitutional law *was* applied politics."[33] Equally, and with alacrity, it should be stressed that constitutional adjudication *is* law. In 1978, the then Chief Justice of Canada, Bora Laskin, was moved to do precisely that, while sternly admonishing a concourse of journalists (whom he obviously felt required such instruction):

> What needs to be emphasized—and I should perhaps apologize for assuming that it needs to be said here—is that the Supreme Court, like other Courts in our country, has been carrying out, has been and is still engaged in a *judicial* function, not a political function, not an executive function, not an administrative function. If I am to credit what I have been reading recently in the press, this time-honoured function of the Supreme Court, its character as a judicial tribunal—which is the only justification for its existence—is not only misunderstood by persons who should know better, but is being questioned on grounds which fill me and fill my colleagues, and I venture to say, all judges, with grave concern.[34]

Significantly, a few years later, Brian Dickson, not long before he succeeded Laskin in the Court's centre chair, similarly stressed the

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33 Bickel, *supra*, note 9 at p. 23.

34 *Address to the Seminar for Journalists*, Ottawa, February 22, 1978, pp. 1–2.

judiciary's irreducible adjudicative role.[35] Even earlier, the two jurists had debated the degree to which this function could cohere with a more quasi-legislative one in their respective opinions in *Harrison* v. *Carswell*.[36]

If the end of constitutional law—whether power, conciliation, or the common good—is political, then its means are legalistic. Constitutional law is not simply law, but it is surely law in a certain sense. For an observer from outside the legal profession, imbued with a spirit of sympathetic realism, the juridical character to constitutional litigation remains an obtrusive actuality. But what does that actuality comprise? In the compound that is constitutional law, can we identify, but not by that fact isolate, its essential juridical elements? Over what things, in other words, must the guardians of constitutional law display mastery, or else incur the risk of being declared delinquent in their duties as *judges*, as members of a *court of law*?

6. NORMS OF LAW

An obvious starting point consists of the standard concerns, the stock-in-trade, of the guild of bench and bar. In framing any representative list of such things, the following entries would deserve substantial consideration.

> The insistence on reason in the judicial process, on analytical coherence, and on principled judgment, is traditional . . . . The Court is the place for principled judgement [sic], disciplined by the method of reason familiar to the discourse of moral philosophy.[37]

> [There are] goals which characterize the properties or virtues of practices, rules, or law themselves. [They are] decisiveness, clarity, publicity, predictability, consistency, authoritativeness, and impartiality.[38]

> . . . [T]hose fallible human beings who become judges [must] meet these requirements.
> . . . Taken as a whole the work of the Court must not appear consistently to favor one faction or party within the electorate.

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35 "The Judiciary—Law Interpreters or Law-Makers" (1982), 12 Manitoba Law Journal 1.

36 [1976] 2 S.C.R. 200.

37 Bickel, *supra*, note 9 at pp. 81 and 87.

38 S.C. Coval and J.C. Smith, "The Causal Theory of Law" (1977), 36 Cambridge Law Quarterly 111.

> . . . My second requirement [is] "consistency in method".
> . . . My third and final condition . . . I call the obligation of candor.[39]

An extrapolation from the above might yield a threefold benchmark of *juridical* competence: the method of reason, the appearance of impartiality (as a necessary, not a sufficient condition), and the obligation of candor.

The trinity thus delineated might not constitute a tough test for a seasoned jurist; it seems more on the order of a minimal scrutiny standard. If this were the whole story, the making of constitutional law, and the judging of those so engaged, could amount to a rather straightforward proposition. But, of course, such is not the case. Juridical obligations form but half the tale; political responsibilities constitute the other part. The principal difficulty lies in this: in the first instance the juridical standards appear reasonably clearcut, internally consistent, almost a coherently related whole; in the second instance, the political standards seem much less settled, for the simple reason that politics assumes various shapes. Not all of them accord with the stated conception of a properly executed judicial function. On one side there are the several political possibilities: the politics of unbridled aggrandizement, the politics of enlightened interest, the politics of disinterested service, the politics of counting noses, the politics of striking bargains, the politics of subserving ideals. On the other side there is the singular juridical standard, compounded of consistency in "employing the method of reason as far as it could be pushed,"[40] candor and clarity of expression, and impartiality in decision-making. Without reason, candor, and impartiality, a judge is no part of a judge, since those attributes are emblematic of the office itself. Depending upon the type of politics being played, however, a politician might find these very things more a burden than a glory.

Can constitutional law, then, ever achieve a significant composition of the two halves of its divided nature? Alternatively, is it doomed to a split personality, or the even worse affliction of an institutional schizophrenia? The clash of opposites in human affairs can be, beyond peradventure of a doubt, deep and obdurate. There is this striking reminder from a distinguished scribe: "There are conflicts, the reconciliation of which lies beyond the powers not only of human effort

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39 Lief H. Carter, *Reason in Law* (Boston: Little, Brown and Company, 1979), pp. 205–208.

40 Bickel, *supra*, note 9 at p. 23.

but of human rational conception."[41] One would have to play Pangloss to deny the existence of such conflicts. Fortunately, the tension between law and politics inherent in constitutional adjudication need not become one of them. The conditions of reconciliation are not beyond the reach of "human effort," let alone "human rational conception."

We need to begin with a stable centre of investigation, a fixed point of reference. Let a lay deacon advance the juridical dimension as a prime candidate for this role. Certain "courtly attributes"[42] may not be abandoned by judges, no matter how political their function otherwise becomes. Among these attributes are the following:

1. an appeal to the bar of reason through analytical coherence;
2. a conspicuous attempt to dispense justice irrespective of persons; and
3. care taken to render an intelligible principle of decision.

These irreducibly and distinctively judicial characteristics, although minimal, are of paramount theoretical and practical importance. They mean that politics, only as *it is sometimes practised and conceived*, can be complementary, rather than contradictory, to the judge-made law of the constitution. In the round, the politics of rewarding the faithful, of ratifying the existing distribution of power and influence in society, of never afflicting the comfortable, seems, *prima facie*, ruled out—on grounds of redundancy alone. Partisan politicians in particular, and governing officials in general, are so assiduous on these matters as to require little extra help, especially from constitutional guardians.

7. COMBINING LAW AND POLITICS

The lord high priests of constitutional law have a superior vocation and they should be judged accordingly. At the least, the politics of constitutional law ought to rise above the drive for power and its appetitive satisfactions. At the best, the constitutional judiciary should

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41 G.K. Chesterton, "Charles Dickens An Early Essay 1903" (1985), XI The Chesterton Review 415 at 418.

42 Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), p. 20.

practise "principled politics".[43] Even though it evades exact definition, the term "principled politics" still connotes a species higher than the common "garden-variety art of the possible."[44] With distressing frequency, ordinary politics validates the cynical claim of Plato's Thrasymachos that, "Justice is the interest of the stronger." All the greater reason, therefore, for constitutional politics to represent a more intimate correspondence with "the better angels of our nature."[45] What are fundamental constitutional principles if not generic appeals to this effect? It is scarcely too much to demand that judges respect the spirit of these appeals in specific applications to particular cases. The Canadian polity, for example, did not entrench a *Charter of Rights and Freedoms*, and establish a section 15 as its arguable centrepiece, for the purpose of perpetuating invidious stereotypes and endemic inequities. This should not be lost on judges, but if it is, then "let them be severely brought to book, when they (thus) go wrong, but by those who will take the trouble to understand them."[46]

An adequate understanding of the judiciary would surely encompass a recognition of its limitations as well as its possibilities. The tools of the judicial craft both legitimize and limit the power of the judge. The necessarily judicial quality involved in deciding constitutional issues operably restricts the inevitably political role. In a simile much to the liking of the present correspondent, the performing of policy-making tasks with judicial tools "is roughly akin to the assignment of playing baseball with a billiard cue."[47] (This mismatch virtually assures a low batting average, highlighted by an inordinate number of foul balls). The more prosaic consequences are several. For one thing, judges are inapt agents of distributive justice. Courts are ill-suited either to apportion social benefits or to levy social burdens. They manifestly lack the legendary legislative capacities for the raising of revenue, the marshalling of resources, the gathering of information (not to mention logrolling, horse-trading, and pork-barreling). Nor

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43 Bickel, *supra*, note 9 at p. 23, "Principled politics", as employed in the present context, should not be confused with "neutral principles", a misleading, and oft-misused, concept. See G. Edward White, *Earl Warren: A Public Life* (New York: Oxford University Press, 1982), especially the concluding chapter.

44 Bickel, *supra*, note 9 at p. 23.

45 The Lincolnian phrase is surely apt, especially as it serves to remind us that all three forms of politics can manifest themselves in the career of any single political leader.

46 "Learned Hand" (1964), 5 The Supreme Court Review ii.

47 McCloskey, *supra*, note 42 at p. 22.

is a lawsuit a notably supple instrument for striking balances between contending groups. The adversary system, with its elements of disjunction and finality, makes it difficult to dispense those half-loaves so crucial to the success of group diplomacy.

The politics of raw power, unleavened by principle, lies below the proper plane of constitutional law. But the politics of conciliation, if placed correctly, does not. At this middle tier, there are really two rungs. The lower of these entails the balancing and reconciling of conflicting social demands, especially those pressed by well-organized interest groups. For reasons indicated earlier, the judicial foothold at this level would be less than secure. The higher rung in the politics of conciliation, however, represents a more comfortable judicial niche. This is the elevation on which, instead of the competition of interests, a collision of values would occur. Here the balancing function of the judiciary has been traditional.

As guardians of the constitution, the justices "are charged with maintaining the most fundamental balances of society: between centralization and localism, between liberty and authority, and between stability and progress."[48] By virtue of this commission, they must endeavor to reconcile "the recurring contrapuntal themes of government under law: innovation and continuity, popular will and imposed restraints, practical reason and categorical imperatives."[49] In a particular case decided recently, the Supreme Court of Canada has confirmed its recognition and acceptance of this role as a balancer of values. The case was one that resulted from Neil Fraser's personal crusade against the metric system. While still in the public service, he had launched thunderbolts against the then Liberal Government's plan to establish metres, and such, as the yardstick—so to speak—of Canadian measurement. Thus regarded as insubordinate, he was dismissed from public employment. Pre-*Charter* in its origins, the case nonetheless implicated the social value of freedom of expression. Cast against this value, though, would be the need for internal governmental cohesion in the implementation of authorized public policy. Given the circumstances of the instant case at bar, it probably did not tax the Court to rule against Fraser. Of greater moment are the clarity and candor of the views, expressed for the Court, by Chief Justice Brian Dickson. He wrote that freedom of expression, although a fundamental value, was not absolute; indeed, perhaps no values were absolute, given that

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48 Robert H. Jackson, quoted in Dean, *supra,* note 10 at p. 14.

49 Paul A. Freund, quoted in Dean, *supra,* note 10 at p. 110.

they had to be balanced against other competing values. Therefore, it devolved upon the Court to weigh values and to strike balances between them.[50]

"Practical reason", operating to discount "categorical imperatives", would point directly to Chief Justice Dickson's conclusion. Under the *Charter*, moreover, there is sound warrant of authority for it in section 1. According to one persuasive line of analysis, "the adjucation process suggested by section 1" unfolds in two stages: "The courts must first characterize the 'matter', or primary thrust, of the impugned law. If they find that it is directed at or effects a guaranteed right, the courts must then balance the competing interests involved."[51] (It is important to note that, in present context, "competing interests" means colliding social values.) In guarding the guardians, especially in monitoring the judiciary's performance of this "critical job,"[52] something else is even more noteworthy. Now that "what is at stake are values and the balancing of interests,"[53] and now that "the *Charter* has turned these value choices over to the judiciary,"[54] Canadian Supreme Court justices are engaged more than ever in a policy-making role as *complex* as it is elevated. "For there are levels of policy; and in Supreme Court litigation, values, like troubles, come not single file but in battalions."[55]

From the beginning, the Supreme Court of Canada, albeit as a tribunal of penultimate resort until 1949, has exercised responsibility for maintaining the balance "between centralization and localism" in its role as an umpire of federalism. Under the statutory Bill of Rights of 1960, the Court, albeit in largely inferior fashion, struggled with striking the balance "between liberty and authority." With the advent of the *Charter*, the Supreme Court is now, in the full sense, the arbiter of Canadian constitutionalism. As determined and deserving forces

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50 A pre-*Charter* issue of freedom of expression could hardly have hinged upon the value in question being absolute, given the fact that, even with entrenchment, "section 1 makes it clear that none of the guarantees contained therein are absolute." See Claire H. Beckton, "The Impact on Women of Entrenchment of Property Rights in the Canadian Charter of Rights and Freedoms" (1985), 9 Dalhousie Law Journal 288 at 310.

51 Neil Finkelstein, "The Relevance of Pre-Charter Case Law for Post-Charter Adjudication" (1982), 4 Supreme Court Law Review 267 at 268–269.

52 Finkelstein, *supra*, note 51 at p. 273.

53 A. Wayne MacKay, "Fairness after the Charter: A Rose by any Other Name" (1985), 10 Queens Law Journal 263 at 333.

54 *Ibid.*, p. 334.

55 Freund, quoted in Dean, *supra*, note 10 at p. 128.

muster in the ranks of the aforesaid "battalions of values" that prepare to march upon the Court, the justices will need to summon reserves of philosophic sophistication as well as legal acumen. The balances will grow more intricate, the Court's task more taxing, public expectations more demanding, professional scrutiny more exacting, political criticism more searching. One can only say, "Just so", on every single count.

8. LESSONS TO BE LEARNED: PORNOGRAPHY AS AN EXAMPLE

A prospective case in point is the issue of pornography. Consider the following chain of reasoning by way of illustration. Pornography falls outside the old frame of liberty versus authority. It is not a stock question of freedom of expression versus the power of censorship, or, to speak more precisely, it is not *simply* that. Freedom of expression is hardly uniform in purpose and quality, and social order is not the only other value involved. In this vein, such comments as these are somewhat instructive, as far as they go:

> Cultural expression, including alleged pornography, is a harder issue (than the distinction between commercial speech and political communication). Although sexual identity and expression are incredibly important, (nonetheless) they are analytically separable from protection of the overall process of democratic self-governance.[56]

> The issue stands at the intersection of a number of competing rights, such as the expression interest of the user, the privacy interest of the unwilling viewer, and the right of the community to maintain certain standards of morality.[57]

This constitutes the beginning, not the end, of understanding on pornography.

The issue embraces the *Charter*'s entire trinity of values: liberty, equality, and community—especially equality. In the matter of curtailing expression to curb pornography, a woman's right to personal dignity, as an equal member of the community, deserves priority. Equality is *the* women's issue, and pornography claims victims: women.

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56 Sanford Levinson, "Princeton Versus Free Speech: A Post Mortem," in *Regulating the Intellectuals: Perspective on Academic Freedom in the 1980s,* Craig Kaplan and Ellen Schrecker, eds. (New York: Praeger Publishers, 1983), p. 203.

57 Finkelstein, *supra,* note 51 at p. 275.

But they are not actually the only ones who suffer. Pornography degrades women, dehumanizes men, and diminishes the whole community. Against a battalion of values comprising equality, dignity, humanity, and community, the putative freedom of the commercial pornographer seems a slender column of little force and less credit. If judges do not know this lesson, then let them learn it. If they know it, but others do not, then let them teach it.

The last portion of the example raises the analysis to the third tier of politics. It is on this uppermost level that the magisterial function—the teaching role—of political leadership operates. The incidence of this form of public education is rare, but there, as elsewhere, rarity and worth are directly proportional. To the public at large, the idea of judges as tutors in civic virtue might seem a rather curious notion. Granted, it is more a scholar's concept than anything else. But, that aside, it makes a certain amount of sense. An appellate court, in particular, takes on an academic character. Supreme Court justices, and their bright young clerks, are less "little law firms", than they are scholars and scholar's apprentices. The Court, as a whole, resembles a university department of jurisprudence. The number of academicians who have served on the Canadian Supreme Court since 1949 might lend credence to this view. The best frame for the idealized picture would be this passage:

> The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.[58]

Compared to other governmental agencies, the ambiance of a Supreme Court is sequestered and contemplative. At least the prerequisites for learning and teaching are present.

Beyond the gaining of power, beyond the balancing of political forces, beyond the weighing of social values, lies the summit of politics. It consists of the enterprise, purpose, and high resolve requisite for the concrete realization of the common good. Its animating ideals are the lessons of liberty, equality, and community. Clearly these lessons are not the exclusive province of any single group or institution. But their verbal signposts are in the Constitution, and judges are the official constitutional interpreters. If the Constitution is the bible, then Supreme Court justices are its anointed exegetes. I concur with my

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58 Eugene V. Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law* (New Haven: Yale University Press, 1962), pp. 167–168.

colleague, Professor Wayne MacKay, that the work of making constitutional law is not mainly about the words in the constitutional text.[59] Rather, one would suggest, it much more concerns words about the words in the text, as the Judicial Committee's suzerainty over the *British North America Act* (as it then was) all too well illustrates. Words about the words of the Constitution can be the chief mode of instruction in our common political ideals. The quality of their choice can determine the difference between the thing done well or the thing done ill.

Let the justices preach sermons based upon the constitutional bible (it is foreordained that they do so). But if these homilies ring hollow, or simply miss the mark, then let them hear sharp criticism from the "schools of theology," the "clergy in the parishes," the "deacons" (drawn from various disciplines), and "the faithful" in general. Let them be taken to task by a "Church Militant" ecumenical enough to adopt an American-style assertiveness:

> I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is a careful scrutiny of their action and fearless comment upon it.[60]

Supreme Court justices are not infallible dispensers of sacred doctrine. That myth has long since evanesced. But they can be, at the top of their form, on the summit of politics, public educators and moral preceptors. Heightened responsibility goes with heightened authority, for "of those to whom much is given, much is required." Having given judges guardianship of the Constitution, should we require less of them than to provide tutelage in the curriculum of constitutionalism itself? Cast in this light, constitutional judgments are not just legal writs.

> [T]he opinion is a piece of rhetoric and of literature, intended to educate and persuade. In the clearest possible way, it represents the conception of the judges speaking directly to the people, as participants in an endless public conversation on the nature and purposes of law in all its applications.[61]

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59 MacKay, *supra*, note 53 at pp. 332–334.

60 Harlan Fiske Stone, (1961) 2 The Supreme Court Review ii.

61 Rostow, *supra*, note 58 at p. 88.

This perspective, we would want to emphasize, envisions the educational process as a two-way, give-and-take affair, an irenic exchange between "Judge and Company."

Being learned in the law, as with the mastery of any demanding profession, inclines one toward a narrowness of outlook. Conversely, electoral success and legislative skill seem the special preserves of the supple generalist. Where the principle of power holds sway, the political generalist is most at home. But where the power of principle comes into play, the attributes of the legal specialist are not inapposite. The discipline of reason, the virtue of fairness, the habit of impartiality—the worthy jurist's second nature, the marks of someone in the grip of the judicial function—could comport easily with the politics of principle. On these terms (especially, if not exclusively), law can remain true to its own best self and still be reconciled to politics, "using the word in its noble sense." To reiterate a crucial point, why insist upon anything else?

No matter how lofty the version, constitutional law *is* politics, and the latter, no less than law in general, can be a logocracy, in which words are monarchs, not subjects. As Disraeli said, "With words, we govern." The terms of the *Charter of Rights and Freedoms*, in common with constitutions everywhere, are provisions of "enumeration not definition."[62] Only by means of constitutional adjudication will they acquire definition. One would not make a serious claim that the *Charter* reflects a compendium of the combined wisdom of the ages. It does symbolize certain values deemed worthy of special custody. The prime *Charter* value is, plausibly, the right to equality, and the leading egalitarian issue is, just as plausibly, women's equality. But what does equality mean? Judges, as their capacities allow, must learn, before they can teach, the meaning of equality. In the current Canadian context, nothing can substitute for an enlightened, common sense definition. The essential elements are not difficult to comprehend. Invidiously discriminatory treatment—of women and the handicapped, of the disadvantaged and the vulnerable, of the differently disposed and the contrary minded—has no place in Canadian law and life. As a necessary corollary, positively differential treatment—that which vindicates, rather than vitiates, the guarantee of equality—has presumptive validity.

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62 The Marshallian formulation, applied to the powers of the United States Congress under the American Constitution, would readily fit the rights and freedoms guaranteed by the *Charter*.

It is vital that Canada's constitutional definitions meet the fair test of enlightened common sense. A war cry is not to be confused with the war itself, and a catchphrase is not coterminous with the cause that it is expressed to support. But it would be folly to gainsay the truth of this proposition: "In politics, words are map coordinates that show on whose territory a battle is being fought."[63] Accordingly, appellate judges, in the selection of words to define constitutional values, ought not to be left solely to their own devices. The lecture hall and the seminar room, the bar association and the trial court, the popular press and the political arena—compositely, the public forum of informed critical opinion—should contribute to "educating the educators." Then, even as the judges affect, guide, and "school" the play of interest, opinion, and idea in the nation, they, in turn, will be affected, guided and "schooled".

In constitutional development, there is most often much to learn. Cearbhall O'Dalaigh, who as Chief Justice of Ireland would exercise an impressive magisterial influence upon the course of constitutional law in the Emerald Isle, remarked earlier in his career: "We have a Constitution but no one knows what it means."[64] Although it is likely that he would be too discreet to do so, Chief Justice Dickson could be forgiven if he were to say the same thing about the *Charter*. Our own process of enlightenment will require, to put it grandly, a constitutional colloquy between the Court and the country. Optimally, it would encompass justices who will listen as well as pronounce, and critics who will evince comprehension of the ineradicable difficulty in "playing baseball with a billiard cue," even as they find fault with the performance on the field.

The formal regimen of the law, culminating in a written record of the reasons for judgment, shapes and directs judicial participation in the constitutional dialogue. Rationality of argument and analysis, objectivity respecting the facts and circumstances of a case, and impartiality regarding the persons at the bar of justice, are accepted standards of judicial conduct. Collectively they convey a coherent sense of judicial obligation. But what about the other side of the colloquy? Is it possible to derive a semblance of coherence from the welter of critical opinion, as catholic as we have called for it to be? The process of guarding the guardians of the Constitution might benefit from a canon of judicial criticism. Some suggestions for inclusion follow.

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63 Gregg Easterbrook, "Ideas Move Nations," The Atlantic, Jan. 1986, p. 80.

64 The quotation is from a fine piece of Irish legal journalism. See Colm Tobin, "Inside the Supreme Court," Magill, Feb. 1985, p. 11.

9. ADVICE TO JUDICIAL CRITICS

Be discerning. Judicial critics should discern that "the Janus-like role of the Supreme Court"[65] resides at the core of constitutional adjudication. Given its duality, the role will resist analysis that is either purely legalistic or indiscriminately political. Concentration upon one aspect to the exclusion of the other distorts the picture by mistaking a part for the whole.

Be empathetic. In Cardozo's words, "the great tides that engulf the rest of the community do not turn in their course and pass the judges idly by."[66] If judicial reasoning remains close to the fundamental concepts of society, and if, indeed, judges tend to work from the postulate of an unquestioned social order, then they have a good deal of respectable company. By the same token, it is not without precedent for judicial institutions to accommodate the main currents of social change in their time and place. The "O'Dalaigh Court", and the "Warren Court", in Ireland and America respectively, would serve as probatory instances in this regard.

Be realistic. "The question is not whether the courts can do everything but whether they can do something."[67] Similarly, it is instructive to recall that "courts make law at retail, whereas legislators make it wholesale."[68] Judicial review, by its nature, is more useful for putting a stop to a particular governmental practice than it is for setting a positive course of general public policy. Do not expect too much of the courts, but do not settle for too little. On the scale of judicial expectations, "*virtus stat in medio.*"

Be prudent. One need not be a "Benthamite with a vengeance" to subscribe to this proposition: "There are no absolutes that a complex society can live with in its law."[69] Such hardy maxims as, "Your right to swing your fist stops at the point of my jaw," and "So use your own so as not to harm that of another," remain of continuing importance as practical articles of social peace. They serve to remind us that the balancing of contending social values is a necessary task of those who govern. To perform this task is neither governance at its most elegant nor at its shoddiest.

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65 Mason, "Myth and Reality in Supreme Court Decisions" (1962), 48 Virginia Law Review 1385 at 1404.

66 Cardozo, *supra,* note 7 at p. 168.

67 Freund, quoted in Dean, *supra,* note 10 at pp. 150–151.

68 Freund, quoted in Dean, *supra,* note 10 at p. 142.

69 Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), p. 88.

Be somewhat confident. Nothing so disciplines criticism as the reasonable prospect that it will achieve results. The reverse also holds true. Nothing exceeds like excess bred of despair of ever having an effect. The notion that the insulation of the judiciary from the electoral process automatically renders it immune to criticism can be self-defeating. Consider the implications of the following sequence of thought. Judges are "gastronomic jurisprudes",[70] and since we cannot dictate their breakfast menus, it does not matter what we say. Therefore, we might as well say anything we like, however extreme it may be. This seems a formula, not only for the failure of criticism, but, what is worse, for the forfeiture of the contest before it even takes place. Once again, self-fulfilling prophesy looms as a genuine danger, albeit an avoidable one. It is better, therefore, to proceed on a different set of assumptions. An historically warranted tenet is that "public concurrence sets an outer boundary for judicial policy-making; (and) judicial ideas of the good society can never be too far removed from the popular ideas."[71] However much we must abide by "the final say" of "the court of last resort" on the meaning of the constitution, the formation of the constitutional consensus is not a process that judicial critics are powerless to influence. Ultimately, we are bound by a constitutional dispensation that—in subtle ways, perhaps—we have helped to shape. If there is an element of belief in this view, then let it stand as an article of faith in the Church of Constitutional Law.

Be unselfconscious and outreaching. Alas, it is not possible to exempt judicial criticism from the general impeachment that "all criticism tends too much to become criticism of criticism."[72] As a corrective measure, we should try to remember that bringing the learned judges to book, not scoring intramural points, is the main event. Public law is not some ideological or methodological parlor game. It is, to borrow a familiar phrase, "the nation's business." It requires and deserves critical commentary of range and depth. To form such a corpus of opinion, which would temper together the requisite elements of diversity and authority in its collective viewpoint, demands much effort, great determination, a resourceful, skillful, and constant outreaching. If this requires crossing the lines of disciplines, ideologies, and

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70 J. Woodford Howard, Jr., *Mr. Justice Murphy: A Political Biography* (Princeton: Princeton University Press, 1958), p. 475.

71 McCloskey, *supra,* note 42 at p. 22.

72 Sylvere Monod, "G.K. Chesterton on Dickens and the French" (1985), XI The Chesterton Review 479.

methodologies, then so be it. If this even requires sometimes cutting across the grain of one's own discipline, ideology, or methodology, then so be it.

Be systematic and comprehensive. As there are different versions of politics, so there are different views of law. It is important to canvas, without exception, if not without prejudice, the various possibilities in each category. In the ancient perspective, expressed by Aristotle, "Law is reason unaffected by desire." In the medieval perspective, expressed by St. Thomas Aquinas, "Law is an ordinance of reason for the common good." In a modern perspective, expressed by the American constitutional scholar, Bernard Schwartz, "Law is reason codified by experience." Politics is the exercise of power to satisfy the "unruly passions," unchecked by either reason or virtue. Politics is the conciliation of interests, tempered by the "calm passions" of prudent calculation. Politics is the pursuit of the common good, sustained by the public-spirited practice of civic virtue. How can what is essential to law be reconciled with what is attainable in politics? That is the question that can be neither fairly dodged nor readily answered. It needs to be addressed with intellectual openness as well as analytical rigor. That is a taxing combination, but, then again, so is the subject matter—the "curious hybrid," the study in ambiguity, which we call "constitutional law".

In applying these, or other, canons of judicial criticism, it is useful to bear in mind the generic quality of Canadian politics. Muddling through the middle would not be an inappropriate description, nor is it the worst form of politics. It is a relief, although not a triumph, that winner-take-all power contests do not constitute the Canadian norm. Given the status and content of the *Charter*, the courts' early record under it, and a perceptibly changed "*Zeitgeist* of the legal community,"[73] there appears to be the capacity, will, and climate for preventing matters from getting worse. The rights of linguistic minorities, to cite an always important Canadian concern, scarcely seem at the mercy of overbearing majorities. Based upon the recent record, it is fair to say that "the Canadian judiciary will be very activist in interpreting language rights."[74] This helps to hold an historic line, the breaching of which would lower the level of Canadian public life in default of its founding obligations.

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73 Russell, "The First Three Years in Charterland" (1985), 28 Canadian Public Administration 367 at 372–373.

74 Russell, *supra*, note 73 at p. 383.

But what about moving in the opposite direction—toward improving the tone and temper of government and politics in Canada? Can the Supreme Court of Canada become something better than a caretaker of Canada's compromises? Can it serve as more than a red-robed fire brigade? Can nine justices, at the apex of our constitutional system, make a significant contribution to *raising* the level of politics? It is early in the day, indeed, for anyone to speak conclusively on this point. One thing, however, seems clear. If the Constitution is to prove a "charter of learning,"[75] then there must be a teaching order to impart its more demanding lessons, especially those that appertain to commutative justice. Conventional politicians are highly unlikely to take the necessary vows. Among the estimable qualities of elected officials, a taste for teaching difficult subject-matter does not spring first to mind. On these terms, the judiciary may become a faculty-by-forfeit. One could wish it worse fates and, with a little help from their friends, as Mayor Daley would say, the justices might enjoy fair prospects for success in the magisterial role.

In public lectures, learned journals, and bar reviews, Canadian scholars have proclaimed and endorsed the educational potential of the *Charter*. As one academician has suggested, the *Charter* could provide a medium through which "the citizens of a fragmented society may achieve an integrating collective sense of themselves from their common possession of rights and the availability of a common language of political discourse."[76] Another, reflecting upon the views of the first, has stated that "the *Charter of Rights* may be having its most significant but most inscrutable impact on the thinking of citizens."[77] In the words of a third authority, "this educational function of the *Charter* is one of its major purposes. It strengthens and clarifies our inherited traditions of freedom, as well as underlining the bilingual and bicultural, indeed multicultural, character of the country."[78] The

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75 For an interesting application of this idea to Ireland, there is this comment from J.C. Casey in "The Development of Constitutional Law under Chief Justice O'Dalaigh" (1978), Dublin University Law Journal 3 at 20: "In Ireland the *concept* of the judge as teacher may be novel; but *the role* has been performed most effectively."

76 Russell, *supra*, note 73 at p. 396.

77 *Ibid.*

78 Gerard La Forest, "The Canadian Charter of Rights and Freedoms" (1983), 61 Canadian Bar Review 19 at 23.

first two statements are from, respectively, the eminent political scientists, Alan Cairns and Peter H. Russell. The third comment comes from none other than the Supreme Court's newest member, Mr. Justice Gerard La Forest. At a minimum, such claims help to legitimate the instructive character of the *Charter* and the Court.

10. STANDARDS FOR JUDICIAL CRITICS

A crisp compendium of normative propositions relative to judging judges might run as follows. (One has resisted, but only barely, the temptation to call it a decalogue.)

1. Law is an ordinance of reason, and an instrument of governance, for the common good.
2. The formal cause of law—its essential character as an ordinance of reason—serves to frame one set of judicial obligations.
3. The final cause of law—its ordination to "the welfare of society"—serves to frame another, somewhat competing, certainly more comprehensive, set of judicial obligations.
4. The judiciary must not observe one category of obligations to the neglect of the other.
5. Constitutional interpretation must mean more than judges reading their own political views into the constitution.
6. An informed sense of self-restraint, induced by both professional concerns and political considerations, should hedge about the judiciary's "sovereign prerogative of choice" in deciding constitutional issues.
7. The judiciary serves best when it teaches rather than commands.
8. Justices of the Supreme Court should both lead and follow.
9. It is both necessary and proper that judges both reflect and shape a constitutional consensus representing the deliberate sense of the nation, the large-minded, public-spirited apprehension of its higher reaches of civility, justice, and community.
10. The justices are charged with the solemn duty of fostering civic-mindedness by precept and example.

If, as the lesson of history and the testimony of our senses tell us, judges frequently fail to fulfill these high ideals proclaimed for them, then, in a sense, they simply cease to be members of any exlusive club. They just join the rest of us, the common run of human beings,

for, as Dickens has Mr. Crook say of himself and the Lord Chancellor, "There's no great odds betwixt us. We both grub on in a muddle."

11. BY WAY OF APPLICATION

Individual work on a Supreme Court, as well as collective, must meet the dual test of both law and politics. As Russell says, "the judicialization of politics and the politicalization of the judiciary, which was predicted as a key consequence of the *Charter*, has begun."[79] It is of extreme importance to insist upon the intrinsic duality of the individual role. A judge must be neither crassly political nor exclusively legalistic. As before, the following would be the applicable set of considerations:

1. there are levels of politics;
2. there is a minimally acceptable standard of law;
3. a significant composition of the spheres of law and politics is imperative;
4. to be acceptably juridical, a judge must be selectively political.

The optimum *Charter* guardian, whether explicating equality or any other constitutional value, would envince learning in the law, a certain degree of political savvy, decent human instincts, and practical common sense.

A single judge, perhaps even more so than an entire court, can engage in "politics played with an eye to partisan advantage."[80] A single judge can take Trudeau's Jesuit school maxim, "reason above passion," and stand it on its head. A single judge can abandon the appearance of impartiality in favour of the advocacy of given interests in the struggle for power. A single judge can adopt the posture of a political weathervane, swift to catch and register the prevailing currents. But that person would hold the wrong office for this brand of politics. From one sworn to do impartial justice, it is unacceptable. At a level higher, a single judge can "forge a prudent accommodation out of the complexity of choice,"[81] balancing interests and values. Such a jurist might even receive the accolade, "a judge's judge."[82] In

79 Russell, *supra*, note 73 at p. 369.
80 Bickel, *supra*, note 9 at p. 23.
81 Howard, *supra*, note 70 at p. 486.
82 *Ibid.*, p. 487.

any event, the evenhanded avoidance of extremes is a respectable, if unexceptional, judicial course.

An individual justice can aspire to be more than a follower, more than a balancer. An individual justice can confront the constellation of political and social forces of the day and seek to change that configuration in a direction closer to a justifiable conception of the public good.[83] This is the best role for a judge, or, for that matter, for any political leader. But the adage, "*corruptio optimi pessima*," applies with full force here. The endeavor to essay a comprehensive explanation and application of the principles of the polity, especially by an individual justice, can corrupt into an exercise in hubris. As a safeguard, the judge who would teach worthily, must first learn well; and the judge who would learn well, must first study widely. Learn from life, as Holmes and Cardozo would say, and remember that there are more things in life than those bound by bench and bar. To that end, the more tutors, and the greater number of subjects, the better.

12. CODA

Constitutional law is a dualism comprising both politics and law. Politics and law, like their proximate correlatives, power and reason, can veer in different directions. But constitutional law, by its dualistic nature, requires some significant composition of its two strands. All things considered, this task of composition devolves upon the official constitutional interpreters, the guardians of the constitution: the judiciary. Since the judges constitute a privileged class—an unelected elite exercising policy-making power—we must seriously concern ourselves with ways to guard the guardians. To that end, there are a number of interlocking propositions, in the twofold scholastic sense of arguments to be made and tasks to be done. One is to widen and diversify the range of judicial criticism. Another is to find an accepted standard of law against which to measure judicial decisions and opinions in constitutional cases. A third is to select acceptable standards of politics to bring to bear upon constitutional judgments. A fourth is to frame a canon of judicial criticism, according to which various viewpoints could forge some coherence and cohesion.

Illustrative of the first proposition is the instant piece, the work

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83 This concept of leadership has gained expression in the impressive corpus of work by the political scientist James MacGregor Burns. See, *e.g.*, *Roosevelt: The Lion and the Fox* (New York: Harcourt, Brace and Company, Inc., 1956).

of a political scientist. Exemplary of the second proposition is the following notion. Judge-made law warrants a principled decision—an articulated judgment that is justified by its rationality, clarity, and fairness. Exemplary of the third proposition is this set of considerations. There are several different forms of politics. To engage in politics is to participate in the contest for power, with a view to partisan gain. To engage in politics is to referee the contest for power—to restrain the participants, with a view to their reconciliation. To engage in politics is to apply, justify, and refine the concepts that control the contest for power, with a view to promoting the common good. From a constitutional jurist, given the essentials of judge-made law, the first form of politics is unacceptable, the second form is unexceptional, and the third is invaluable. Exemplary of the proposed canon of judicial criticism is the counsel to undertake the enterprise in a spirit of empathetic realism, which would render one equally cognizant of both high responsibility and vast difficulty inherent in an office called upon to juggle law and politics.

13. CONCLUSION

In one vital respect, theory and practice, the normative and the empirical, are invariably related. The point is so simple and direct that it can easily get lost during inexpressibly complex debates over norms and values. Espouse what values you will, impose what norms you can—of politics and law, of justice and the common good, of fairness and equality—there is no denying the substantial capacity of the judiciary to accept, reject, or modify the standards in question. Concrete judicial decisions can deflect, as well as reflect, even the soundest concepts. Unless sustained criticism of the judiciary emanates from all points of the social compass, all positions on the ideological spectrum, and all manner of fields, an unfortunate consequence seems certain. Once again, with eminently foreseeable results, the elaboration of the constitutional framework will remain confided to a remote, unchallenged judicial *curia*.

The Church of Constitutional Law needs must adopt a syncretic creed, incorporating and integrating the beliefs and rituals, the precepts and practices, of sundry sources. It will not be a faith for the fundamentalist, the purist, the perfectionist. Instead, it will be for those who believe that grace builds on nature. For the nature of constitutional law will ever remain dualistic, simultaneously legalizing the political, politicizing the legal, and—with good will, good works, and good luck—uplifting the faithful.