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JUDICIAL REVIEW AND ABORTION IN CANADA: LESSONS FOR THE UNITED STATES IN THE WAKE OF *WEBSTER v. REPRODUCTIVE HEALTH SERVICES*

DONALD L. BESCHLE*

INTRODUCTION

In 1973, the United States Supreme Court held that the United States Constitution protects a woman's right to obtain an abortion free of state interference, except where state restrictions would serve to protect either the health of the woman seeking the abortion, or a fetus which had reached the point at which it might survive independent of its mother.[1] The detail with which the Court set forth its views on permissible and impermissible government action during each trimester of pregnancy[2] suggests that the justices hoped, if not expected, that *Roe v. Wade* would substantially resolve the divisive issue of abortion in the United States.[3]

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1. Roe v. Wade, 410 U.S. 113 (1973).

2. The Court set forth the following scheme:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164-65.

This language, together with the Court's finding that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks," *id.* at 160, has served as the basic framework for analysis of abortion restrictions since 1973. The detailed language was arguably unnecessary to the specific decision in *Roe* striking down the Texas abortion statute, a nineteenth century law which prohibited abortion without exception. The analysis of *Roe* is more central to the disposition of *Roe's* companion case, Doe v. Bolton, 410 U.S. 179 (1973), which invalidated Georgia's abortion statute, a more nuanced law, based on the American Law Institute's Model Penal Code, which permitted abortion where the pregnancy endangered the life or "would seriously and permanently" endanger the health of the pregnant woman, where the fetus was likely to be born with "a grave, permanent, and irremediable mental or physical defect," or the pregnancy was the result of rape. *Id.* at 183.

3. In the years immediately preceding *Roe*, four states (New York, Alaska, Hawaii and Washington) legalized abortions in early pregnancy, and fourteen (Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, Oregon, South Caro-

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That hope, of course, has not been realized. The right to secure an abortion still is fiercely opposed. Thus far opponents of *Roe* have not been able to secure its reversal; indeed, for over a decade subsequent decisions expanded the right beyond the strict confines of *Roe* itself.[4] Apart from direct courtroom challenges opponents of legal abortion have maintained indirect legislative attacks on the right by seeking to limit abortion as far as possible after *Roe*,[5] to complicate and thereby to discourage exercise of the right,[6] or to influence judicial selection with the long-term goal of reversing *Roe*.[7] Impassioned as the continuing debate is, it has been confined within generally accepted principles concerning the allocation of lawmaking power in the United States. The once controversial principle that the word of the Supreme Court is final on questions of constitutional interpretation is now firmly a part of our jurisprudence.[8] Much can be said in favor of such a principle. It has served to bring about or protect important social changes from the uncertain fate of legislative evaluation. These

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lina, and Virginia) had moved from strict prohibition, except perhaps for abortions necessary to save the woman's life, to the Model Penal Code approach discussed *supra* note 2. *See also* Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. ILL. L.F. 177 (1972). The New York statute was the most widely debated, both because of the prominence of the state and its sharp break with past law in flatly permitting any abortion up to the twenty-fourth week of pregnancy. *See* Comment, *The New York Abortion Reform Law: Considerations, Applications and Legal Consequences - More Than We Bargained For?*, 35 ALB. L. REV. 644 (1971).

4. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (invalidating requirements of consent by a woman's husband and by parents of a woman under 18); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (invalidating, among other things, a twenty-four hour waiting period, a requirement that abortions after the first trimester be performed in a hospital, and a requirement that the remains of an aborted fetus be given "humane and sanitary" treatment); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (invalidating requirements that a woman seeking abortion be given specific information which might lead her to change her mind, and setting high degree of care in abortions when fetus is possibly viable).

5. For a proposal to codify as much protection for the unborn as possible after *Roe*, and by doing so to possibly influence the Supreme Court to reconsider it, see Walker & Puzder, *State Protection of the Unborn After* Roe v. Wade: *A Legislative Proposal*, 13 STETSON L. REV. 237 (1984).

6. Not all state limits have failed to survive constitutional challenge. *See, e.g.*, Simopoulos v. Virginia, 462 U.S. 506 (1983) (upholding a requirement that some abortions be performed in hospitals); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (upholding requirement of second physician's presence for post-viability abortion and requirement for parental consent with alternative judicial consent procedure for minor's abortion).

7. The saliency of the membership of the Court as a political issue has risen and fallen throughout American history. *See generally* L. TRIBE, GOD SAVE THIS HONORABLE COURT (1985); D. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (1986). Of course, the anti-abortion movement has also advocated, more directly, a constitutional amendment to overrule *Roe*. *See* Hofman, *Political Theology: The Role of Organized Religion in the Anti-Abortion Movement*, 28 J. CHURCH & STATE 225 (1986).

8. Contrast the cautious assertion of the power of judicial review by John Marshall in Marbury v. Madison, 5 U.S. 137 (1803), detailing how it is necessary to allow the Supreme Court to carry out its function under article III, and the more sweeping assertion of judicial power in Cooper v. Aaron, 358 U.S. 1, 18 (1958): "The federal judiciary is supreme in the exposition of the law of the Constitution."

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social changes are generally acknowledged as beneficial or even essential.[9] Still, the benefits which come from a strong doctrine of judicial review are not without some costs.

Perhaps the most significant cost of a strong theory of judicial review is the risk that it will reduce, distort, or eliminate popular dialogue concerning the proper scope of rights and responsibilities of citizens in a democratic society. A paradox of a constitutional system that includes extensive antimajoritarian rights is that ultimately those rights rest on popular acceptance of and confidence in the overall system that balances the desires of communities to control their futures democratically against the fears that the community will oppress individuals or minorities. That acceptance largely depends on the extent to which the system is responsive, not necessarily in the sense of producing the outcomes favored by citizens, but at least in the sense of taking the citizens' concerns seriously and allowing them input in decisions about the allocation of power.

The bitterness and frustration evident in the continuing abortion controversy should be disturbing to those on both sides of the issue. Public discussion seems to consist overwhelmingly of the loud assertion of absolute or near-absolute positions on each side, with little genuine dialogue and even less genuine effort to forge an acceptable compromise position. Yet public opinion polls consistently show that the largest group of Americans belong to neither absolutist camp. To what extent is the failure to find an acceptable resolution of the issue due to the difficulty of the abortion question, and to what extent is it due to the structures within which the problem has been addressed in the United States?

On July 3, 1989, the Supreme Court upheld Missouri's enactment of several restrictions on abortion in the closely-watched case of *Webster v. Reproductive Health Services.*[10] Far more significant than the specific restrictions at issue was the clear suggestion by at least four members of the Court that, in whole or in part, the question of abortion will now be returned to the legislative arena.[11] Reaction to *Web-*

9. "[T]he most impressive thing in affirming the claims of judicial review is the operation of our history since its beginning . . . ." C. BLACK, THE PEOPLE AND THE COURT 23 (1960); *see also* L. HAND, THE BILL OF RIGHTS 1-30 (1958). For a thorough collection of essays, both new and historical, and a thorough bibliography on American judicial review, see A. MELONE & G. MACE, JUDICIAL REVIEW AND AMERICAN DEMOCRACY (1988).

10. Webster v. Reproductive Health Serv., 109 S.Ct. 3040 (1989).

11. "There is no doubt that our holding today will allow some governmental regulation of abortion . . . . But the goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from the ambit of the legislative process . . . ." *Id.* at 3058.

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ster has been swift, with one theme focusing on the undesirability of permitting legislative definition of the scope of individual rights.[12]

The United States, of course, is not the only nation with a generally admirable record of respect for individual rights. Neither is it the only nation to wrestle with the problem of the legal status of abortion.[13] As Americans prepare for legislative battle on the abortion issue, it may be helpful to examine how other western democracies are dealing with the same questions. Such an examination may reveal insights into not only the abortion issue, but also into the roles of judicial and legislative bodies in addressing questions of individual rights. In 1988 the Supreme Court of Canada struck down the Canadian statutory scheme regulating abortion, declaring the statute inconsistent with the Charter of Rights and Freedoms, the document at the core of Canada's new constitution.[14] The fact that the decision struck down legislative restrictions on abortion, and its dramatic illustration of the new powers of judicial review given Canadian courts by the Charter, indicate that Canadian constitutional jurisprudence is moving closer to that of the United States.

It would be a mistake to view the Canadian abortion decision as simply an example of our neighbors "catching up" to or learning from the United States. Canada's confrontation with the question of legal abortion should interest United States constitutional lawyers primarily because of what we might learn from the ways in which it differs from the balance of majoritarianism and individual rights maintained in the United States. This is not to say that the Canadian approach to judicial review is necessarily "better," either on the whole or in the particular context of its approach to abortion or other especially divisive issues. Nor is it necessarily to say that even if the system could be proven "better" in some objective way it should not necessarily be adopted by the United States. Differences in culture, beliefs and history, even between nations as similar as the United States and Canada, make wholesale changes in basic constitutional structures at least impractical, and very possibly unwise. Still, insight into the virtues of different approaches can be helpful in understanding the limitations of one's own, and lead not to the abandonment of a constitutional system, but a more sensible use of it.

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12. *See* Dionne, *On Both Sides, Advocates Predict a 50-State Battle,* N.Y. Times, July 4, 1989, at A1, col. 5.

13. *See* M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 13-24 (1987).

14. Regina v. Morgentaler, [1988] 1 S.C.R. 30. *See infra* note 77 and accompanying text.

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I. BACKGROUND TO *REGINA V. MORGENTALER*: JUDICIAL REVIEW IN CANADA

A brief description of judicial power under the Canadian constitutional system should aid in the understanding of the Canadian judicial response to the question of abortion. The differences between the constitutional histories of Canada and the United States are significant. To a great extent, this is due to the fact that independence came about through revolution in the United States, but by evolution in Canada.[15] The shift of sovereignty from London to Ottawa came about in stages through generally amicable legal and political processes, rather than the sharp, violent trauma of revolutionary war. Although the basic law of Canada has modified British precedent to accommodate the unique Canadian experience, particularly the bicultural, bilingual nature and history of the nation, English law has served as the primary model and source of Canadian constitutionalism. A particularly important part of this Anglo-Canadian model is the principle of parliamentary, or legislative, supremacy.

To a United States constitutional lawyer, no principle is more fundamental than the judicial power to invalidate duly enacted statutes of both federal and state legislative bodies upon a finding that the substance of the enactment violates the Constitution.[16] Implicit in this concept of judicial review are the principles that a final decision by the judiciary is binding on other branches of government, and that freedom is best protected by reliance on a written document, subject to change only through an exceptionally difficult amendment process, that acts as a bulwark against abuses committed during normal political processes.[17]

Traditional Anglo-Canadian theory is quite different. While judges may shape the law to conform with extra-legislative fundamental principles through manipulation of the common law and through

15. The "basic framework of the Canadian constitution" was provided by three British statutes: the Colonial Laws Validity Act of 1865, 28 & 29 Vict., Ch.63 (U.K.); the British North America Act of 1867, 30 & 31 Vict., Ch.3 (U.K.); and the Statute of Westminster of 1931, 22 George V., Ch.4. These enactments shifted sovereign power from Britain to its former colony. *See* G. GALL, THE CANADIAN LEGAL SYSTEM 46 (1977).

16. There are countless assertions of this principle. For one made in the specific context of a comparison of United States and Canadian approaches see Mosk, *The Role of the Court in Shaping the Relationship of the Individual to the State: The United States Supreme Court*, 3 CAN.-U.S. L.J. 60 (1980).

17. See the classic defense of judicial review set forth in Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). This "extraordinary power and position of the judiciary" has been described as "[t]he distinguishing characteristic of the American system of government." C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 23 (2d ed. 1959).

techniques of statutory interpretation,[18] courts have no power to invalidate duly enacted statutes on substantive grounds.[19] The absence of both the power of judicial review, and a single document setting substantive limits on legislative power is so alien to the United States constitutional lawyer that such an observer may see it as the absence of any fundamental law at all. Yet there is nothing in the concept of a constitution that makes substantive judicial review necessary. A constitution, to serve as such, must merely set forth how lawmaking power is to be exercised. It is, therefore, perfectly correct to view the traditional Anglo-Canadian system of allocating government power as a constitution, albeit one committed to the principle of parliamentary supremacy.

The theory of legislative supremacy does not reject the concept of individual rights. Contrary to theories supporting strong judicial review, however, legislative supremacy considers the ultimate source and guardian of those rights to be the people, acting through those branches of government most responsive to their concerns.[20] Judges, as well as kings, may deny the true rights of the people, and may do so in the guise of affirming other "rights" of their own choosing. If such decisions are final, the people have no direct recourse. If legislators were to try to do such a thing, according to this theory, they would promptly be turned out of office. *Vox populi* may not quite be *vox dei*, but it is the best approximation available.

The theory of parliamentary supremacy would appear to designate as the strongest of all rights, not the power of the individual to stand apart from community goals, but rather the power of the individual to share in shaping the community and its impact on citizens' lives. Of course, anti-majoritarian rights might be created within such a system, but they would clearly be subordinate to this primary right

18. Canadian courts occasionally used these techniques, in pre-Charter days, to move Canadian law toward positions felt to be more compatible with fundamental principles. *See* Days, *Civil Rights in Canada: An American Perspective*, 32 AM. J. COMP. L. 307, 310-12 (1984).

19. *See* P. HOGG, CONSTITUTIONAL LAW OF CANADA 197-203 (1985). Hogg and other Canadian constitutionalists rely on the classic work of A.V. Dicey in explaining the legal system of the United Kingdom. E.C.S. Wade, in his introduction to Dicey's work, summarizes the principle of parliamentary supremacy: "Parliament has the right to make or unmake any law whatever . . . . No person or body is recognized by the law of England as having the right to override or set aside the legislation of Parliament . . . ." A. DICEY, THE LAW OF THE CONSTITUTION xxxix-xl (10th ed. 1959).

20. Dicey contends "the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people" and that the fundamental purpose of representative government is "[t]o prevent the divergence between the wishes of the sovereign and the wishes of the subjects . . . ." A. DICEY, *supra* note 19, at 83. For a brief discussion of the political and legal culture underlying the Canadian doctrine of parliamentary supremacy, see MacDonald, *Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice*, 39 U. FLA. L. REV. 217, 220-30 (1987).

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to participate in the enactment of law and the delineation of the rights and duties contained in positive law.[21]

Canadian constitutionalism has built upon the foundations of parliamentary supremacy. The basic Canadian constitutional document, that which established Canada as a sovereign nation, was the British North America Act of 1867.[22] The BNA Act, renamed the Constitution Act of 1867 and still in effect, addressed the distribution of power in the new nation, particularly the division of authority between the national and the provincial legislatures of the Canadian federalist system.[23] Unlike the United States Constitution, the Constitution Act of 1867 enumerates powers of the provinces as well as powers of the national government.[24] It has often fallen to Canadian courts to decide whether the national government or one of the provinces has acted *ultra vires* and invaded the proper sphere of the other; courts have not hesitated to strike down legislation over the years on such grounds.[25]

The Constitution Act of 1867 does not, however, limit legislative power when exercised by the proper unit of government. Therefore, judicial review of the substance of legislation was unknown during most of Canadian history. Canadian courts might further their own conceptions of individual rights through creative use of the doctrine of *ultra vires* or the tools of statutory interpretation,[26] but there was no basis for them to explicitly invalidate acts of Parliament or provincial legislatures as infringements of individual rights.

After World War II, Canada, along with much of the rest of the world, expressed greater interest in explicit codification of human rights. In 1960, the Canadian Bill of Rights was enacted. The Bill recognized most of the freedoms found in the United States Bill of Rights, such as freedom of speech, religion and the press,[27] freedom

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21. Thus, Dicey defines the fundamental English right of personal freedom as the right "not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." A. DICEY, *supra* note 19, at 207-08. In other words this right (and others such as the right of free expression) are defined by the authority of Parliament, acting on behalf of the people.

22. British North America Act of 1867, 30 & 31 Vict., Ch.3 (U.K.).

23. The distribution of power is summarized in G. GALL, *supra* note 11, at 72-82.

24. The British North America Act of 1867, 30 & 31 Vict., ch.3, § 91, enumerates the powers of the national parliament. Section 92 enumerates exclusive powers of provincial legislatures. Provincial powers include fifteen specific items and, as subject 16: "Generally all Matters of a merely local or private Nature in the Province . . . ."

25. *See generally* P. HOGG, *supra* note 19, at 29-46. Decisions on grounds of *ultra vires* have sometimes had the effect of expanding individual rights. For example, the Supreme Court of Canada has invalidated provincial regulations involving speech and religion on the ground that those topics are allocated to the exclusive control of Parliament. *E.g.* Switzman v. Elbling, [1957] S.C.R. 285, 288; Reference *re* Alberta Statutes, [1938] S.C.R. 100, 132-135.

26. *See supra* notes 18 & 25.

27. An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 1960 8-9 Eliz. II, ch. 44 (Can. Stat.) § 1(c)-(f).

from arbitrary arrest, cruel and unusual punishment, self-incrimination and other abuses of the criminal law process,[28] and the right to equal treatment under the law.[29] While the language of the Canadian Bill of Rights is at least as expansive as that of the analogous provisions of the United States constitution, the Bill did not bring about a great shift of power to the Canadian judiciary.

The Canadian Bill of Rights had the legal status of an ordinary Act of Parliament. In keeping with the principles of Canadian federalism, it applied only to actions of the national government, not to the provinces.[30] As a statute, it was subject to amendment or repeal through normal legislative action.[31] And, as a statute, it had to be reconciled with other legislation. In the 1969 case of *Regina v. Drybones*,[32] the Canadian Supreme Court held that the Bill of Rights was intended to be given special status, and to invalidate all inconsistent national legislation, prior or subsequent.[33] The grant of such "quasi-constitutional" status to the Bill of Rights[34] had great potential to expand Canadian judicial power. But, to the disappointment of several commentators,[35] Canadian courts, perhaps intimidated by *Drybones's* sharp break from the tradition of parliamentary sovereignty, continued to defer to specific parliamentary enactments despite their alleged violation of the Bill of Rights.[36]

Many Canadians were troubled by their lack of a bill of rights with full constitutional status. Foremost among them was Pierre Trudeau, the former law professor who became prime minister and dominated Canadian politics for over a decade.[37] This concern, added to serious concern about the proper balance of power between the national government and the provinces and the vestigial colonial absence of a procedure for amending Canadian constitutional documents with-

28. *Id.* § 2.

29. *Id.* § 1(b).

30. "The [substantive rights] provisions . . . shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada." *Id.* at § 5(3).

31. The Bill provided that Parliament could expressly declare a subsequent law of Canada to "operate notwithstanding the Canadian Bill of Rights." *Id.* at § 2.

32. 9 D.L.R.3d 473 (1970).

33. *Id.* at 485. The Court did not discuss its basis for concluding that the Bill of Rights made "inoperative" conflicting legislation. On its face, the Bill of Rights purports to control both prior and subsequent acts of Parliament, but control of future parliamentary actions is inconsistent with general principles of parliamentary supremacy. See the discussion of the issue, and of *Drybones*, in P. HOGG, *supra* note 19, at 435-38.

34. *See* Gold, *Equality Before the Law in the Supreme Court of Canada: A Case Study*, 18 OSGOODE HALL L.J. 337, 357 (1980).

35. *E.g.*, Days, *supra* note 18, at 323-28; Schmeiser, *The Role of the Court in Shaping the Relationship of the Individual to the State: The Canadian Supreme Court*, 3 CAN.-U.S. L.J. 67 (1980).

36. *See* Days, *supra* note 18, at 325-28; Schmeiser, *supra* note 35, at 71-75.

37. *See generally* D. MILNE, THE NEW CANADIAN CONSTITUTION 23-46 (1982).

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out the consent of Great Britain,[38] led to the adoption of the Constitution Act of 1982.

Most debate concerning the new Canadian constitution focused on the proper balance of power between the provinces and the national government. Quebec's concern for the preservation of its French language and culture presented particular problems.[39] While these issues of federalism and their resolution are of great significance, it was the adoption of the Charter of Rights and Freedoms[40] which most significantly altered the role of the judiciary in protecting individual rights.

Individual rights guarantees are set out in sections two through twenty-three of the Charter. Section two protects those freedoms guaranteed by the First Amendment to the United States Constitution, that is, freedom of religion, expression, assembly and association.[41] Sections three through five deal with "democratic rights," protecting the right to vote and requiring that the House of Commons and provincial assemblies be elected at intervals of no more than five years.[42] Section six secures "mobility rights," roughly comparable to what United States courts have called the right to travel.[43]

Sections seven through fourteen deal with "legal rights." Section seven guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[44] Sections eight through fourteen deal with specific matters of criminal procedure, including the right to counsel,[45] security against unreasonable searches,[46] and prohibition of cruel and unusual punishment.[47]

38. Perhaps the thorniest legal issue in the creation of the new Canadian Constitution was the question of just how, given the vestigial powers of the British Parliament over the Canadian Constitution, Canada could properly go about securing constitutional change. *See* Colvin, *Constitutional Jurisprudence in the Supreme Court of Canada*, 4 SUP. CT. L. REV. 3 (1982).

39. The "Quebec problem" was the most prominent political obstacle to constitutional reform. *See* D. MILNE, *supra* note 37, at 46-103, 135-164.

40. Part I of the Constitution Act, 1982, Canada Act, 1982, ch.11, sched. B (U.K.) [hereinafter Canada Act, 1982].

41. Specifically, "(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association." Canada Act, 1982, § 2.

42. Canada Act, 1982, §§ 3-5.

43. Specifically, "mobility rights" include the right to enter, remain in and leave Canada and the right "to move to and take up residence in any province." Canada Act, 1982, § 6. The right to interstate travel is implied in the United States Constitution. *See* Edwards v. California, 314 U.S. 160 (1941).

44. Canada Act, 1982, § 7.

45. "Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right . . . ." Canada Act, 1982, § 10(b).

46. Canada Act, 1982, § 8.

47. Canada Act, 1982, § 12.

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Section fifteen gives every individual "the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[48] Sections sixteen through twenty-three deal in great detail with language rights, a subject of great importance both to the francophone minority nationwide and the anglophone minority in Quebec.[49]

In addition to these sections enunciating individual rights, several charter provisions are of great significance in establishing the framework for interpretation and enforcement of those rights. Section thirty-two provides that, unlike the Canadian Bill of Rights, the Charter limits both Parliament and the provincial legislatures.[50] Section one, on the other hand, provides a basis for judicial deference to legislative decisions. It establishes that Charter rights are not to be considered absolutes, but are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[51]

The most important departure from the United States model of constitutional protection of civil liberties is found in section thirty-three of the Charter. In keeping with the Anglo-Canadian tradition of parliamentary supremacy, that section provides that Parliament or a provincial legislature may expressly declare in a piece of legislation that it will be effective "notwithstanding a provision included in section two or sections seven to fifteen . . . ."[52] Such a declaration expires in five years, unless it is re-enacted.[53] Thus, although Canada has, for the first time, established the power of courts to invalidate statutes based on their inconsistency with constitutional guarantees of individ-

48. Canada Act, 1982, § 15. A subsection specifically permits government activity "that has as its object the amelioration of conditions of disadvantaged individuals or groups," apparently resolving the continuing problem under American constitutional equal protection law of the legitimacy of affirmative action. *Id.* § 15(2). Professor Marc Gold describes this as an example of "post-liberal" provisions in the Charter. Gold, *A Principled Approach to Equality Rights: A Preliminary Inquiry*, 4 SUP. CT. L. REV. 131, 156 (1982).

49. *See* Magnet, *The Charter's Official Languages Provisions: The Implications of Entrenched Bilingualism*, 4 SUP. CT. L. REV. 163 (1982); Magnet, *Minority-Language Educational Rights*, 4 SUP. CT. L. REV. 195 (1982).

50. *See* Hogg, *Canada's New Charter of Rights*, 32 AM. J. COMP. L. 283, 300 (1984). Professor Hogg points out that the language of § 32 might be interpreted expansively to govern private action, as well as that of government, but "it is almost certain that the Canadian courts will decide that the Charter operates only as a restriction on 'state action.'" *Id.*

51. Canada Act, 1982, § 1. This "makes clear that [Charter rights] are not absolutes," while still placing the burden on government "to establish that the ostensible breach is a 'reasonable limit' . . . ." Hogg, *supra* note 50, at 295.

52. Canada Act, 1982, § 33(1).

53. Canada act, 1982, § 33(3)-(4). Professor Hogg states that inclusion of § 33 "was a crucial element" in securing provincial endorsement of the new constitution. Hogg, *supra* note 50, at 298.

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ual rights, judicial decisions are the final word on the subject, only in decisions concerning violations of democratic rights, mobility rights and language rights.[54]

This is, in short, the constitutional background against which Canadian courts have been called on to deal with the divisive issue of abortion.

II. ABORTION AND THE LAW IN CANADA

Not surprisingly, before adoption of the Charter there was little hint in Canadian law that abortion could not be strictly regulated or prohibited by statute. Canada, upon independence pursuant to the BNA Act of 1867, "inherited England's *Offenses Against the Person Act* of 1861, which was later codified in the Canadian *Criminal Code*."[55] This Act provided that abortion was a form of homicide punishable by life imprisonment.[56] This stringent provision, which prohibited even abortions which would preserve the life of the woman,[57] remained in force until 1969.

At that time, the statute which would be the subject of litigation two decades later was adopted and codified as section 251 of the Criminal Code. The principal purpose of the new enactment was to exempt therapeutic abortions from the general prohibition. After restating the principle that abortion was a criminal offense, section 251 set out a procedure through which a woman could apply to a therapeutic abortion committee consisting of at least three hospital-appointed doctors to determine whether "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health." Upon such a finding, the committee could issue a certificate to the woman's doctor, who could then legally perform the abortion.[58]

The most significant omission in section 251 was its failure to define the related words "therapeutic" and "health." This omission was intentional. Justice Minister Turner, speaking for the government, stated that "[h]ealth is incapable of definition . . . ."[59] The government apparently hoped and expected that the medical community would supply the best standards available in applying the term to particular

54. Note that the override provision does not apply to §§ 3 through 6 and 16. *See supra* notes 41-49 and accompanying text.

55. Campbell, *Abortion Law in Canada: A Need for Reform*, 42 SASK. L. REV. 221, 224 (1978).

56. *Id.* at 223-34.

57. Some felt that an exception to preserve the life of the mother was implied in the Act, but uncertainty remained. *Id.* at 224.

58. R.S.C. ch. 34, § 251 (1970). *See* Ferri & Ferri, *Canadian Abortion law*, 30 CATH. LAW. 336, 337-39 (1986).

59. Campbell, *supra* note 55, at 226.

cases. The power given to abortion committees and the unpredictability inherent in the flexibility sought by the statute would prove to be its ultimate undoing.

The compromises of section 251 may have been the most satisfying, or least objectionable, balancing of the diverse views of the Canadian people on the issue of abortion. But like all compromises on sharply divisive issues, they failed to satisfy those most committed to maximalist positions on each side. Those strongly opposed to abortion were appalled by what they saw to be a gross overextension of the term "health" by most therapeutic abortion committees. Many committees used the World Health Organization's (WHO) definition of health: "a state of complete physical, mental and social well-being, not simply the absence of illness or disease." Even where this definition was not explicitly endorsed, it seemed to lie behind the common use of mental health grounds to justify the issuance of abortion certificates.[60]

By the late 1970s, the overwhelming majority of legal abortions were certified on the basis of threats to mental health.[61] A broad interpretation of section 251 was not universal, however. Some committees applied restrictive definitions of "health," and some required lengthy certification procedures, whatever the grounds for certification might be.[62] Thus, abortion rights advocates also were dissatisfied with the section 251 procedure.

Not long after *Roe v. Wade*, the Supreme Court of Canada was presented with a challenge to section 251 under pre-Charter Canadian law. Dr. Henry Morgentaler had performed an abortion without certification. He was acquitted by a jury which had been instructed on the common law defense of necessity,[63] but the Quebec Court of Appeals set aside the verdict, holding that the necessity defense was un-

60. *Id.* at 225-29; Ferri & Ferri, *supra* note 58, at 339-47. Both articles are highly critical of the expansive definition of "health" used by the health professionals interpreting § 251. Campbell found it "increasingly clear that [Canadian] abortion law has been misunderstood, misapplied and wilfully ignored." Campbell, *supra* note 55, at 225. Ferri and Ferri reach the same conclusions, focusing less on the definition of "health" than on the meaning of the word "therapeutic." Ferri & Ferri, *supra* note 58, at 339-56. Nevertheless, the government's specific refusal to narrowly define "health," and Turner's statement that "this will be left to the good professional judgment of medical practitioners to decide," *id.* at 339, stand as rather strong evidence that adoption of the WHO definition could not have been entirely unforseen.

61. Ferri & Ferri, *supra* note 58, at 347. "At Kingston General Hospital, Kingston, Canada, 674 (or 95.7%) of the 704 abortion applications approved in 1983 were on the basis of 'mental health and psychosocial' reasons." *Id.*

62. *See infra* notes 82-87 and accompanying text. H.R.S. Ryan states that thousands of abortions continued to be performed in Canada after 1969 without committee certification. Ryan, *Abortion and Criminal Law*, 6 QUEEN'S L.J. 362, 363 (1981).

63. *See* Morgentaler v. The Queen (Morgentaler), 53 D.L.R.3d 161, 164-65 (1975).

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supported by the evidence.[64] On further appeal to the Supreme Court of Canada, Morgentaler not only pressed his claim involving the necessity defense, but also challenged the validity of section 251 under the BNA Act and the Canadian Bill of Rights.

A divided Court held that the "ill-defined and elusive concept . . . of necessity" was not available to Morgentaler,[65] but the Court was unanimous in rejecting the constitutional challenge to the abortion law. First, the Court held that although the BNA Act gave the provinces rather than the national government authority to regulate the practice of medicine, section 251 was properly classified as a matter of criminal rather than health law.[66] As such, it was a proper subject for Parliament under the federal structure of the BNA Act.[67] More significantly, all justices agreed that section 251 did not violate the Canadian Bill of Rights. Morgentaler claimed that the limits on abortion violated the Bill of Rights guarantees of "life, liberty and security of the person," "equality before the law" and freedom from "cruel and unusual treatment."[68] The Court found that judicial interference with the substance of legislation was quite foreign to the constitutional law traditions of Canada, and even in light of the "new dimension" of federal law created by the Canadian Bill of Rights, the principle of parliamentary supremacy was of great import in dealing with such claims as those made by Morgentaler.[69]

Under this standard, section 251 was held to be a permissible balancing of the rights of privacy implicit in the Bill of Rights against the legitimate interest of Parliament in limiting activity which had been regarded as criminal throughout Canadian history.[70] *Morgentaler v. The Queen* (*Morgentaler* (1975)) was the only significant pre-Charter decision of the Supreme Court of Canada on the question of abortion

64. Regina v. Morgentaler, 47 D.L.R.3d 211 (1974).

65. 53 D.L.R.3d at 208 (Dickson, J.). More important than the lack of evidence that there was an urgent medical need for the abortion was the lack of evidence that the defendant and the woman had made the slightest effort to comply with section 251 to procure a legal abortion. *Id.* at 214.

The Court also rejected the contention that § 45 of the Criminal Code, which protects, in general terms, from criminal liability, anyone who performs a surgical operation where "the operation is performed with reasonable skill" and "it is reasonable to perform the operation," could absolve the defendant under these circumstances. *Id.* at 206-08.

66. *Id.* at 167-70 (Laskin, C.J., dissenting). Chief Justice Laskin's opinion, although dissenting from the Court's holding on the question of Morgentaler's use of the defenses of necessity and section forty-five, contains the most elaborate discussion of the question of the constitutional validity of § 251.

67. *Id.* In sharp contrast to the United States federal system, criminal law is a national, not a local matter in Canada. British North America Act of 1867, 30 & 31 Vict., ch. 3, § 91(27).

68. The specific contentions are set forth in 53 D.L.R.3d at 171-72.

69. *Id.* at 173. Laskin did not foreclose the possibility that there might be, in some cases, "a proper invocation of due process of law in respect of federal legislation as improperly abridging a person's right to life, liberty, security and enjoyment of property." *Id.* at 174.

70. *Id.* at 174-77.

rights, and its holding is entirely unsurprising in light of the history of judicial review in Canada. It was inevitable that the Charter, having introduced the concept of individual rights "entrenched" against legislative action, would spark a new round of litigation on the subject of abortion.

The first Charter-based challenge to section 251, though, sought its invalidation not on a claim that it was too restrictive, but rather that it was too permissive. In *Borowski v. Attorney General of Canada*,[71] the plaintiff claimed that the Charter guarantee of the right to life to "everyone" protected a fetus from abortion, regardless of the findings of a therapeutic abortion committee.[72] In addition, the plaintiff claimed that a system of certified abortions denied the aborted fetus the right to equality before the law, and subjected the fetus to cruel and unusual treatment, both in violation of the Charter.[73]

The use of fundamental rights concepts to attack permissive abortion statutes was not unprecedented in western democracies, and such arguments have not always been rejected.[74] The Saskatchewan Court of Queen's Bench, however, refused to extend Charter protection to the unborn, holding that "it is the prerogative of Parliament, and not the courts, to enact whatever legislation may be considered appropriate to extend to the unborn any or all legal rights possessed by living persons."[75] Since existing law contained no such declaration, the plaintiff's claim was dismissed.[76]

A subsequent Charter-based challenge to section 251, claiming that the section impermissibly burdened the rights of women, was more successful. Once again, Dr. Henry Morgentaler was charged with violations of the statute, and once again he challenged its validity, this time invoking the entrenched rights of the Charter. Although the Supreme Court of Canada rejected a number of Charter-based claims,[77] it found that the overall system established by section 251

71. 4 D.L.R.4th 112 (1983).

72. *Id.* at 121.

73. *Id.* at 121-22.

74. In 1975, the Federal Constitutional Court of West Germany declared that the 1974 liberalization of West German abortion law to permit elective abortions in the first trimester was inconsistent with the provision of the Basic Law (the 1949 West German constitution) which states "[e]veryone shall have the right to life . . . ." 39 BVerfGE 1 (1975). An English translation appears in 9 J. MARSHALL J. PRAC & PROC. 605 (1976). The case is discussed in M. GLENDON, *supra* note 13, at 25-39, and in Mezey, *Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada*, 32 INT'L & COMP. L.Q. 689 (1983).

75. Borowski v. Attorney Gen. of Can. & Ministry of Fin., 4 D.L.R.4th 112, 131 (1983).

76. *Id.* The Court cited Weiler & Calton, *The Unborn Child in Canadian Law*, 14 OSGOODE HALL L.J. 643 (1976), a concise overview of the extent to which pre-Charter Canadian law recognized or failed to recognize the unborn child as a holder of legal rights.

77. Regina v. Morgentaler, [1988] 1 S.C.R. 30. In addition to the § 7 claims, Morgentaler alleged

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infringed upon the rights to life, liberty and security guaranteed by section seven.[78] The opinion, however, was quite different from *Roe v. Wade*, and does not necessarily signal the existence of a strong right to abortion in Canada.

The Court[79] initially found that the "security of the person" protected by section seven "must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction."[80] Thus, it could not be a crime to seek "effective and timely medical treatment."[81] The first difference between *Roe* and *Morgentaler*, then, is the analytical starting point, the definition of the woman's right involved. In *Morgentaler*, the Court refused to address the question of a broad "right to privacy," focusing instead on the life and health of the pregnant woman.

Section 251 significantly burdened the right to seek medical treatment by virtue of the lengthy and often cumbersome procedures necessary to obtain certification for a therapeutic abortion. Although evidence was in conflict concerning the length of the average delay, it did establish that many women had to wait several weeks between their first contact with a doctor and their certified abortion.[82] Also, since the capacity of individual hospitals is limited, many women had to apply to more than one institution.[83] A delay that would seem unimportant in many medical contexts takes on much greater significance in the case of abortion. "[T]he evidence indicated that the earlier the abortion was performed, the fewer the complications and

violations of § 2(a) (freedom of conscience and religion); § 12 (prohibiting cruel and unusual punishment); § 15 (equal protection of the laws); § 27 ("[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians"); and § 28 (equal rights for male and female persons). *Morgentaler*, [1983] 1 S.C.R. at 47.

78. *See supra* note 44 and accompanying text.

79. There were four separate opinions written by members of the Court. Chief Justice Dickson wrote for himself and Justice Lamer. Justice Beetz wrote an opinion joined by Justice Estey. Justice Wilson, writing separately, set forth the strongest defense of the right of a pregnant woman to have an abortion. These five justices constituted the majority. As used here, the term "the Court" refers to the common ground of these three opinions. As discussed *infra*, Justices McIntyre and La Forest dissented. Seriatim opinions have been much more common in the Canadian Supreme Court than in the United States. Canadian lawyers often can "only ascertain the *ratio* of a decision by piecing together the reasons given by several judges on the majority side." Russell, *Introduction: History and Development of the Court in National Society: The Canadian Supreme Court*, 3 CAN.-U.S. L.J. 5, 9 (1980). Another sharp difference with United States Supreme Court practice is that the Canadian Court not only may, but quite often does, sit in panels of fewer than its full nine members. *Id.* at 10.

80. *Morgentaler*, [1988] 1 S.C.R. at 81 (Beetz, J.); *see also id.* at 53-56 (Dickson, C.J.).

81. *Id.*

82. *Id.* at 57-58 (Dickson, C.J.). At one extreme, the 1977 REPORT OF THE COMMITTEE ON THE OPERATION OF THE ABORTION LAW 146, states that the average delay between initial contact with a physician and an abortion was eight weeks. At the other, the Attorney General of Canada contended that the average delay had been reduced to one to three weeks. *Morgentaler*, [1988] 1 S.C.R. at 57-58.

83. *Morgentaler*, [1988] 1 S.C.R. at 57.

the lower the risk of mortality."[84] The delay also is likely to have significant harmful psychological effects. The wait itself, the uncertainty of a favorable committee decision, and the knowledge that a significant delay might require the use of more painful and dangerous abortion methods[85] all added weight to the court's finding that section 251 intruded on the personal security protected by the Charter.

Section seven does not absolutely prohibit such intrusions. It does require that they be imposed in a way consistent with "principles of fundamental justice." The Supreme Court of Canada found section 251 inconsistent with such principles. The complex procedure required to secure a certificate, the Court found, would often work to bar a woman from an abortion for reasons other than ineligibility under the substantive standards of the statute. The requirement that there be three doctors on each committee meant that nearly one-quarter of all Canadian hospitals could not create a committee from their staff.[86] The requirement that abortions be performed only in "approved" or "accredited" hospitals further reduced the availability of abortion, for reasons unrelated to whether particular abortions qualified as therapeutic.[87] Finally, the failure of the statute to provide any definition of the term "health" led to committee decisions based upon "widely differing" standards; the Court found that "the absence of any clear, legal standard . . . is a serious procedural flaw."[88] In light of all this, section 251 was held to violate section seven of the Charter.

As discussed above, section seven, as well as the other substantive prohibitions of the Charter, is subject to section one, which makes these freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Supreme Court of Canada has held that section one means that a violation of Charter freedoms can be justified

> if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to

84. *Id.* at 59. Under medical practice common in Canada, the method of abortion will change at about the twelfth week, and again at about the sixteenth, each time to a more dangerous procedure. Even within each of these time periods, each week of delay significantly increases the risk of complications.

85. *Id.* at 60.

86. "Of the 1,348 civilian hospitals in operation in 1976, at least 331 hospitals had less than four physicians on their medical staff." *Id.* at 66 (quoting the 1977 REPORT OF THE COMMITTEE ON THE OPERATION OF THE ABORTION LAW). The screening committees could not include the doctor who was to perform the operation; thus if a hospital had fewer than four physicians on staff, no committee could be formed. Beyond this, since the law did not require that a hospital establish a committee, even if it could, an even larger percentage of hospitals lacked functioning committees. *Id.* at 66-67.

87. *Id.* at 66.

88. *Id.* at 68-69. Perhaps most significantly, some committees did not accept psychological health justifications, despite the broad WHO definition of "health." *See supra* note 60 and accompanying text.

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> warrant overriding a constitutionally protected right or freedom" . . . and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society.[89]

Although the Court held that section one did not, under this test, save section 251, the justices in the majority differed in their reasoning. Chief Justice Dickson and Justice Lamer found that the important end sought by Parliament in section 251 was the proper balance between the health of the pregnant woman and the welfare of the fetus. Since Parliament had decreed that fetal welfare was "not to be protected where the 'life or health' of the woman is threatened," the justices concluded that the "paramount" goal of section 251 was the protection of the health of pregnant women.[90] In light of this finding, the justices concluded that insofar as section 251 made the process of obtaining therapeutic abortions longer and less predictable, it not only failed to advance Parliament's primary end, but actually interfered with it.[91]

Justices Beetz, Estey, and Wilson, on the other hand, regarded protection of the fetus as the primary goal of section 251, with protection of the pregnant woman a secondary objective.[92] Both are clearly important parliamentary goals. The "reasonableness" test of Charter section 1 requires "proportionality between the *effects* of the measures which are responsible for limiting the Charter right of freedom, and the objective which has been identified as being of 'sufficient importance.' "[93] These justices found that the severe infringement of the right to seek a therapeutic abortion was disproportionate to the benefits achieved by at least some of the requirements of section 251.[94]

Justices McIntyre and LaForest dissented, arguing that the right to abortion could not be inferred from section seven of the Charter.

89. *Id.* at 73.

90. *Id.* at 74. Since the basic structure of § 251 permits the health of the mother to override any interests in protection of the fetus, Justices Dickson and Lamer see maternal welfare as Parliament's primary goal.

91. *Id.* at 75-76.

92. *Id.* at 82 (Beetz, J.); *id.* at 181 (Wilson, J.).

93. *Id.* at 125 (citing Regina v. Oakes, [1986] 1 S.C.R. 103, 139, 180 (Beetz, J., Wilson, J.)).

94. *Id.* at 125 (Beetz, J.); *id.* at 183 (Wilson, J.). Justice Wilson came the closest to endorsing a *Roe*-like position. He specifically states in his opinion, that no procedure drafted by Parliament could constitutionally prevent a woman from choosing an abortion "at *all* stages of her pregnancy." *Id.* Apparently, he regards legitimate balancing under § 1 of the Charter to require a temporal division of pregnancy into a period in which the abortion choice is unfettered, and a subsequent period in which regulation is permitted. "The precise point . . . at which the state's interest becomes . . . 'compelling' I leave to the informed judgment of the legislature . . . ." *Id.* But that judgment may not be exercised to leave the woman with no period of free choice, and Justice Wilson strongly hints that he might find any regulation prior to the second trimester unreasonable. *Id.* at 182-83.

With no right to abortion to be found in the Charter, the Bill of Rights or Canadian tradition, section 251 must be seen, according to this view, as creating a limited statutory right, rather than infringing on a preexisting freedom. The dissenting justices would defer to Parliament regarding the scope of that new right.[95]

In striking down section 251, *Regina v. Morgentaler* decriminalized abortion in Canada. To that extent, it resembles *Roe v. Wade*. But since the decision focused on the flaws of the particular procedures required by that statute, *Morgentaler* does not establish a right to abortion that may not be infringed by legislation designed to protect the fetus. Unlike *Roe*, *Morgentaler* invites, if not requires, the legislative branch of government to reconsider the fundamental issue of abortion. Parliament may preserve the basic core of section 251, the principle that only medically-approved therapeutic abortions are to be permitted, if it streamlines the certification procedure to meet the Court's objections. Alternatively, Parliament may choose a permissive approach to abortion, such as that mandated by *Roe* in the United States. Less likely, especially in light of the suggestions of several justices that it would violate the Charter, Parliament could revert to the absolute prohibition of abortion found in pre-1969 Canadian law.[96] Finally, Parliament could exercise its power under section thirty-three of the Charter to simply re-enact section 251 as is for five years.[97]

Morgentaler clearly is a significant step in the evolution of not only abortion law, but also constitutional law in Canada. But as it does not purport to be the final word on the abortion issue, it is very different than *Roe*. One need not know the ultimate outcome of the Canadian abortion debate to learn from *Morgentaler* and the Charter approach to judicial review. How do the contrasts between *Morgentaler* and *Roe*, and the systems of distributing government power to declare and protect individual rights which underline each decision, highlight the comparative strengths and weaknesses of the system of judicial review found in the United States?

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95. *Id.* at 148 (McIntyre, J., dissenting). The procedural problems with section 251, the dissenters state, were caused, not by defects in the statutory scheme, but by the burden placed on the abortion delivery system by applications to abortion committees by many more women than those entitled to certification, at least under the standards envisioned by Parliament. Since the aim of the statute was "not to provide unrestricted access to abortions," its procedure cannot be criticized on the grounds that it does, in fact, restrict abortion. *Id.* at 154-5.

96. "The objective of protecting the fetus would not justify, in my view, the severity of the breach of pregnant women's right to security which would result if the exculpatory provision [of § 251] was *completely* removed from the Criminal Code." *Id.* at 82 (Beetz, J.) (emphasis added). Justice Wilson clearly would regard pre-1969 law as unconstitutional. *See supra* note 94.

97. *See supra* note 53 and accompanying text.

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III. Courts, Legislatures, Abortion and Other Divisive Questions: Learning from *Morgentaler*

In *Morgentaler*, as in *Roe*, the power of judicial review was exercised to strike down statutory restrictions on abortion. Canadian constitutional law has moved closer to that of the United States, not only on the abortion question, but on the broader question of the use of judicial power to override legislative solutions to controversial social issues. However, the differences between the two cases and the legal and political context in which they were decided are more intriguing than the similarities.

The United States Supreme Court decided *Roe* at a time when abortion law at the state level was evolving, albeit in a cautious and uneven way, toward a more permissive stance.[98] *Roe* recognized the existence of a strong right of abortion, and held invalid any legislative attempt to curb that right based on concern for the welfare of a non-viable fetus.[99] Given the generally accepted principle that the power of judicial review in the United States includes the power to have the final word on constitutional questions, barring constitutional amendment,[100] *Roe* appears to be an attempt to decisively resolve the divisive issue of abortion in the United States.

In contrast, at the time of *Morgentaler*, Canadian abortion law had been stable for two decades. Application of the law had changed, but this was due to the private decisions of medical professionals, rather than the open, conscious choices of lawmakers.[101] The Supreme Court of Canada struck down section 251 on cautious, narrow grounds. It based its holding on the relatively noncontroversial right to obtain medical care rather than a right to abortion itself, and did not deny that protection of a fetus might be a legitimate legislative interest to balance against the rights of a pregnant woman. The Court insisted only that Parliament clearly choose its own balance, and construct legislation well-suited to achieve it.[102] Both the limited scope of

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98. *See supra* notes 2-3 and accompanying text. *See also* M. GLENDON, *supra* note 13, at 47-50.

99. *See supra* notes 1-2 and accompanying text.

100. For a discussion of the movement to amend the Constitution in response to *Roe* see Hofman, *supra* note 7, at 238-42.

101. *See* Ferri & Ferri, *supra* note 58, at 338-47.

102. I have no difficulty in concluding that the objective of section 251 as a whole, namely, to balance the competing interests identified by Parliament, is sufficiently important.... I am equally convinced, however, that the means chosen to advance the legislative objectives of section 251 do not satisfy any of the three elements [necessary to satisfy section one of the Charter].

[1988] 1 S.C.R. at 75 (Dickson, C.J.). Those elements are:

> First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as little as possible the right or free-

the opinion and the limited nature of Canadian judicial review under the Charter, assure that the Court could not claim the power to have the final word on the abortion issue.[103] In short, the Court in *Morgentaler* did not attempt to put an end to political dialogue on the abortion question. Rather, it insisted that such dialogue continue.

Each society must mark the boundary between those decisions that are matters of individual choice and those properly made by the community as a whole. But each society must also choose the procedure by which the boundary will be marked. The right of individual choice on some matter may exist because of a societal choice to respect individual choice, and society may retain the power to revoke that right. Alternatively the right of individual choice may be accorded protection from revocation by normal processes of social decisionmaking. This second, stronger concept of a right is central to United States constitutional law, but far less prominent in most other nations.[104]

The principle that limits must be placed on the discretion of the lawmaker is rooted in theories of natural law. Yet any attempt to enforce natural law norms is immediately paradoxical. When recognized organs of the state impose natural law norms, those norms become, by definition, positive law. Discussion of the scope and enforcement of the norms will now proceed on positivist terms.[105] The constitutional law of the United States can be seen, then, as an attempt to synthesize the virtues of natural law and positivist thought. This is particularly true in twentieth century United States constitutional analysis dealing with questions of individual rights.

There is a distinct difference in tone between the writings of Dr. Martin Luther King on civil disobedience and those of nineteenth century abolitionists on the same subject, which illustrates this point quite well. It is not uncommon to find in nineteenth century abolitionist

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> dom under consideration. Third, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

Id. at 74.

103. Ultimately, the legislative branch retains its right to act under § 33 of the Charter. *See supra* notes 53-54 and accompanying text.

104. *See generally* M. GLENDON, *supra* note 13, at 114-34. Outside of western democracies, the concept is often quite foreign. *See generally* several of the essays in A. POLLIS & P. SCHWAB, HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (1979).

105. Natural law theories, in practice if not in concept, deal in norms based in moral reasoning. Their effect is to produce a set of "shoulds" to admonish the lawmaker. In contrast, positivism tends to speak in "musts" which bind rather than guide. As an example of the replacement of "wishful normatives" by "flat commands" Edmund Cahn outlined the development of the provision of the English Bill of Rights of 1689: "Excessive bail *ought not* to be required" to the eighth amendment provision, adopted in 1789, "Excessive bail shall not be required." Cahn, *A New Kind of Society*, in THE GREAT RIGHTS 5 (E. Cahn, ed. 1963).

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thought explicit recognition that the writer's position conflicts with the Constitution.[106] The author would assert that the Constitution, that is, positive law, would simply have to defer.[107] Writing against a background of twentieth century constitutional thought, Dr. King was able to put forward a synthesis of natural law and positivism in asserting that statutory law must defer because of natural law principles embodied in the Constitution.[108] Thus, an active role for the judiciary in policing legislative enactments can be seen as an attempt to bridge the timeless gap between the two classic competing models of jurisprudence. It is hardly surprising that commentators on the work of Ronald Dworkin, an advocate of an activist judiciary, cannot agree on whether he should be classified as a positivist or a natural law theorist.[109]

A system of strong judicial review will be quite attractive, if not essential, to a society that has chosen to attempt to incorporate natural law principles into its positive law. And this attraction is even stronger when society sees the rights secured by natural law primarily as negative rights, that is, freedom from overt government interference, rather than positive rights, or entitlements.[110] No one can doubt the enormous value of the strong model of judicial review in protecting individual rights over the last century, just as no one can doubt the enormous value of natural law theory in providing the basis for resistance to tyranny throughout western history.[111] However, recognizing

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106. *See* essays and speeches collected in CIVIL DISOBEDIENCE IN AMERICA 91-175 (D. Weber, ed. 1978). Weber notes, in his introductory essay, that nineteenth century conservatives were the ones most likely to appeal to the primacy of the Constitution and positive laws. *Id.* at 93-98.

107.
> The judges and lawyers . . . consider, not whether the Fugitive Slave Law is right, but whether it is what they call *constitutional.* Is virtue constitutional, or vice? . . . The question is, not whether you or your grandfather, seventy years ago, did not enter into an agreement to serve the Devil, and that service is not accordingly now due; but whether you will not now, for once and at last, serve God . . . .

Thoreau, *Slavery in Massachusetts, reprinted in* CIVIL DISOBEDIENCE IN AMERICA, *supra* note 66, at 163, 166.

108.
> But we must see that the Negro today, when he marches in the streets, is not practicing civil disobedience because he is not challenging the Constitution, the Supreme Court, or the enactments of Congress. Instead he seeks to uphold them. He may be violating local municipal ordinances or state laws, but it is these laws which [contradict] basic national law.

Address to the American Jewish Committee by Martin Luther King, Jr., *reprinted in* CIVIL DISOBEDIENCE IN AMERICA, *supra* note 66, at 219, 221.

109. *See* Mackie, *The Third Theory of Law* in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 161 (M. Cohen, ed. 1984).

110. This is the traditional Anglo-American view. Other societies have been more willing to at least enunciate positive rights, that is entitlement to have something given to people or something done on their behalf, as fundamental. *See generally* Okin, *Liberty and Welfare: Some Issues in Human Rights Theory*, in HUMAN RIGHTS (NOMOS XIII) 230 (J. Pennock & J. Chapman, eds. 1981).

111. The close connection between religious or quasi-religious thought in a society and its approach to questions of human rights is discussed in M. STACKHOUSE, CREEDS, SOCIETY AND HUMAN

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the value of these closely related philosophic and political models need not lead to a refusal to recognize that the models present some significant problems.

Classic natural law theory flourished in a world in which modern democracy was unknown. In an autocratic or oligarchic state, not only is it essential to create a theory that will legitimate opposition to government, but it also will be quite natural to equate the concept of freedom with the ability to frustrate legislative or administrative power. Acts of the state will be, to most members of the community, acts of others choosing to enforce their will upon the majority. As the "active" branches of government become more responsive within a democratic system, the relationship between judicial review and freedom becomes more complex. Strong judicial restraints on legislation still maximize freedom, to the extent that it is defined as the right to be free of community decisionmaking. But to the extent that freedom is defined positively as the ability to shape one's life through community action, checks on legislative power decrease it. As society becomes more complex and interdependent, it may be that the individual's ability to create the good life, however defined, depends as much on the power to help direct the community as on the power to stand apart from the community.

But even if we put aside the positive rights of the citizen to participate in shaping the community, a strong power of judicial review may have subtle harmful effects on the preservation of the negative rights entrusted to judicial care. First, the psychological effect of a "division of labor" that makes judges the primary arbiters of individual rights may be to convince legislators that protecting individual rights is not part of their job. The likelihood that proposed legislation interferes with constitutional guarantees may be seen as an improper reason for opposing it. The courts, after all, will definitively resolve that issue after the statute is enacted.[112] Somewhat more cynically, legislators may see courts as useful in protecting them from the consequences of their own actions. A legislator might vote for a measure to curry favor with a vocal constituency, confident that the courts will see to it that the statute is never enforced. A system of legislative supremacy might well force legislators to act more deliberately.

A system of strong judicial review also may make the entire pro-

RIGHTS (1984). *See also* essays in THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVES (A. Rosenbaum, ed. 1985).

112. Despite rather clear evidence that the framers intended that legislators would carefully weigh the constitutionality of proposed legislation, the predominant attitude toward constitutional issues tends to be "let the Court decide it." Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 472 (1971).

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cess of defining and enforcing individual rights into an elitist activity. At the very least, this is how it will be perceived. If the only legitimate forum for constitutional debate is the courtroom, and the only competent debaters are attorneys, constitutional rights will come to be seen as something imposed by elites upon a reluctant people, the precise opposite of the original concept of the rights as bulwarks of the people against abuse by governing elites. This effect may extend beyond attitudes toward particular controversial rights claims to the entire concept of antimajoritarian rights. A citizen will accept much more readily a decision, even one he strongly disagrees with, if the process through which it is reached is seen as open to citizen participation, rather than being one that treats the people as spectators whose views are irrelevant.[113] The dilemma is clear. Judicial intervention, history shows, will at least occasionally be necessary to protect individual rights, but those rights will be most durable when they are seen as coming from the people themselves, rather than from distant decisionmakers.

Perhaps no question of constitutional law has illustrated this dilemma more clearly than abortion. The ferocity of the opposition to *Roe* may well stem not only from disagreement with legalization of abortion, but also from frustration over how that result was achieved. Professor Mary Ann Glendon has described how different the American response to the abortion issue has been to that prevailing in the rest of the world.[114] Although most of the western world has moved to a more permissive position on abortion during the past twenty years, it has occurred through legislative action.[115] While the judicial process deals with claims of right and denials of such claims, usually put forward in absolute or near-absolute terms, the legislative process in democratic societies deals with claims of interest and welfare. While these may be advanced passionately, each side knows quite well that negotiation, bargaining and compromise are expected, normal and perhaps even praiseworthy. The judicial process requires that one party be declared the winner, the other the loser. Thus, even where the winner gets only part of the relief sought, the system labels parties as winners and losers, right and wrong.[116] The political process, in

113. Although he supports the outcome of Roe v. Wade, Professor Guido Calabresi is critical of the Court's reasoning process because of the way in which it excludes from the analysis the views and values of a significant part of the population while resolving a question of great importance to those excluded. G. CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 87-114 (1985).

114. M. GLENDON, *supra* note 13.

115. *Id.* at 13-39.

116. Thus, litigation is considered most appropriate when issues are few, clear, and subject to efficient, narrow resolution. Litigation is most troublesome where the problem is "polycentric," and

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contrast, regards compromise outcomes as the norm. A wise political actor, even when achieving exactly what he wants, will strive to label the outcome as victory for all.[117]

At least two significant differences emerge, then, between a permissive legal attitude toward abortion achieved through legislation, and one achieved through judicial decree. First, the legislative liberalization is likely to result in some sort of compromise.[118] No one involved in the debate must be labeled as the loser; all involved in the debate will feel that, at the very least, they have been listened to, and have had some impact on the final legislative product. Second, when embodied in legislation, any solution to the abortion dilemma is provisional. As attitudes evolve, as society learns and gains experience, the law may evolve toward greater permissiveness, or move back toward more severe restrictions. Such changes, and the political dialogue preceding them, are entirely consistent with the theory, as well as the practice, of legislation.

In contrast, the judicial approach of *Roe* labels the position of one side not only as a losing position, but also as unconstitutional, that is, a position which is contrary to the basic norms under which society is governed. The anti-legalization position is not merely defeated, it is declared fundamentally illegitimate.[119] Also, insofar as normal government processes go, the Court had declared the abortion question closed, at a time when the interest of the public and legislatures in the issue was increasing. After *Morgentaler*, Canadian lawmakers and their constituents must face and resolve, in one way or another, the abortion issue. Parliament's decision must be made with clear understanding that the question of the legal status of abortion is, in fact, the issue under discussion. Even the failure to enact legislation will itself be a response to the issue, a choice to remain silent, and thereby permit abortion.

In the wake of *Webster*, public and legislative dialogue on the legal status of abortion in the United States will no doubt increase. Debate must no longer confine itself to peripheral questions such as parental consent[120] or what may or may not be done with an aborted

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where the solution cannot be "winner takes all." *See* J. LIEBERMAN, THE LITIGIOUS SOCIETY 25-32 (1981).

117. Of course, these are also the principles which guide the attorney as negotiator. *See generally* R. FISHER & W. URY, GETTING TO YES (1981). The lawyer-as-negotiator and the lawyer-as-courtroom-advocate are, or at least should be, different species.

118. *See* M. GLENDON, *supra* note 13, at 13-50.

119. For a discussion of the consequences of such labeling, see G. CALABRESI, *supra* note 113, at 91-114.

120. *See* Bellotti v. Baird, 443 U.S. 622 (1979).

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fetus,[121] but will no doubt extend to the fundamental questions underlying the abortion question. Through different routes, and against a background of different constitutional approaches to judicial power, the Supreme Courts of both Canada and the United States have set the stage for legislative debate about the right to abortion.

Although legislative outcomes do not satisfy our desire for certainty and may be offensive to those who begin the discussion from a position assigning an absolute right to one party or the other, these outcomes may succeed in important but less obvious ways where Court-imposed solutions fail. Placing the issue of the extent of individual rights before the legislature gives the non-lawyer citizen a sense of participation in defining rights, which is important in maintaining the legitimacy of those rights. It conveys the message that the citizen's strongly held ethical views, even if rejected in the final analysis, are entitled to respect and consideration. The total effect, then, may be to strengthen public support for the overall constitutional system, support which may be crucial at times when the system must invoke its power against majoritarian outcomes.

Still, the fear of unrestrained majorities that lies behind the American doctrine of judicial review must be respected. Though the value of an antimajoritarian branch of government in properly limiting legislative power has been proven by history, there are costs associated with expansion of judicial power. Such costs may expand as the scope of the power expands and may justify the preservation of limits to the power of judicial review.

The limits on judicial power in the United States largely come from the judiciary itself, its institutional conservatism, and the caution of individual judges.[122] Constitutional limits are few and indirect.[123] The Canadian Charter takes a very different route. Aside from questions concerning the proper functioning of the legislative process and the citizens' role therein,[124] constitutional matters must ultimately be settled by the legislature, if only by its failure to exercise ultimate power and override a judicial finding of unconstitutionality. Still, the judicial role under the Charter is significant. Courts can force the legislature at least to accept responsibility for its choices (including the choice to defer to the courts) on matters of individual rights, and can add their own considered judgment to the constitutional debate. The risk that the people's elected representatives will reject a meritorious

121. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

122. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962).

123. *See generally* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

124. *See supra* notes 53-54 and accompanying text.

claim of right is surely a significant cost imposed by such a system, but the benefits of preserving a sense that the people are the ultimate guardians of their own rights must not be ignored.

In at least one respect, the debate over abortion and the debate over judicial review often proceed in similar fashion. Supporters and opponents of the right to legal abortion often refuse to acknowledge that their preferred position will impose costs on society. One side is pictured as representing all that is good, the other side as advocating policies that are outrageous and worthless. Of course, this is far from an accurate portrayal of the reality of this, or any other, significant social choice. Legalization and prohibition each impose costs on society, and each confers benefits. Some choice is required, and while an informed choice will lead to a better outcome, the more informed the society or the individual is concerning the ambiguous consequences of a tragic choice, the more difficult the choice will be. The desire to minimize anxiety may lead an individual or a society to pretend that a hard choice need not be made, and that the outcome is evident and cost-free.

The question of judicial review can also be over-simplified. Advocates of broad forms of judicial review[125] and advocates of legislative supremacy[126] often seem blind to the costs associated with either system. The silence of the United States Constitution on the scope of judicial review has made striking the proper balance between majoritarianism and anti-majoritarianism a somewhat uncertain, evolving task that depends largely on the interplay of scores of decisionmakers' choices rather than a precise formal equation. The Canadian system attempts to formalize the balance, and in doing so, makes its courts less powerful than those of the United States, but clearly more powerful than those of Great Britain or pre-Charter Canada.

What can the legal community in the United States learn from the new Canadian system of limited judicial review, and its application in *Morgentaler*? It would be foolish to suggest that taking the final decision on the constitutionality of statutes away from courts is possible, or even desirable, in the United States. The history, legal culture, and even the popular culture surrounding the concepts of individual rights within the United States would be profoundly shaken by such a change. The remarkable public opposition to the Supreme Court nomination of Robert Bork triggered by the perception that he would

125. *See, e.g.*, Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981).

126. *See, e.g.*, A. DICEY, *supra* note 19.

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not use judicial power to counter majorities when appropriate[127] is strong evidence of continued support for leaving the final say on constitutional questions where it is. It may also be true that after generations of judicial supremacy on questions of constitutionality, American legislators, individually and collectively, have largely lost the art of factoring constitutional restrictions into legislative decisions.[128]

But just as the Canadian system has moved toward accommodating the need for an anti-majoritarian source of legal authority while maintaining legislative supremacy, so can the United States system become more accommodating of the value of popular and legislative involvement in the allocation of basic legal rights and duties. Such accommodation must come not from legislative command, but rather from the courts themselves and the ways in which they choose to approach the task of constitutional interpretation.

Theories of constitutional interpretation that are well within the mainstream of American legal thought lend themselves to the enhancement of the legislative and popular role in defining rights while still preserving a strong form of judicial review. First, strong judicial protection of full and equal participation in the electoral process is a form of judicial activism that furthers, rather than restricts, legitimate popular and legislative power. This has led scholars, most notably John Hart Ely, to develop theories that provide special constitutional protection to the rights of participation in democratic processes.[129] These theories are consistent with the special, final power of judicial review given by the Charter to Canadian courts where legislation threatens democratic rights.[130]

Second, the finality of judicial review in the United States calls for caution in the creation of new constitutional rights, at least in areas in which legislatures have been actively and responsibly wrestling to balance competing claims. Caution, of course, is not the same as paralysis. Occasionally the courts must lead. But a final decisionmaker must not overlook the extent to which an intemperate use of power may seriously distort the system upon which that decisionmaker's legitimate power itself rests. Just as Canadians should expect legislatures to be cautious in explicitly countering a judicial holding of unconstitutionality, Americans should expect courts to take care in

127. The seminal article of Bork's constitutional thought is Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). *See also* Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985).

128. *See supra* note 112.

129. J. ELY, DEMOCRACY AND DISTRUST (1980).

130. *See supra* notes 53-54 and accompanying text.

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sharply breaking with previously accepted notions of the scope of legislative power.

Third, the way in which the Canadian Charter promotes constitutional dialogue between branches of government can be emulated in the United States system by courts avoiding either sweeping declarations of constitutional invalidity or automatic deference to legislatures. Narrow rationales for constitutional decisions, such as those set forth in *Morgentaler*,[131] may greatly advance the cause of individual rights, while at the same time avoiding the harm that comes from a *Roe*-like attempt to declare the matter closed, at least to discussion not carried on by law-trained elites. Together, these lessons, along with a renewed sense of the extent to which judicial review can be seen as a tool to cure legislative distortions of true public sentiment rather than a device for nullifying that sentiment,[132] may narrow the perceived gulf between individual rights and popular will in the United States constitutional system.

Finally, as the United States enters a post-*Webster* period of legislative debate about abortion, *Morgentaler* illustrates that even where the last word on a question of individual rights rests with the legislature, successful judicial challenges may be made to legislation that on its face or in its effects, is not carefully tailored to the achievement of the legislature's own stated ends, or which intrudes on rights that are clearly endorsed by constitutional language. *Morgentaler* suggests lines of argument, such as equal protection, a fundamental right to seek medical care for a condition threatening to health, and the lack of a relationship between a legislature's stated goals and its chosen means of achieving them, that might be used to critique crude legislative attempts to exercise their new power in this area.[133]

No one can doubt the value of the United States constitutional system in preserving the proper balance between individual rights and effective popular government. But the overall success of the system has led American constitutional lawyers to see the proper balance of trade in constitutional ideas to be entirely one-sided. Our principles are to be exported, but ideas from other systems are not acceptable imports. But in light of the similarly positive record of Canada in

131. *See supra* notes 77-102 and accompanying text.

132. Professor William Nelson contends that this was generally seen as the proper end of judicial review during the early years of the republic. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166 (1972).

133. The *Webster* plurality suggests that even under its view of expanded legislative power in the regulation of abortion, there might be some limits. Chief Justice Rehnquist, in belittling the notion "that legislative bodies . . . will treat our decision today as an invitation to enact abortion regulation reminscent of the dark ages . . . ." *Webster*, 109 S. Ct. at 3058, seems to imply that the Court will find ways to help assure that this does not occur.

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balancing these same concerns while working from quite different assumptions concerning the distribution of government power, it may be time to reconsider our informal restrictions on the import of constitutional ideas. The Canadian Charter, and the distinctive ideas it embodies, are not likely to put American constitutional thought out of business, nor should they. But American constitutional theorists may learn valuable lessons from the modified model of parliamentary supremacy under the Charter. As the United States continues to refine its own balance of judicial and legislative power, the still unfolding story of the Canadian system's struggle with the issue of abortion should be of great interest.

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