ON NOT STANDING FOR NOTWITHSTANDING*

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Many commentators have attempted to locate a justification for the legislative override in section 33 of the Charter *on the basis of Canadian constitutional theory. Professor Whyte argues that the abolition of the notwithstanding clause would conform comfortably with the premises which underly the Canadian constitutional regime. The first among these is the principle of legalism, the process by which we have chosen to adjudicate the resolution of public issues. Second, the principle of democracy, it is contended, provides some support for judicial control over political choices on the basis that, at the very least, certain* Charter *rights enhance the democratic process. The final principle examined, that of federalism, provides a historical perspective within which the disruption caused by judicial nullification can be assessed. The author argues that constitutionalism already exacts a high price on the autonomy of electoral politics and that the capacity of governments to regulate for the public good has not been seriously hampered as a result. Lastly, Professor Whyte examines the rationale for the* Charter, *as a tool to circumvent oppressive legislative measures, and why the judiciary can be relied upon to protect the radically dispossessed when they have no alternative route for the vindication of* Charter *values.*

De nombreux commentateurs ont tenté de justifier la dérogation à la Charte *et le pouvoir des gouvernements aux termes de l'article 33, en invoquant la théorie constitutionnelle. Or, le professeur Whyte avance que l'abolition de la clause de dérogation à nonobstant serait tout à fait conforme aux prémisses qui sous-tendent le régime constitutionnel canadien: la première d'entre elles étant le principe de légalisme, selon lequel nous avons choisi de trancher les questions d'intérêt public; la seconde, le principe de la démocracie, qui autorise un certain contrôle judiciaire des choix politiques du fait que certaines garanties de la* Charte *favorisent, pour le moins, la démarche démocratique; la dernière, le principe du fédéralisme, qui fournit une perspective historique dans le cadre de laquelle la rupture que provoque l'annulation judiciaire peut être évaluée. Selon l'auteur, la rançon du constitutionnalisme est déjà élevée en ce qui touche l'autonomie de la politique électorale et la capacité des gouvernements de régir dans l'intérêt public ne s'en pas trouvée gravement entravée. Envin, le professeur Whyte étudie la raison d'être de la* Charte *en tant qu'outil servant à contourner les voies législatives oppressives et explique pourquoi on peut compter sur le pouvoir judiciaire pour protéger ceux qui sont radicalement dépossédés quand ils ne disposent pas d'autre moyen de revendiquer les valeurs de la* Charte.

TABLE OF CONTENTS

I. INTRODUCTION 347
II. LOOKING FOR THE LESSON FROM CONSTITUTIONAL THEORY 349
A. LEGALISM 350
B. DEMOCRACY 351
C. FEDERALISM 353
III. FINDING A LESSON IN POLITICAL PRACTICE 354

I. INTRODUCTION

In our political culture we tend to believe that resolution of conflict comes about either by way of choosing policies or by way of following principle. Under this dichotomy, claims that are supported by appeals to principle are seen to enjoy a moral advantage. In constitutional discourse, our sense is that both adjudication and the process of constitutional reform should be driven by appeals to principle.

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There is good reason for this; a constitution is an ethical document revealing what a nation recognizes as a good social arrangement. In my view, however, it is mistaken to conflate the ethical nature of constitutional discourse with the claim that such discourse should invariably be principled. For instance, critics of the *Canadian Charter of Rights and Freedoms* have shown that in *Charter* adjudication, simple appeals to the text of the *Charter*, or to the political principles that are embodied in that text, are not dispositive of conflict. They have argued that it is the preferences of judges that determine results. (They also argue that it is a defeat for democracy that policies adopted by judges should prevail over policies chosen by legislators.) The critics' description of the weakness of principle is supported by Michael Ignatieff:[1]

> It is a recurring temptation in political argument to suppose that these conflicts can be resolved in principle...Yet who really knows whether we need freedom more than equality? Modern secular humanism is empty if it supposes that the human good is without internal contradiction. These contradictions cannot be resolved in principle, only in practice.

Yet, the critics miss the point of constitutional principles. They do not lead to crisp conclusions but, rather, to a focussed arbitration of conflicting claims. As David Dyzenhaus has observed:[2]

> . . . [A] charter that promises not only freedom and justice for all but also equality provides a forum in which consciousness can be raised. Lawyers can aim to raise consciousness and provoke participation by focusing public attention on the ways in which society fails to live up to its formally enacted promise.

This unclear relationship between the role of policy preferences and the role of principles of public ordering in constitutional adjudication is matched in those political processes that are directed at reforming the constitution. Deciding whether Canada should have in its constitution a clause that permits a legislative override of otherwise entrenched rights is not the same sort of question as the distributional issues that arise under the *Charter* and it might seem that this question is more susceptible to principled resolution. However, in constitutional reform the question of which institutional arrangements — which long term political commitments — match best the ethical conceptions of the state are in the end also resolved by the choice of policies for the state. Although the resolution of difference on these issues is based on notions of the good state, these notions are, ultimately, chosen. I take the position that, with respect to the future of the override clause, the role of policy choice is dominant and the answer cannot be found by resort to principle. There are no principles that determine how we ought to vote on keeping or abandoning the legislative trump over rights contained in the *Charter of Rights*. Furthermore, our usual expectation that questions of the appropriate institutional arrangement can be answered by inference from the commitments reflected in our basic constitutional order cannot be met in this particular debate.

Nevertheless, with respect to the debate on whether to continue the override clause, the usual starting point has been to advance arguments rooted in Canadian constitutional principle. For instance, a claim made by Professors Peter Russell and Paul Weiler in their opinion piece on the issue is that the legislative override is a uniquely Canadian feature of our constitution.[3] What must be being expressed

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1. M. Ignatieff, *The Needs of Strangers* (New York: Viking Penguin, 1984) at 137.
2. D. Dyzenhaus, "The New Positivists" (1989) 39 U.T.L.J. 361 at 378.
3. Note, for example, the title of P. Russell's and P. Weiler's, opinion article: "Don't scrap override clause — it's a very Canadian solution" *The Toronto Star* (4 June 1989) B3.

by this observation is that there are other elements of our constitution — other constitutional arrangements that reveal fundamental commitments — that fit well with permitting legislative override of *Charter* protections. Professors Russell and Weiler, in arguing against repeal of the override power, provide a rudimentary explanation of what those commitments are:[4]

> . . . nothing in our constitution is so distinctively Canadian as this manner of reconciling the British tradition of responsible democratic government with the American tradition of judicially enforced constitutional rights.

Another version of principled justification of the override clause is to label it as the perfect device for accommodating a regime for vindicating civil rights with the constitutional principle of parliamentary supremacy. Professor Peter Hogg, for example, has explained the clause as "a concession to Canada's long tradition of parliamentary sovereignty".[5]

In my view these attempts to locate a justification for the override procedure in Canadian constitutional theory are wrong for two reasons. First, the principles at work in the design of the Canadian state support not allowing any legislative exemptions from court-enforced rights at least as powerfully as they support including such a power in the constitution. Second, arguments rooted in constitutional principle distract us from enquiry into the actual social goods and bads that are likely to be produced by the practice of exercising the legislative power to override *Charter* rights. In short, this sort of debate keeps us from choosing a policy that is good because it reflects the actual aspirations of political community.

II. LOOKING FOR THE LESSON FROM CONSTITUTIONAL THEORY

The position that is advanced in this paper is that the debate over keeping the override power should be conducted in terms of what will produce the soundest government and fairest society and that we should approach this question by trying to anticipate how effective courts and legislatures actually will be in making various sorts of social and political accommodation.[6] For this reason it is not essential to demonstrate that Canadian constitutional theory requires repeal of an override power for legislatures. What I do want to demonstrate is that the values inherent in our constitutional arrangements do not require (or even tend towards) including in the constitution a trumping authority for legislatures over courts in the complex business of mediating between claims of right and the general social interest.

The basic constitutional principles that I perceive to be at work in the formal structure of the Canadian state are legalism, democracy and federalism. I do not include as a fundamental constitutional principle, at least for the purposes of this debate, individual and collective rights. It is clear that, ever since the Second World War, human rights have become politically constituted in the Canadian state. And of course, the *Constitution Act, 1982*, gave human rights immense constitutional status. (Our experiences over the last seven years have confirmed how ripe Canadian society was to absorb the constitutionalization of human rights.) Nevertheless, to

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4. *Ibid.* later in the same article Professors Russell and Weiler call the constitution's override procedure "quintessentially Canadian".
5. P. Hogg, *Constitutional Law of Canada*, (2nd edn.) (Toronto: Carswell, 1985) at 692.
6. An example of pure functional analysis of the override clause issue is found in A. Petter, "Canada's shield against despotic courts" *The Toronto Star* (25 July 1989) A17.

argue against continued inclusion of the override clause on the basis that the legislative override power undermines the concept of rights would be a bootstrap argument.

An argument might be made that, from a purely semantic point of view, the override power is inconsistent with a rights regime (at least, a rights regime as we understand such a thing in a legalist society). The problem with basing an argument against the override provision on the prior constitutional commitment to rights is that it begs the question of the nature and extent of the actual constitutional commitment. It is not morally defective for Canada not to have granted to courts hearing claims arising under the *Charter* ultimate authority over other political processes and choices. However, not having done so means that arguments from constitutional principle, based on the claim that Canada has adopted the principle of entrenched human rights, proceed on an inaccurate premise.

Let us look at the constitutional principles that are less equivocally present in our constitutional arrangement — legalism, democracy and federalism.

A. LEGALISM

Public authority in Canada derives at least a part of its legitimacy from its legal base. What a government does must accord with what, from a legal perspective, it is entitled to do. This idea that the legitimacy of state power can be measured through legal adjudication is, in our culture, well over half a millennium old. We understand authoritative social relationships to be formed and governed by enforceable promises and the keystone of the system is that enforceability is produced through legal evaluation. In order to produce a system for legal evaluation that has some degree of formality, specialized legal agencies grew up. Furthermore, we attached to those agencies political attributes that were designed to conduce to legal or formal evaluation (as opposed, say, to self-interested evaluation). These attributes were expertise and independence. Of course, we are right to be highly sceptical about the role of expertise and formality when the legal order that requires expertise and formal elaboration is as indeterminate as it is. We are also right to be sceptical about the actual degree of independence from social forces that can be achieved simply through protecting pay and tenure, the devices that are provided by the 1867 *Constitution*. However, it is not important to this argument that we subscribe to the purity of formalism or complete independence. All that is necessary is to see that they are long-standing constitutional values; it is through the identification of certain ideals and values that we can determine what arguments from principle can be made.

If it is accepted that these values have been recognized in Canadian constitutional ordering then other conclusions might be drawn. The chief one is that our state structure seems to be based on the idea that formal commitments represent binding promises that restrain future power. This idea is perhaps derived from the development of the law of contract. In any event, the commitment to legal enforceability of promises extends to binding governments as well as individuals. Legalism is what makes possible constitutionalism, the process by which political expressions from one age can bind future ages unless equally formal political processes are mustered to remove the constitutional constraint. In short, Canadian constitutionalism is not in thrall to the idea that populations are free to determine their own

best interests from moment to moment. Judicial control over governmental authority and legislative choices is no alien concept for Canada. We are a nation in which past solemn commitments are allowed to work to the disadvantage of current preferences. For instance, perfectly clear legislative preferences about the administration of laws are frequently frustrated by the prior constitutional commitment to the separation of powers. The separation of powers is seen as a relevant doctrine to the maintenance of a commitment to legalism and the implications of that commitment are tolerated by the people of this democratic state.

My claim is simply this. As a matter of principle we have adopted the notion that there are adjudicable public issues. Furthermore, we have come to terms with these issues being *ultimately* adjudicable — not subject to legislative review and revision. If Canada wants to say about human rights claims that not only are they adjudicable at the first stage of resolution, but they are adjudicable as a matter of ultimate resolution, this would be entirely consistent with our commitment to legalism in public ordering.

However, in the context of the *Canadian Charter of Rights and Freedoms*, section 33 means, first, that what were once political problems have been transformed into legal problems but, second, that when political interests are sufficiently compelling these issues can revert to being resolved through political choice. This arrangement gives rise to a further principled argument. The idea that some problems may be adjudicated — may be made subject to legal determination — requires there to be substantive constitutional value to be interpreted and applied. It is necessary to the conception of legalism that adjudication of disputes be based on previously expressed normative standards. When there is a sense that there are no constraints, or no interpretative processes (for instance, when there is no textual basis for decision-making), no genuine adjudication is possible.[7] Canada, in enacting the *Charter of Rights*, accepted that some political problems were capable of adjudication and at the same time, created a normative order (a text, in other words) to ensure that those issues could be resolved through adjudication. The nation expressed its commitment to, first, the rightness of social resolution being produced by the interpretation of rights and, second, the capacity of the terms of the *Charter* to be interpretable — to be the subject matter of adjudication. This assessment of what was possible and appropriate for adjudication does not fit well with the idea that the ultimate method of resolution of conflicting claims is through a purely political process. In other words, once the advantages of constitutional interpretation were accepted, as a general matter, it is not easy to see why the framers of the 1982 *Constitution* then saw political judgment to be a preferred form of political accommodation in each and every instance in which political interests wished to suspend the operation of legalism.

B. DEMOCRACY[8]

Judicial enforcement of human rights standards poses a serious challenge to majoritarianism. The advantage of pure majoritarianism is that there is no situation

7. See, S. Levinson, "Law as Literature" (1982) 60 Texas L. Rev. 373 at 400-401.
8. A longer version of the ideas expressed here is found in J. Whyte, "Legality and Legitimacy: The Problem of Judicial Review of Legislation" (1987) 12 Queen's L. J. 1 at 5-12. A better version of these ideas is found in W. Bishin, "Judicial Review in Democratic Theory" (1977) 50 Southern California L. Rev. 1099 at 1112-1117.

which cannot be responded to and no strategy of social regulation that cannot be tried once a majority of the people wish to act.

The problem with truly entrenched rights is that it undermines the majoritarian principle. Legislative calculations of social need are subject to being substituted by courts which are not representative and are not amenable to majoritarian control. The will of the electors is not sovereign. The question is whether the shift away from majoritarianism through removal of the override power reflects a conception of democracy that is as fundamental as the popular conception of democracy — that state policies ought always to reflect the preferences of a majority of electors.

Democratic theory rests not so much on the mechanisms of expressing political preferences (or who should represent the voters in making political choices) and on who should govern, as it does on deeper conditions such as political participation, equality, autonomy and personal liberty. From the now fully developed constitutional idea that people have the right to participate in public choices it is possible to tease out a series of non-derogable conditions. For example, we know that duly elected and popularly supported governments can, and do, believe that the appropriate conditions for democratic politics include such things as censored political speech, restrictions on political participation,[9] political campaigns that are funded by government, and perhaps most currently, in at least two Canadian jurisdictions, gerrymandering.[10] In considering this list, it is not difficult to see the connection between the use of judicially enforced fundamental rights of speech, equality and due process and the vindication of principles that are designed to protect democratic processes.

Of course it would be wrong to suggest that the whole array of interests identified in the *Charter of Rights* are justifiable on the basis that they enhance the democratic process. Some rights, (for example, an expanded notion of personal security being protected from substantive injustice under section 7 of the *Charter*) must be explained by reference to other political commitments. However, the point that needs to be made is that the democratic principle provides a powerful pedigree for judicial control over political choices that erode some fundamental human rights.

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9. Professors Russell and Weiler, *supra*, note 3, seem to believe restrictions on political participation is an appropriate policy to adopt in the context of elections and argue that the override power should be used to counteract any court decision that protected political participation on the basis of freedom of speech or equal protection of the laws. They write: "Having just experienced in the last federal election the wave of private election advertising, American-style, we would strongly endorse the use of Canada's override procedure if our Supreme Court were to . . . interpret "freedom of expression" in the Charter [to preclude legislative restriction on the amount spent on an election campaign]".

   It is not, of course, likely that freedom of expression protects limitless political campaigns (although it may protect limitless spending by an individual in his or her own campaign). Furthermore, it is not evident that the wave of privately funded advertising on the issues of the November 1988 federal general election did not serve a positive role in educating Canadians on important issues. Do Professors Russell and Weiler really prefer that our information on free trade or tax reform, as well as critical analysis of what they mean for Canada, be limited to what we are provided by the political parties?

10. In British Columbia, see *Dixon* v. *A.G.B.C.* (1989), 35 B.C.L.R. (2d) 273 (B.C.S.C.); the other jurisdiction in question is Saskatchewan. See "New ridings to be passed", *The Leader-Post [Regina]* (22 August 1989) A-8; Professor Howard McConnell of the University of Saskatchewan is reported as saying "If Saskatchewan's [electoral] boundaries were challenged in court it's likely the result would be the same as in B.C.", *The Leader-Post [Regina]* (20 April 1989) A-11.

C. FEDERALISM

There are two points to make about Canada's adoption of federalism in organizing state power. The first is that the chief justification for the federal arrangement (and this is particularly true in the Canadian experience) is that it provides protection to minorities from the political choices of national majorities.[11] Federalism is a political arrangement that is designed to blunt the force of majoritarianism because groups within the nation are recognized as having special interests that deserve entrenched protection. It is true that this mode of protection does not entail courts engaging in the same kind of social accommodation as they do under the *Charter*. Nevertheless courts do intervene to protect specific constitutionally recognized interests. Federalism is quite simply a substantial check on the exercise of national popular will. As such it is a further instance of seeing our constitutional order as consisting of commitments that have been embraced so that, as we live out our life as a community, certain ideals or images will prevail over power.

The second point is that by looking at the history of court adjudication over federalism we might get a better perspective on the significance of the debate over the override clause. Courts have been involved in disallowing back to work legislation and Sunday closing legislation, in adjudicating refugee claims and rules for qualifying as a profession, and in setting out the modes of proof of criminal liability and the allowable strategies for criminal investigations, each of which produces some disruption of public administration.[12] These outcomes require the abandonment of administrative processes and, sometimes, governmental policies. Indeed, some of these policies have become established within the country as the standard way of accommodating social conflict. *Charter* decisions that cause an abandonment of established accommodations will produce periods of dislocation and adjustment and could effect long term changes in the distribution of social benefits. However, the capacity of governments to regulate society for the public good has not, yet, been fundamentally hampered by *Charter* decisions. The major determinants that shape well-being in society are not frequently at stake in *Charter* decisions. For instance, compare the significance of any of the *Charter* cases alluded to above to the significance of a court decision that prevents a province from controlling trans-boundary environmental damage produced by pollution that is licensed by an adjoining province.[13] Compare any *Charter* decision with the significance to a province's economic development of deciding that it is unconstitutional to ration production of a resource with a view to sustaining a viable market for the resource.[14] Or compare the impact of any *Charter* decision with the consequence for a province of limiting its capacity to control the distribution of benefits from its most valuable natural attribute.[15] This is not a country in which govern-

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11. See, for example, R. Whittaker, *Federalism and Democratic Theory* (Kingston: Institute of Intergovernmental Relations, 1983); and F. Neumann, "Federalism and Freedom, A Critique" in A. Macmahon (ed.), *Federalism: Mature and Emerging* (New York: Doubleday, 1955) at 44-57.

12. I do not, of course, wish to minimize the political impact of decisions under the Charter. Judicial nullification of legislation has been fairly extensive. See, F. Morton, G. Solomon, I. McNish and D. Poulton, *Judicial Nullification of Statutes Under the Charter of Rights and Freedoms, 1982-1988* (1990) XXVIII Alta. L. Rev. 396.

13. *Interprovincial Co-operatives Ltd.* v. *The Queen*, [1976] 1 S.C.R. 477.

14. *Central Canada Potash* v. *Saskatchewan*, [1979] 1 S.C.R. 42.

15. *Churchill Falls (Labrador) Corp.* v. *Attorney General of Newfoundland; Reference re. Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

ments have never been seriously frustrated in implementing policies that make a difference to the health, wealth and well-being of every person in their jurisdiction. It is not credible to argue that removal of the override clause will produce a shift in the balance of power between political decision-makers and courts that will change the nature of our society. Constitutionalism already exacts a high price on the autonomy of electoral politics. Most Canadians see this as legitimate and fair in order to maintain the integrity of our national commitment to federalism. Undoubtedly the *Charter of Rights* has produced additional restraints on democratic politics. However, it has not made irrelevant the role of politics in shaping the nature of our society.[16] Our experience under federalism has clearly shown us that politics lives (that political initiatives are vital and that political mobilization makes an important contribution to the well-being of society) even when courts have the authority to protect constitutional values.

As I have stated, it is not my ambition to demonstrate that the override provision cannot coherently be included in our constitutional arrangements. My goal has been simply to show that it doesn't earn its place in the Constitution because of its logical fit with the general constitutional pattern. The most basic features of our constitutional arrangements do not, as it happens, create a logical or principled argument for the legislative override of the *Charter of Rights*.

III. FINDING A LESSON IN POLITICAL PRACTICE

There is a hope about the override clause. It is that it will be used to preserve social arrangements that have been carefully worked out by legislators through a process in which competing interests have been fully explored and understood and compromises have been thoughtfully constructed. Sometimes this hope takes stronger forms. One is that uses of section 33 are reviewable by courts to determine whether the exercise has been reasonable.[17] Another is that use of section 33 is limited to situations in which a court has already struck down the legislative provision that is being granted legislative immunity from *Charter* review.[18] An instance of this sort of use may be the enactment by Saskatchewan of the *S.G.E.U. Dispute Settlement Act*.[19] However, even the rather narrow use of section 33 to

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16. Minimizing the impact of the Charter of Rights on the respective roles of courts and legislature is something that I (with others) have done before. See, R. Romanow, J. Whyte and H. Leeson, *Canada . . . Notwithstanding* (Toronto: Carswell/Methuen, 1984) at 219: "The Charter does not change the way that important political accommodations are made, nor does it subordinate the role of politics in the conflict between the state and the individual".

    Professor Andrew Petter in his review of *Canada . . . Notwithstanding* (" 'Duck Soup' — Canada Style" (1985) 7 Supreme Court L. Rev. 553) commented on this sentence: "Clearly this is incorrect" (at 556). Clearly he is correct; the Charter does have an impact on the role of politics. (I suppose the sentence could be justified by giving the most abstract reading to the concepts of the "way" of political accommodation and the "role" of politics. In any event I have expressed the minimalist position differently, and more cautiously, in this paper.)

17. B. Slattery, Legislative Note, "Canadian Charter of Rights and Freedoms — Override Clause Under Section 33 — Whether Subject to Judicial Review Under Section 1" (1983) 61 Can. Bar Rev. 391.

18. Discussed in D. Greschner and K. Norman, "The Courts and Section 33" (1987) 12 Queen's L. J. 155 at 188-9. This position is supported by the judgment of Jacques, J. A. in *Alliance des Professeurs de Montreal* v. *Attorney General of Quebec* (1985), 21 D.L.R. (4th) 354 at 364.

19. Bill 144, 4th Sess., 20th Leg. Saskatchewan, 1985-86.

confirm the provinces' right to stop rotating strikes in the public sector was challenged as anything but a thoughtful accommodation of competing public and group interests. It was viewed by some as opportunistic and gratuitous, two characteristics that get to the heart of what it means to act repressively.

The constitutional patterns that we create are, happily, hardly ever pure.[20] There are many visions of a good society and we act wisely when we find ways not to deny the legitimacy and place of perfectly plausible visions. Hence, one of the virtues of the override power is that it has allowed Canada to create a regime for protecting human rights and it has left room for determined legislators to maintain social arrangements that they consider particularly important.

The unfortunate aspect of this benign description of the override clause as a restrained tool, instrument of thoughtful response and balancer of constitutional ideologies is its use is simply not likely to be restricted to instances that match this description. The primary reason for wishing to do away with the override clause is that the anxiety that produced the political demand for entrenched rights cannot rationally be calmed in the face of the legislative power granted by section 33. That anxiety is simply this: political authority will, at some point, be exercised oppressively; that is, it will be exercised to impose very serious burdens on groups of people when there is no rational justification for doing so.

Furthermore, the more that we succeed in marginalizing section 33 by pointing to its rare use and speaking of its deployment in extraordinary circumstances only, the more that legislative override will become associated with the intense political moments that produce political oppression.

There are two types of situations in which the *Charter of Rights* seems a positive constitutional instrument. One is when legislatures neglect to calculate the extraordinary impact of legislative measures on particular individuals. Another is when they know full well the impact on certain people but do not care enough about the problem (or do not have the time or skill to cope with the problem) to tailor the measure to avoid the injury to constitutional rights. Courts applying the terms of the *Charter of Rights* can give to individuals and groups both a forum to explain the precise nature of the disadvantage, and relief from undue burdens.

The other scenario that impels the entrenchment of rights is one in which fear and distaste by the majority for certain people leads to the oppression of those people. The Canadian historical record reveals a number of instances of political passion directed against conspicuous minorities — Japanese Canadians, Hutterites, Doukhobors, aboriginal peoples, Jehovah's Witnesses, the Acadians, Metis, Roman Catholics, communists and separatists.[21] All of these groups have, at some point, been seen as producing more social disruption and risk than society has been able to bear and all of these groups have been governmentally burdened in order to reduce the fear that has surrounded their presence. In all of these cases the governmental assessment of risk has been facile and overstated. In all of these cases the governmental response has been more than merely disadvantageous

20. "It would not be consistent with the Canadian experience for Canada's constitution to be based on the whole-hearted adoption of a single political idea." From R. Romanow, J. Whyte and H. Leeson, *supra*, note 15 at 259.

A similar claim on behalf of ideological modesty is made in B. Schwartz, *First Principles, Second Thoughts* (Montreal: Institute for Research on Public Policy, 1986) at 18.

21. See, T. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke Irwin, 1981).

to members of these groups. It has been brutal, community crushing, and life destroying. Political passion that is generated by the fear that there are communities within whose practices subvert the fabric of our society is powerful and terrifying.

In a recent article, Professor Andrew Petter quotes the famous observation of Judge Learned Hand: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it".[22] To the extent that this is accepted the moments of political anger and passion that I fear — the moments of political reaction that we invariably come later to regret — will not be forestalled by the removal of the override powers. There are, however, two ways in which Learned Hand's assessment of the role of courts in applying constitutionalized human rights is unduly pessimistic.

First, the terms of the *Charter of Rights* are not totally indeterminate. Judges are not free to reflect the dominant political winds in interpreting rights. The systematic destruction of a group's expression and practices cannot easily be denied as a *Charter* violation. Judges are, of course, aware of the political passion that is around them, but the values of independence and discipline that we seek to vindicate in appointments, do frequently shine through both in this country and in the brave judgments of courts in nations with a longer record of repression than ours.

The claim that is most commonly made about the political values that are represented in judging are the values of class and wealth.[23] Even if one were to accept the impossibility of understanding the life experiences of the poor and dispossessed, this claim has much more salience in cases of ordinary infringement, for instance, in cases of equality claims based on the differential impact of a regulation on marginalized members of society. Even those who have enjoyed a life of privilege know both the social impact of radical political control and exclusion, and the legal rights that have been placed in jeopardy by such controls. In other words, the moments of extreme political reaction that are likely to generate use of the legislative override power are the moments of serious political repression; cultural blindness to disadvantage is much less possible with respect to the elements of this sort of oppression.

Of course, it must be admitted that if the override clause were not available, governments engaged in oppression would argue that a loss of rights was reasonable in view of the dire social condition. With the *Charter's* section 1 formula available to justify the deprivation of rights it is easier to see the possibility of judges becoming caught up in the political impetus for control. This concern gives credibility to Learned Hand's doubts about judicial effectiveness. The answer is, again, to point to the judges comparatively advantageous position to measure the legality of legislated repression. They are disciplined by the legal text and legalism. They

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22. L. Hand "The Contribution of an Independent Judiciary to Civilization" in *The Spirit of Liberty and Other Writings*, (1953) at 144 quoted in A. Petter, "Canada's Charter Flight: Soaring Backwards into the Future" (1989) 16 Jo. of Law & Society 151.

23. "There are few public institutions whose composition more poorly reflects, and whose members have less direct exposure to, the interests of the economically and socially disadvantaged. . . . In short, there is nothing about the Canadian judiciary to suggest that they possess the background, the experience, or the training to comprehend the social impact of Claims made to them under the Charter, let alone to resolve those claims in ways that promote, or even protect, the interests of disadvantaged Canadians." A. Petter, *ibid.* at 157.

are committed to due process in assessing competing claims. They are politically indifferent, at least at a structural level. They are distanced from the popular expression of political will.

The second claim to make for the benefit of judicial supervision in moments of oppression is that the calling into play of *Charter* claims reminds the political community of the costs to fundamental values of political desperation. For the political process, for the people whose rights are being abridged and for the future political environment, the process of identifying carefully and calmly the precise loss of freedoms and rights is a process to be valued above all others in extreme political moments.

It is my view that the *Charter*, in its normal course, does not substantially rearrange society. In the normal course the *Charter's* benefits are, in any event, distributed in the same manner as legal services — preponderantly to the wealthy. It seems perverse to advocate the retention of a provision which is most likely to be used to preclude judicial intervention when that process has its strongest moral claim, and when the radically dispossessed will have no route for salvation other than appealing to courts to intervene on behalf of the *Charter* values of liberty, equality and due process.