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Only in Canada: Reflections on the Charter's Notwithstanding Clause

We should entrench our fundamental rights in the Canadian constitution... But we should include in the constitutional Bill of Rights the kind of *non obstante* provision now contained in our statutory bill, a provision which would allow Parliament to enact (or reenact) a statute which would then be legally valid irrespective of a judicial holding that it is incompatible with the Bill of Rights.... In typically Canadian fashion, I propose a compromise, between the British version of full-fledged parliamentary sovereignty and the American version of fullfledged judicial authority over constitutional matters.¹

So wrote Professor Paul Weiler before the enactment of the *Canadian Charter of Rights and Freedoms, 1982*. That the Charter contains a notwithstanding clause may be due, then, in no small part to Professor Weiler's essay in this *Review*. Moreover, the clause has since been defended by a number of constitutional scholars, and is thus well on its way to being viewed as the uniquely Canadian contribution to the theory of constitutionalism.² My purpose in this paper is to assess this constitutional optimism by subjecting the notwithstanding clause to a more systematic examination than it has yet received. Specifically, I shall outline four frameworks within which assessment of the clause must take place, and I shall suggest that it is with respect to the last framework — namely, that of federalism — that the clause encounters its greatest difficulties. That is so, I shall suggest, because Professor Weiler and other defenders of the notwithstanding clause have given insufficient attention to the fact that Canada is a federal state.³ In fact, their concern has not been federalism at all but the relationship between the legislature and the judiciary under a Bill of Rights, and their aim has been to secure and justify the ultimate supremacy of the legislature without depriving the judiciary of its most characteristic functions.⁴ My objection is not that they have failed to justify the supremacy of the legislature or have deprived the judiciary of its role, for here they have been largely successful. It is, rather, that they have failed to secure the very supremacy that they have succeeded in justifying, largely because their argument has proceeded as if Canada were a

unitary state. But Canada is, manifestly, a federal rather than a unitary state, and thus use of the notwithstanding clause — far from removing legislation from the judicial forum, as it would in a unitary state — brings into play the federal division of powers and its judicial construction. And Canadian experience with respect to that subject, I shall argue, suggests not only that a notwithstanding clause cannot secure the subordination of the judiciary to the legislatures, but also that use of the clause will entangle both the judges themselves and constitutional rights in the politics of federalism. But before elaborating this argument, I shall first outline the political objectives and concerns of the politicians who either advocated or opposed the notwithstanding clause; I shall then examine the clause from the perspective of constitutional theory, after which I shall consider the role of the Supreme Court under both the Canadian Bill of Rights and the Charter of Rights and Freedoms.

Politicians and the Notwithstanding Clause

Entering politics with the belief that Canada needed a Bill of Rights binding upon both levels of government,⁵ Prime Minister Trudeau also believed, together with Frank Scott, that though provincial consent had been difficult to obtain for other constitutional changes, “a Bill of Rights in theory should win acceptance more easily, since it does not disturb the balance of power.”⁶ No constitutional change, however, has been more difficult to secure than the Charter of Rights. It required two Supreme Court decisions and a series of concessions to the provinces, among them a notwithstanding clause. But that clause, it seemed to the Prime Minister, came dangerously close to defeating the very purpose of an entrenched Charter. Moreover, the government of Quebec refuses to recognize the legitimacy of the Charter and has already used the notwithstanding clause to override some of its major provisions; and it was Quebec that the Prime Minister had hoped to please most by his constitutional initiative.

The Prime Minister based his argument for an entrenched Charter upon the idea of equal rights. Bills of Rights have not, traditionally, been justified upon that ground at all. Their justification has been either that they secure individual and minority rights by placing them beyond the reach of intolerant political majorities, or that, in federal states, the greatest threat to such rights comes from local rather than national government.⁷ But the Prime Minister was not arguing that provincial governments failed to respect rights, or that rights were insecure in Canada. While an entrenched Charter would give greater security to rights, security of rights was not the issue. Rights can be

reasonably secure and yet unequal, and what primarily concerned the Prime Minister was the inequality of rights. "A constitutional bill of rights," he suggested, "... would well establish that all Canadians ... have equal rights."⁸ The federal Parliament could establish equal rights if it acquired additional legislative power, but the provinces would not consent to such a change in the division of powers. And individual action by the provinces would result in the diversity rather than the equality (or uniformity) of rights. Only the courts, operating under an entrenched Charter, could establish equal rights for all Canadians.

The Prime Minister linked equal rights not with egalitarianism but with unity. The Charter would promote some forms of equality: it would secure, for example, equal voting rights and equal freedom of conscience and the right to live and work anywhere in Canada. But the Charter would not diminish inequalities of wealth or political influence, nor did it even attempt to secure socio-economic rights. Egalitarian objectives would have to be achieved by other means. However, the equal rights of the Charter would promote Canadian unity. "You will appreciate," the Prime Minister said of his proposal, "that ... we will be testing—and, hopefully, establishing — the unity of Canada."⁹ That hope draws upon two complementary ideas. It applies to Canadian federalism what Durkheim said of the division of labour: "[A]s a consequence of a more advanced division of labour... the contents of men's minds differ from one subject to another. One is gradually proceeding towards a state of affairs ... in which members of a single social group will no longer have anything in common other than their humanity."¹⁰ If federal diversity had deprived Canadians of everything but their humanity, then that status, expressed in terms of uniform constitutional rights, might unite them. This was reinforced by the American experience that equality of rights can serve to create a national identity and a unity that transcend the identification citizens have with states and regions.¹¹

To many of the premiers, however, an entrenched Charter, equal rights, Canadian unity, political centralization, and the loss of provincial autonomy were much the same thing. The premiers did not oppose rights; they were not seeking to maintain, as Ottawa has sometimes suggested, parochialism and local intolerances. But the dispute over entrenchment, it was suggested in a paper prepared for the Government of Manitoba, "does not pertain solely, or mainly, to rights at all. It pertains, rather, to the transfer of power."¹² An entrenched Charter "would amount to a constitutional revolution," entailing the loss of provincial sovereignty and thus of provincial parliamentary democracy. It would transfer power from the provincial legislatures to the

courts. And what that suggested to some of the premiers was the loss of provincial autonomy, for “[t]o judge by the American experience an entrenched Bill of Rights would tend to centralize authority, certainly if the federal government had a predominant say in appointments to the Supreme Court.”¹³

But despite this claim, American experience does not in fact support the view that an “entrenched Bill of Rights would tend to centralize authority in any federation.” Both that claim and the assertion of the Supreme Court — that the entrenched American Bill of Rights was of no value in the interpretation of the statutory Canadian Bill of Rights¹⁴—rest upon the same fallacy, namely that virtually everything depends upon constitutional status. The American Bill of Rights has centralized power not because it is entrenched, nor even because it is interpreted by a federally appointed Supreme Court. If those were sufficient conditions for centralization, then the process would have begun in 1789 and America might have avoided her Civil War. The original Bill of Rights could not centralize power because it limited only federal power. It was only after the Civil War, and as a result of it, that the Fourteenth Amendment was adopted. That amendment placed open-ended restrictions upon state power and conferred primary enforcement power upon Congress.¹⁵ It should not be altogether surprising that a provision designed to centralize power should do just that.

What American experience suggests, then, is that the actual provisions of a Bill of Rights are as important as its constitutional status. Critics of the proposed Charter could point, however, to no provision that resembled the Fourteenth Amendment of the American constitution. The Prime Minister had, in fact, insisted that his Charter “would not involve a transfer of legislative power from one government to another.”¹⁶ It would simply be a “common agreement to restrict the power of governments.”¹⁷ The latter statement was only partly true. Some rights, such as speech, are primarily restrictions upon governmental power and require little implementing legislation. But other rights, such as language, are effective only if supported by legislation. An entrenched Charter might well lead to more rather than less government. Yet it was precisely here that the Prime Minister showed his concern for federalism: “In order not to be inconsistent with the present constitutional division of powers, an entrenched bill of rights must recognize that any required legislation falls within the competence of Parliament in some respects and within the competence of the provincial legislatures in others.”¹⁸

If the Charter of Rights is designed to promote unity rather than to centralize power, then a major *political* justification for the notwith-

standing clause appears groundless: the provincial legislatures cannot use the clause to prevent a centralization of power that will not occur.¹⁹ But frequent or extensive use of the clause could undermine the idea that Canadians have equal rights, and thus nullify the Prime Minister's goal of creating a Canadian unity based upon a Canadian identity. The provincial legislatures would be inclined to do just that if they believed, with Donald Smiley, that the Charter is "a device for strengthening national against provincial allegiances."²⁰ Legislative power is of little value to the provincial legislatures if voters identify with Ottawa rather than the provinces. Moreover, Ottawa already possesses, under the Canadian constitution, far greater legislative power than do the provinces and has at its disposal the powers of reservation and disallowance, even though judicial interpretation and usage have restricted those powers. But if the Charter succeeded in changing the loyalties of voters, it is not inconceivable that the Supreme Court might abandon the Privy Council's decentralist interpretation of the Constitution for Macdonald's centralist interpretation, and that the powers of reservation and disallowance might be revived. Frequent or extensive use of the notwithstanding clause would nullify that possibility as well (providing of course that the courts upheld legislation enacted under the clause as within the legislative powers of the provinces).

Constitutional Theory and the Notwithstanding Clause

The Charter's notwithstanding clause is also an exercise in constitutional theory. According to orthodox theory, however, the clause encounters an immediate and insuperable difficulty. The purpose of the clause is to secure the ultimate supremacy of the legislatures; but legislative supremacy is thought to be the very antithesis of constitutionalism. That latter claim was given classic expression by Chief Justice John Marshall in the celebrated American case of *Marbury v. Madison*. The alleged difficulty is apparent in the Canadian Charter. The Charter purports to be paramount law. It is part of the Constitution of Canada which "is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of inconsistency, of no force or effect."²¹ Yet the notwithstanding clause enables the legislatures to enact laws which conflict with the Charter. If *Marbury v. Madison* is sound, then the notwithstanding clause defeats the very purpose of the Charter.

Marbury v. Madison is not based upon the view that federalism requires a judicial umpire; and it is not, primarily, an exposition of the law of the American constitution. It is, rather, an exercise in abstract political theory and its aim is to lay bare the very idea of a limited or

constitutional government, of which the American is but one example. It sets out a series of alternatives between which "there is no middle ground"; and the alternatives are so constructed that Marshall's conclusion necessarily follows. A written constitution, the Chief Justice asserted, "is either paramount law ... or it is on a level with ordinary legislative acts."²² Since "all those who have framed written constitutions" contemplate them as forming paramount law, "an act of the legislature, repugnant to the constitution, is void."²³ But should courts give effect to void acts of the legislature? Those who maintain that "courts must close their eyes on the constitution, and see only the law" would "subvert the very foundation of all written constitutions." They would give the legislature "a practical and real omnipotence," reducing to nothing the "greatest improvement on political institutions, a written constitution."²⁴

Marbury v. Madison begins, then, by asserting the supremacy of the constitution; but it concludes by asserting a radically different kind of supremacy, namely that of the judicial version of the constitution. And it holds, even more radically, that the only alternative is legislative omnipotence. The heart of its argument is the equation of constitutional limitations and judicially imposed limitations, with the corollary that a written constitution is mere paper unless the courts defend it against the legislature. But the decision does not even attempt to establish these claims. Instead, it argues that courts ought to enforce the constitution rather than a statute which conflicts with it. And there are difficulties even here: for if courts were confined, as the Chief Justice implied, to preventing clear violations of the constitution by the legislature, judicial review would come to an end, since even a legislature bent on violating the constitution would not be foolish enough to do so clearly.²⁵

Not only is the Chief Justice's principal argument a *non sequitur*, but his opinion overlooks the institutional incapacities of courts and ascribes to them functions that they do not and cannot perform. *Marbury v. Madison* implied that the most important task of the courts was to defend the constitution against the legislature. Yet it was not until 1857—more than fifty years after *Marbury v. Madison*—that the Court again asserted its power against an Act of Congress. Not only have American courts been hesitant to oppose Congress (concerning themselves far more with administrative and police action than legislation action²⁶), but their power to gain compliance and their prestige have been lowest when they have sought to do so. "[T]he Court," Robert Dahl has written, "is least effective against a current law-making majority—and evidently least inclined to act."²⁷

But what makes the Chief Justice's conception of constitutionalism altogether unworkable is his assumption that legislators are unconcerned with constitutionality. If that assumption were sound; if (as Ronald Dworkin has suggested²⁸) legislators relied upon utilitarian and majoritarian considerations, while only judges based their decisions upon the constitution; then our constitutional polity would come to an end. For legislators, rather than judges, bear the exclusive responsibility for the enactment of laws, and most laws are either never tested in courts or receive limited judicial scrutiny only after being in force for a number of years. But a utilitarian and majoritarian legislature, unconcerned with constitutionality, would enact many unconstitutional laws and many of these would escape the judicial veto. Not only would such a legislature reduce to absurdity the presumption of constitutionality found in existing constitutional systems, but the system itself could not be described as a constitutional system, since it would contain a significant number of unconstitutional laws. Yet *Marbury v. Madison* leads, logically, to such a system.

These difficulties both suggest that *Marbury v. Madison's* central assumptions are unsound and point to a more satisfactory theory of constitutionalism. If courts were the sole guardians of constitutionality, then *Marbury v. Madison* could not have implications which conflict with some of the most basic features of existing constitutional systems, nor would it lead to absurd results. It is not that courts are unimportant; but *Marbury v. Madison* attaches importance to the wrong judicial functions. And it mistakenly supposes that legislators are unconcerned with constitutionality. But if legislators—whose role in a constitutional system is crucial—are concerned with constitutionality, and if courts are important in different ways than *Marbury v. Madison* suggests, then constitutional theory should take account of these facts.

The Canadian Charter attempts to do that by means of a notwithstanding clause, a clause which attempts to secure the ultimate supremacy of the legislature without depriving the judiciary of its role. The Charter itself is supreme law, and it empowers the courts to review for constitutionality all matters within the authority of Parliament and the provincial legislatures. Thus Canadian courts possess virtually the same judicial powers that American courts have acquired as a result of *Marbury v. Madison*. And that is unaffected by the notwithstanding clause: for the supremacy of the Charter, so far as the courts are concerned, is no more undermined by the notwithstanding clause than it is by the power of formal amendment. The reverse may be nearer the truth since the clause, as Paul Weiler has suggested, may have a psychologically liberating effect upon judges, inclining them to be

“adventurous ... if only because the political process remains there as a backstop if they miscue badly enough.”²⁹ But whether or not judges choose to be adventurous, their duty is to apply the Charter as supreme law.

That duty is important not because it prevents manifest violations of the constitution by the legislature, but because even a legislature which respects the constitution may violate it through inadvertence. And that suggests that talk of judicial deference and judicial activism — so common in American constitutional theory³⁰ — is often misleading, since those terms imply that courts must either exercise no independent judgment regarding constitutionality or must set themselves against the legislature. But in cases of legislative inadvertence courts uphold the constitution without opposing the legislature. In such cases the Charter’s notwithstanding clause is of no consequence either: for a legislature is not likely to override a judicial decision which prevents it from doing what it never intended to do.

In other cases courts do not uphold the constitution so much as substitute judicial for legislative judgments of constitutionality. In those cases the judicial version of the Charter is supreme unless the legislatures decide otherwise. But the legislatures, if supported by public opinion,³¹ may be more inclined to use the notwithstanding clause in such cases than some constitutional scholars suppose. And the Canadian Bill of Rights does not prove the contrary.³² For though its notwithstanding clause was used only once and then only in a situation of apparent emergency, the Bill itself was never used to render inoperative laws of whose validity Parliament and the public were convinced. But if the legislatures should consistently fail to use the Charter’s notwithstanding clause in situations in which its use is justified, then that failure would not only deprive the clause of its possible liberating effect upon the judiciary: it would also nullify the most important difference between the Charter and the American Bill of Rights.

In yet other cases Parliament and the legislatures are likely to use the notwithstanding clause to enact legislation designed to meet exceptional circumstances, if such legislation cannot be introduced otherwise. Thus Parliament would almost certainly use the clause to protect emergency legislation which failed to survive judicial scrutiny under the Charter’s ‘reasonable limits test’.³³ In such cases, however, the notwithstanding clause does not empower the legislatures to infringe constitutional rights so much as it acknowledges that Bills of Rights are framed for normal rather than exceptional circumstances. And that would remain true even if the Charter did not contain such a clause, for American experience with an entrenched Bill of Rights

suggests that exceptional circumstances give rise to exceptional means.

All this supposes of course that legislators respect constitutional rights. But even if this were disputed, it would by no means follow that a notwithstanding clause makes infringement of constitutional rights easier or more likely. In the case of surreptitious infringements, for example, the clause may be of no consequence whatsoever. For if infringements are surreptitious because they would fail to receive wide public support if done openly, then a democratic legislature is not likely to override judicial decisions exposing such infringements. The notwithstanding clause would be used by a legislature whose infringements were supported by public opinion; but the clause does not enable such a legislature to infringe constitutional rights so much as it provides a new means of doing so. Even without such a clause, legislators can often undermine constitutional rights through the appointment and removal of judges, through manipulation of the jurisdiction of courts, through participation in the amending process, and by a variety of other means. But constitutionalism supposes that legislators respect rights, for otherwise a constitutional system could not exist. It supposes, as Holmes said in a different context, that "legislators are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."³⁴ And the Charter's notwithstanding clause supposes that too, for otherwise we can imagine no circumstances in which it would have relevant application.

The Charter and the Bill of Rights

Although the notwithstanding clause owes its existence largely to the fear that the courts would supplant the legislatures as policy-makers under a Charter of Rights, that fear could not have been based upon Canadian experience. For judicial interpretation of the Canadian Bill of Rights, as Walter Tarnopolsky has observed, provides "no evidence ... that any of the Canadian courts, and certainly not the Supreme Court of Canada, are declaring legislation inoperative because of excessive zeal to protect civil liberties against the legislators and administrators of Canada."³⁵ But the Charter differs from the Bill of Rights, and those differences may incline the courts to give it strong judicial application; and that in turn may incline the legislatures, as we have seen, to use the notwithstanding clause. What is crucial, then, is whether or not the Supreme Court will give the Charter overriding effect.

That question is obviously unanswerable since it presupposes knowledge of future judicial behaviour. But knowledge of judicial

behaviour under the Canadian Bill of Rights is available. That the Supreme Court used the Bill (except in two cases²⁶) as merely an interpretation statute came as no surprise to some academic lawyers. For they had insisted, even before the Bill became law, that it was an interpretation statute. Thus Frank Scott, writing in 1959, stated: "I regret that I don't think it means much as a matter of law. I just do not think it has amended all the laws that now exist which are contrary to it—and there are many."³⁷ Bora Laskin, then a professor of law, concurred: his analysis of the Bill did "not portend any greater role for the proposed Canadian Bill of Rights than its operation as a political charter."³⁸ And W.R. Lederman — after adding (in 1967) his authority to the view that the Bill "contains only presumptions as to the construction of other federal statutes"—concluded that the Bill "is itself poorly drafted."³⁹

When judges were asked to apply the Bill their reasons for refusing to use it as anything more than an interpretation statute bore a striking resemblance to the reasons given by the academic commentators. And most of their reasons related to the language of the Bill. Thus section 1 states: "it is hereby recognized and declared that ... there have existed and shall continue to exist ... the following human rights." Some of the judges took that to mean that the Bill created no new rights but merely enshrined the rights that Canadians already possessed; and that implied that if Canadians did not possess a right prior to the enactment of the Bill, then they did not possess the right as a result of it.⁴⁰ Section 2, which enacts that "Every law of Canada shall ... be construed and applied," created difficulties as well. To some of the judges that phrase suggested that the courts were required to resolve conflicts between the Bill and other laws by interpretation; but if the conflict could not be so resolved, then the conflicting legislation must be applied.⁴¹ If Parliament had intended otherwise, Chief Justice Cartwright reasoned, it would have added such words as "and if any law of Canada cannot be so construed and applied it shall be regarded as inoperative or *pro tanto* repealed."⁴²

Parliament had intended otherwise. Parliament's intention became apparent when the Chief Parliamentary Draftsman explained the significance of the Bill in an essay published in 1968⁴³—an explanation which appears to have convinced academic lawyers but not the judges.⁴⁴ For though the Supreme Court used the Bill, shortly afterwards, to render inoperative a section of the *Indian Act*, *The Queen v. Drybones* was exceptional and the courts continued to use the Bill as an interpretation statute. At that point Parliament might have responded by simply amending the Bill along the lines suggested by Chief Justice Cartwright, thus reassuring the judges that the Bill

(which has a statutory rather than a constitutional basis) was intended to have overriding effect. But Parliament, or at least the Prime Minister, seems to have thought otherwise, believing perhaps, with one constitutional scholar, that "the strongest argument for entrenching a Bill of Rights is the impotence of the present one."⁴⁵

The suggestions of the judges were influential, however, in the framing of the Charter of Rights: and thus judicial interpretation of the Charter should be free of at least some of the difficulties encountered by the Bill of Rights.⁴⁶ The Charter, for example, does not speak of "recognizing rights" or of "existing rights", but confers rights. And laws which conflict with the Charter are not to be "construed and applied" but are "of no force or effect." Moreover, the Charter also possesses constitutional status, and thus avoids another alleged difficulty of the Bill of Rights, namely its statutory or at most quasi-constitutional basis.⁴⁷

But there were other reasons for the difficulties encountered by the Bill of Rights, reasons whose force depended neither upon the language nor the status of the Bill. Thus, when the Supreme Court was asked to give overriding effect to the Bill, some of the judges expressed concern that the Court could do so only by performing functions which, in "the traditional British system that is our own by virtue of the B.N.A. Act,"⁴⁸ belonged exclusively to Parliament. For the courts were being asked to adapt the law to changing circumstances and thus to exercise, in effect, legislative power. Not only were the courts, some of the judges reasoned, ill-equipped to perform these functions; but functions of this kind raised questions about legislative sovereignty and about the legitimacy of judicial review in a democracy.⁴⁹

Although influential, such reasoning presupposes a fallacious view of the basis of judicial authority. It supposes, that is to say, that judicial action under a Bill of Rights is justified only if courts possess greater expertise than the legislature, or if the action in question is in fact 'democratic'. But to argue in this way is not only to require a standard of 'proof' that may be impossible to attain: it is also to overlook the soundest basis for judicial action. "[W]e act in these matters," Justice Jackson held in a case concerning the American Bill of Rights, "not by authority of our competence but by force of our commissions."⁵⁰ That answer has never satisfied American constitutional scholars, but only because (as Justice Jackson himself recognized by invoking history) the American constitution does not confer a clear commission upon the judiciary.⁵¹ The Canadian constitution, however, does confer such a commission, and thus Canadian Courts would be required to give overriding effect to the Charter of Rights even if it could be shown that

the judiciary lacked the expertise of the legislature, or that judicial review was in fact undemocratic.

Judicial Federalism and the Notwithstanding Clause

The Charter of Rights is, however, only part of the Canadian constitution. It presupposes the B.N.A. Act, and especially its division of legislative powers. That would be of little consequence if the Charter did not contain a notwithstanding clause, or if, though it contained such a clause, the B.N.A. Act allocated legislative jurisdiction over civil liberties in a precise manner. But the allocation of civil liberties jurisdiction is one of the most disputed features of the B.N.A. Act, so much so that Frank Scott, for example, recommended entrenching a Bill of Rights on that ground alone: "It is hard to protect something by law when you do not know whom it belongs to. This is why my personal preference is for a bill of rights which is placed in the B.N.A. Act."⁵² The Charter of Rights is of course part of the B.N.A. Act. But use of its notwithstanding clause requires courts to address logically prior and politically sensitive questions about which level of government has jurisdiction over civil liberties — the very question that, according to Scott and others, an entrenched Bill of Rights was to eliminate.

That civil liberties jurisdiction under the B.N.A. Act is radically uncertain is illustrated, though not exhausted⁵³ by *Laurier Saumur v. The City of Quebec*; a case which raised the seemingly simple question of the validity of a municipal by-law prohibiting the distribution of pamphlets in the streets without the permission of the chief of police. The Supreme Court eventually decided that the by-law was *ultra vires* but only by a majority of 5-4 and only after setting out at least three views of the constitutional position of civil liberties, none of which was accepted by a majority of the court. Thus Chief Justice Rinfret and Justices Kerwin and Taschereau, relying on provincial legislative power over property and civil rights and in relation to matters of a merely local or private nature, held that provincial legislative jurisdiction over civil liberties was unlimited.⁵⁴ But Justice Estey countered that federal jurisdiction was unlimited, given Parliament's power to make laws 'for the peace, order and good government of Canada'.⁵⁵ And Justices Cartwright and Fauteux insisted that some civil liberties (freedom of speech among them) fell partly under provincial and partly under federal jurisdiction.⁵⁶

To some constitutional scholars, *Saumur* suggested more than that (in cases concerning the constitutional position of civil liberties) it was "not difficult to find some reason why a particular piece of legislation

is invalid if the judges are so inclined.”⁵⁷ *Saumur* also suggested, to Frank Scott at least, that the federal division of legislative powers could be used to protect what the judges understood to be the liberties of the subject. “For by saying that a particular statute exceeds the jurisdiction of Parliament or legislature, the courts remove the statute from the books and the liberties it destroyed are restored.”⁵⁸ Such use of the division of powers was justified, Scott insisted, because it was the “function and duty [of judges] to act as guardians of our rights whether we have a Bill of Rights or not.”⁵⁹

But such use of the division of powers, as Scott himself acknowledged, also provided one of the most compelling justifications for entrenching a Bill of Rights. For not only was that approach to civil liberties jurisprudentially unsound, but it might turn out to be completely ineffective; and whether effective or not, it had serious implications for the structure of Canadian federalism. The approach was unsound because questions of civil liberties and questions of federalism were not coextensive in all cases.⁶⁰ And it might prove ineffective because the courts, using the federalism device, could find a statute *ultra vires* only by attributing jurisdiction over the liberties in question to the level of government that had not legislated. But that government, now secure in its constitutional jurisdiction, might choose to enact the very statute that the courts sought to remove from the books.

The question of effectiveness aside, such judicial tactics would not only have serious implications for the structure of Canadian federalism, but might even result in the diminution of provincial legislative power. The latter hinged upon the fact, as Walter Tarnopolsky observed in 1968, that “[t]here have been more civil liberties cases involving provincial governments than the federal government.”⁶¹ That fact, coupled with the uncertainty of legislative jurisdiction over civil liberties and the apparent determination of judges to uphold what they believed to be the liberties of the subject, would result in the courts “holding that the particular right ... is beyond the jurisdiction of the province.”⁶² And that implied, Tarnopolsky reasoned, that “absence of an overriding Bill of Rights results in the diminution of provincial power.”⁶³ An entrenched Bill of Rights would diminish provincial power too, but (unlike the device of judicial federalism) it would not transfer the relinquished power to the federal government. Those being the alternatives, it was, Tarnopolsky concluded, “all the more ironic that opposition to the proposed Charter of Human Rights should come from provincial spokesmen.”⁶⁴

It is even more ironic that provincial spokesmen should have demanded the inclusion of a notwithstanding clause in the Charter of

Rights. For use of the clause — far from removing legislation from the judicial forum, and thus securing the supremacy of the provincial legislatures over the judiciary — requires the courts to address logically prior and radically uncertain questions about the allocation of legislative jurisdiction over civil liberties under the federal division of legislative powers.⁶⁵ And because that jurisdiction is uncertain, courts will be asked to hold legislation enacted under the clause *ultra vires* by attributing jurisdiction over the rights in question to the government that has not legislated. How these cases will be decided cannot of course be predicted. What can be said, however, is that the allocation of civil liberties jurisdiction is uncertain enough, contested enough, and sufficiently entangled in the politics of federalism to make judicial decisions with respect to it appear to have more of the characteristics of judicial legislation than of judicial interpretation. And if those decisions, following the example of the 1950s, deal with provincial use of the notwithstanding clause by resorting to the device of judicial federalism, then use of the clause will bring about the very centralization of legislative power that it was intended to prevent. But even if the courts decide otherwise, their decisions will still have a profound effect upon the structure of Canadian federalism; and thus use of the notwithstanding clause will make judges more, rather than less, important.

Since these difficulties are rooted in federalism rather than in the relationship between the legislature and the judiciary under an entrenched constitution, they do not of course diminish the importance of the Charter's notwithstanding clause as a contribution to the theory of constitutionalism. But what they do suggest is that the notwithstanding clause is an advance primarily in the constitutional theory of the unitary state. For though it may be possible to construct a federal division of powers which is more precise than the Canadian, and thus to remove larger portions of it from the judicial forum, a characteristic feature of virtually all such divisions of powers is that they are both uncertain and contested. So long as this is the case, and so long as the courts are required to resolve the jurisdictional disputes which arise, a notwithstanding clause cannot ensure the supremacy of the legislature over the judiciary in a federal state. And this suggests that *Canadian* optimism concerning the notwithstanding clause is misplaced.

NOTES

1. P.C. Weiler, "Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?" (1980/81) 60 *Dalhousie Review* 205, at 231-232. The notwithstanding clause is set out in section 33 of the Canadian Charter of Rights and Freedoms.

2. See W.S. Tarnopolsky, "The Constitution and Human Rights," in K. Banting and R. Simeon, *And No One Cheered: Federalism, Democracy and the Constitution Act* (1983), at 271; H. Marx, "Entrenchment, Limitations and Non-Obstante," in W.S. Tarnopolsky and G. Beaudoin, *The Canadian Charter of Rights and Freedoms* (1982), 70-73; J. Jaconelli, *Enacting a Bill of Rights: The Legal Problems* (1980), at 61-91; W.R. Lederman, "Concerning a Bill of Rights for Canada and Ontario," in *The Confederation Challenge* (1970), at 61-91.
3. See Weiler, "Of Judges and Rights," at 234-235: "I advance this proposal to define the relative responsibility for, and ultimate authority over, fundamental rights only as between Parliament and the Supreme Court of Canada in Ottawa."
4. See note 2; and especially Weiler, "Of Judges and Rights," at 231-235.
5. P.E. Trudeau, "A Constitutional Declaration of Rights," in his *Federalism and the French Canadians* (1968), at 52.
6. F.R. Scott, *Civil Liberties and Canadian Federalism* (1959), at 52. Compare Trudeau, "A Constitutional Declaration of Rights," at 57.
7. The former justification is set out, for example, in the opinion of Justice Jackson in *Barnette v. West Virginia State Board of Education*, 319 U.S. 638 (1943). The latter justification is elaborated in Scott, *Civil Liberties and Canadian Federalism*, at 23; and in W.H. Riker, *Federalism: Origin, Operation, Significance* (1964), at 139-145.
8. P.E. Trudeau, *A Canadian Charter of Human Rights* (1968), at 11. See P.H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 *Canadian Bar Review* 30-54.
9. Trudeau, "A Constitutional Declaration of Rights," at 54.
10. S. Lukes, "Durkheims 'Individualism and the Intellectuals'" (1969), 17 *Political Studies* 14, at 26.
11. See A.C. Cairns, "Recent Federalist Constitutional Proposals: A Review Essay" (1979) 3 *Canadian Public Policy* 348, at 354.
12. G.P. Browne, "On the Entrenchment of a Bill of Rights," mimeographed, Government of Manitoba, September, 1980, 1, at 1.
13. *Ibid.*, at 13.
14. See, for example, Chief Justice Fauteux's remark in *Smythe v. The Queen* 19 D.L.R. 3d 480 (1971); and the discussion in W.S. Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981) 44 *Law and Contemporary Problems* 169, at 181.
15. See A.M. Bickel, "The Original Understanding and the Segregation Decisions" (1955) 69 *Harvard Law Review* 1, at 64; and R. Berger, *Government by Judiciary* (1977).
16. Trudeau, *A Canadian Charter of Human Rights*, at 14.
17. *Ibid.*, 14.
18. *Ibid.*, 29.
19. Compare Browne, "On the Entrenchment of a Bill of Rights," at 21.
20. D. Smiley, *The Canadian Charter of Rights and Freedoms, 1981* (1981) at 57, 12.
21. See section 52 of the Constitution Act, 1982.
22. 1 Cranch 137, at 177 (1803).
23. *Ibid.*, at 177.
24. *Ibid.*, at 178.
25. Marshall's opinion is criticized by J.B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," in L.W. Levy, *Judicial Review and the Supreme Court* (1967), at 43-63; and C.L. Black, *The People and the Court* (1960), at 26-27.
26. W.S. Tarnopolsky, "Enacting a Bill of Rights: The Legal Problems" (1982) 2 *Oxford Journal of Legal Studies* 122, at 125.
27. R.A. Dahl, "Decision-Making in a Democracy: the Supreme Court as a National Policy-Maker," in L.W. Levy, *Judicial Review and the Supreme Court* (1967), at 122.
28. R. Dworkin, *Taking Rights Seriously* (1977), at 141; and especially his "Liberalism," in S. Hampshire, *Public and Private Morality* (1978), at 134.
29. Weiler, "of Judges and Rights," at 227.
30. See, for example, M. Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (1966), at 5-45.
31. The five year limitation on legislation enacted under the notwithstanding seems to be designed to ensure that legislative opinion conforms to public opinion.
32. Compare Tarnopolsky, "Enacting a Bill of Rights," at 124.
33. See Section 1 of the Canadian Charter; and the discussion in Marx, "Entrenchment, Limitation and Non-Obstante," at 61.
34. *Missouri, Kansas and Texas Rwy. Co. v. May*, 194 U.S. 267, at 270 (1904).

35. Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms," at 192.
36. See *The Queen v. Drybones* [1970] S.C.R. 282; and *Hogan v. The Queen*, 48 D.L.R. 3d 427 (1974).
37. Scott, *The Canadian Constitution and Human Rights*, at 47.
38. B. Laskin, "An Inquiry Into the Diefenbaker Bill of Rights" (1959), 37 *Canadian Bar Review* 77, at 134.
39. Lederman, "Concerning a Bill of Rights for Canada and Ontario," at 278.
40. See, for example, Justice Ritchie's opinion in *Robertson and Rosetanni v. The Queen*, 41 D.L.R. 2d 485 (1963). Walter Tarnopolsky has called this the "frozen concepts" principle.
41. See Justice Pigeon's opinion in *The Queen v. Drybones* [1970] S.C.R. 282, at 300.
42. *Ibid.*, at 288.
43. E.A. Driedger, "The Canadian Bill of Rights," in O.E. Lang, *Contemporary Problems of Public Law in Canada* (1968), at 40.
44. Lederman, "Concerning a Bill of Rights for Canada and Ontario," at 286.
45. W.S. Tarnopolsky, "A Constitutionally Entrenched Charter of Human Rights — Why Now?" (1968) 33 *Saskatchewan Law Review* 247.
46. See Tarnopolsky, "The Constitution and Human Rights," at 261; and P.W. Hogg, "Supremacy of the Canadian Charter of Rights and Freedoms" (1983) 61 *Canadian Bar Review* 69.
47. See, for example, Justice Martland's opinion in *Regina v. Burnshine*, 44 D.L.R. 3d 584, at 590 (1974).
48. See Justice Pigeon's opinion in *The Queen v. Drybones* [1970] S.C.R. 282, at 306.
49. J.D. Whyte, "Civil Liberties and the Courts" (1976) 83 *Queen's Quarterly* 655.
50. *Barnette v. West Virginia State Board of Education*, 319 U.S. 624, at 640 (1943).
51. See L. Hand, *The Bill of Rights* (1963), at 27-30; and H. Wechsler, *Principles, Politics and Fundamental Law* (1961), at 4-15.
52. Scott, *The Canadian Constitution and Human Rights*, at 50.
53. See also *Switzman v. Elbling and A.G. Quebec* (1957) 7 D.L.R. (2d) 337; D.A. Schmeiser, *Civil Liberties in Canada* (1964), at 13-16; J.D. Whyte and W.R. Lederman, *Canadian Constitutional Law* (1977), at 4-108; and W.S. Tarnopolsky, "A Constitutionally Entrenched Charter of Human Rights — Why Now?" at 248, where it is suggested that "[t]here is a very deep disagreement with respect to the division of legislative jurisdiction over civil liberties."
54. [1953] 2 S.C.R. 299, at 301, 321.
55. *Ibid.*, at 356.
56. *Ibid.*, at 379.
57. Scott, *Civil Liberties and Canadian Federalism*, at 27.
58. *Ibid.*, at 27.
59. *Ibid.*, at 27.
60. See P. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 *University of Toronto Law Journal* 307, at 342; and his *In The Last Resort* (1974), at 192-196.
61. Tarnopolsky, "A Constitutionally Entrenched Charter of Human Rights — Why Now?" at 249.
62. *Ibid.*, at 249.
63. *Ibid.*, at 249.
64. *Ibid.*, at 249.
65. Section 31 of the Charter enacts: "Nothing in this Charter extends the legislative powers of any body or authority." Thus the Charter and especially the notwithstanding clause presuppose the legislative powers set out in the B.N.A. Act.