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TABLE OF CONTENTS

ARTICLES

BOOK REVIEWS

ON ARISTOTELIAN EQUALITY, THE FUNDAMENTAL RIGHT TO EQUALITY, AND GOVERNMENTAL DISCRETION

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The author examines the relationship between the principle of equality in constitutional and administrative law and other public law principles governing governmental discretion. He exposes some basic elements of the relationship between equality and rules governing governmental discretion in democratic legal systems, and concludes that while equality limits governmental discretion, it does not fetter it altogether.

L'auteur étudie la relation entre le principe de l'égalité dans le droit constitutionnel et administratif et les autres principes du droit public qui régissent le pouvoir discrétionnaire du gouvernement.Il énonce certains éléments fondamentaux de la relation entre l'égalité et les règles régissant le pouvoir discrétionnaire du gouvernement dans les systèmes juridiques démocratiques.Il conclut que bien que l'égalité limite ce pouvoir discrétionnaire, elle n'en entrave pas l'exercice.

I. INTRODUCTION

It is a fundamental principle in democratic legal systems that governmental authorities must maintain equality and refrain from discrimination.[1] Despite the undeniable, pivotal role of the equality principle in public — constitutional and administrative — law, its contents and meaning, and thus the results of its application, remain among the least clear of legal issues.[2]

Discretionary powers generally enable government to choose among several possible decisions or actions (including a decision to refrain from acting).[3] When a valid act or regulation dictates to the governmental authority in explicit language how it must act, the principle of equality seems irrelevant. In contrast,

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1 See *e.g.* J. Rutherford, "Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion" (1996) 81 Cornell L. Rev. 1049 at 1070–76.

2 See *e.g.* R.G. Dixon, Jr., "Equality, The Elusive Value" [1979] Wash. U.L.Q. 5; W. von Leyden, *Aristotle on Equality and Justice: His Political Argument* (Basingstoke: MacMillan, 1985) at 5; and P.M. Bator, "Equality as a Constitutional Value" (1986) 9 Harv. J.L. & Pub. Pol'y 1 at 1.

3 See *e.g.* K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969).

when the governmental authority is granted discretionary powers, the equality principle becomes germane, as the authority must exercise such discretion within the scope of that principle. The equality principle, then, is part of the body of law dealing with the restriction and guidance of official discretion.

This essay examines the relationship between the principle of equality in constitutional and administrative law and other public law principles governing governmental discretion. Clarification of this relationship is important both for determining the rules concerning equality and for an evaluation and critique of these rules. This article tries to expose some basic elements of the relationship between equality and rules governing governmental discretion in democratic legal systems (such as the United States, Great Britain and Canada, whose case laws are referenced in the footnotes). Hence, it does not discuss in detail specific jurisprudence, including the constitutional doctrine of three levels of Equal Protection review.[4]

After briefly discussing the legal rules regarding governmental discretion, I attempt to differentiate between two definitions of the equality principle which are commonly accepted in law, and explore the relations between them. These are the Aristotelian definition of equality and the definition of equality as a fundamental human right. Finally, I examine the relation between the equality principle and the body of legal rules regarding governmental discretion. In this context I present the different ways in which the equality principle, under each definition, limits governmental discretion in constitutional and administrative law.

II. ON THE LAWS REGARDING GOVERNMENTAL DISCRETION

The laws regarding governmental discretion are intended to restrict and guide the exercise of discretion by government authorities. In many instances, even after applying these rules, the authority will still be able to choose between several different lawful decisions in a given matter. If this were not the case, of course, it would be meaningless to speak of discretion. Nevertheless, there may be circumstances in which the rules of discretion will dictate only one lawful decision. The fact that the power is discretionary does not imply that the authority will in all cases have a choice among several possible decisions or actions.

[4] See generally J.E. Nowak & R.E. Rotunda, *Constitutional Law*, 5th ed. (St. Paul: West Co., 1995) at 595–951.

The notion of discretion underlying my argument below is grounded upon the following premises. First, the choice of decision is made on the basis of a series of considerations. Second, each possible decision reflects a different balancing of those considerations. Third, the law, either explicitly or through interpretation, determines which considerations shall be taken into account when exercising discretion ("the relevant considerations").

Under these three premises, the following general, primary rules of discretion may be posited. First, in choosing its preferred outcome the authority must take account of all relevant considerations.[5] Second, in making its decision the authority must not give heed to any motive, purpose or consideration which is not relevant.[6] Third, the authority must accord weight to the relevant considerations reasonably, or, at any rate, in a manner which is not arbitrary and capricious, extremely unreasonable or patently untenable.[7] When the exercise of such power may result in a violation of human rights, more specific rules may apply, which greatly restrict discretion, such as the requirements of clear and present danger or proportionality.[8]

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[5] See *e.g. Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965) (*Appeal of Concord Natural Gas Corp.*, 433 A.2d 1291 (N.H. 1981)); *R. v. Shadow Education Committee of Greenwich B.C. ex p. Governors of John Ball Primary School* (1989), 88 L.G.R. 589; and *R. v. M.(S.H.)*, [1989] 2 S.C.R. 446.

[6] See *e.g. Morrill v. Jones*, 106 U.S. 466 (1883); *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973) (improper purpose); *United States ex rel. Partheniades v. Shaughnessy*, 146 F. Supp. 772 (D.N.Y. 1956); *P.G.P. Entertainment Corp. v. State Liquor Authority*, 52 N.Y.2d 886 (1981) (extraneous considerations); *Roberts v. Hopwood*, [1925] A.C. 578; *Ville de Boucherville v. Jaybatt Corp.*, [1965] C.S. 611 (Que. S.C.); *New Brunswick Broadcasting Co. v. Canadian Radio-Television and Communications Commission*, [1984] 2 F.C. 410 at 422–23 (C.A.); *Lindsay v. Nova Scotia (Minister of Consumer Affairs)*, [1986] 76 N.S.R. (2d) 208 at 215 (S.C.); *Bugdaycay v. Secretary of State for the Home Department*, [1987] 1 All E.R. 940 at 953 (H.L.); *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 7.

[7] See *e.g. Delpro Co. v. Brotherhood Railway Carmen*, 519 F. Supp. 842 (1981); *Martin Oil Service Inc. v. Koch Refining Co.*, 582 F. Supp. 1061 (N.D. Ill. 1984); B. Schwartz, *Administrative Law: A Casebook*, 3d ed. (Boston: Little, Brown, 1991) at 654, and at 640–42; W.F. Fox, Jr., *Understanding Administrative Law*, 2d ed. (New York: Matthew Bender, 1986) at 258–59; *Associated Provincial Picture Houses v. Wednesburg Corporation*, [1948] 1 K.B. 233; *R. v. Secretary of State for the Home Department ex parte Brind*, [1991] 1 A.C. 696; *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 139–40; *R. v. Simon (No. 1)* (1982), 68 C.C.C. (2d) 86 at 90–92 (N.W.T.S.C.(T.D.)); and *Levitz v. Ryan*, [1972] 3 O.R. 783 at 790 (C.A.).

[8] See *e.g. Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *Widmar v. Vincent*, 454 U.S. 263 (1981); G. Gunther, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" (1972) 86 Harv. L. Rev. 1; H.A.

What is the proper place of the principle of equality in the legal rules regarding governmental discretion? Is it an independent, self-sustaining rule, or merely an expression of the other rules? To answer this question one must first examine the substance of the equality principle.

III. THE NATURE OF THE EQUALITY PRINCIPLE: TWO COMMON DEFINITIONS AND THE RELATION BETWEEN THEM

A. Two Common Definitions

The equality principle, which is employed in a broad spectrum of fields, bears many definitions and meanings.[9] In law, one commonly accepted definition is that posited according to the way Aristotle[10] is explained by various scholars,[11] under which equality is giving equal treatment to equals and unequal treatment

Linde, "Due Process of Lawmaking" (1976) 55 Neb. L. Rev. 197; G.R. Stone, *et al.*, *Constitutional Law*, 2d ed. (New York: Aspen, 1991) at 579, and the 1994 Supplement at 112–13; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199.

[9] See *e.g.* R. Dworkin, "What is Equality: Part 1, Equality of Welfare" (1981) 10 Philosophy & Pub. Aff. 185 at 185; D. Rae, *Equalities* (Cambridge: Harvard University Press, 1981) at 133. Professor Rae has calculated that there are 108 different meanings of equality. By contrast, Professor Westen maintains that the principle of equality by itself lacks all meaning. See P. Westen, "The Empty Idea of Equality" (1982) 95 Harv. L. Rev. 537. See also H. Kelsen, "What is Justice?" in *What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays by Hans Kelsen* (Berkeley: University of California Press, 1960) 1 at 15. Compare P. Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of Equality in Moral and Legal Discourse* (Princeton: Princeton University Press, 1990) [*Speaking of Equality*]. Professor Westen's approach has been criticized. See *e.g.* W. McKean, *Equality and Discrimination Under International Law* (Oxford: Clarendon, 1983) at 4; K.R. Greenawalt, "How Empty is the Idea of Equality?" (1983) 83 Colum. L. Rev. 1167; and Professor Westen's response: P. Westen, "To Lure the Tarantula From its Hole: A Response" (1983) 83 Colum. L. Rev. 1186. See also S.J. Burton, "Comment on 'Empty Ideas': Logical Positivist Analyses of Equality and Rules" (1982) 91 Yale L.J. 1136; P. Westen, "On 'Confusing Ideas': Reply" (1982) 91 Yale L.J. 1153. For further discussion, see C.J. Peters, "Equality Revisited" (1997) 110 Harv. L. Rev. 1210; and the response of K. Greenawalt, "Prescriptive Equality: Two Steps Forward" (1997) 110 Harv. L. Rev. 1265.

[10] See Aristotle, *Nicomachaean Ethics*, trans. by R. Crisp (New York: Cambridge University Press, 2000).

[11] See *e.g.* T.L. Beauchamp & J.F. Childress, *Principles of Biomedical Ethics*, 3d ed. (New York: Oxford University Press, 1989); M.J. Meurer, "Book Review of *Fair Division*" (1999) 47 Buff. L. Rev. 937 at 940, n. 19; R.W. Wright, "Substantive Corrective Justice" (1992) 77 Iowa L. Rev. 625 at 641–42.

to those situated differently, according to the degree of difference (hereinafter "Aristotelian equality" or "the Aristotelian definition"). Those who employ the Aristotelian definition usually argue that no two people or situations are equal, and thus the equality to which the definition refers is equality in terms of the facts and circumstances relevant to the matter in question. In applying the Aristotelian definition, then, one must always ask, equal for what purpose? It seems that one of the central characteristics of the Aristotelian definition is its relativity.[12] Aristotelian equality deals with situations in which there are at least two possible decisions. A single decision which relates to one object or case cannot be "equal" or "unequal" under the Aristotelian definition. The requirement of treating similar cases similarly and different cases differently is meaningless unless there is something with which the decision may be compared.[13] However, one could conceivably claim that a single decision might violate Aristotelian equality, provided that hypothetical cases different from the one in question exist.

Alongside Aristotelian equality we find the notion of equality as defined in constitutional charters of human rights, in provisions dealing with the fundamental right to equality.[14] Such provisions entail equal treatment for all persons, regardless of any differences deriving from status or from particular categories such as religion, race, sex and so on.[15] For example, article 26 of the *International Covenant on Civil and Political Rights* provides, *inter alia*:

> the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[16]

Sometimes such definitions hold that in a certain matter *all* persons should be treated equally, without specifying any particular status or category, which must be disregarded. One example is the first paragraph of the Fourteenth Amendment of the American Constitution, which stipulates that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." There are also provisions which blend the two types of definitions, such as article 14 of the *European Convention on Human Rights*, which provides that "The enjoyment

[12] Compare von Leyden, *supra* note 2 at 3–4.

[13] See K.W. Simons, "Equality as a Comparative Right"(1985) 65 B.U.L.Rev. 387 at 389; and *Speaking of Equality*, *supra* note 9 at 18–38.

[14] Compare P.A. Freund, "The Philosophy of Equality" [1979] Wash. U.L.Q. 11 at 15; T. Nagel, "The Meaning of Equality" [1979] Wash. U.L.Q. 25.

[15] See A. Koppelman, *Antidiscrimination Law and Social Equality* (New Haven: Yale University Press, 1996) at 57.

[16] 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368.

of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[17]

It may be noted that both Aristotelian equality and the "fundamental right" approach to equality are essentially expressions of substantive equality. Substantive equality has to do with the equality-promoting content of the rules which are applied. It is distinguished from formal equality, which has to do with the equal treatment of every person. Indeed, as mentioned above, the fundamental right to equality applies to cases in which it is held that, in a particular matter, every person must be treated equally. But in these given instances, and only in such instances, the presumption is that substantive and formal equality are identical.

In contrast with Aristotelian equality, the fundamental right to equality is relevant not only in those instances in which several decisions have been made, but may apply also to a single decision relating to a specific object or event.[18] For example, a public authority which rejects, on grounds of gender, the first candidate who seeks a newly-created position, may be deemed to be violating the fundamental right to equality regardless of gender even if it has not yet had the opportunity to consider the candidacies of members of the opposite sex for that same position.

B. The Relations Between the Two Definitions

Aside from the difference mentioned above, what is the relation between the fundamental right to equality and Aristotelian equality? The answer to this question depends on how one interprets the fundamental right. Three principal interpretations may be discerned.[19]

On one interpretative approach, which henceforth I will call the "relative prohibition approach," the prohibition against taking account of status or categories mentioned in the definition of the fundamental right to equality applies only when such characteristics are irrelevant. When, on the other hand, such classifications are relevant, then the fundamental right does not reject taking them into consideration. Similarly, even if the fundamental right mandates

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[17] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5.

[18] See *Speaking of Equality*, *supra* note 9 at 72–74.

[19] Compare H. Hill Kay, "Models of Equality" (1985) U. Ill. L. Rev. 39.

treating all persons equally in respect of a given matter, there is nothing that prevents differential treatment of persons who are different in a manner that is relevant to the matter in question.[20] For example, if the sex of a public official is relevant to carrying out the functions of his or her office, then consideration of the sex of candidates for that office will not be a violation of the fundamental right to equality. Under the relative prohibition approach, the fundamental right to equality is thoroughly consistent with Aristotelian equality, and overlaps (actually, is subsumed within) it.

There would seem to be two grounds for its existence. First, the fundamental right seeks to render suspect[21] the distinction based on a status or category mentioned in its definition, or any distinction between persons with regard to a particular matter, and perhaps even to create a rebuttable legal presumption that the distinction is based on irrelevant considerations, thus violating Aristotelian equality. Second, in many legal systems, including American law, the prohibition against violating fundamental rights has a constitutional character, and applies to the legislature itself, and in any case has greater force.

On the other hand, Parliament (as distinct from other public authorities) may be allowed a mere violation of Aristotelian equality which does not entail impairment of a fundamental right, or, even if such a violation were prohibited, the degree of severity attached to it and the resulting sanctions are more moderate than those that apply in the case of violation of fundamental rights.

Under the second possible interpretation of the fundamental right to equality, which I will call the "absolute prohibition approach," the prohibition against taking into consideration any status or categories mentioned in the definition of the basic right is absolute, as is the prohibition against distinguishing between different persons in respect of a particular matter. Under this interpretation, the Aristotelian terms of definition make the status or categories included in the

[20] See *e.g.* I. Berlin, "Equality as an Ideal" in F.A. Olafson, ed., *Justice and Social Policy* (Englewood Cliffs: Prentice Hall, 1961) 128. Berlin supports the principle that persons should in every respect be treated in a uniform and identical manner, unless there is a sufficient reason not to do so.

[21] The American Supreme Court has indicated, with varying degrees of explicitness, that certain classifications are suspect. See *e.g. Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (race); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (nationality). See L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola: Foundation Press, 1988) at 1465–66; Note, "Mental Illness: A Suspect Classification?" (1974) 83 Yale L.J. 1237 at 1241. For similar Canadian jurisprudence see *Young v. Young*, [1993] 4 S.C.R. 3 at 114; and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

definition of the fundamental right irrelevant (or, to put it another way, there is an irrebuttable presumption that they are irrelevant).

The same is true of the fundamental right to equality between persons with respect to a particular matter. In the Aristotelian terms of definition, this latter right determines (or creates an irrebuttable presumption) that all distinctions between persons in respect of a particular matter are based on irrelevant considerations.

Under the third possible interpretation of the fundamental right to equality, which I will refer to as the "balanced prohibition approach," the prohibition against taking these and other statuses or categories into account does not derive from their irrelevance in all cases. Similarly, the prohibition against distinguishing for purposes of a particular matter between persons does not derive from the notion that there may not be relevant differences between different persons with regard to that matter. The reason is that taking a particular status or category into account — even if it meets the requirement of relevance — or distinguishing between persons with respect to a particular matter, is likely to impair values or interests deemed worthy of protection.

For example, one may argue that there are differences between men and women, which to some degree may be relevant in certain matters. The fact that women become pregnant and give birth, and as a result need maternity leave, may be a relevant consideration for an employer who faces the choice of hiring a man or a woman. In any event, the fundamental right to equality without distinction on the basis of gender under the balanced prohibition approach has resulted in public authorities being restrained from denying positions to women solely on the grounds that they may become pregnant and give birth. This is because such a distinction between men and women violates the dignity of women, their interest in making a living, and other general private and social interests.

At the same time, fundamental rights, as well as the values and interests underlying them, are not absolute, and it is common to balance between those values and interests that the fundamental right serves against those which it harms. Thus, for example, if women are totally unable to fill the position in question, or if its execution by a woman will cause severe difficulties to the authority and the public (as is sometimes argued with regard to military service in battle units), the fundamental right to equality without gender differences may yield to the interests with which it conflicts.

Under the balanced prohibition approach, the fundamental right to equality is opposed, *prima facie*, to equality according to the Aristotelian definition. While Aristotelian equality consists, among other things, of treating differently-situated persons differently, the fundamental right to equality sometimes requires (subject to the balancing I have mentioned) treating differently-situated persons equally.

Nevertheless, one may claim that the contradiction between Aristotelian equality and the fundamental right to equality under the balanced prohibition approach is only apparent, and that the two definitions may be reconciled by taking a broader view of the matter to which these definitions are applied, and widening the range of considerations deemed relevant for purposes of the Aristotelian definition. For example, in the case of a woman expected to become pregnant applying for public office, one may argue that the relevant considerations include not only the authority's profits and the realization of the particular aims of that office, but also those considerations regarding the woman's dignity, her interest in earning a living and other general social interests which are injured by discriminating against women because they become pregnant and give birth.[22] If this is so, then a male should not be deemed a victim of discrimination because the public employer hires a woman in spite of the inconvenience, or even the losses, to be suffered when she takes maternity leave. The injury to the dignity of women and to other interests which will occur if she is rejected on these grounds are relevant considerations which the governmental authority must take into account if its action is to meet the standards posited by Aristotelian equality.

Similarly, it is possible to respond to the claim that not every violation of the fundamental right to equality amounts to a violation of Aristotelian equality, because the fundamental right applies to the first case of its type, while under the Aristotelian definition there is no violation of equality unless there are several cases. The answer to such a claim may be that widening the view of the matter can always bring about its examination under the Aristotelian definition. Take, for example, the case that I mentioned earlier regarding the government authority which rejects the first candidate (or perhaps several candidates) for a new position on gender-related grounds. This may be a violation of the fundamental right to equality with no differences based on gender, but, it would appear, not a violation of Aristotelian equality. One may apply the Aristotelian principle of equality to this example by comparing the rejected candidate to other candidates of the same — or the opposite — sex who were rejected or hired by other

[22] See J. Trebilcot, "Sex Role: The Argument from Nature" in J. English, ed., *Sex Equality* (Englewood Cliffs: Prentice Hall, 1977) 121 at 127.

employers. At least from a practical standpoint, this broadening of perspective enables rejection of the "first case" label, hence enabling the application of Aristotelian equality to all cases.

Another apparent difference between the two definitions has to do with how they address the issue of affirmative action. One may argue that affirmative action is consistent with the fundamental right to equality, as it aims to promote the personal and social values and interests that underlie the fundamental right. For example, affirmative action for women aims to promote the dignity of women and other social interests. On the other hand, one may further argue, affirmative action — to the extent that it involves preference over others with the same or lesser skills — is inconsistent with Aristotelian equality. However, to this claim, too, one may respond that a broad perspective of the matter at hand, unfettered to any particular context, may result in the considerations underlying affirmative action being seen as relevant to the determination of equality or difference between the persons who are the object of the policy.

From a formal standpoint, then, there is no significant difference, if any, between the relative prohibition and the balanced prohibition approaches to interpreting the fundamental right to equality. Nevertheless, the balanced prohibition approach emphasizes the values and interests that deny a distinction based on a particular status or categories or any distinction between persons with respect to a particular matter. The import of this emphasis is the narrowing, and at times the negation, of the discretion actually granted to the governmental authority in choosing between alternative possible decisions — an outcome commonly seen in respect of fundamental rights. Thus, even though the balanced prohibition approach, like the relative prohibition approach, may be integrated with Aristotelian equality as a formal matter, I will distinguish between these two interpretations, as my focus in this article is the relation between equality and discretion.

The absolute prohibition approach is not reasonable, and in some cases it is inapplicable. For example, it would appear impossible to refer offers to donate sperm or to carry a fetus to women and men without distinction. I will therefore not continue to address it in this context. Rather, I will focus on the relation between the other two interpretations of the fundamental right to equality and the laws of discretion.

IV. THE RELATION BETWEEN ARISTOTELIAN EQUALITY AND THE LAWS REGARDING GOVERNMENTAL DISCRETION

Does the duty to maintain equality (or, conversely, the prohibition against discrimination) under the Aristotelian definition add to the three rules I have mentioned in my discussion of the laws of discretion, or, rather, does it overlap with them, in whole or in part?

A. The Duty to Consider All Relevant Factors

In certain cases there is an overlap between a violation of the duty to take all relevant considerations into account and a violation of the duty to observe Aristotelian equality. This is because a decision based on all of the relevant considerations may differ from a decision taken in equivalent circumstances but not based entirely on relevant factors. Indeed, each of the decisions violates Aristotelian equality by its very difference from the other. Even so, only one of the two decisions is illegal, and that is the second decision. The reason for its illegality is that it was taken in violation of the obligation to consider all relevant factors. Even if there were no other decision taken through consideration of all relevant factors, and all the other decisions taken in those circumstances failed to take a particular relevant factor into account, all of the decisions would be illegal on this ground. The discrimination entailed by the second decision is thus subsidiary to the non-consideration of the relevant factors.

Take, for example, two persons with similar criminal records who apply for a business license. The application of the first is denied due to his criminal record. The second applicant is granted a license because the licensing authority was unaware of his criminal record and thus did not take it into account. In such an instance one may say that the granting of the license violates Aristotelian equality. Yet, even if the instance in which the license was granted was the only one of its kind, and there was no other applicant with a similar criminal record who was refused a license, the granting of the license would still be illegal due to non-consideration of a relevant factor. Hence the discrimination is secondary in this case to the failure to consider a relevant factor.

B. The Prohibition Against Considering Irrelevant Factors

My remarks regarding the relation between Aristotelian equality and the duty to consider all relevant factors essentially apply also to the relation between equality under this definition and the prohibition against taking irrelevant factors into account. A decision that is defective because of an irrelevant consideration, such as one taken as a result of a bribe, is illegal whether or not there are other

decisions regarding the same matter which are not based on the same type (or any type) of extraneous factor. Once again, the discrimination, in Aristotelian terms, inherent in a decision based on irrelevant factors is secondary to the defect involved in taking such improper factors into account.

C. Reasonableness

Under the doctrine of administrative reasonableness, in its various manifestations where discretion is given to an administrative authority, there may be several reasonable balances among the various relevant considerations. Each of these reasonable balancings leads to a decision which is within "the zone of reasonableness." Such a decision is lawful, even if there are those who believe that a better, more effective or efficient decision might have been made. In contrast, a decision situated beyond the zone of reasonableness — that is, a decision based on an extremely unreasonable, capricious or arbitrary weighing of the various considerations — is unlawful, and may be nullified by the court upon due request to do so.

As with the previous rules that I have discussed — the duty to take the relevant factors into account and the prohibition against considering irrelevant factors — so, too, an unreasonable decision in the above sense may result in discrimination, but the defect of discrimination is subordinate to its unreasonableness.

However, the discussion of the relation between Aristotelian equality and governmental reasonableness does not end there. As a matter of pure theory, it would seem that there is a substantive incongruity between Aristotelian equality and the doctrine of reasonableness in the above sense in particular, and between Aristotelian equality and the very existence of governmental discretion in the other. For Aristotelian equality is, as mentioned above, the giving of equal treatment to equals and different treatment to those who are differently situated, *according to the degree of their difference*. That is, under this definition a decision is "equal" if it is "adjusted" to the circumstances of the case. It is not sufficient that equal decisions are taken in equal circumstances, nor that different decisions are taken in differing circumstances. Rather, in differing circumstances, the difference between the decisions must fit the difference between the cases *completely*, and each of the decisions must *completely* fit the case it addresses.

The requirement of absolute fit follows from the impossibility of several divergent decisions in equivalent cases being equivalent. As I have indicated, as a practical matter there are no cases in which Aristotelian equality is irrelevant.

This means that a governmental authority that is subject to the duty to maintain Aristotelian equality will never have any discretion whatsoever. Any apparent discretion which it has will have to be exercised in such a manner that every decision must express equal treatment of equal cases or different treatment of different cases in exact proportion to their degree of difference. In other words, no discretion will remain. This result would appear to derive from a situation in which the number of possible decisions located within the zone of reasonableness — which may itself be infinite — is greater than the number of cases to which those decisions must be "fitted." This result is inconsistent with the very existence of administrative discretion. It is also inconsistent with the doctrine of administrative reasonableness, which recognizes, as mentioned above, the existence of a zone of reasonableness, within which (even if not outside of which) the authorities have power to choose among several decision options. Moreover, the incongruity between Aristotelian equality, on the one hand, and the existence of governmental discretion and a zone of lawful decisions, on the other, sometimes derives not from the fact that the possible decisions within that zone of reasonableness outnumber the cases to which those decisions must be fitted. Rather, it derives from the fact that the number of such decisions is *less* than that of such cases.

Take, for example, the granting of or refusal to grant a license to engage in a profession, with regard to which the law gives the authority discretion (assuming that the law does not allow for making the decision contingent upon conditions). The number of possible "cases," that is, the number of applicants for a license, with their various relevant qualifications, is close to infinite. In such circumstances, it is hardly possible to take decisions which are all equal under the Aristotelian definition — that is, decisions that treat different cases differently according to the degree of their difference — because there are only two possible decisions and a much greater number of different cases. In this example, then, one cannot avoid taking equal decisions in respect of different cases (nor, it would seem, could one avoid taking different decisions regarding cases in which the difference between them is less than that between two cases in which the same decision was reached).[23]

One must conclude, then, that it is not possible to reconcile the Aristotelian view of equality in its pure form with the existence of governmental discretion or a notion of a zone of reasonableness. It is also clear that, on the one hand, it is impossible, and in any case undesirable, to do away entirely with governmental discretion by its inability to withstand the pure version of Aristotelian equality. Such an approach is undesirable, among other reasons,

[23] Compare A.M. Honoré, "Social Justice" (1961) 8 McGill L.J. 77 at 83–84.

because the practical result of it would be to transfer ultimate discretion in every matter handled by the government to the judiciary, which is neither practicable nor consistent with acceptable notions of the separation of powers. On the other hand, the principle of equality should not be sacrificed on the altar of governmental discretion. As I have mentioned, the principle of equality is one of several legal doctrines that restrict the discretion of governmental authorities. Even if the possibility that the equality principle replaces and cancels discretion is unacceptable, one must find ways in which Aristotelian equality may limit discretion.

V. EQUALITY UNDER THE ARISTOTELIAN DEFINITION AS LIMITING GOVERNMENTAL DISCRETION — "ADMINISTRATIVE EQUALITY"

Even in a system which recognizes governmental discretion, situations may arise in which, at first glance, a violation of Aristotelian equality will not be secondary to another type of violation of the rules regarding governmental discretion (*i.e.*, non-consideration of a relevant factor, consideration of an irrelevant factor, or unreasonableness). In such a system a governmental authority (especially one which operates through several independent bodies or organs) may reach different decisions in equivalent matters, and each decision, were it examined in isolation, would be legal both in terms of its content and in terms of the considerations weighed.

This follows necessarily from the fact that the authority is discretionary. In such a case impermissible discrimination is neither related to nor conditioned upon the illegality of the considerations weighed or the unreasonableness of each decision taken alone, but rather is rooted in its very inconsistency. In other words, a decision that meets the requirements of the other rules of discretion may be invalidated because it is different from other decisions which themselves meet such requirements. The discretion of governmental authorities is thus restricted by the Aristotelian principle of equality in the sense that discretion must be exercised consistently.[24]

For example, in certain cases a licensing authority may be entitled initially to grant a business license at its discretion. But once it customarily grants licenses in such cases, it must act consistently by granting a license in all similar

[24] See Schwartz, *supra* note 7 at 708–12. See also R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) at 113; and E. Chemerinsky, "In Defense of Equality: A Reply to Professor Westen" (1983) 81 Mich. L. Rev. 575 at 580–81.

cases. The same is true, of course, with respect to the refusal to grant a license. To realize this aim of consistency, the law provides for the enactment of regulations, and at times of administrative guidelines, chiefly aimed at promoting the equal, that is, consistent, exercise of discretionary powers.

Nevertheless, absolute consistency is neither possible nor desirable.[25] First, as I have noted, no two cases are completely equivalent, and therefore absolute consistency is impossible (unless we return to the result which we have been trying to avoid, that is, canceling governmental discretion or transferring it entirely to the courts). Second, it is not proper that a single decision taken at some point will forever bind the discretion of a governmental authority. The authorities should be allowed to weigh their policy from time to time according to changing circumstances, needs, and fundamental perceptions.

Consistency is thus not an absolute obligation, but a relevant consideration that an authority employing discretionary powers must take into account and accord appropriate weight in the circumstances before it. When an authority acts inconsistently, hence violating Aristotelian equality, one must examine whether there was fitting justification for doing so. Aristotelian equality may thus be reconciled with the general doctrine of discretion. Under this proposed version it neither contradicts the theory nor is external to it.

The duty of consistency is not relevant except when there are several decisions, or, to be more precise, when there are several cases that have been or will be decided. One may ask which one among these decisions should be compared to another decision, or conversely, which decision is illegal due to inequality in the above sense.[26]

It seems that there are four main types of possible basic criteria on this question: 1) the lawful decision is that which is better from the standpoint of the individual (a decision will be deemed discriminatory if it is less considerate of the individual); 2) the lawful decision is the first decision (the last or later decision will be deemed unlawful); 3) the lawful decision is that which is consonant with accepted custom or policy (a decision will be deemed

[25] See J.E. Coons, "Consistency" (1987) 75 Cal. L. Rev. 59 at 92; F. Schauer, "Precedent" (1987) 39 Stan. L. Rev. 571 at 604.

[26] Compare *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221; *International Woodmakers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Califano v. Westcott*, 443 U.S. 76 (1979); *Heckler v. Mathews*, 465 U.S. 728 (1984); B.K. Miller, "Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of *Heckler v. Mathews*" (1985) 20 Harv. C.R.–C.L. L. Rev. 79.

discriminatory if it deviates from such custom or policy); and 4) in the event of several unequal decisions, they all are unlawful.

It may be noted that the choice among these approaches (or some combination of them) cannot be made only on the basis of the principle which mandates consistency. As all the approaches fulfill it to the same degree, it alone cannot decide among them. The decision must be made in view of other considerations external to those underlying the equality principle in the sense mentioned. Each of the four basic criteria has its merits and drawbacks, which deserve a more detailed, separate discussion.

In any event, the rules of discretion ought essentially to be directed, to the extent possible, toward the governmental authorities in order to guide them when they exercise their discretion, and not solely to the courts when they review governmental decisions. The rules must focus on the question of how governmental discretion ought to be exercised, not on the question of when such discretion ought to be nullified.

In view, among other things, of this principle, none of the four types of basic criteria mentioned above should be adopted as is. A mixed standard should be preferred, under which the authority should exercise its discretion in a manner equal to that in which it is exercised by accepted custom or policy in like cases; in the absence of widely accepted custom or policy, in the (lawful and reasonable) manner which is most considerate of the individual. When this last alternative is not relevant (whether because the decision does not involve an individual or it involves several individuals with conflicting interests), the authority must set non-discriminatory rules for exercising discretion, and must follow them to the extent possible in making such decisions in the future.

Consistency, despite its not-inconsiderable importance for upholding justice and fairness, and to the public's sense that they are upheld,[27] is not a constitutional value to which the legislative branch ought to be subordinated. The duty of consistency, then, which derives from the Aristotelian principle of

[27] On the complex relation between equality and justice see *e.g.* J. Stone, "Justice in the Slough of Equality" (1978) 29 Hastings L.J. 995; G. Vlastos, "Justice and Equality" in J. Waldron ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) 41; and von Leyden, *supra* note 2 at 1–6. The duty of consistency also has value in that it sometimes relieves a petitioner from having to discharge the difficult burden of proving that the governmental authority did not take a relevant consideration into account, or took into account an extraneous consideration.

equality, generally focuses on administrative law alone. We may thus call it "administrative equality."

VI. THE RELATION BETWEEN THE FUNDAMENTAL RIGHT TO EQUALITY AND THE LAWS REGARDING GOVERNMENTAL DISCRETION — "CONSTITUTIONAL EQUALITY"

The fundamental right (actually, rights) to equality, under the interpretation which distinguishes it from Aristotelian equality, is defined, as noted earlier, in one of two ways: either as a right not to differentiate among people on the basis of status or category, or a right of persons to be treated equally with regard to a particular matter.

When a particular status or category (with respect to the first definition) or some consideration (with respect to the second definition) are not relevant to the decision in question, the prohibition against taking them into account essentially derives from the prohibition against weighing irrelevant considerations, which is one of the general rules of discretion. Thus, *in a certain sense*, one may say that in such a case the fundamental right is secondary to the general prohibition against weighing extraneous considerations. At the same time, if in a given legal system the violation of the fundamental right (but not any weighing of irrelevant considerations) may lead to the invalidation of a statute, the classification of the irrelevant consideration as ordinary or as entailing a violation of the fundamental right to equality will of course be important. Furthermore, in view of the constitutional character of the fundamental right to equality, in many cases — especially those involving a status or category included in the first definition — there is a presumption that these considerations are irrelevant,[28] and the burden of proof is imposed on whomever wishes to rebut the presumption.

There may be legal systems in which the fundamental right will be recognized even when, under the circumstances of the case, a particular status or category (in respect of the first definition) or a particular consideration (in respect of the second) are, at least *prima facie*, relevant to a given decision. In such systems a balance will be drawn between the values and interests which underlie the fundamental right and the specific relevant interests that bear upon

[28] See J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 136–70. But see D.A. Strauss, "Discriminatory Intent and the Taming of Brown" (1989) 56 U. Chic. L. Rev. 935 at 956–57; and *Egan v. Canada*, [1995] 2 S.C.R. 513 at 519.

the decision at hand.[29] *In a certain sense* one may say that in such a case the fundamental right is subordinate to the general principle of reasonableness. However, as mentioned above, the fundamental right to equality may also bind the legislature.

In any case, the above balance will be made, as is common with balancing between fundamental rights and other values and interests, with an intent to realize the fundamental right to the extent possible, and to allow a conflicting interest or value to impinge on it only in extraordinary cases, and then only when there is no reasonable way to realize all of the conflicting values and interests.[30] With respect to the fundamental right to equality, the zone of reasonableness — which defines the scope of the discretion given to the authorities — may thus be especially narrow, to the point of obligating the authority in a given case to take a particular decision, thereby erasing its discretion with regard to that case.

Special applications of the fundamental right to equality may be discerned in affirmative action, which is based precisely on taking into account (rather than avoiding) a particular status or category of persons in order to repair distortions which violate values and interests underlying the fundamental right.[31] In this sense one may understand the inclusion, in the section on equality in the *Canadian Charter of Rights and Freedoms*, of subsection 15(2), dealing with affirmative action. This subsection, notwithstanding its wording,[32] does not represent an exception to the general constitutional right to equality contained in subsection 15(1), but rather derives from it and supplements its aims.

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[29] See also, in the United States, Note, "Legislative Purpose, Rationality, and Equal Protection" (1972) 82 Yale L.J. 123.

[30] For the "Constitutional Fact" doctrine, see *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287 (1920); *United States v. Raddatz*, 447 U.S. 667 at 683 (1980); and Schwartz, *supra* note 7 at 666–67.

[31] Compare J.H. Ely, "The Constitutionality of Reverse Racial Discrimination" (1974) 41 U. Chic. L. Rev. 723 at 727.

[32] *Canadian Charter of Rights and Freedoms*, s. 15(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"; see *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; and *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 at 452.

VII. CONCLUSION

The equality principle limits governmental discretion, but does not fetter it altogether. In administrative law the equality principle is implemented as a duty to maintain consistency. Administrative agencies must exercise discretion in a consistent manner, so that justice and its image will not suffer. At the same time, absolute consistency in the long run nullifies discretion, and it is both impossible and undesirable — hence the need for balancing between unfettered discretion and consistency in its exercise. A violation of the equality principle in this sense is generally not a ground for the nullification of statutes.

In constitutional law, the equality principle is implemented as a fundamental right to non-consideration of a particular status or categories, and to identical treatment of all persons in specific matters. Equality in this sense is necessary to prevent infringement on human dignity and upon society as a whole. Violations of the equality principle in constitutional law may also bring about nullification of governmental decisions — and even of Parliament's statutes — when the decision or statute is based upon legal considerations, if the violation of equality impairs the values or interests that it aims to protect. However, in the constitutional context, the constitutional principle is not absolute and must be balanced against other relevant considerations. Such balancing must be conducted with the intent of privileging as much as possible the fundamental right to equality, and disregarding it only in exceptional cases.

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USING THE *CHARTER* TO CURE HEALTH CARE: PANACEA OR PLACEBO?

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The author critically examines the claim that the Charter *can be used to address social concerns about public health care through constitutional means. He concludes that a close examination of recent case law illuminated by the political assumptions underlying the* Charter *offers a far slimmer basis for hope than might initially appear.*

L'auteur examine d'un oeil critique la revendication que la Charte *puisse être utilisée pour régler les préoccupations sociales relatives aux soins de santé publique par des moyens constitutionnels.Il en arrive à la conclusion qu'une étude approfondie d'une récente jurisprudence mise en lumière par des hypothèses politiques fondamentales à la* Charte *indique une base plus restreinte que ce que l'on croyait d'abord.*

"When the only tool you have is a hammer,
every problem begins to resemble a nail."
— Abraham Maslow

I. INTRODUCTION

Two generations of Canadians have now lived much of their lives in the protective embrace of public health care. As a result, this comparatively new idea of state-funded health care has become deeply imbedded in the political and social discourse of Canada. In medicare, Canadians have found a reflection of the country's ideals, at the core of which is a social welfare system that provides the fundamentals of life for all citizens, without regard to their status, power, or wealth. Indeed, issues of health care push to the fore of public debate in each Canadian provincial or federal election, and the emotional and political stakes of this conversation are always high.

Parallel to this concretization of state medical aid has been the ascendancy of rights discourse. Michael Ignatieff writes that, because they give the veneer of legal legitimacy to our core values, "rights have worked their way deep inside our psyches. Rights are not just instruments of the law, they are expressions of our moral identity as a people."[1] Rights are a means of talking about a peculiarly liberal conception of human agency, whereby the "right" demarcates a sphere of human interest in which no one, particularly the state, is justified in interfering through deprivation or coercion.

It seems natural, therefore, that health care and rights discourse, both factors constitutive of identity in modern Canadian society, would be destined to

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1 M. Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000) at 2.

entwine. In Canada, the *Canadian Charter of Rights and Freedoms*[2] has provided the institutional locus for this consort of rights and health. The social stakes of this debate have risen while escalating costs associated with the provision of public health care combined with policies of fiscal restraint have resulted in "cost-containment" measures that seek to limit the nature and scope of medical care provided by government. To many, these cost-containment measures threaten to erode the cherished institution of universal and comprehensive health care. As a result, a number of scholars have argued for the interpretation of the *Charter* as a document that affords constitutional status to social welfare rights, including rights to health care.[3] Indeed, many point to recent cases in which the courts have appeared to apply the *Charter* in a manner that supports and affirms individual rights to health care as evidence that *Charter* litigation can be an effective means of protecting, and even expanding, medicare.

I will argue that a close examination of the case law reveals that the case for such hope is not nearly as strong as may initially appear. The jurisprudence regarding health care betrays the liberal limitations of our *Charter* and attracts an analytical distinction between the *Charter*'s ability to effectively address the "internal" functioning and provisions of existing medical services and its impotence with respect to the "external" structuring of policy and budget choices about the nature and scope of medical services provided. As a result, I will suggest that our energies are misplaced when we seek to use the *Charter* to remedy systemic health issues and that, rather, the most desirable and hopeful means of addressing concerns regarding public health care remains political redress.

II. UNIQUENESS OF THE HEALTH CARE "PROBLEM" AND THE SEDUCTIVENESS OF THE *CHARTER*

The *Charter* has a number of qualities that make it magnificently attractive to the political or legal activist. First, as has been noted above, the *Charter* speaks the language of "rights" and rights carry with them the connotation of immutability and supremacy. Once an interest can be characterized as a right, this interest adopts an aura of imperviousness and, with it, a sense of security. Second, the *Charter*, a constitutional document, is part of "the supreme law of Canada" and as such, "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[4] The *Charter* is, therefore, an avenue to a trump-position in the Canadian legal

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[3] See especially M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's L.J. 65.

[4] *Constitution Act, 1982*, s. 52, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

system. A successful *Charter* claim is the pinnacle of legal vindication, untouchable as it is by any other legislative act. Associated with this last point is a third and final seductive aspect of the *Charter*. At a time in which governments seem reluctant to take upon themselves the most exigent and, concomitantly, the most contentious social decisions, the *Charter* presents a means of binding the actions of government despite itself. Section 32(1) of the *Charter* establishes the application of its provisions to all government action. *Charter* litigation can be an expeditious route around slow and seemingly Sisyphean political forms of action. All of these aspects of the *Charter* — its rights-talk, its legal supremacy, and the fact that it binds government action — create a centripetal social force tending to draw claims for social justice towards the *Charter*.

It is for these reasons that legal activists have argued that the *Charter* is a promising tool for remedying health care issues. Martha Jackman observes that "[a]s part of government within the meaning of section 32(1), the laws, policies and actions of federal, provincial/territorial, and municipal departments of health and other government bodies are clearly subject to Charter review."[5] This legal fact, combined with her conception of the *Charter* as a reflection of "who we wish to be" and her notion of publicly funded health care as a "fundamental aspect of our national character,"[6] Jackman seems to make out a case for the *Charter* as a panacea for Canadian health care concerns. Yet the issue of publicly funded health care has a number of dimensions that make it a particularly demanding social problem. First, it is extremely expensive to fund a public health care program[7] and, as such, any attempt to address perceived deficiencies in medicare must confront the intractable issue of fiscal limitations and government responsibility for expenditure. Second, decisions about the provisions of health care are consummate policy decisions, engaging community assessments of the importance of health care, the appropriateness of public responsibility for individual lives, and the scope and nature of permitted treatment. Finally, matters of health are not purely legal, but intensely polycentric. Not only are issues of law and politics involved in any question of public health care, but education, wealth, and social status are important determinants of health. It follows that any attempt to address health issues must, in order to be effective, move beyond a consideration of individual rights to consider and address each of these diffuse social factors as well as their complex interplay.

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5 M. Jackman, "The Application of the Canadian Charter in the Health Care Context" (2000) 9 Health L. Rev. 22 at 23.

6 M. Jackman, "The Protection of Welfare Rights under the *Charter*" (1988) 20 Ottawa L. Rev. 257 at 338.

7 The Canadian Institute for Health Information "estimates that the cost of health care topped $95 billion in 2000." CIHI, *Health Care in Canada: 2001* (Ottawa: CIHI, 2001) at 71.

These aspects of the health care problem are, I suggest, incommensurable with the foundational ideology that informed the creation and has continued to guide the judicial application of the *Charter*. In a piece written contemporaneously with Jackman's plea to use the *Charter* to secure social welfare rights, Allan Hutchinson and Andrew Petter note the following:

> The Charter is, at root, a liberal document. Its enactment was a constitutional affirmation of liberal faith. The framework and tenor of the Charter reflect traditional liberal values; it arms individuals with a negative set of formal rights to repel attempts at government interference.[8]

Unpacking this paragraph reveals a number of critical attributes of the *Charter* whose perpetuation in judicial interpretation have rendered it a blunt instrument for addressing social welfare issues. First, jurisprudence has affirmed that the rights enshrined in the *Charter* are negative in nature. The *Charter* has not generally been interpreted as imposing an obligation upon the state for positive action to ameliorate conditions that diminish rights or to take active steps to protect individual interests. Where the Courts have mandated positive actions, this has been within the context of requiring equal application of existing state action rather than forcing the government into entirely new policy or budgetary directions. Second, the *Charter* is formal in orientation inasmuch as it is concerned with the relationship between extant state action, including legislation, and the impact that these actions can have on the individual. It is, in this sense, solely reactive. Finally, the *Charter* is atomistic — it is concerned with the rights of the individual in relation to the state, and thus severs the rights-bearing individual from the context in which these very rights and their infringement occur.

Therefore, while medical care involves the expenditure of large amounts of public funds and the creation of complex policies to actively address health issues, the *Charter* is negative in its orientation. While health care is highly policy-intensive and prospective, the *Charter* is remedial and formal. And while health involves a complex interaction of social, economic and political determinants, the *Charter*'s atomistic nature looks only to the individual's rights and the actions of the state. The fundamental disconnect between these attributes of the health care "problem" and the dominant characteristics of the *Charter* is, I suggest, the source of the limited use of the *Charter* rights in the struggle for public health care. The *Charter* has only proven an effective instrument where the courts have been faced with *past state action* that has deprived an individual of *existing benefits or protections*. As will be demonstrated below through an analysis of sections 7 and 15 jurisprudence, these caveats functionally restrict the

[8] A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278 at 283.

Charter to policing the internal operation of the existing health care system. As soon as one turns to the *Charter* with a plea for expanded care, amelioration of non-legal determinants of health, or policy formation, the *Charter* has proven desperately ineffective — a placebo at best.

A. Section 7: The Basis for Hope

Section 7 of the *Charter* guarantees that: "Everyone has 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."[9] While the guarantee to "life" has received little judicial elaboration and, as Peter Hogg writes, "has little work to do,"[10] the references made in the section to "liberty" and "security of the person" have been unpacked in such a way as to provide a foundation of hope for health care advocates.

New Brunswick (Minister of Health and Community Services) v. G.(J.)[11] and *Blencoe v. British Columbia (Human Rights Commission)*[12] have recently confirmed that "s. 7 is not limited solely to purely criminal or penal matters" because "[t]here are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person."[13] The Supreme Court of Canada has held that the right to liberty delineated in section 7 is engaged whenever "state compulsions or prohibitions affect important and fundamental life choices."[14] A similarly broad interpretation of the guarantee to security of the person has embraced not only physical autonomy, but a right to be free from state actions that "have a serious and profound effect on a person's psychological integrity."[15] *Prima facie*, this elaboration of the section 7 guarantee affords considerable hope in the sphere of public health. Issues of choice and physical and psychological integrity are core elements in health care and, as such, this social welfare issue would appear to find a comfortable home in section 7 of the *Charter*. It is this kind of abstracted and principled reading that gives an air of plausibility, if not persuasiveness, to Jackman's claim that "a right to life and to security of the person is meaningless without access to the care necessary for sustaining reasonable health."[16]

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[9] *Supra* note 2 at s. 7.
[10] P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2000) at 906.
[11] *New Brunswick (Minister of Health and Community Services) v. G.(J.).*, [1999] 3 S.C.R. 46 [*G.(J.).*].
[12] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 [*Blencoe*].
[13] *Supra* note 11 at para. 65.
[14] *Supra* note 12 at para. 49.
[15] *Supra* note 11 at para. 60.
[16] M. Jackman, "The Right to Participate in Health Care and Health Resource Allocation Decisions under Section 7 of the Canadian Charter" (1995) 4 Health L. Rev. 3 at 3.

As will be discussed below, the second half of section 7, which provides that an individual can be deprived of these rights "in accordance with the principles of fundamental justice," imposes an internal limitation upon those interests that section 7 seems to protect. While "there is strong evidence to suggest that, at the time of the *Charter*'s adoption, it was widely believed that the phrase 'principles of fundamental justice' was restricted to procedural values,"[17] the Supreme Court of Canada has made clear that this term gives courts the power to investigate the substantive, as well as procedural, soundness of an impugned provision. In *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*,[18] Lamer J. (as he then was) stated that "the principles of fundamental justice are to be found in the basic tenets of the legal system"[19] and in *Cunningham v. Canada*,[20] McLachlin J. (as she then was) stated that "fundamental justice" required an assessment of "whether, from a *substantive* point of view, the change in the law strikes the right balance between the accused's interests and the interests of society."[21] It would appear, therefore, that the courts are empowered to consider both the procedural fairness and the substantive merits of an impugned provision when assessing whether or not a deprivation accords with fundamental justice. This expansive scope of review is, again, encouraging to the health care advocate.

1. The Apparent Successes

A survey of the case law provides examples that would seem to affirm the potential usefulness of section 7 in the health care context. In *R. v. Morgentaler*,[22] the Supreme Court of Canada was asked to consider the constitutionality of section 251(4) of the *Criminal Code*,[23] which made it a crime for a doctor to perform an abortion for a woman that did not have a certificate from a therapeutic abortion committee of a hospital. The Court was divided 5–2 on the issue. The justices comprising the majority issued three concurring opinions declaring the provision unconstitutional. Chief Justice Dickson, with whom Lamer J. concurred, concluded "beyond any doubt that s. 251 of the Criminal Code is prima facie a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not wish to continue with a pregnancy."[24] Chief Justice Dickson forcefully stated:

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[17] R.J. Sharpe & K.E. Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 137.
[18] *Reference re Motor Vehicle Act (British Columbia), s. 94(2),* [1985] 2 S.C.R. 486 [*B.C. Motor Vehicle Reference*].
[19] *Ibid.* at 503.
[20] *Cunningham v. Canada,* [1993] 2 S.C.R. 143.
[21] *Ibid.* at 152 [emphasis added].
[22] *R. v. Morgentaler,* [1988] 1 S.C.R. 30 [*Morgentaler*].
[23] *Criminal Code,* R.S.C. 1985, c. C-46, s. 251(4) [*Criminal Code*].
[24] *Supra* note 22 at 56.

> At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person.[25]

Wilson J. was even more categorical in her characterization of the effects of the criminal prohibition, stating that a woman subject to this provision

> is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person?[26]

Accordingly, inasmuch as this provision compromised the ability of an individual to make a fundamental life choice, section 251 interfered with security of the person and the Court was willing to strongly affirm the rights of a woman to have control over what was done medically with her body.

The decision in *Morgentaler* was equally clear on the issue of fundamental justice. The Court interrogated the procedure for obtaining a valid certificate that would permit an abortion under section 251. Both Dickson C.J.C. and Beetz J. identified failures in delay, access, and equal geographical application of the law such that even women who fit within the criteria delineated in section 251 might well be unable to secure the necessary certificate. As a result of these procedural shortcomings, Dickson C.J.C. concluded that the defence provided by the section (that is, obtaining a certificate from a therapeutic abortion committee) was "illusory or so difficult to attain as to be practically illusory,"[27] and, as such, section 251 was inconsistent with the principles of fundamental justice.

While Dickson C.J.C. left open the broader question of whether "the deprivation of a pregnant woman's right to security of the person can [ever] comport with fundamental justice,"[28] Beetz J., with whom Estey J. concurred, decided the issue somewhat more narrowly, holding that "[i]t is only in so far as the administrative structure creates delays which are unnecessary that the

[25] *Ibid*. at 56–57.
[26] *Ibid*. at 173–74.
[27] *Ibid*. at 70.
[28] *Ibid*. at 73.

structure can be considered to violate the principles of fundamental justice."[29] Justice Wilson was prepared to go much further, arguing that the restriction in question offended the principles of fundamental justice not only owing to its procedural flaws, but because section 251 also infringed upon the pregnant woman's freedom of conscience. She alone took the position that "a deprivation of the section 7 right which has the effect of infringing a right guaranteed elsewhere in the Charter cannot be in accordance with the principles of fundamental justice."[30] In the result, however, *Morgentaler* unequivocally affirmed the right of women to have control over this aspect of their medical care and, at the minimum, not to be subjected to undue delay or geographical limitations in the exercise of their choice.

Another encouraging result can be found in *Fleming v. Reid*,[31] a decision of the Ontario Court of Appeal. The applicants, having been found not criminally responsible by reasons of mental infirmity, were involuntary patients at a mental health facility. Both patients, while competent, had indicated that they would refuse treatment with a particular drug because, based upon their past experience with it, they considered the side-effects intolerable. The treating physician subsequently found both patients to be incapable of making decisions regarding their own treatment and turned to their substitute decision-makers for approval to administer the drug in question. The substitute decision-maker, who was required by statute to take into account the previously communicated competent wishes of the patients, refused to give consent. Following the prescribed procedure, the physician appealed to a review board which, not bound to take into account the competent wishes of the patients, allowed the doctor to proceed with the treatment.

The patients alleged that their section 7 rights had been infringed and the Ontario Court of Appeal agreed. Justice Robins, for the Court, stated:

> The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s. 7.[32]

Having established this contravention, Robins J.A. considered whether or not this deprivation was in accordance with fundamental justice. He observed that the governing legislative scheme that constituted the review board "purports to recognize the prior known competent wishes of incompetent patients and to ensure that those wishes are respected," but then renders these wishes irrelevant

[29] *Ibid.* at 114.
[30] *Ibid.* at 175.
[31] *Fleming v. Reid (Litigation Guardian)* (1991), 82 D.L.R. (4th) 298 (Ont. C.A.) [*Fleming*].
[32] *Ibid.* at 312.

when the issue reaches the review board.[33] The Court held that this flaw was not in accordance with fundamental justice and, therefore, section 7 had been offended.

Both *Morgentaler* and *Fleming* are strong affirmations of health care rights. In deciding as they did, both Courts invoked section 7 to protect patient choice and autonomy. However, these decisions must be further interrogated in order to assess the true scope of their protection. In both cases, the Courts were confronted with legislation — state action — that interfered with the individual by depriving those involved of liberty and security of the person. The atomistic relationship between individual and state was clear and the courts were asked to protect the applicants' "freedom from" — to ensure their negative liberty by repelling this state action from the individual's sphere of autonomy. As to the question of fundamental justice, both Courts identified procedural flaws, one in the *Criminal Code* and one in mental health legislation, that rendered the administration of health care unfair in its operation. All of these characteristics firmly imbed both of these decisions in the *internal* operation of health care. Both address *how* the state conducts itself within the scope of an existing scheme. They concern failings in the already extant structure and take action to remedy these defects.

I will demonstrate below that section 7 has little impact upon the *external* regulation and formation of health care. When the alleged deprivation is sourced in something other than the government's legal action or when the procedures surrounding a deprivation are sound and carefully constructed with a purpose that the court can construe as reasonable, the *Charter*'s application in the health care context is eviscerated.

2. The Limiting Factors — Economics and Fundamental Justice

Recent jurisprudence has imposed two substantial limitations on the ability of section 7 to address more systemic or external aspects of the provision of public health care. The first, definitional in nature, excludes deprivations of an economic nature from the embrace of the word "deprived" found in section 7. The second, more operational in nature, arises because of the broad justificatory latitude that has been injected into the "principles of fundamental justice."

In *Whitbread v. Walley*,[34] the British Columbia Court of Appeal considered a plaintiff's claim that a provision of the *Canada Shipping Act*[35] limiting liability

[33] *Ibid.* at 317.
[34] *Whitbread v. Walley* (1988), 51 D.L.R. (4th) 509 (B.C.C.A.) [*Whitbread*], aff'd on other grounds [1990] 3 S.C.R. 1273.
[35] *Canada Shipping Act*, R.S.C. 1985, c. S-9.

of masters and members of the crew had the effect of depriving the plaintiff of full recovery for an injury sustained on board a ship, thereby contravening his section 7 rights. While this case was not directly concerned with the provision of health care, the principle that it established and its broad acceptance has had a significant impact upon the application of section 7 in matters of public medical assistance. For a unanimous Court, McLachlin J.A. (as she then was) held that the absence of property rights within the language of section 7 meant that "legislation or state action which is entirely economic falls outside the scope of section 7."[36] Recognizing that economic activity can have an impact upon the interests that are enumerated in section 7, McLachlin J.A. nevertheless held that, "[w]hile money ... may almost always be argued to affect a person's liberty and security, that is an indirect and incidental effect not contemplated by s. 7 of the Charter."[37] This conclusion effectively bars the application of any section 7 claims to deprivations of life, liberty or security of the person that can be characterized as having their source in economic constraints or inequality.

Widely cited with approval,[38] *Whitbread* has been decisive in its impact upon section 7 claims relating to the provision of health care. In *Brown v. British Columbia (Minister of Health)*,[39] Coutlas J. was presented with a case in which the plaintiffs challenged the province's decision to place the drug AZT on the Pharmacare list; a decision that had the result of requiring patients in need of AZT to pay for a portion of the cost of this highly expensive drug. The plaintiffs claimed that "the decision to place AZT on the plan violates their security because it affects their health, both physically and psychologically, imposing stress, stigma, perception of discrimination and loss of self esteem."[40] Justice Coutlas did not deny that these interests were adversely affected by the government's policy choice;[41] rather, he found that the deprivation alleged was economic in nature and that "[the plaintiffs'] position does not differ from the position of any person in this province who must survive on a low income."[42] Expressly following *Whitbread*, Coutlas J. concluded that because the deprivation was economic in nature such that an increase in funding would

[36] *Supra* note 34 at 520.
[37] *Ibid*. at 522.
[38] See *e.g. Conrad v. Halifax (County)* (1993), 124 N.S.R. (2d) 251 (S.C.).
[39] *Brown v. British Columbia (Minister of Health)* (1990), 66 D.L.R. (4th) 444 (B.C.S.C.) [*Brown*].
[40] *Ibid*. at 465–66.
[41] Although this was not ultimately the basis for his decision he did, however, suggest that the deprivation "lies in the fact that they are infected with a debilitating and incurable disease," not in government action (*ibid*. at 466–67). This *obiter* is analytically dubious at best, particularly in light of Sopinka J.'s statement in *Rodriguez* that "[a]s a threshold issue, I do not accept the submission that the appellant's problems are due to her physical disabilities caused by her terminal illness, and not by government action" (*infra* note 46 at para. 128).
[42] *Ibid*. at 467.

remove the deprivation, "the plaintiffs are seeking a 'benefit' which may enhance life, liberty or security of the person, which s. 7 cannot provide."[43]

A strikingly similar conclusion was reached in *Ontario Nursing Home Association v. Ontario*.[44] In this case, before the Ontario High Court of Justice, a patient in a nursing home was seeking a declaration that his section 7 rights were violated because "homes for the aged" and "rest homes" received more funding than nursing homes. Again, Holland J. acknowledged that the patient's section 7 interests in life, liberty, and security of the person were affected. But the plaintiffs were seeking an economic benefit and, accordingly, their claim was not within the ambit of section 7's protection:

> It is true that with greater funding he might receive more care, but it cannot be said that he is being deprived of his rights to life, liberty or security of the person. The section does not deal with property rights and as such does not deal with additional benefits which might enhance life, liberty or security of the person.[45]

Able to find the source of the adverse effects in economic rather than legal disadvantage, both Coutlas and Holland JJ. construed the alleged deprivation as an economic benefit sought and, therefore, denied the Plaintiffs the protection of section 7.

Yet even where an applicant has been able to satisfy a Canadian court that he or she has been deprived of rights to life, liberty, and security of the person, the section's internal limitation permitting deprivations in accordance with "the principles of fundamental justice" has proven a substantial limitation on the application of section 7 to health care issues. In the famous case of *Rodriguez v. British Columbia*,[46] Sue Rodriguez was suffering from a rapidly deteriorating disease that, before killing her, would render her incapable of speech, swallowing, walking, or moving at all without aid. She desired assistance to commit suicide and sought a declaration that section 241(b) of the *Criminal Code* violated her section 7 rights and, as such, was unconstitutional. Section 241(b) prohibited individuals from helping others to commit suicide. Like *Morgentaler*, this case involved criminal legislation that the Court found deprived Rodriguez of her security rights. However, the majority of the Court was unable to find any procedural flaws in the legislation and this conclusion, compounded with a reluctance to declare the government's apparent purpose as contrary to public policy, disposed of the case:

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[43] *Ibid*. at 469.
[44] *Ontario Nursing Home Assn. v. Ontario* (1990), 72 D.L.R. (4th) 166 (Ont. H.C.J.) [*Ontario Nursing Home*].
[45] *Ibid*. at 177.
[46] *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 [*Rodriguez*].

> Given the concerns about abuse that have been expressed and the great difficulty in creating appropriate safeguards to prevent these, it can not be said that the blanket prohibition on assisted suicide is arbitrary or unfair, or that it is not reflective of fundamental values at play in our society. I am thus unable to find that any principle of fundamental justice is violated by s. 241(b).[47]

So despite the acceptance that "the principles of fundamental justice are concerned with more than process,"[48] absent some formal procedural defects in the legislation, the Court refused to second-guess Parliament's policy choice and, as a result, allowed Rodriguez to be deprived of her right to security of the person. Rodriguez asked the courts to protect her rights in a positive manner by forcing a shift in government policy, but this plea was overcome by the formal nature of *Charter* rights jurisprudence.

This formalistic focus on the procedural aspects of impugned legislation can also be found in the initial decision in *Wakeford v. Canada*.[49] Wakeford was suffering from AIDS and found that the only drug that could relieve him of the difficult side-effects associated with his AIDS treatment was marijuana. The Applicant asked Laforme J. to find that the prohibition of possession of marijuana contained in the *Controlled Drugs and Substances Act*[50] offended his section 7 rights and, therefore, was unconstitutional. Justice Laforme decisively agreed that the legislation contravened the applicant's rights to liberty and security of the person:

> [Wakeford] has found a treatment that allows him to ease his suffering, assist in his overall medical treatment, and perhaps assist in prolonging his life. ... In my view it is enough that Mr. Wakeford chooses to treat his illness in the manner he has, which, in my view, he is constitutionally entitled to. The CDSA, by denying him that right, I find, infringes upon his right to security of the person.[51]

Nevertheless, "Parliament [had] provided a specific means for individuals to apply for exemptions and that must be exhausted prior"[52] to seeking relief from the Court. Justice Laforme, without regard to the substantive merits of the deprivation as mandated by *Cunningham*, found that the legislation provided a

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[47] *Ibid*. at para. 175.
[48] *Ibid*. at para. 173.
[49] *Wakeford v. Canada* (1998), 166 D.L.R. (4th) 131 (Ont. Gen. Div.) [*Wakeford*]. After this decision, Mr. Wakeford pursued and exemption through the Ministry of Health. He discovered that, although it was in the process of development, the Ministry had no procedure for granting an exemption. Mr. Wakeford applied to reopen his application and, in light of this fresh evidence that there was no *procedural mechanism* in place, Laforme J. varied his earlier decision, see 173 D.L.R. (4th) 726 (Ont. S.C.).
[50] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
[51] *Supra* note 49 at 145; see also at 142–43.
[52] *Ibid*. at 151.

potentially sound procedure and, as such, fundamental justice was not offended. The formalistic and procedural interpretation of the "fundamental justice" limit again precluded a vindication of the right to liberty and security of the person.

3. Prognosis

Past judicial application of section 7 to the health care field has affirmed that the liberal foundations of the *Charter* continue to shape its utility. Only where an applicant can demonstrate that a health-related interest is non-economic in nature and sourced in the official activity of the state, will the courts be prepared to acknowledge a *prima facie* infringement of life, liberty, or security of the person. Even if this hurdle is surmounted, the applicant will have to defeat the formalistic emphasis upon procedure that dominates the discussion around "fundamental justice." Atomism, negative liberty, and formalism are alive and well in section 7's intersection with health care. As a result, while the *Charter* may well serve to police the internal administration of existing health care programs (as in *Morgentaler* and *Fleming*), when the borders are pushed — when the external matters such as policy and funding are engaged — section 7 promises little.

B. Section 15: The Basis for Hope

Section 15(1) of the *Charter* has also received a great deal of attention from health care advocates and heath law scholars. Section 15(1) states:

> Every individual is equal before and under the law and has 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.[53]

The language of "equality before and under the law" offers a hopeful fusion between the *Charter* and the concepts of universality and equal access that have become so imbedded in heath care discourse. Jackman has advocated for the use of this section in the protection of social welfare rights[54] and Richard Haigh has fashioned a section 15 argument for the expansion of medical services to include alternative health care.[55]

[53] *Supra* note 2 at s. 15(1).
[54] See *e.g.* Jackman, *supra* note 3.
[55] R.A. Haigh, "Reconstructing Paradise: Canada's Health Care System, Alternative Medicine and the *Charter of Rights*" (1999) 7 Health L.J. 141.

With its recent decision in *Law v. Canada*,[56] the Supreme Court sought to consolidate and clarify section 15 jurisprudence. The Court held that the purpose of this section is

> to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[57]

The Court went on to state that "human dignity" is concerned "with physical and psychological integrity and empowerment."[58] This reference to physical and psychological integrity as a core element of section 15 is, no doubt, fertile soil for a health law advocate.

The Court then described the comparative approach appropriate to a section 15 analysis[59] and set out the following three questions that must be answered in the affirmative for a section 15 claim to be made out:

(1) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(2) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

(3) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[60]

To the extent that ill-health or some other personal characteristic can be identified and failures in the public health system can be characterized as

[56] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*].
[57] *Ibid.* at para. 51.
[58] *Ibid.* at para. 53.
[59] *Ibid.* at para. 56ff.
[60] *Ibid.* at para. 88.

imposing a burden or withholding a benefit, the basis for optimism arising from this section is evident.

1. Apparent Successes

A number of cases have seemingly borne out this insipient promise. I will examine two examples of these health care "victories" won under section 15 before considering the limitations that arise. First, and most famously, is *Eldridge v. British Columbia*.[61] In this case, the appellants, born deaf and whose preferred means of communication was sign language, sought care in a B.C. hospital. No interpreter was made available, and the appellants argued that the hospital's failure to provide interpretation services impaired their ability to communicate with their doctors and other health care providers. This impairment, they contended, interfered with their ability to access effective medical treatment — a benefit denied to them on the basis of a physical disability.

The Court was unanimous and unequivocal in its vindication of these patients' rights. Justice La Forest, writing for the Court, noted that it was insufficient that, on its face, the B.C. medical system treated all individuals equally; no interpretation services were provided for anyone. This, he argued, was a case of adverse effects discrimination that stemmed from "a failure to ensure that they benefit equally from a service offered to everyone."[62] The Court asserted that "[e]ffective communication is quite obviously an integral part of the provision of medical services"[63] and the failure to provide sign-language translation denied the appellants the benefit of these services. Justice La Forest reasoned as follows:

> If there are circumstances in which deaf patients cannot communicate effectively with their doctors without an interpreter, how can it be said that they receive the same level of medical care as hearing persons? Those who hear do not receive communication as a distinct service. For them, an effective means of communication is routinely available, free of charge, as part of every health care service. In order to receive the same quality of care, deaf persons must bear the burden of paying for the means to communicate with their health care providers, despite the fact that the system is intended to make ability to pay irrelevant. Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an "ancillary" service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.[64]

[61] *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624 [hereinafter *Eldridge*].
[62] *Ibid*. at para. 66.
[63] *Ibid*. at para. 69.
[64] *Ibid*. at para. 71.

Accordingly, the appellants' section 15 rights had been breached. The Court went on to consider whether or not this breach could be justified under section 1. Justice La Forest held that, even assuming that the impugned actions passed the other sections of the *Oakes*[65] analysis, the government had failed at the minimal impairment stage. The government had not shown that a complete denial of translation services was the least rights-derogating means of achieving their purpose of containing health care costs. The result was a strong vindication of rights to equal access to health care, achieved through the vehicle of section 15.

Knodel v. British Columbia[66] presents another example of health care interests being protected through the equality protection of the *Charter*. The *Medical Services Act*[67] set out a framework into which medical insurance suppliers were obliged to fit their programs. A regulation enacted pursuant to this statute defined the term "spouse" as applying exclusively to a man and a woman who, regardless of whether or not they are legally married, live together as husband and wife. The petitioner, Knodel, was a gay man whose partner, by operation of this regulation, was precluded from benefiting from the petitioner's health policy as a dependent spouse. Knodel sought a declaration that section 15 required that the term "spouse" be interpreted to include same-sex partners.

Justice Rowles found that the exclusion of homosexual couples from the definition of "spouse" was contrary to section 15. The legislation imposed an economic penalty on homosexual couples by denying a benefit available to heterosexual couples.[68] Since the government had conceded that section 1 could not save the contravention, the term "spouse," Rowles J. held, should be interpreted to include same-sex couples. Justice Rowles' decision seems to afford section 15 protection to even economic interests in health care and appears at first blush to be a strong vindication of health care rights.

Yet once again, these apparent successes are, on closer examination and in light of other case law on the topic, far more limited than they initially appear. There is little doubt these cases represent victories for the equal internal operation of health care programs and, as such, are commendable. However, both involve questions of access to *existing* services whose provision is procedurally flawed by inappropriate government action. Justice La Forest's careful characterization of the petitioners' claim in *Eldridge* is telling:

> Their claim is not for a benefit that the government, in the exercise of its discretion to

[65] *Infra* note 76.
[66] *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.) [*Knodel*].
[67] *Medical Services Act*, R.S.B.C. 1979, c. 255, s. 2.01.
[68] *Supra* note 66 at 383.

> allocate resources to address various social problems, has chosen not to provide. On the contrary, they ask only for equal access to services that are available to all.[69]

It seems critical to the Court's decision that this case involved the internal regulation of access to existing services and *not* a petition for an expansion of services or increased health benefits. In both cases, the government's legal action — in *Eldridge* the regulation of access to services and in *Knodel* direct legislative measures — were the clearly identifiable source of the inequality and not questions of policy or funding. Both cases redeem the individuals' negative *freedom from* discrimination but say nothing of a positive obligation upon the government to remedy social and economic inequalities — the systemic determinants of health and health care.

Parallel in this way to section 7, the jurisprudence relating to health care under section 15 demonstrates that, while an effective tool for remedying *internal* procedural defects in the provision of public health care — that is, inequities in the administration of existing and accepted health services — section 15 is a blunt instrument in relation to the *external* structuring and scope of health care. When claims are made under section 15 to expand health care or refine policy in pursuit of more effective treatment, the *Charter* simply cannot respond.

2. The Limiting Factors — Legal Sources of Inequality and Government Objectives

Case law reveals that health-related claims argued through section 15 that seek to affect the structuring of medical services or the policies informing public health care— that which I have called *external* elements of the health system — are presented with two substantial barriers. First, in fidelity to the liberal roots of the *Charter*, the courts have adopted a highly formalistic approach to the language of "before and under the law," thereby excluding claims early in the section 15 analysis. Second, and a cousin to the "fundamental justice" barrier found in section 7, the broad justificatory opportunity presented by section 1 is amenable to high degrees of deference with respect to decisions of government regarding the public purse.

Fernandes v. Manitoba[70] was a case heard by the Manitoba Court of Appeal. Fernandes was confined to a wheelchair and required sixteen hours attendant care each day. When his relationship with his girlfriend, who had been providing this care, ended, he was admitted to a hospital. Fernandes wanted to live in the

[69] *Supra* note 61 at para. 92.

[70] *Fernandes v. Manitoba (Director of Social Services (Winnipeg Central))* (1992), 93 D.L.R. (4th) 402 (Man. C.A.) [*Fernandes*], leave to appeal to S.C.C. refused 99 D.L.R. (4th) vii.

community, but there were no vacancies in the state-sponsored community residences and he could not afford his own attendant care. He applied to the Director of Income Security for a supplementary allowance to hire a care-giver so that he could return home, but was refused on the grounds that he was receiving adequate care in the hospital.

Justice Helper, for a unanimous Court, held that the applicant had no section 15 claim because the law was not the source of his deprivation. Section 15, she reasoned, is solely concerned with equality "before and under the law" and there was no law here that was treating him unequally. Rather,

> [u]nder the Act, Fernandes is being treated in the same manner as all applicants for an allowance. He is receiving all basic necessities as required by the Act. All his needs are being met. He is not receiving unequal treatment under the law. The fact that he is not being housed in a facility of his choice does not give rise to a determination that he is deprived of equal protection and benefit before and under the law.[71]

The failure to provide a supplementary benefit did not amount to discrimination. The Court took no account of the relative access to home care for the rich and poor, and gave no consideration to the inequality in choice of housing between able-bodied individuals and those with disabilities. These factors could not be characterized as formally "legal" and, accordingly, fell outside the section 15 protection.

Similar reasoning led to the Court's decision in *Rogers v. Faught*.[72] While being treated by a dentist, Rogers experienced severe pain in her TMJ (temporomandibular joints). Women suffer disproportionately from TMJ pain and Rogers discovered that neither the Royal College of Dental Surgeons nor the College of Dental Hygienists had developed policies or treatment guidelines in recognition of this fact. She claimed that this failure to take into account the particular needs of women when undergoing dental treatment contravened her section 15 rights. Both colleges were clearly bound by the *Charter*,[73] but the Court denied that section 15 was engaged and, accordingly, struck the pleadings. The Court reasoned that "[t]he failure to act or omission by the Colleges to develop programmes and standards of practice is not a 'law' or 'government action' within the meaning of s. 15 of the Charter," and that "[a]ccordingly the necessary precondition of a law giving rise to inequality is not asserted."[74]

Not only is this conclusion one that interprets the section in a formalistic and narrow fashion, but this case evidences the seemingly inexorable tendency of the

[71] *Ibid.* at 414.
[72] *Rogers v. Faught* (2001), 5 C.C.L.T. (3d) 109 (Ont. S.C.J.) [*Rogers*].
[73] See *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232.
[74] *Supra* note 72 at para. 77.

courts to recoil from positive rights claims. In *Rogers*, the Court refused to use the *Charter* to force policy change, in part because Rogers, in a manner more consistent with positive rights thinking, sought "to impose an obligation on a legislature or government to root out all situations where there may be systemic discrimination and to legislate to remove the discrimination."[75] Yet even in circumstances where applicants are able to fit their claims within section 15, a similar reticence to interfere with policy decision, particularly those involving budgetary expenditures, thwarts the applicant at the section 1 stage.[76]

In *Cameron v. Nova Scotia*,[77] the applicants were an infertile married couple who sought reimbursement of their expenses for cytoplasmic sperm injection, a special form of *in vitro* fertilization (IVF). They claimed that the government's refusal to pay for this form of IVF constituted discrimination based on physical disability (their inability to conceive). The Court agreed, stating that

> the appellants belong to the group which may be classed as the infertile who need, but do not get, the full array of services for reproduction. The comparative group is the fertile who need, and do get, the full array of services for reproduction. The policy reinforces the disadvantage of the infertile.[78]

A clear section 15 violation had been made out. Yet when the Court turned its attention to section 1, it gave complete deference to the need of policy-makers for "latitude in balancing competing interests in the constrained financial environment."[79] The Court characterized the government's pressing and substantial objective as "being to provide the best possible health care coverage to Nova Scotians in the context of limited financial resources"[80] and found that the government had satisfied all elements of the *Oakes* test.

Section 15 interests did not stand up against the pressures of financial constraint and the Court was loathe to force the government to alter its policy where budgetary issues would be engaged. Although the Court in *Eldridge* stated that "financial considerations alone may not justify Charter infringements," this statement was significantly qualified by the direction that "governments must be

[75] *Ibid*. at para. 80.

[76] If a breach of s. 15 is made out, the government has an opportunity to save impugned legislation or state action by recourse to section 1. *R. v. Oakes*, [1986] 1 S.C.R. 103., established that the government must show (1) that the breach is one that is "prescribed by law," (2) that the government has a pressing and substantial purpose in acting in the way that it has chosen, (3) that there is a rational connection between this purpose an the actions taken, (4) that the state action minimally impairs the right in question and, finally, (5) that the salutary effects of the impugned action outweighs the deleterious impact of the rights breach.

[77] *Cameron v. Nova Scotia (A.G.)* (1999), 177 D.L.R. (4th) 611 (N.S.C.A.) [*Cameron*].

[78] *Ibid*. at 651.

[79] *Ibid*. at 667.

[80] *Ibid*. at 664.

afforded wide latitude to determine the proper distribution of resources in society."[81] *Cameron* is suggestive of the true breadth of this latitude. Financial constraint combined with well-tailored policy is, it appears, a full answer to a claim of abuse of section 15 rights. The atomism of this decision fully segregates issues of economic disadvantage from legal rights to equality. The Court refused to impose upon the government a positive obligation to use its money to relieve inequality; indeed, quite the opposite — the fact that the *Charter* claim necessarily engaged the public purse amounted to a bar to the vindication of the applicants' rights. Leave to appeal to the Supreme Court of Canada was refused.[82]

3. Prognosis

Section 15 is highly effective when invoked to remedy an inequality in the provision of extant policies or services. *Eldridge* and *Knodel* are strong examples of this use of the *Charter* for that purpose. Yet this is where the section's utility ends when applied in the health care context. The legal formalism of the courts combined with a firmly negative approach to rights narrows the application of section 15 to only those inequalities that are sourced in the law and do not require policy formation or interrogation of a government's budgetary choices. As *Fernandes* and *Rogers* evidence, even where a government body is bound by the *Charter*, if an alleged inequality can be viewed as having arisen from "external" constraints, such as economics, or requires positive action on the part of the state, section 15 will be a far less effective tool. Additionally, the government has a permanent ace up its sleeve in the form of pleas of fiscal constraint. The *Cameron* decision suggests that a rights violation flowing from legislative action that has as its purpose cost containment will be readily justifiable under section 1. The result is that where section 15 of the *Charter* is invoked to address "external" health care concerns such as scope of care and coverage, medical policy, and the desirability of particular forms of treatment, the prospective impact of the *Charter* again proves bleak.

III. CONCLUSION — THE *CHARTER* AND THE LEGALIZATION OF HEALTH CARE

The foregoing is far from a blanket condemnation of the use of the *Charter* in the health care context. Indeed, I have sought to demonstrate that the *Charter* has a degree of usefulness as a legal mechanism for controlling some aspects of the health care system. Cases such as *Fleming* and *Eldridge* demonstrate that legal action can provide substantial improvements to the operation of the

[81] *Supra* note 61 at para. 85.
[82] *Cameron v. Nova Scotia (A.G.)*, [1999] S.C.C.A. No. 531 (QL).

existing system. But the *Charter* is effective for correcting these internal processes precisely because these cases mesh well with the liberal nature of the courts' interpretation of *Charter* rights. Where there are formal or procedural problems with a state action that impinges on the negative liberty of an individual, the *Charter* can rise to the occasion. In cases where positive conceptions of liberty, policy and budget decisions, or economic determinants of health are involved, the *Charter* evinces limited utility.

This internal/external analytical distinction is not simply academic hair-splitting; rather, there is a critical reason why this conceptual clarity is necessary. Use of the *Charter* in some contexts can be far more than merely unsuccessful — it can be harmful to the furtherance of social justice. By *Charter*izing health care issues, the polycentric nature of the social problems are masked. Economic, class,[83] and social determinants of health care are concealed behind the rhetorical veil of legal rights discourse and, in this marginal position, are not identified, elaborated or addressed. Michael Mandel persuasively argues as follows:

> The beauty of the Charter ... is that it appears to *depoliticize* politics. In form, it replaces "conflicts of interest" with "matters of principle." It is easy to understand why this appeals to actors on the right, because it allows power to disguise itself in the abstraction of claims about rights.[84]

Accordingly, in the context of health care, the broadly political nature of the issues involved goes unaddressed. This masking is inherent in the liberal essence of the *Charter* and makes recourse to the courts a very limited means of health care advocacy.

It follows that lasting and effective change to the Canadian health care system lies with political advocacy and engaging in public debate. Having reviewed the applicability of the *Charter* in securing access to alternative medicine, Haigh rightly observes that "[i]n many cases consumer advocacy can be just as successful, less expensive and less controversial or politically uncertain than complex constitutional argument before the courts."[85] A poignant example of this truth arises from the *Morgentaler* case. Though it stands as a "health care victory" won under the *Charter*, what was the practical effect of the legal vindication of women's rights to have non-therapeutic abortions? Sandra Rogers notes that, even following the decision in *Morgentaler*, access to abortions

[83] "The effect of limiting Charter application to actions of the legislative and executive branches of government is to exclude from Charter scrutiny the major source of inequality in our society: the maldistribution of property entitlements among individuals." *Supra* note 8 at 292.

[84] M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational, 1994) at 72.

[85] *Supra* note 55 at para. 117.

services "remains problematic."[86] Only four provinces pay for clinic-based abortions and no abortions whatsoever are performed in P.E.I. Anti-abortion violence in the wake of *Morgentaler* had exacerbated access issues and women in rural and remote areas are still consigned to expensive, trying, and long-distance travel to find the services they need. *Morgentaler* did not — and could not — address public opinion, fiscal management, or any other of the non-legal determinants of health care and, as a result, the victory has a somewhat pyrrhic aura about it.

Political and social mobilization holds the distinct advantage of being able to address the varied sources of ill-health and multiple barriers to health care in a manner the courts simply cannot. For all of the promise that the *Charter* holds, "[t]he Charter does not alter a basic historical fact: namely, progressive change follows from mobilization and organization by oppressed and disempowered people."[87] With limited resources and the clear exigency of the issue, the energy of advocates seeking fundamental changes in the orientation, structuring, and funding of health care should be directed not to the law courts and the *Charter*, but to the court of public conscience, political will, and social action.

[86] S. Rogers, "State Intervention in the Lives of Pregnant Women" in J. Downie & T.A. Caulfield, eds., *Canadian Health Law and Policy* (Toronto: Butterworths, 1999) 275 at 286.

[87] J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What you Want (Nor What you Need)" (1991) 70 Can. Bar Rev. 307 at 328.

RECLAIMING THE FREEDOM TO TRADE: RECTIFYING *MARSHALL*

Paul Groarke*

The author examines the judgments in Marshall, *and the right of the Mi'kmaq to harvest natural commodities and trade them commercially. He suggests that these rights can be traced to Aboriginal title, rather than in the Treaty put before the Court. The author sets out some principles that might provide a basis for a legal resolution of these issues, and concludes that we must begin by recognizing that society has an interest in acknowledging the legal validity of Aboriginal title.*

L'auteur examine les décisions de l'affaire Marshall *et le droit des Mi'kmaq de récolter des produits naturels et d'en faire le commerce. Il estime que ces droits remontent au titre autochtone plutôt qu'au traité soumis à la Cour. L'auteur énonce quelques principes qui peuvent servir de point de départ d'une résolution juridique de ces questions, et il conclut que nous devons commencer à reconnaître qu'il y va dans l'intérêt de la société d'admettre la validité juridique du titre autochtone.*

I. INTRODUCTION

It would be a mistake to think that the ongoing conflict over the lobster fishery at Burnt Church, which has yet to be settled, can be reduced to a legal dispute.[1] No one in the social sciences, certainly, would believe that we can understand what has happened in Mirimachi Bay without investigating the long and relatively bitter relations between natives and European settlers in the region.[2] Important as this is, I will leave it for those more familiar with the experience of the native peoples to explain the sociology of the situation. Rather than deal with the social parameters of the conflict, I wish to suggest that there is a conceptual issue at the heart of the controversy, which the case law has failed to address.

The present article begins by re-examining the judgments in *R. v. Marshall*, which precipitated the events in Mirimachi Bay. It accordingly examines the right of the Mi'kmaq to harvest natural commodities and trade them commercially. The article goes on, however, to suggest that the conceptual

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1 For a convenient summary of the events following *Marshall*, see K.S. Coates, "The Marshall Crisis and East Coast Confrontations" in *The Marshall Decision and Native Rights* (Montreal & Kingston: McGill-Queen's University Press, 2000) 127.

2 See *e.g.* L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979).

framework underlying the jurisprudence in the area of native rights requires re-examination. It argues that the source of the Mi'kmaq right to trade in natural commodities can be found in Aboriginal title, rather than the Treaty put before the court. It then suggests that this analysis may be extended to Aboriginal rights more generally.

The major premise of my argument is that the Mi'kmaq enjoyed some form of Aboriginal title when the treaties were signed, which gave them a commercial right to trade. This title can be traced to the sovereignty enjoyed by Canada's indigenous peoples at the time of European settlement. Although the Treaty in *Marshall* is important as a testimonial which acknowledges such rights, the article argues that the source of these rights lies in Aboriginal title. It accordingly adopts the view that the commercial rights of the natives are inherent and original, and were never extinguished. There is nothing in this argument that dispenses with the importance of treaties, which still govern the relationship between natives and the Crown. It nevertheless recognizes that the rights that find expression in the treaties, in some cases at least, are more accurately seen as an attribute of sovereignty.

The current jurisprudence sees Aboriginal rights as a more encompassing concept than Aboriginal title.[3] This is a product, however, of the reluctance of the courts to recognize the survival of Aboriginal title. As a result, they have had no alternative but to postulate a set of Aboriginal and treaty rights, that stand free of native original title. This has produced a fragmented and relatively *ad hoc* approach to native claims, divorced from fundamental principles. I believe that the approach set out in the present article serves the needs of legal analysis better, at least in cases like *Marshall*, where the disputed rights derive directly from the native use of the inhabited territory.

It may be helpful to clarify a number of points before discussing the substantive issues raised by *Marshall*. The first is that the case law in the area of Aboriginal rights has become unnecessarily technical and legalistic. The present inquiry has a philosophical side and is predicated on the firm belief that there is a need to return to legal fundamentals in the area. I am more concerned with the conceptual problems in the approach that was taken by counsel and the courts than with the specifics of the law. As a result, the article does not address the technicalities in the case law.

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[3] There is an extensive jurisprudence that deals with the meaning, significance and extent of such rights, which goes far beyond any remarks that I might offer. See *e.g.* the decision of the Supreme Court in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].

This deserves further comment. In my view, at least, the position adopted by the Supreme Court of Canada in *Marshall* reflects two competing considerations in the present law. The first is the unwillingness of the courts to recognize the legal fact of native sovereignty. This has deprived Aboriginal peoples of the respect and equality that they enjoyed as nations in their own right. The present article calls for a less paternalistic approach, which recognizes the inherent rights of Aboriginal peoples. I do not believe that this requires a full assertion of sovereignty and the article argues that there is room for a middle way, which recognizes the competing interests on both sides of the issue.

The other consideration in the case law, which ameliorates the first, can probably be found in the merits of individual claims. This has given rise to a results-oriented approach, however, that has led critics on both sides of controversial cases to question the legitimacy of the courts' reasoning. Although it would be a mistake to ignore the equities in individual cases, the distinguishing feature of legal reasoning is that it rests on the application of principle. Any jurisprudence that relies too heavily on policy will eventually fragment into a body of divergent opinions that cannot be anchored in a satisfactory conceptual framework.

There are two other points that might be clarified. One is that there is a sense in which I have consciously "taken sides" in writing this article. This is partly because the problem that concerns me rests on the Aboriginal side of the conflict. It is also in keeping with legal practice, however, which generally examines legal issues from the perspective of the parties. This approach sets out the competing arguments in a more compelling manner than other approaches.

The final point is simply that this is an exploratory discussion. Although I have examined the *Marshall* judgments in some detail, I have tried to step back from the intense feelings generated by the case. I have also avoided any speculation as to the appropriate disposition in other cases. My purpose is only to provide the general framework in which the case for Aboriginal title might be examined. This ultimately calls for some reflection on the concept of sovereignty, where the deeper problem in the case law appears to lie.

So much for the introduction. The second part of the article provides a synopsis of the various decisions in *Marshall* and argues that the Supreme Court failed to deal with the real source of the Mi'kmaq claims in the case. The third part argues that the rights that Marshall was claiming have their origins in native sovereignty rather than the treaty rights discussed in the case. The argument is

that the Treaty merely recognizes the existence of such rights and assumes that they will continue. This essentially operates as an estoppel on the Crown. The final part of the article comments on the larger dispute over native title and sets out some of the principles that might provide a basis for a legal resolution of the issues in the area.

II. THE *MARSHALL* DECISION

The facts in *R. v. Marshall* are deceptively simple. Donald Marshall and another Mi'kmaq caught 463 pounds of eel in Pomquet Harbour, Nova Scotia in 1993. They sold the eels for $787.10. Marshall was subsequently charged with three offences under the federal fishery regulations: fishing without a license, fishing during "the close time for eels" and selling eels without a commercial license.[4]

At trial, counsel argued that Marshall was exempt from the regulations under the terms of a "Treaty of Peace and Friendship" signed on 10 March 1760 at Halifax. The defence relied on a particular clause in the Treaty, under which the Mi'kmaq agreed to restrict their trade to "truckhouses" established by the government. The argument was apparently that this clause implicitly granted the Mi'kmaq a right to trade in natural commodities.

Marshall was convicted by Embree Prov. Ct. J. on the basis that the Treaty did not exempt him from the fishery regulations.[5] Marshall appealed to the Nova Scotia Court of Appeal, which upheld his conviction.[6] The case was then appealed to the Supreme Court of Canada, which overturned the convictions and substituted an acquittal on all three counts.[7] The majority held that Marshall had a treaty right to fish and sell eels.

Although the original ruling in *Marshall* was quite limited in its scope, it immediately gave rise to a confrontation between natives and the Department of Fisheries at Burnt Church. This led the West Nova Fisherman's Coalition to request a rehearing of the case, on the basis that the issue of Aboriginal rights had not been properly argued before the Court. There is much to be said for the

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[4] The case actually proceeded on the basis of an agreed statement of facts, which forms part of the decision in the provincial court and can be found in that decision, *infra* note 5 at para. 4.

[5] *R. v. Marshall*, [1996] N.S.J. No. 246 (Prov. Ct.) (QL) [*Marshall* Prov. Ct.].

[6] [1997] N.S.J. No. 131 (C.A.) (QL) [*Marshall* C.A.].

[7] [1999] 3 S.C.R. 456 [*Marshall 1*].

popular view that the court reversed itself — at least in spirit — in rejecting the Coalition's application.[8] The tone of the second ruling, *Marshall 2*, does not favour Aboriginal rights.[9]

In his judgment at trial, Embree Prov. Ct. J. reviewed the events leading up to the signing of the relevant Treaty. He held:

> It is fundamental to the Treaties of 1760 and 1765 that they are peace treaties, that they acknowledge the jurisdiction of [the] British King over Nova Scotia, that any quarrels or misunderstandings between the Mi'kmaq and the British will be redressed according to British laws and that trade with the Mi'kmaq will be carried out in accordance with the trade clause.[10]

This was a constant in the case. All of the judges in *Marshall 1* held that the Mi'kmaq had formally relinquished any claim to sovereignty in entering these treaties. This extinguished their right to pursue their traditional way of life, other than as British subjects.

Judge Embree took the position that the essentials of the Treaty are relatively simple. The major consideration between the parties was peace. The British also wanted a promise from the Mi'kmaq that they would not trade with the French.

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[8] Brian Fleming wrote in "Supreme admission of incompetence" *Halifax Daily News* (30 November 1999): "Confidence in the court is now somewhere below the bellies of Mr. Marshall's eels, and at best, this appalling attempt at damage control was an open admission of the court's failure in crafting its September judgment properly. At worst, Canada's highest court has, willy-nilly, created a new final, final appeals procedure." See *Coates*, *supra* note 1 at 19. There is a convenient discussion of the reaction in the popular press in Leonard I. Rotman, "'My Hovercraft is Full of Eels': Smoking Out the Message in *R.* v. *Marshall*" (2000) 63 Sask. L. Rev. 617. See also the colourful remarks of Claire Hoy, in "Supremes clarified" *Law Times* (6 December 1999) 7: "Rather than do the honourable thing and admit that they had goofed the first time around, the Supremes blamed everybody but themselves for misinterpreting their decision and even went to the extraordinary—and highly debatable—length of inventing something called a 'regulated right' to cover their tracks. . . . perhaps it took a while to speak up because the art of finessing a mistake to make it appear as if everybody else was wrong takes a little more time than a simple admission of error." Hoy was off the mark in complaining about the invention of a "regulated right," but the comments are an accurate reflection of the general scepticism in the press. Catherine Bell and Karin Buss, *infra* note 23 at n. 23–27, provide a number of examples of the response of editors and columnists to the decision, and describe the general reaction in the popular press as a "media frenzy."

[9] [1999] 3 S.C.R. 533 [*Marshall 2*].

[10] *Marshall* (Prov. Ct.), *supra* note 5 at para. 97.

In return, they agreed to provide truckhouses, where the Mi'kmaq could trade natural commodities for European goods. This eventually became the focus of the case. Even from this distance, the Treaty was a mutually satisfactory agreement, which appears to have contained meaningful promises from both sides.[11]

One of the difficulties in *Marshall* is that the defence appears to have rested its case on the trading clause. This may have been an understandable strategy, in light of the case law. It nevertheless allowed the various judges who heard the case to side-step the issue of Aboriginal title. Judge Embree, for example, writes:

> The Defendant has specifically put forward the Treaties of 1760 and 1761 as the source of any rights applicable to the charges he faces. While I am clearly asked to consider those treaties, and to do so in their proper historical context, it is also clear that the only source of rights I am asked to consider are those treaties.[12]

There is little doubt, however, that Marshall's claim has its origins in Aboriginal title. The real issue in the case was whether the rights and liberties enjoyed by the Mi'kmaq before the European settlement survived the Treaty. This was never properly considered by the courts.

The Court of Appeal and the Supreme Court adopted the same approach as the trial judge. The Supreme Court did not consider the possibility that Marshall had an inherent right or freedom.[13] Thus, the Chief Justice was careful to note that the appellant "does not argue for an aboriginal (as distinct from a treaty) right to trade on this appeal."[14] This echoes the statement of Roscoe and Bateman JJ.A. in the Court of Appeal, who wrote that the appellant "did not attempt to establish that there was a pre-existing Aboriginal or treaty right to trade."[15]

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[11] See the comments of the Supreme Court of Canada in *Marshall 1*, *supra* note 7 at 469.

[12] *Marshall* (Prov. Ct.), *supra* note 5 at para. 130.

[13] The decision in the Court of Appeal, *supra* note 6 at para. 78, stresses the limits of the truckhouse rights in the written Treaty: "The trial judge's conclusion that the only implication for the Mi'kmaq of the demise of the truckhouses was that they were free to trade in the same manner as all other subjects of the Crown supports the conclusion that he found that the clause restrained Mi'kmaq trade, rather than granted a right to trade at truckhouses."

[14] *Marshall 1*, *supra* note 7 at 512.

[15] *Marshall* (C.A.), *supra* note 6 at para. 63.

The problem with the approach adopted by the defence is essentially that it forced Marshall to rely on the clauses in the Treaty, which can never provide the kind of inherent right that we associate with sovereignty. As Thomas Isaac writes, the courts have essentially held that the "substance" of the treaty rights in *Marshall* is fundamentally restrictive. "That is to say, the Court has gone to great lengths in both *Marshall No. 1* and *Marshall No. 2* to put inherent limitations on the treaty rights to fish, hunt, gather and trade for necessaries."[16] Isaac reviews the restrictions set out in *Marshall* and *Delgamuukw v. British Columbia*,[17] in concluding that the courts have left enough room for the federal government to justify almost any encroachment on native rights.

There is a significant linguistic issue here, which goes to the difference between a freedom and a right. If the right to trade in natural commodities has its source in native sovereignty, it seems more accurate to characterize it as a freedom. There will still be situations where the term "right" is convenient, but without implying that the right has a more specific provenance. At first glance, at least, the freedom to trade would appear to have its source in the natives' general title to their land. The use of a term like "rights" is more appropriate in circumstances where the ownership of the land is vested in someone else. An easement, for example, may create a "right." This can hardly be considered a fair characterization of the historical prerogatives of the natives.

This has significant implications for legal practice. Isaac argues that the distinction between a freedom and a "right" has a pivotal role in deciding which party has the burden of proving its case.[18]

> When interpreting a liberty or freedom, one does so with the intent of understanding how the liberty or freedom may be limited in its application. For a right, the interpretation is affirmative: that is, one need decide what a right is as opposed to what it *is not*."[19]

The argument is essentially that Aboriginal rights can be traced to the freedom they enjoyed before the European settlement. It is accordingly for the Crown to justify any limitation on these freedoms. There is an increasing judicial tendency, however, to see Aboriginal prerogatives as specific and inherently restricted rights. This places the onus on native claimants.

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[16] T. Isaac, "The Courts, Government, and Public Policy: The Significance of *R.* v. *Marshall*" (2000) 63 Sask. L. Rev. 701 at 708.

[17] [1997] 3 S.C.R. 1010 [*Delgamuukw*].

[18] Isaac, *supra* note 16.

[19] *Ibid*.

Although the majority of the Supreme Court ruled in favour of Marshall, it did so on the basis that the right to trade is a treaty right. This was problematic, since the terms of the written Treaty do not contain an explicit right to trade in natural commodities. The Court navigated its way around this issue by treating the oral negotiations that led to the signing of the written document as part of the Treaty.[20] The Supreme Court still seemed to feel, however, that it was necessary to trace such a right to the written terms of the Treaty. This is what led the majority to rely so conspicuously on the truckhouse clause which was pivotal, if the Court was to characterize Marshall's rights as treaty rights.

These kinds of issues also led to a controversy as to whether extrinsic evidence concerning the oral history of the Mi'kmaq people could be relied upon in interpreting the Treaty. This became an emotional issue, for historians as well as natives, but only helped to obscure the more significant aspects of the judgment. Although the majority and the minority accepted this evidence in *Marshall 1*, neither of the judgments manage to convey why the Mi'kmaq understanding of the Treaty seems so important in a legal context. It is a mistake to put too much emphasis, as the Court did, on the honour and dignity of the Crown. The more important principle is that a sovereign people can only relinquish what they intend to relinquish.

While the limited rights that the Supreme Court recognized in *Marshall 1* were sufficient to defeat the charges, the Court held that they did not give the Mi'kmaq the right to pursue the "open-ended accumulation of wealth."[21] The Court justified this limitation on the basis that the truckhouses provided by the British were only intended to provide the natives with European "necessaries."[22] This seems artificial: if the British agreed to provide the Mi'kmaq with European necessaries, it was because that was what the Mi'kmaq wanted. The historical facts reviewed by the Court do not support the suggestion that the truckhouses

[20] See the comment of the majority in *Marshall 1*, *supra* note 7 at 497: "In more recent times, as mentioned, the principle that the honour of the Crown is always at stake was asserted by the Ontario Court of Appeal in *Taylor* and *Williams*, *supra*. In that case, as here, the issue was to determine the actual terms of a treaty, whose terms were partly oral and partly written." Whatever the significance of the honour and dignity of the Crown, the Supreme Court was right in holding that the written document cannot be properly interpreted without investigating the circumstances under which it was negotiated.

[21] *Ibid.* at 470.

[22] In *Marshall 1*, *ibid.* at 484, the Court relies on the minutes of a meeting between the Governor and the Chiefs of the Maliseet and Passamaquody on 11 February 1760, which expressly uses the word "necessaries."

were provided with the intention of limiting the financial extent of the trading practices followed by the Mi'kmaq.[23]

Catherine Bell and Karin Buss have described the quasi-commercial character of the *Marshall* right:

> This historical right to obtain "necessaries" from truck houses through access to fish and wildlife is equivalent to a contemporary right to "produce a moderate livelihood for individual Mi'kmaq families at present-day standards". Less than a commercial right to hunt and fish for general economic gain, and more than a right to sustenance, a moderate livelihood includes such "basics" as "food, clothing and housing, supplemented by a few amenities."[24]

The concept of "a moderate livelihood" can be found in the American jurisprudence, where it may or may not be justified.[25] Although the term has appeared in the Canadian jurisprudence, it inevitably looks like a political compromise, which attempts to accommodate native interests without interfering with the *status quo* in the fishing industry.[26]

There is a sense in which the majority of the Supreme Court was determined to do the right thing in the first of the *Marshall* decisions. Justice Binnie held that any ambiguities in the Treaty should be resolved in favour of the native signatories and his judgment is replete with references to the honour and integrity of the Crown. There is an element of paternalism, however, in the suggestion that the Mi'kmaq are only entitled to pursue "a moderate living." We do not restrict the material aspirations of other people in the same way and strict construction seems out of place in determining the scope of such integral rights.

Legally, the *Marshall* right is an enigmatic right, which is difficult to apply in a courtroom. The quasi-commercial standard envisaged by the Court is vague, speculative and subject to change. It involves more policy than law. The courts

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[23] The historical evidence appears to support the position adopted in the present paper. See W. Wicken, *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002), where one of the historians who testified for the defence has taken the position that the early Mi'kmaq treaties preserved the authority of Mi'kmaq law. Wicken argues that these treaties were re-interpreted by the Crown after 1749, when the colony was secured by a stronger military presence.

[24] C. Bell & K. Buss, "The Promise of *Marshall* on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63 Sask. L. Rev. 667 at 669 [Bell & Buss; citations omitted].

[25] See *ibid*.

[26] See *e.g.* the dissenting judgment of McLachlin J. in *Van der Peet, supra* note 3 at para. 283.

do not have the expertise to decide such questions, which involve social and political considerations that stand outside the limits of justiciability. The question of what constitutes "a moderate livelihood" is a matter of opinion and open to legitimate debate.

The more significant argument was never seriously addressed by the Court in *Marshall*. It was simply that the British recognized the inherent right of the Mi'kmaq to trade in natural commodities when they signed the 1760 Treaty. There is accordingly no need to fall back on the truckhouse clause, which serves another purpose entirely, and was included to dissuade the Mi'kmaq from exercising their freedom of trade with the French. This naturally assumes that they possessed the freedom to trade in the first place.

The majority in *Marshall 1* rejected this position without examining it, and simply assumed that the rights enjoyed by the Mi'kmaq were treaty rights. It is notable that Binnie J. and the majority were willing to accept the dissenting position that the truckhouse clause put the Mi'kmaq in a worse position than other citizens.

> My colleague, McLachlin J., takes the view that, subject to the negative restriction in the treaty, the Mi'kmaq possessed only the liberty to hunt, fish, gather and trade "enjoyed by other British subjects in the region". . . The Mi'kmaq were, in effect, "citizens minus" with no greater liberties but with greater restrictions. I accept that in terms of the *content* of the hunting, fishing and gathering activities, this may be true.[27]

This is the critical finding in *Marshall 1*. The essential force of the decision is to diminish the natural scope of native rights.

The effect of *Marshall 1* was only compounded by the ruling in *Marshall 2*, where the full Court at least implicitly narrowed the right that had been recognized by the majority in the initial decision. The Court also held that the need for conservation placed definite limits on any Aboriginal rights:

> Conservation has always been recognized to be a justification of paramount importance to limit the exercise of treaty and aboriginal rights in the decisions of this Court cited in the majority decision of September 17, 1999, including *Sparrow*, *supra*, and *Badger*, *supra*. As acknowledged by the Native Council of Nova Scotia in opposition to the Coalition's motion, "[c]onservation is clearly a first priority and the Aboriginal peoples accept this". Conservation, where necessary, may require the complete shutdown of a hunt or a fishery for aboriginal and non-aboriginal alike.[28]

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[27] *Marshall 1*, *supra* note 7 at 494.

[28] *Marshall 2*, *supra* note 9 at 553–54.

The significance of such a statement lies in its implications. The important point is that the second decision left no doubt that the federal government and the Department of Fisheries have the ultimate authority over the fishery.

The Court in *Marshall 2* seized on the fact that the rehearing requested by the West Nova Fisherman's Coalition related to the lobster fishery. It followed that a rehearing would serve "no useful purpose," the Court held, since the ruling in *Marshall 1* "related only to the closed season in the eel fishery."[29] It was these facts that provide "the precise context in which the majority decision of September 17, 1999 is to be understood."[30] This line of reasoning is not particularly convincing: although legal rulings can always be confined to the facts of the case, the Supreme Court seemed more interested in escaping the controversy generated by its original decision.

In the second ruling, the Supreme Court again held that Marshall's right went beyond fishing for food and could be characterized as a limited commercial right, which had its origins in the Treaty. The Court also took a second opportunity to side-step any discussion of inherent, free-standing Aboriginal rights.

> The emphasis in 1999, as it was in 1760, is on assuring the Mi'kmaq equitable access to identified resources for the purpose of earning a moderate living. In this respect, a treaty right differs from an Aboriginal right which in its origin, by definition, was exclusively exercised by Aboriginal people prior to contact with Europeans.[31]

This naturally treats Marshall's right as a creature of the Treaty. The question whether the Mi'kmaq have inherent rights, which derive from the sovereign status enjoyed by the native peoples before the European settlement, was not considered by the Court.

The Supreme Court went on to suggest that *Marshall 1* was decided on the basis of the burden of proof. Although it was open to the Crown to demonstrate that it was closing the season for eels in the interests of conservation, it had chosen not to do so. There was accordingly no evidence before the Court that would justify regulations that overruled the native right to fish for eels. In spite of the Court's firm avowal that legislators and administrators are obliged to

[29] *Ibid.* at 554.
[30] *Ibid.*
[31] *Marshall 1, supra* note 7 at 526.

accommodate native rights, this kind of reasoning underscores the limited nature of the *Marshall* rights.

III. THE MI'KMAQ CLAIM

I have already made reference to the fact that the right recognized by the Supreme Court was actually inferred from the minutes of the negotiating session. The reality, for those who care to look, is that the ruling in *Marshall 1* traces Marshall's freedom of trade to a treaty that is silent on the issue. From a legal perspective, at least, the idea that the minutes constitute a part of the Treaty seems rather strained. The truckhouse clause merely assumes that the natives enjoy such a freedom. This goes against the fundamental premise of the majority, which is that the Treaty is the source of the native freedom to trade.

The view of the dissenting judges in *Marshall 1* is more convincing in this context. There is no reason, on a plain reading of the Treaty, to believe that it gave the Mi'kmaq any trading rights. This does not mean that the Treaty took away their freedom to trade. There was another source for such a freedom, and the stronger argument is that the 1760 Treaty merely acknowledged the existing freedom of the Mi'kmaq to pursue their traditional activities. This freedom had its origins in native sovereignty and Aboriginal title. Since both sides took this freedom for granted, there was no reason to mention it in the body of the Treaty.

The dissenting judges held that the rights of the Mi'kmaq and the rights of the settlers were merged under the Treaty: "upon entering into a treaty with the British and acknowledging the sovereignty of the British king, the Mi'kmaq automatically acquired all rights enjoyed by other British subjects in the region."[32] Their position was supported by the testimony of Stephen Patterson, a historian who gave evidence at the trial. In Patterson's view, the native people would have been subject "to the very same regulations that the subjects of the British Crown would have been subject to in 1760 and 1761."[33]

One of the problems with this position, as the truckhouse clause makes clear, is that the Mi'kmaq were not treated like other British subjects. They were obliged to sell their goods to those appointed by the Crown. The Supreme Court held that this merely delayed the full enjoyment of their rights, until the

[32] *Ibid.* at 526.

[33] See Isaac, *supra* note 16, citing S. Patterson,"High court accused of 'distorting' history" *National Post* (28 October 1999) A9.

restriction was relaxed.[34] There is no need to postulate a merger of rights, however, and there is another possibility. The native view is that the Mi'kmaq enjoyed a sovereign set of rights and freedoms, which survived the signing of the Treaty. They were accordingly in a position to voluntarily restrict the exercise of their own freedoms in order to obtain concessions from the British.

The native interpretation of the Treaty seems more convincing than the interpretation advanced by the Supreme Court. This is particularly true if the Treaty is given a generous interpretation. The choice between the two positions is clear: either the Mi'kmaq surrendered their traditional freedoms — there is nothing in the Treaty to suggest this — or the Crown agreed to let them continue, on the basis that they would be exercised in favour of the British. One of the interesting features of the latter position is that it would free the Mi'kmaq from the restrictions negotiated by the British when the Crown shut down the truckhouses promised in the Treaty.

The position adopted in the Supreme Court appears to rest on the opening words of the Treaty, which contain a formal pledge of allegiance to the British Crown.[35]

> I, Paul Laurent do for myself and the tribe of LaHave Indians of which I am Chief do acknowledge the jurisdiction and Dominion of His Majesty George the Second over the Territories of Nova Scotia or Accadia and we do make submission to His Majesty in the most perfect, ample and solemn manner.

It would seem to follow that the legal fact of allegiance is indisputable. This does not decide the matter, however, and the language of the pledge leaves open the possibility that the Mi'kmaq pledged their allegiance on the condition that they would continue to enjoy the freedom to hunt, fish and pursue their traditional ways of life.

The effect of the pledge of allegiance was only implicitly addressed by Embree Prov. Ct. J., who stated that European "notions of government, sovereignty and authority" were not a conceptual part of Mi'kmaq culture.[36] It could easily be argued that this lends credence to the view that the Mi'kmaq had

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[34] See *Marshall 1*, *supra* note 7 at 526: "Although these rights were supplanted by the exclusive trade and truckhouse regime while it was extant, when this regime came to an end, the Mi'kmaq trading interest continued to be protected by the general laws of the province under which the Mi'kmaq were free to trade with whomever they wished."

[35] *Ibid.* at 467.

[36] See *Marshall* (Prov. Ct.), *supra* note 5 at para. 28.

not surrendered their sovereign status in pledging allegiance to the Crown. There is no need to adopt such a radical position, however: the central point is that the Mi'kmaq believed that they would continue to enjoy the freedom to hunt, fish and gather throughout their territory. As the trial judge recognized, this was accepted as an article of faith and it would not have occurred to either side to question it.[37]

There is nothing in the essentials of the Treaty to counter the Mi'kmaq argument that they retained their inherent rights and freedoms. Judge Embree accepted that there was a state of war between the British and the Mi'kmaq in the years prior to the signing of the Treaty.[38] The British wanted peace, along with a commitment that the Mi'kmaq would not trade with the French. The Mi'kmaq wanted European goods and, perhaps, the protection of the Crown. There is no reason to believe that the Mi'kmaq would have agreed to the Treaty if they had known that they were surrendering their inherent freedom to trade. If anything, the truckhouse clause establishes that they wanted to continue their trading practices in the same manner as before.

The judges in *Marshall 1* appear to have assumed that the pledge of allegiance in the Treaty was sufficient to extinguish the sovereign right of the Mi'kmaq to hunt and fish. This is by no means clear: if we accept the logical principle of parsimony, the simplest interpretation of the Treaty should be adopted unless there is a compelling reason to discard it. But the simplest interpretation is that the Crown was willing to accept the *status quo* and let the rights and freedoms of the natives continue. This freedom can be traced to the sovereign rights enjoyed by the Mi'kmaq before the European settlement, and the Aboriginal title to the land, which in my own view provides the real source of Marshall's rights.

The real issue is whether the Treaty preserved the right of the Mi'kmaq to trade in the fruits of their hunting, fishing and gathering, or whether it created a new right. This is much like asking whether the origins of the freedom of trade presently enjoyed by the Mi'kmaq can be found in the treaty or earlier events.

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[37] See *ibid*. at para. 116: "I accept as inherent in these treaties that the British recognized and accepted the existing Mi'kmaq way of life. Moreover, it's my conclusion that the British would have wanted the Mi'kmaq to continue their hunting, fishing and gathering lifestyle."

[38] See *e.g. ibid*. at para. 51, where Embree Prov. Ct. J. observes: "Professor Patterson describes what followed in the years immediately after the Proclamation of 1749 as a British-Mi'kmaq war." There is no suggestion in the judgment that the native peoples of Nova Scotia legally surrendered to the British.

The answer to such a question seems plain. The trading practices of the Mi'kmaq have come down to them from their ancestors and the suggestion that their freedom to trade has its source in the Treaty is something like a metaphysical mistake. As Embree Prov. Ct. J. states, the Mi'kmaq "had been trading . . . with Europeans for approximately 250 years before 1760,"[39] the year the Treaty was signed.

The legalities of the situation are relatively simple. If the Treaty does not contain an explicit right to trade in natural commodities, it is because both sides assumed that the freedom of trade enjoyed by the Mi'kmaq would continue. The Mi'kmaq already enjoyed this freedom, and any accompanying rights, independently of any rights that they obtained as a result of the Treaty. They accepted the authority of the British Crown on the basis that they were entitled to follow their traditional ways. Since this included their commercial practices, it follows that their commercial rights survived the signing of the Treaty with the British. The idea that the Mi'kmaq were willing to surrender these commercial rights, in return for a right to pursue a "moderate" living, is highly artificial.

The primary question in the *Marshall* case was not whether the Treaty gave the Mi'kmaq the freedom to trade in natural commodities. Since the Mi'kmaq already enjoyed such a freedom, the legal question was whether the Treaty repudiated it. This implicitly shifts the burden of proof in the case: without words that explicitly extinguished the freedoms of the Mi'kmaq, their freedoms would logically persist. It follows that it was the Crown and not the defence that needed to find language in the Treaty that supported its position. The legal reality is that the presumptions in the case run in favour of the commercial rights of the Mi'kmaq.

The real significance of the truckhouse clause lies in the assumption that the freedom of the Mi'kmaq to trade in natural commodities will continue. This was an entrenched right and was openly commercial. There is nothing in the provision to indicate that the native right has been replaced by the rights enjoyed by other subjects. On the contrary, the establishment of truckhouses by the Crown, at considerable expense to the public purse, confirms the Mi'kmaq view that their freedoms continued under the Treaty. From the native perspective, this raises an estoppel against the Crown, which cannot accept the Mi'kmaq understanding of the Treaty, only to discard that understanding when it becomes convenient to do so.[40]

[39] *Ibid*. at para. 115.

The doctrine of estoppel prevents an interested party from denying the position it has taken in its dealings with others. As one legal dictionary puts it: "One who has allowed another to believe in the existence of a particular state of affairs," and thus induces another to act, "cannot argue that the true state of affairs was different."[41] The common law on the doctrine of estoppel is extensive and forms part of the substantive law of evidence. The more recent case law associates it with fair dealing.[42] It is not the details that matter, however; "the argument" is simply that the concept captures the essential logic of the situation in *Marshall*.

The Aboriginal argument in *Marshall* is that the Mi'kmaq were always free to trade in natural commodities. This commercial freedom was never surrendered: the pledge of allegiance was contingent on the understanding, on both sides, that the existing rights and freedoms of the Mi'kmaq would continue. The relevance of the doctrine of estoppel in this context is self-evident: the real significance of the Treaty in *Marshall* is that it recognizes the existing rights and freedoms of the Mi'kmaq. The truckhouse clause assumes that these prerogatives will continue. This estops the Crown from controverting such an assertion. Other citizens might enjoy their right to hunt and fish at the pleasure of the Crown, but the rights of the Mi'kmaq can be traced directly to their sovereign status, prior to the arrival of European settlers.

This goes a long way towards explaining the conflict at Burnt Church. Many natives believed, after *Marshall 1*, that the Supeme Court had upheld the inherent right of the Mi'kmaq to pursue their way of life. As Andrea Bear Nicholas stated, in a newspaper interview: "What the Marshall decision has done is to recognize a truth that has existed all along—that we, the Wolastrokwiyik and Mi'kmaq, have neither sold our lands nor surrendered our

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[41] *The Dictionary of Canadian Law*, 1st ed., *s.v.* "estoppel." There are many pithy invocations of the doctrine, which exists in a wide variety of manifestations. One of the entries in *Black's Law Dictionary*, 5th ed., *s.v.* "estoppel," merely states: "An inconsistent position, attitude or course of conduct may not be adopted to loss or injury of another." Estoppel puts the party who is entitled to the operation of the doctrine in the same position as if the representation were true.

[42] See the comment of Binnie J. in *Mount Sinai Hospital v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281 at para. 41, in dealing with public law promissory estoppel: "In the more recent English cases estoppel too has been swallowed up under the general heading of fairness."

access to sources of life in the land."[43] This is a sound argument, legally, but was never addressed in the decision. The Supreme Court restricted its inquiry to an examination of the truckhouse clause and the Treaty of 1760.

The two decisions in *Marshall* suggest that the judiciary is reluctant to deal with the fundamental question.[44] That question can be found in the foundations of the older case law, which holds that the native peoples in North America did not enjoy any underlying legal title. As a result, the law has historically held that any prerogatives that the native peoples enjoyed were converted into moral and political obligations on the Crown. In *St. Catherine's Milling and Lumber Co. v. R.*, for example, Watson L.J. stated that the interest of the natives in their land was a "personal and usufructuary right, dependent upon the good will of the Sovereign."[45] These normative obligations later gave rise to fiduciary duties.

Although later courts have characterized this as a legal title to land, it does not affect the ultimate title to the land, which remains vested in the Crown. The legal title recognized by the courts is limited in scope and appears to have originated in the *Royal Proclamation of 1763*, rather than the sovereignty of the native people. I do not wish to go into the specifics of the title enjoyed by the native peoples. But the more recent case law has only mitigated the effects of such a position. This is apparent in *Guerin v. Canada*,[46] for example, where the Supreme Court of Canada ostensibly recognized the existence of an Aboriginal title that gives the native peoples a legal right to the occupation and possession of tribal lands. This title theoretically predates the *Royal Proclamation* and provides an independent source of claims.

The Court in *Guerin* ran into difficulty, however, when it tried to describe the nature of such a title. Justice Dickson identified two lines of authority, which characterize Aboriginal title as either a "beneficial interest" in land, or a personal, usufructuary right. He went on to state that neither concept was sufficient, in itself, to capture the nature of native title. The important legal fact in the case, however, was that native title gives rise to fiduciary obligations.

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[43] "The Marshall decision is a door to liberation" *St. John Telegraph Journal* (23 September 1999) as quoted in Coates, *supra* note 1 at 8.

[44] This is borne out by the more recent decision of the Provincial Court in *R. v. Marshall*, [2001] N.S.J. No. 97 (QL), confirmed by the Nova Scotia Supreme Court at [2002] N.S.J. 98 (QL), where the court convicted Marshall and a number of other accused of cutting timber on Crown lands.

[45] (1888), 14 App. Cas. 46 at 54 (P.C.).

[46] [1984] 2 S.C.R. 335.

Although there is no need to discuss these obligations in the present context, the point is that this leaves the Crown with the sovereign title to native lands. There is no suggestion in *Guerin* that this title is defeasible: the conditions that attach to such a title are normative rather than legal in character.

The courts have consistently held that the original title of the native peoples, which derived from their independent, sovereign status, has been extinguished. This is the presumption that needs reassessment. There is no reason to enter into an argument about the requirements of surrender, or the question whether Aboriginal title continued beyond European settlement. Those are separate issues that raise larger concerns. The relevant argument in *Marshall* is merely that some of the rights attached to Aboriginal title — like the right to trade in natural commodities — have survived. Legally, this means that these rights are vested in the original title of the Aboriginal peoples to the land they occupied, prior to any surrender to the British Crown. It follows that the Crown took the land with these encumbrances attached.

There is no obvious reason why the usufructuary rights attached to Aboriginal title should not survive the signing of the Treaty. These kinds of rights are no more intangible than easements or other common law rights that derive from the use of property. A usufruct is recognized as a distinct species of ownership in systems of civil law, which gives a property holder the right to enjoy the fruits of any property. The usufructuary owns two of the three members of ownership — *usus* and *fructus* — and holds a title to real property.[47] It follows that the law has ample resources to accommodate the rights claimed by the native peoples.

There is at least one decision from the American courts which adopts exactly this approach. It is *U.S. v. Winans*,[48] where the United States Supreme Court dealt with an application for an injunction preventing the respondents from interfering with the right of the Yakima people to fish at certain places along the Columbia river.[49] The relevant Treaty had provided such a right, which could not be exercised because the Yakima no longer had title in the land bordering the river. The question for the Court was whether the rights of the natives were

[47] See *e.g. Civil Code of Quebec* Art. 1120 C.C.Q., book 4, title 4, which deals with "Des démembrements du droit de propriété." The English version of Art. 1120 reads: "Usufruct is the right of use and enjoyment, for a certain time, of property owned by another as one's own, subject to the obligation of preserving its substance."

[48] 1905 U.S. Lexis 1110, No. 180.

[49] I would be remiss if I did not thank an anonymous reviewer for directing me to this decision.

sufficient to defeat the patents that the respondents had obtained to the land from the state and federal governments.

The position adopted by the United States Supreme Court is set out remarkably well in the case syllabus. The right of taking fish "at all usual and accustomed places," the Court held,

> was not a grant of right to the Indians but a reservation by the Indians of rights already possessed and not granted away by them. The rights so reserved imposed a servitude on the entire land relinquished to the United States under the treaty and which, as was intended to be, was continuing against the United States and its grantee as well as against the State and its grantees.[50]

The right to fish, in other words, was inalienable. It attached to the underlying title, and placed an encumbrance on the sovereign title of the United States, which was not sufficient to defeat it. This is the kind of argument, in retrospect, that should have been advanced in *Marshall*. It goes far beyond the position that the Supreme Court of Canada adopted in *Marshall 1* and qualified in *Marshall 2*.

Some of the more recent decisions of the Canadian courts seem to implicitly acknowledge the force of such an argument. In *Delgamuukw*, Chief Justice Lamer adopted a broad interpretation of section 35(1) of the *Constitution Act, 1982*, which recognizes the "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada." Chief Justice Lamer held that this included Aboriginal rights which were not recognized under common law or French colonial law.[51] As a result, Aboriginal rights can be seen as "a burden on the Crown's underlying title" and remain with the land.[52] It would seem to follow that the Crown holds the sovereign power on the condition that it respect the legitimate claims of the native peoples.

John Borrows has criticized the *Delgamuukw* decision for its failure to reconsider the question of native sovereignty.[53] Chief Justice Lamer's comments

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[50] See *supra* note 48 at 1119: "In other words, the treaty was not a grant to the Indians, but a grant of rights from them — a reservation of those granted. And the form of the instrument and its language was adapted to that purpose."

[51] *Supra* note 17 at para. 136.

[52] *Ibid*. at para. 45.

[53] See J. Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw* v. *British* Columbia" (1999) 37 Osgoode Hall L.J. 537 at 542: "the *Delgamuukw* decision generated a great deal of commentary concerning its perceived 'blow to the legacy of colonialism.' This controversy is somewhat perplexing, given the judgment's conservative foundation; yet both

are historically significant, however, and hold that the legal assertion of sovereignty by the British did not automatically extinguish Aboriginal claims. This is a new development, which supplies the kind of analysis that is needed if we are to solve the apparent paradox in *Marshall*, where the Mi'kmaq pledged allegiance on the understanding that they would retain their original rights. There is no inconsistency in such a position, if the accoutrements of native sovereignty can be construed as a legal encumbrance on the powers of the Crown.

The most fundamental observation in the context of *Marshall* may well be the simplest. The language, terms and circumstances of the Treaty considered in the case suggest rather formidably that it was negotiated between equals, who retained some element of equality under the agreement. It seems ironic, in this context, that the Nova Scotia Court of Appeal held that peace treaties should be interpreted in a less generous manner than treaties which cede land. This is a fundamental error, which fails to acknowledge that both sides sued for peace. There was no surrender and the Treaty should not be interpreted in a way that deprives one of the parties of its inherent rights.

IV. RESOLVING THE BROADER DISPUTE

It would be a mistake to conclude this paper without reflecting on the implications of the argument I have set out in the broader context of native claims. The general force of the position I have taken is clear enough: the Mi'kmaq accepted the sovereignty of the Crown on the basis that they would continue to enjoy their inherent rights and freedoms. They have accordingly retained their commercial freedoms. This does not compromise the authority of the Crown, which is specifically acknowledged in the Treaty. The authority of the Crown is contingent, however, on the recognition of some unextinguished Aboriginal tenure, which provides the real guarantee of native rights.

It follows that the relationship between the inherent authority of the Crown and the inherent rights and freedoms of the Mi'kmaq under the Treaty of 1760 is reciprocal. The native view is certainly that there are two sovereignties here, which are contingent upon each other. The broader question is whether this analysis can be applied to other treaties, since there is a more general argument

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supporters and critics of Aboriginal rights have argued that this decision shows the Court's 'willingness to make new law and to adapt traditional legal concepts to changing cultural demands.'" There are similarities, in this regard, between *Delgamuukw* and *Marshall*, though it is the rulings in *Marshall* that deserve more criticism.

that the first nations entered into their relations with the British crown without surrendering the rights and freedoms associated with their traditional life. Alan Cairns identifies the problem by stating that "sovereignty was first exercised by European peoples over Aboriginal nations that did not believe they had given up their own sovereignty."[54]

Although I have restricted myself to the *Marshall* case, this historic misconception has been perpetuated in the idea that Aboriginal rights derive from treaties. It was accordingly reinforced by the Supreme Court when it characterized Marshall's right to fish for eel as a treaty right. The legal problem for the native peoples is that such an interpretation essentially vests Marshall's right to fish for eels in the Crown's title to the sovereign power. The reason for this is exceedingly simple: if Aboriginal title is extinguished, there is nowhere else for it to vest. As a practical matter, the *Marshall* right accordingly takes on the character of a grant from the Crown which holds the residual title to the territory, held by the Mi'kmaq.[55]

I do not want to go too far in assessing the general status of treaties, but the position that I have set out is in keeping with some of the views expressed in the literature regarding treaties and their interpretation. Brian Slattery, for example, has argued that a principle of continuity should be applied to the customary law of the native peoples.[56] Gordon Christie argues against the view that treaties are "surrenders."[57] Although the courts have recognized the existence of some free-standing Aboriginal rights, and the situation is reasonably complex, this remains

[54] A.C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000) at 212. Although he is writing in the context of native self-government, his comments apply with equal force to the issue of Aboriginal title.

[55] This is the kind of concern that informs the comments of authors like Isaac, *supra* note 16.

[56] See B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L.J. 101 at 111–12: "The second principle denies that aboriginal laws, jurisdiction, and land rights were automatically terminated when European powers gained sovereignty. It maintains that these rights presumptively remained in force under the new regime, as necessarily modified by the advent of the Crown. We may call this the doctrine of continuity." See also B. Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196.

[57] See G. Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's L.J. 143; see also S. Henderson, "Constitutional Powers and Treaty Rights" (2000) 63 Sask. L. Rev. 719.

the *causa causans* of the present law. There is little doubt that it has always been a source of bitterness among native people.[58]

Where this takes us is another matter. It is evident that the legal solution to the dilemma lies in the recognition that the sovereignty of the Crown has moral and legal limits. There is no way of addressing the fundamental issue without recognizing that there are ways in which sovereignty can be legally shared or apportioned. This raises much wider theoretical issues. Such a view is nevertheless in keeping with the current evolution of a new and more limited theory of sovereignty, which rests political authority on its moral and legal legitimacy rather than the fact of power.[59] There is more than enough conceptual room, within these contemporary developments, to recognize the inherent nature of the rights and freedoms claimed by Aboriginal communities.

The question of sovereignty raises political rather than legal issues. The origins of the prerogatives discussed in the *Marshall* case can presumably be found in the right of the Mi'kmaq to maintain their way of life. This can be seen as a qualified right of self-determination, which is invested with many of the elements of self-government.[60] There are a number of important qualifications that need to be made in this context. It would be unrealistic, for example, to

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[58] See the passage cited in *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 319: "What we don't like about the government is their saying this: 'We will give you this much land.' How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land — our own land."

[59] It is impossible to review the literature here. I am hesitant to recommend any sources, since so much of the attack on the historical concept of sovereignty is philosophically wanting. But see *e.g.* F.X. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (The Hague: Kluwer Law International, 2000); T.J. Biersteker & C. Weber, eds., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996); S. Hainsworth, "Sovereignty, Economic Integration, and the World Trade Organization" (1995) 33 Osgoode Hall L.J., 583; and earlier, R.B.J. Walker & S. Mendlovitz, eds., *Contending Sovereignties: Redefining Political Community* (Boulder: L. Rienner, 1990). On the general subject of sovereignty, see D. Philpott, "Sovereignty: An Introduction and Brief History" (1995) 48:2 J. Int'l Affairs 353, which I recommend.

[60] This has been considered in the literature. See *e.g.* J.J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291, where he argues that the Chippewa people retained some aspects of their inherent sovereignty and continued to exercise self-government after the signing of the treaties.

think that this affects the legal and political fact of Canadian sovereignty. There is also the difficulty of determining the ambit of the right of self-determination, which evolves over time. The contemporary exercise of the legal rights granted in 1760 must take the many changes in physical, social, and political circumstances into account.

The important point, however, is that this calls for a different kind of discussion. Although the courts can determine the legal and constitutional validity of government action, it is not for the courts to decide how sovereignty should be shared. The same kind of problem arises, moreover, in solving the practical issues that arise between the parties. If the fundamental argument in *Marshall* is that native peoples are entitled to equal access to the commercial fishery, we need to determine what we mean by equal access. The legal answer would seem to lie in some principle of proportionality, which holds that native peoples are entitled to a fair portion of the commercial fishery, having considered the needs of the resource and the fishery at large.[61] The law can only establish the basic parameters, however, in which a more specific answer can be found.

The answer to most of the outstanding questions lies in the political realm. One of the commonplaces in the literature dealing with Aboriginal rights is that litigation appears to have taken the place of political dialogue.[62] As the Nova Scotia Supreme Court states in its new *Marshall* decision, which deals with the rights of Aboriginals to cut timber:

> many of the issues still outstanding between Aboriginal communities and governments are best resolved through a process of negotiations as opposed to litigation. Litigation, whether criminal or civil, is slow and extremely expensive. This adversarial approach does nothing to further the process of reconciliation. Surely after waiting 240 years it is time to move on and resolve the outstanding issues in a comprehensive way.[63]

[61] The Supreme Court's comments in *Marshall 2*, *supra* note 9 at para. 42, are helpful in this context.

[62] See the somewhat exaggerated comment of Coates, *supra* note 1 at 199: "The national legal bill in Canada continues to mount. There are hundreds of Aboriginal rights cases working their way through the courts. In the Maritimes, almost every week brings an announcement of another charge against a Mi'kmaq or Maliseet person for ignoring federal or provincial resource regulations."

[63] *R. v. Marshall*, [2002] N.S.J. 98 at para. 151 (S.C.) (QL).

The legal process was not designed to regulate the relations between native peoples and the government and can only provide the framework in which a social or political settlement can be reached.

Alan Cairns, like political scientists, has expressed other concerns about the approach adopted by judges, lawyers and legal academics to native claims. Their approach, he argues, fails to recognize the "moral ties" and common values that hold the larger community together.[64] This kind of criticism deserves consideration. There is much to be said for the argument that native and government leaders need to recognize that they share a common set of interests, a large degree of interdependence, and mutual goals.[65] This is not possible without a larger sense of community, which motivates both sides to seek a solution that meets the interests of society as a whole.

This kind of concern has a bearing on a number of issues. There are many legal and practical reasons, for example, why the Mi'kmaq should be subject to the same regulatory regime as the rest of the commercial fishery. The management of different fishery regimes introduces unnecessary complications into the administration of our natural resources. There are many similar issues. We need to start, however, by acknowledging that our society has an interest in recognizing the legal validity of Aboriginal title. In the *Marshall* case, this means giving the Mi'kmaq their fair share of the fishery. There is no reason why this should supplant the needs of conservation.

Most legal commentators would agree that we are obliged to respect the force of the original bargain between the British and the Mi'kmaq. This is where the legal issues lie, moreover, and is not open to political negotiation. If the rights and freedoms that were attached to Aboriginal title were never surrendered, and our jurisprudence is based on a misconception, the courts must correct it. This is a necessary part of living in a just society and rectifying the unfairness of the past.

[64] See Cairns, *supra* note 54 at 177.

[65] See *ibid.* at 207 where Cairns draws attention to Burrows as an Aboriginal theorist who believes that "the dignity of self-government needs to be supplemented by the dignity that comes from making contributions to the larger society."

THE FORMALIST CONCEPTION OF THE RULE OF LAW AND THE *MARSHALL* BACKLASH

Michael Plaxton*

Following the Supreme Court's 1999 ruling in R. v. Marshall, *Parliamentarians and members of the public vigorously attacked the judgment. This paper discusses the implications of the public criticism that greeted* Marshall, *and the subsequent Supreme Court "clarification," for formalist theories of the rule of law. Although formalism "fits" the Canadian consitutional environment,* Marshall *suggests that it fails to account for Canadian political life.*

Après la décision de la Cour suprême dans l'affaire R. c. Marshall *en 1999, les membres du Parlement et du public ont vigoureusement réagi. Cet article porte sur les implications de la critique publique qui a accueilli Marshall et la « clarification » subséquente de la Cour suprême pour les théories formalistes du principe juridique. Bien que le formalisme « cadre » dans le milieu constitutionnel canadien,* Marshall *estime que cela ne justifie pas la vie politique canadienne.*

I. INTRODUCTION

In *R. v. Marshall*,[1] the Supreme Court of Canada overturned the convictions of Donald Marshall Jr., a Mi'kmaq Indian, for the selling of eels without a licence, fishing without a licence and fishing during the closed season with illegal nets.[2] The Court held that a series of treaties between the Mi'kmaq and the British Crown created a Mi'kmaq treaty right to fish among other things.[3] It was, therefore, unconstitutional for the federal government to delegate discretionary licensing powers to provincial Ministers[4] without making specific provision for this treaty right.[5] In order for fisheries regulations to pass constitutional muster, they must provide "explicit guidance for accommodating Mi'kmaq treaty rights."[6] To the extent that the *Fishery (General) Regulations* and the *Maritime Provinces Fishery Regulations* conflicted with Mi'kmaq treaty rights, the regulations were facially unconstitutional.

The ruling was ... unpopular. The timing of the decision contributed to a wave of violent clashes between Aboriginal and non-native fishermen, as lobster

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1 *R. v. Marshall,* [1999] 3 S.C.R. 456 [*Marshall 1*].

2 *R. v. Marshall,* [1996] N.S.J. No. 246 (Prov. Ct.) (QL), aff'd (1997), 159 N.S.R. (2d) 186 (C.A.).

3 *Marshall 1*, *supra* note 1. For an analysis of this aspect of *Marshall 1*, see W.H. Hurlburt, "Case Comment on *R.* v. *Marshall*" (2000) 38 Alta. L. Rev. 563.

4 *Fisheries Act*, R.S.C. 1985, c. F-14; *Fishery (General) Regulations*, S.O.R./93–53; *Maritime Provinces Fishery Regulations*, S.O.R./93–55.

5 *Marshall 1*, *supra* note 1 at paras. 64–66.

6 S. Henderson, "Constitutional Powers and Treaty Rights" (2000) 63 Sask. L. Rev. 719 at 719. See also *Marshall 1*, *ibid*. at paras. 62–63.

season followed closely on the ruling's heels.[7] Non-native fishermen complained bitterly that the *Marshall* decision would result in the depletion of lobster stocks,[8] that many would lose their livelihood while the government struggled to accommodate this "new" native fishing right.[9] Non-native fishermen, in turn, demanded that the government either put a stop to out-of-season native fishing or compensate non-native fishermen for their economic loss.[10] Native fishermen vociferously declined invitations to suspend their fishing while negotiating with the federal government.[11] In response, hundreds of native traps were sabotaged;[12] a building, used by natives for religious ceremonies, was deliberately burnt down;[13] and natives were attacked and injured.[14] Native fishermen remained intransigent, even in the face of their leaders' recommendations that they suspend fishing for thirty days in order to ensure their safety; some responded with threats that non-native fishermen could expect their own traps to be sabotaged when the regular fishing season opened;[15] some responded with threats of a boycott of non-native stores.[16] Parliamentarians decried the *Marshall* decision; Cabinet considered suspending the judgment.[17] Ultimately, federal

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7 See P.M. Saunders, "Getting Their Feet Wet: The Supreme Court and Practical Implementation of Treaty Rights in the *Marshall* Case" (2000) 23 Dal. L.J. 48 at 50; Henderson, *ibid*. at 719–20. See also J. DeMont, "Beyond Burnt Church" *Maclean's* 112:42 (18 October 1999) 34 at 34–35; J. DeMont, "A Fishery on the Boil" *Maclean's* 112:43 (25 October 1999) 45 at 45.

8 This concern was echoed by at least one biologist with the Department of Fisheries and Oceans: K. Honey, "Lobster supply at risk: biologist" *Globe & Mail* (7 October 1999) A8. See also M. MacAfee, "Even experts can't agree on lobsters" *Globe & Mail* (11 October 1999) A4.

9 "Fishermen express fear over court ruling" *Globe & Mail* (27 September 1999) A6; K. Cox & E. Anderssen, "Ottawa, Micmacs try to resolve fishing feud" *Globe & Mail* (29 September 1999) A4; K. Cox, "Native leaders refuse to break impasse by halting lobster fishery" *Globe & Mail* (30 September 1999) A6.

10 "Fishermen demand compensation" *Globe & Mail* (1 October 1999) A5; K. Cox, "East Coast fishermen urge Ottawa to act on top court's ruling" *Globe & Mail* (21 September 1999).

11 K. Cox, "Ruling on fishing 'just like Christmas'" *Globe & Mail* (2 October 1999) A3; T.T. Ha, "Mi'kmaqs brace for further clashes" *Globe & Mail* (5 October 1999) A4; K. Cox, "Defiant N.B. natives refuse to yield" *Globe & Mail* (5 October 1999) A4.

12 K. Cox & D. LeBlanc, "Anger explodes over fishing rights" *Globe & Mail* (4 October 1999) A1; K. Cox, "25 charged in dispute over fishery" *Globe & Mail* (13 October 1999) A3.

13 T.T. Ha, "Violence escalates in conflict over fishery" *Globe & Mail* (6 October 1999) A3.

14 *Ibid.*; Cox, "25 charged in dispute over fishery," *supra* note 12.

15 K. Cox, "Native leaders propose fishing truce" *Globe & Mail* (7 October 1999) A1; T.T. Ha, "Natives defy call to stop fishing" *Globe & Mail* (8 October 1999) A1; T.T. Ha, "Indians once sheltered Acadians" *Globe & Mail* (9 October 1999) A10.

16 T.T. Ha, "Residents struggle with fallout of fishing dispute" *Globe & Mail* (7 October 1999) A8.

17 See *e.g.* House of Commons, *Debates* (13 October 1999) at 1305 (B. Gilmour); Cox & Anderssen, *supra* note 9. See also D. LeBlanc, "Ottawa gropes for response to fish battle" *Globe & Mail* (5 October 1999) A1; B. Myles, "Confusion à Ottawa" *Le Devoir* (5 October 1999) A1. See also R.L. Barsh & J.Y. Henderson, "*Marshall*ing the Rule of Law in Canada: Of Eels and Honour" (1999) 11 Const. Forum 1 at 11–12, 13. For criticism of the suggestion

Fisheries Minister Herb Dhaliwal unilaterally restricted the fishing rights recognized by the Supreme Court, declaring a moratorium on native fisheries.[18] Henderson has accurately described the reaction of politicians and the media to *Marshall* as "antagonistic and hysterical."[19]

And then, on 17 November 1999, something quite unusual — one might even say extraordinary — happened. The Supreme Court, in denying a motion for rehearing and a stay by the intervener West Nova Fishermen's Coalition, effectively issued a second set of reasons justifying its earlier ruling.[20] The Court claimed that the controversy was grounded in a consistent misreading, by politicians and the media of *Marshall 1*; had everyone simply read *Marshall 1* carefully, the ensuing debacle might never have taken place.[21] Various commentators[22] were, and are, unconvinced by the Court's vigorous defense of *Marshall 1* and, unfortunately, *Marshall 2* did not end the tension in Atlantic Canada.[23]

The extraordinariness of *Marshall 2*, however, is not diminished by its perhaps limited persuasiveness. Quite apart from the judgment's direct contribution to Aboriginal rights jurisprudence, the decision is intriguing for the assumptions it makes about the authority of judicial decisions.[24] The *Marshall*

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to suspend the judgment, see P. Fontaine, "We need a return to treaties, not a downgrading of them" *Globe & Mail* (13 October 1999) A19.

18 "Natives split over Ottawa's fish rules" *Globe & Mail* (12 October 1999) A4; K. Cox, "Natives scrap lobster fishing moratorium" *Globe & Mail* (14 October 1999) A4; M. MacKinnon, "Strict limits on tap for native fishermen" *Globe & Mail* (15 October 1999) A7; K. Cox, "DFO blasted for seizing native lobster traps" *Globe & Mail* (22 October 1999) A5.

19 Henderson, *supra* note 6 at 719. See also "The burden of language in the Mikmaq case" *Globe & Mail* (6 October 1999) A14; "The Supreme Court all at sea" *Globe & Mail* (5 October 1999) A14.

20 *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall 2*].

21 *Ibid*. at paras. 11, 25. See also K. Makin, "Top court issues rebuke in fish furor" *Globe & Mail* (18 November 1999) A1.

22 See *e.g.* J. Simpson, "Mi'kmaq patty whack" *Globe & Mail* (19 November 1999) A19; C. Hoy, "Supremes clarified" *Law Times* (6 December 1999) 7; Saunders, *supra* note 7 at 67–85 (arguing that there are significant differences between the statements of law in *Marshall 1* and *Marshall 2*); L.I. Rotman, "'My Hovercraft is Full of Eels': Smoking Out the Message in *R.* v. *Marshall*" (2000) 63 Sask. L. Rev. 617 at 631–32 (observing that "the *Marshall No. 1* case was pointed to as being indicative of the worst of the excesses of judicial activism").

23 The judgment appears to have helped somewhat. See J.P. McEvoy, "*Marshall v. Canada*: Lessons from Wisconsin" (2000) 12 N.J.C.L. 85 at 86 (noting that "[t]he clarification, coupled with the arrival of winter, assisted leaders of all interested parties to restore a level of calm"); Saunders, *supra* note 7 at 50 (noting that the "confusion, acrimony and violence" in the east coast fishing industry, continued "to a lesser extent in the period since the second ruling"); and K. Cox & G. Fraser, "Natives enraged by Supreme Court interpretation" *Globe & Mail* (18 November 1999) A3.

24 This paper will not explore the particular implications of *Marshall* for Aboriginal treaty rights.

decisions together represent one of the rare situations where the authority of a court judgment did not stand on its own,[25] where it was subjected to such vigorous challenge by the public and its representatives that the ruling Court felt obliged to defend it. Moreover, in defending *Marshall 1* from its vociferous critics, the Court did not make an appeal to the role of the judiciary in a free and democratic society; it did not stress the need for an independent system of courts pursuant to the separation of powers doctrine; nor did it resort to a wholesale explication of the first principles underlying liberal constitutionalism. Instead, the Court ostensibly did nothing more than rephrase the reasons issued in *Marshall 1*.[26] *Marshall 2* implies that the Court's authority is premised on its ability to provide clear and convincing reasons for its judgments. Where is the emphasis on rules for their own sake? Where is the indignant rebuke to those who would deny the authoritativeness of Supreme Court judgments solely on the basis of their content?[27] What happened to formalism?

The objective of this paper is two-fold: first, to show where the formalist theory of the rule of law goes wrong and, second, to demonstrate how *Marshall* illustrates the formalist's failure to devise a theory that "fits" Canadian political life even if it is compatible with its constitutional structure. Part II will argue that, on its own terms, formalism requires something more than rules. That being the case, formalism's difficulty is a necessary one, a flaw at the conceptual level. Specifically, this paper takes the view that the formalist conception of authority requires that legal decision-makers be prepared to provide reasons for the particular rules they create. Part III will examine the judicial power as it is understood in the Canadian constitutional tradition. It will take, as its starting point, the absence of any constitutional rule resembling the "case or controversy" provision in Article III of the U.S. Constitution. Part IV will illustrate how formalism cannot account for the public backlash against the Supreme Court's decision in *Marshall 1*.

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[25] See on this point K.J. Hunt, Letter to the Editor, *Globe & Mail* (22 October 1999) A16; T. Glavin, "The politics of fishing and the flouting of the law" *Globe & Mail* (8 October 1999) A15.

[26] But see Saunders, *supra* note 7, for the view that the Court may have provided somewhat different supporting reasons for judgment.

[27] Compare B. Laghi, "Top-court judge denies activism" *Globe & Mail* (21 October 1999) A4 (quoting Binnie J.'s elliptical observation that objections to *Marshall* are made primarily by people who dislike the content of the ruling).

II. THE FORMALIST CONCEPTION OF THE RULE OF LAW

The formalist position, as exemplified in the respective works of Schauer[28] and Raz,[29] represents the view that the rule of law requires *only* that law be laid down in an exhaustive and relatively clear set of stable rules.[30] The formalist position may be contrasted with others that consider clarity and stability to be necessary aspects of the rule of law, but not co-extensive with it.[31] Thus, those who adhere to substantive conceptions of the rule of law argue that it is not enough that a legal system embody a set of rules; the rules themselves must have a particular content.[32] Likewise, historicist conceptions of the rule of law require that rules emerge out of "legitimate lawmaking authorities prior to their application to particular cases."[33] Finally, a legal process view of the rule of law would require that rules be justified through a process of reasoning, whether implicit or explicit.[34] Missing from the formalist picture is a basis for critiquing particular rules on the basis of their legitimacy. This may prompt some to dismiss formalism as unconcerned with the issue of legitimacy. Yet no account of law can plausibly ignore the question of legitimacy insofar as it is the apparent legitimacy of law that prompts citizens and administrators to accept law as authoritative; that is, without addressing the question of legitimacy, one has no obvious means of distinguishing legal rules from other kinds of rules, rules that

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28 See *e.g.* L. Alexander & F. Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110 Harv. L. Rev. 1359 (arguing that the Court should have the final word with respect to the content of the Constitution, for the sake of clarity and stability); F. Schauer, "Justice Stevens and the Size of Constitutional Decisions" (1996) 27 Rutgers L.J. 543; F. Schauer, "On the Supposed Defeasibility of Legal Rules" (1998) 51 Curr. Leg. Probs. 223; and F. Schauer, "Formalism" (1988) 97 Yale L.J. 509.

29 See *e.g.* J. Raz, "The Rule of Law and Its Virtue" (1977) 93 L.Q. Rev. 195.

30 See also A. Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U. Chic. L. Rev. 1175; R.H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 Colum. L. Rev. 1 at 14–15, 28. On the distinction between rules and standards, see M. Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987) at 1563; F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991) at 104, n. 35; L. Kaplow, "Rules Versus Standards: An Economic Analysis" (1992) 42 Duke L.J. 557 at 591–92; D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685 at 1687–713; and K.M. Sullivan, "The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards" (1992) 106 Harv. L. Rev. 22 at 56–69.

31 Fallon, *ibid.*, envisions four "ideal types" of the rule of law: historicist, formalist, legal process, and substantive. Professor DeCoste discusses two (particularly antagonistic) conceptions: formalist and substantive. See F.C. DeCoste, "Political Corruption, Judicial Selection, and the Rule of Law" (2000) 38 Alta. L. Rev. 654 at 659. I will work within Fallon's framework, though, as Fallon himself acknowledges, these categories are not hard and fast and may be susceptible to collapse.

32 See *e.g.* R. Dworkin, "Political Judges and the Rule of Law" in *A Matter of Principle* (Cambridge: Harvard University Press, 1985) 9.

33 Fallon, *supra* note 30 at 11.

34 *Ibid.* at 18–19.

do not provide content-independent reasons for action.[35] That being the case, formalism seems at first glance to be too "thin" a theory of law to be useful as a theory of law.[36]

Yet it is important to note that underpinning the formalist's emphasis on clear and stable rules is a similar emphasis on the need for legal authority to be clear and unambiguous.[37] Raz acknowledges that a legal authority may irresponsibly draft directives — for instance, choosing the content of a directive by reference to a coin toss — without such irresponsibility affecting the *de facto* authority of those directives, so long as the public has no reason to *disbelieve* that the putative authority has engaged in the expected balancing.[38] A legal decision-maker need only plausibly claim that it has acted legitimately in order to maintain *de facto* authority.[39] Citizens require *some* reason for not distrusting the claim that competing reasons for action are being responsibly arbitrated before they will allow a normative directive to "pre-empt" their own reasoning process. A directive that has apparently materialized out of thin air and cannot be attributed to any intentional agent who shoulders a burden of balancing reasons for action, does not inspire trust in citizens.[40]

The Razian view of legal authority emerges out of a particular view of the aims of law. People appeal to law and authority, in the first place, because they

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35 Compare P. Markwick, "Law and Content-Independent Reasons" (2000) 20:4 Oxford J. Legal Stud. 579 (arguing that all rules — and not just legal rules — provide content-independent reasons for action).

36 Fallon, *supra* note 30 at 30: "adherence to formalism as a complete and free-standing theory of the Rule of Law in constitutional cases seems manifestly unreasonable, if not wholly impossible. It is hard to imagine anyone insisting that rules, regardless of either their origin or their content, are both necessary and sufficient for the Rule of Law. An account of which rules should be applied by courts, and why, is plainly needed."

37 *Ibid*. at 15: "Because blurry lines of authority promote uncertainty, formalism also idealizes a sharp division between the legislative and judicial functions."

38 See J. Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) 210 [*Ethics*]. See also T. May, "On Raz and the Obligation to Obey the Law" (1997) 16 L. & Phil. 19 at 26: "the 'check' upon authority provided by the dependence thesis is not really a 'check' so much as it is a test of 'proper pedigree'."

39 Raz himself does not put the matter in such terms. He makes what is, on the surface, the much different claim that a *de facto* authority need only appeal to its own legitimacy. Raz observes, however, that where an arbitrator gives her reasons while drunk, for instance, a party to the dispute must conclude that there was no balancing of reasons for action. This suggests that the claim to legitimacy must not only be made, but *credibly* made. The real test for authority, then, is belief on the part of those who are putatively required to obey the directives passed off as authoritatively binding legal directives. See J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 42; J. Raz, "Authority and Justification" (1985) 14 Phil. & Pub. Aff. 3 at 10 ["Authority and Justification"].

40 David Dyzenhaus presents a clear and concise treatment of Raz's conception of authority in D. Dyzenhaus, "Positivism's Stagnant Research Programme" (2000) 20 Oxford J. Legal Stud. 703 at 710. See also J.M. Breslin, "Making Inclusive Legal Positivism Compatible with Razian Authority" (2001) 16 Can. J.L. & Jur. 133.

need resolved certain disputes concerning how they ought to live their lives. They want their competing conceptions of the good to be rendered more or less compatible by foreclosing — through legal directives — the possibility of certain courses of action, and thereby making the social world predictable. Individuals look to legal authority to be the final arbiter of debates that, if left unresolved, would make it difficult for them to make plans for themselves (to the extent that they are radically unable to divine the actions of others). *De facto* authority, therefore, necessarily requires at least the pretence of balancing of reasons for action.[41] It exists only to give individuals the confidence to pursue their respective conceptions of the good by obligating them and others to take one of various life-paths.[42] At the same time, one must assume that citizens are interested only in the minimum assurance that figures in authority will in fact balance competing reasons for action when determining the content of legal directives. Raz wants to make this claim, because such a low threshold test for authority best ensures that citizens will obey legal directives; a higher threshold would force citizens to engage in substantial deliberation in order to know whether or not they should obey.[43] This would undermine citizens' ability to confidently predict social interaction, and therefore defeat the very purpose of law. If there are to exist clear and stable rules, the authority of institutional agents responsible for crafting those rules must be presumptively accepted in the absence of overt reasons to doubt that the rules are crafted responsibly.

There is, then, a sense in which formalism assumes, as its conceptual starting point, that people will be generally deferential to putative legal authority; if they were not so deferential, then a legal decision-maker would need to provide, for its *de facto* authority, some positive assurance — in the form of articulated reasons — that competing interests/reasons for action are reflected in the content of its directives. Indeed, if formalism seems counterintuitive as a theory of the rule of law, it is not only because it posits that legal authority is in no way premised upon the content of its rules. One also raises an eyebrow at the notion that people would, as a social *fact*, accept the authority of legal rules, the content of which is disputed, notwithstanding the absence of any articulated reasons suggesting that the rules were generated conscientiously.

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41 For one recent scholarly treatment of reasons in American constitutional decisions, see L.H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park: Pennsylvania State University Press, 1995) (arguing that the reasons in all American constitutional decisions contain some fact and some fiction).

42 *Ethics*, *supra* note 38 at 202–203.

43 See *ibid*. at 8.

The idea that a bare assurance could suffice strains credibility,[44] or *would* strain credibility if it did not appear consistent with much of Canadian and American law. While it is true that, in Canada at least, administrative tribunals are sometimes said to have a duty to issue reasons for their decisions,[45] reasons are not normally required of trial judges sitting alone in criminal cases.[46] In fact there are many situations within Anglo-American legal systems in which legal decision-makers are *not* required to give reasons for their decisions.[47] One should not assume, however, that the absence of a general duty to give reasons implies that people are simply willing to accept any putative authority that presents itself. This would be a mistake because the legal process often makes reasons unnecessary. The adversarial nature of proceedings, in which two (or more) positions are expressed and the decision-maker can be assumed to have ultimately chosen from the positions brought before him or her (and made available on a public record), renders explicit reasons more or less superfluous.[48]

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[44] It is possible to view individuals as eager to submit to any authority. See R. West, "Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner" (1985) 99 Harv. L. Rev. 384 (discussing Kafka's portrayal of authority and autonomy).

[45] See *e.g. Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. See also J.L.H. Sprague, "Remedies for the Failure to Provide Reasons" (2000) 13:2 Can. J. Admin. L. & Prac. 209. In England, there appears to be no "general duty" to give reasons in administrative decisions: *Doody v. Secretary of State*, [1993] 3 All E.R. 92 at 110; *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 W.L.R. 242. There may be a requirement for reasons where the decision in question is "in particular need of explanation": N.R. Campbell, "The Duty to Give Reasons in Administrative Law" [1994] P.L. 184 at 191; *R. v. Secretary of State for the Home Department, ex parte Duggan*, [1993] 2 All E.R. 277; *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310; *Lonhro plc v. Secretary of State for Trade and Industry*, [1989] 2 All E.R. 609 at 620; *R. v. Secretary of State for the Home Department, ex parte Sinclair*, [1992] E.W.J. No. 4155 (H.C.J. (Q.B.)) (QL). See also J. Herberg, "The Right to Reasons: Palm Trees in Retreat?" [1991] P.L. 340; P.P. Craig, "The Common Law, Reasons and Administrative Justice" (1994) 53 Cambridge L.J. 282; and G. Richardson, "The Duty to Give Reasons: Potential and Practice" [1986] P.L. 437.

[46] *R. v. Burns*, [1994] 1 S.C.R. 656 at 664. See also *R. v. Barrett*, [1995] 1 S.C.R. 752 at 753; *R. v. McMaster*, [1996] 1 S.C.R. 740 at 750; *R. v. R.(D.)*, [1996] 2 S.C.R. 291 at 318; and *R. v. Sheppard* (2002), 210 D.L.R. (4th) 608, 2002 SCC 26. Appellate courts, of course, must provide reasons when deciding the merits of an appeal: *R. v. Biniaris*, [2000] 1 S.C.R. 381. There is a statutory duty to give reasons for the choice of sentence: see *Criminal Code*, R.S.C. 1985, c. C-46, s. 726.2. See also G. Cournoyer, "Annotation to *R. v. Biniaris*" (2000) 32 C.R. (5th) 4. In England, there are various statutory requirements for reasons, but no general all-encompassing duty on the part of judges to do so: A. Samuels, "Giving Reasons in the Criminal Justice and Penal Process" (1981) 45 J. Crim. L. 51 at 52. See also G. Mitchell, "Do Trial Judges Have a Duty to Give Reasons for Convicting?" (1999) 25 C.R. (5th) 150.

[47] F. Schauer, "Giving Reasons" (1995) 47 Stan. L. Rev. 633 at 634 ["Giving Reasons"]; Fallon, *supra* note 30 at 32.

[48] Fallon, *ibid*. at 51, n. 246: "the procedural formalities surrounding many [legal decisions] seem designed to ensure reasoned, deliberative decision making. Trial by jury is a good example. To cite another, the Supreme Court has articulated the criteria generally governing

Also, where a panel, rather than a single person, is charged with making a decision and a consensus is required to make that decision, there is further reason to believe that some debate took place among the panel members even if no reasons for decision are ultimately provided.[49] Where the rule governing the disposition of a given appeal or motion is widely regarded as settled, it may be unnecessary to provide reasons.[50] In short, it is not difficult to imagine a citizen — even a relatively skeptical citizen — accepting a decision as reasoned, given the procedural constraints imposed on legal decision-makers.

Even where there are procedural constraints on a legal decision-maker's discretion, the public must still accept as a matter of faith that the decision-maker has actually balanced competing reasons for action unless articulated reasons are published. This will not be problematic in a great many cases, but what about cases where the stakes are especially high? Schauer, of course, claims that "[t]he act of giving a reason is the antithesis of authority."[51] If it is necessary to give a detailed, thorough reason for a rule that governs trivial interests, or the same for a rule that, on its face, disadvantages no one and benefits everyone, then Schauer's point is well-taken, for it would indeed seem to be the case that the reason-giver lacks authority. There is nothing contrary to the idea of authority, however, in demanding that a rule-maker provide some description of the process by which he or she balanced competing reasons for action where the rule in question is counterintuitive (rather than merely questionable), and where the stakes involved are of sufficient magnitude.[52] If one

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the exercise of its *certiorari* jurisdiction, and individual Justices are free to criticize what they take to be their colleagues' departure from those standards." See also R.H. Fallon, Jr., *et al.*, *Hart & Wechsler's The Federal Courts and the Federal System*, 4th ed. (Westbury: Foundation Press, 1996) at 1691–714.

49 See K.Taylor-Thompson, "Empty Votes in Jury Deliberations" (2000) 113 Harv. L. Rev. 1262. See also K.M. Stack, "The Practice of Dissent in the Supreme Court" (1996) 105 Yale L.J. 2235 (arguing that there may be some doubt that a process of reasoning was really undertaken, even by panels, in the absence of a written judgment (and dissenting judgment)).

50 See F. Schauer, "Easy Cases" (1985) 58 S. Cal. L. Rev. 399. See also the body of literature supporting the use of unpublished opinions: P.M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings" (1995) 62 U. Chic. L. Rev. 1371 at 1374–75; B.F. Martin, Jr., "In Defense of Unpublished Opinions" (1999) 60 Ohio St. L.J. 177; P. Nichols, Jr., "Selective Publication of Opinions: One Judge's View" (1986) 35 Am. U. L. Rev. 909; D.A. Berman & J.O. Cooper, "In Defense of Less Precedential Opinions: A Reply to Chief Justice Martin" (1999) 60 Ohio St. L.J. 2025.

51 "Giving Reasons," *supra* note 47 at 636–37.

52 See C.J. Friedrich, "Authority, Reason, and Discretion" in C.J. Friedrich, ed., *Authority* (Cambridge: Harvard University Press, 1958) 28; M. Shapiro, "The Giving Reasons Requirement" [1992] U. Chic. Legal F. 179 at 181: "the very concept of political authority, or indeed any kind of authority, implies the capacity to give reasons. When we impute authority, as opposed to merely acknowledging power, we are asserting our belief that the persons or entities making statements or rendering decisions could, if called upon, give good reasons for what they have said or done. It is natural, then, to ask administrative authorities actually to give reasons and to view such a request as the mildest of all constraints on administrative discretion. Such a request is not a limitation on the scope or substance of the

regards citizens as rational beings, one cannot expect them to settle for all manner of rules just for the sake of stability in the law; one must expect citizens to challenge — again, to varying degrees depending upon the nature of the rule in question — the reasons underlying the rule. Authority is not best embodied in the image of one person barking orders at another; rather, authority emerges out of a dialogue, whether actualized or anticipated.[53] It emerges when a rule-maker is prepared to do what is necessary to convince others to defer to the rule in question.[54] This may involve no effort whatsoever on the part of the rule-maker; it may turn out that others are simply not interested in challenging the basis of the rule.[55] If that is the case, however, it is nonetheless true that the rule-maker's authority is premised upon the acquiescence, the intentional silence *qua* absolute deferral, of those governed by the rule. One cannot expect this level of deference in all cases. In extraordinary cases, it may be necessary for legal decision-makers to provide reasons for their decisions, because these decisions *invite* challenge from the community in which the decision, and underlying rule, is to be enforced.[56] A decision-maker such as a court will most obviously be constrained in this way when it is responsible for determining the scope of

discretion but merely a test of the authority of the administrator to wield discretion. Administrators may still arrive at whatever decisions they think best; they must merely give reasons for the decision at which they did arrive."

53 See M. Plaxton, "*Alberta Provincial Judges' Association* v. *Alberta*: Trust and Rationality" (2000) 38 Alta. L. Rev. 903 at 904 (arguing that reasons always take place in the context of a real or imagined dialogue); E.A. Hartnett, "A Matter of Judgment, Not A Matter of Opinion" (1999) 74 N.Y.U. L. Rev. 123 at 158: "giving reasons is still a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one."

54 It is important to stress that the object of the reason is not to persuade others to agree with the rule, but to persuade others that a reasoning process was undertaken in the formulation of the rule and that it is better for them to defer than to fight for the rule they would have crafted had they been in a position to craft an alternative rule.

55 Hartnett, *supra* note 53 at 155–56.

56 See S. Choudry & R. Howse, "Constitutional Theory and the Quebec Secession Reference" (2000) 13 Can. J.L. & Jur. 143.

constitutional rights[57] and the scope of government authority;[58] likewise where the stakes in a particular case are especially high.[59] In such cases, where the public or the executive branch will be most tempted to disregard the court's determinations,[60] the court may be obliged to justify not only the rule used to decide the particular case, but the rule that ostensibly gave the court the authority to decide the question at all.[61] These are hard cases, not easy ones, and admittedly such cases will be rare in a healthy democracy. To say they are rare,

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57 See *e.g. Cooper v. Aaron*, 358 U.S. 1 (1958) [*Cooper*]; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) [*Dred Scott*]. In *Dred Scott*, the Court held that Congress lacked the power to abolish slavery in the territories. President Lincoln subsequently denied that the decision established a "political rule" preventing Congress from drafting abolitionist legislation in the future: see S. Douglas, *Created Equal? The Complete Lincoln-Douglas Debates of 1858*, P. Angle, ed. (Chicago: University of Chicago Press, 1958) 43, reprinted in The Federalist Society, *Who Speaks for the Constitution? The Debate Over Interpretative Authority* (Occasional Paper 3, 1992) at 67–69; *The Collected Works of Abraham Lincoln*, R. Basler, ed. (New Brunswick: Rutgers University Press, 1953) vol. 2 at 516, reprinted in The Federalist Society, *Who Speaks for the Constitution? The Debate Over Interpretative Authority* (Occasional Paper 3, 1992) at 71–73. In *Cooper*, the Supreme Court was obliged to affirm its ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), owing to the reluctance on the part of administrators to enforce the ruling. For a background description of *Cooper*, see D.A. Farber, "The Supreme Court and the Rule of Law: *Cooper v. Aaron* Revisited" [1982] U. Ill. L. Rev. 387 at 390–403.

58 See *e.g. Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Quebec Secession Reference*]; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) [*Marbury*].

59 See *Bush v. Gore*, 121 S. Ct. 525 at paras. 126–28 (2000), per Breyer J., dissenting.

60 Whether the executive branch would be legally entitled to "overrule" a Supreme Court decision interpreting the Constitution is a matter of some debate. For positions supporting the legal power of the executive branch to render independent constitutional interpretations that are inconsistent with Supreme Court *dictum*, see J. Harrison, "The Role of the Legislative and Executive Branches in Interpreting the Constitution" (1988) 73 Cornell L. Rev. 371 at 371; E. Meese III, "The Law of the Constitution" (1987) 61 Tulane L. Rev. 979 at 981–82 (distinguishing between the law of the Constitution (what the text says) and constitutional law (how the courts interpret the text)); C. Warren, *The Supreme Court in United States History* (Boston: Little, Brown, 1923) at 470–71: "However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of this Court."

61 See Choudry & Howse, *supra* note 56. For cases in which the U.S. Supreme Court has so defined its authority see *Marbury*, *supra* note 58; *Cooper*, *supra* note 57; and *City of Boerne v. Flores*, 521 U.S. 507 at 519 (1997). Obviously, it is problematic that the Court itself defined its own authority. See T.W. Merrill, "Judicial Opinions as Binding Law and as Explanations for Judgment" (1993) 15 Cardozo L. Rev. 43 at 53: "the scope of the executive's duty to the decisions of the Court is obviously something that the Court cannot declare unilaterally: the answer must be one that is perceived to be correct by both branches"; Meese, *ibid*. (arguing that the Court does not have exclusive interpretive authority over the Constitution). Compare Alexander & Schauer, *supra* note 28 (arguing that the Court should have the final word with respect to the content of the Constitution, for the sake of clarity and stability); and B. Neuborne, "The Binding Quality of Supreme Court Precedent" (1987) 61 Tulane L. Rev. 991 (arguing the same point).

however, is not to say that they are marginal.[62] Legal decision-makers may not know, ahead of time, what cases will invite public attention, what rules will invite public criticism,[63] and what judgments will provoke the public's sense of injustice or outrage.[64] To this extent, formalists are wrong to claim that a clear and coherent set of stable rules is all that the rule of law requires. Sometimes the rule of law requires legal decision-makers to present principled and coherent reasons for the rules they craft, and the means by which they apply those rules; sometimes, as *Marshall* shows, even the reasons themselves will be subjected to intense scrutiny.

Before exploring the public backlash against *Marshall*, however, it is worth considering the Supreme Court's institutional power to create rules in the first place. After all, if the judicial power does not extend to making the sort of rules that were deployed in *Marshall*, then *of course* the public would respond critically to the judgment. It would, in that event, be open to question whether the Court's decision created a legally binding rule at all. As it turns out, even if the American conception of the judicial power precludes federal courts from creating rules (and this is doubtful), Canadian courts have a different institutional role that appears more permissive of judicial rule-making.

III. THE JUDICIAL POWER TO CREATE RULES

To the extent that there is a wealth of American scholarship touching upon the nature and scope of the judicial power, it is fruitful to briefly examine Article III of the U.S. Constitution. Article III limits the jurisdiction of federal courts to deciding actual "cases or controversies,"[65] narrowing the courts' power to create rules to particular cases where it *must* craft such rules in order to decide those cases.[66] Federal courts do not have jurisdiction to issue advisory opinions.[67] Although some state constitutions confer the power to issue such opinions upon

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62 Compare Alexander & Schauer, *ibid*. (arguing that cases like *Dred Scott* are of limited use in determining the scope of judicial rule-making authority); F. Schauer, "The Jurisprudence of Reasons" (1987) 85 Mich. L. Rev. 847.

63 See *R. v. Askov*, [1990] 2 S.C.R. 1199. In *Askov*, the Supreme Court of Canada held that criminal trials must be conducted within a certain time-frame. The result was the staying of thousands of criminal trials in Ontario. There is some dispute as to whether the Court knew of the consequences of the ruling.

64 Admittedly, there will be some cases where the possibility of public outrage is low. The question, then, is how low is "low enough" for the purpose of risking the legitimacy of legal decisions and rules. One might well wonder if there is such a threshold of minute public importance.

65 U.S. Const. art. III, § 2.

66 See L. Brilmayer, "The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement" (1979) 93 Harv. L. Rev. 297.

67 *Muskrat v. United States*, 219 U.S. 346 at 362 (1911). See also J.F. Davison, "The Constitutionality and Utility of Advisory Opinions" (1938) 2 U.T.L.J. 254.

state courts,[68] it is noteworthy that these opinions are not binding on the other branches of government.[69] Advisory opinions are issued by the court acting not as a court but as a body of legal experts lending assistance to the state; advisory opinions are *not* judgments, though they may, in practice, have strong persuasive force.[70] The prohibition against advisory opinions is curious and deserves some consideration. If the Constitution empowers judges to lay down constitutional rules binding on members of the legislative and executive branches, it is peculiar that courts would be prohibited from sharing their wisdom at precisely the time when it would be most useful, that is *before* executive or legislative acts are committed that might provoke a "case or controversy."[71] The answer closest to hand is that courts should refrain from issuing broad abstract rules as a matter of institutional competence,[72] that the judiciary is simply ill-equipped to draft such rules in the absence of real cases or controversies. Courts need to wait until real people — as opposed to hypothetical, abstract people — appear before them with complaints about a piece of legislation or an executive act. Only in hindsight do the constitutional issues surrounding the legislation or act become apparent.[73] A constitutional rule drafted in anticipation of actual cases or controversies would inadequately address the issues that arose in those particular instances.[74] Courts, unlike Congress, lack the resources to adequately investigate

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68 See *e.g.* Alabama and Delaware, where advisory opinions are authorized in certain circumstances by statute: Ala. § 12.2.10 (1975); Del.Ann. tit. 10, § 141 (1996 Supp.).

69 O.P. Field, "The Advisory Opinion — An Analysis" (1949) 24 Ind. L.J. 203 at 213–14.

70 *Ibid*. at 216.

71 *Ibid*. at 221: "The advisory opinion has a great advantage over judicial review with respect to the time element, for the advisory opinion operates when a device for testing the validity of statutes is needed. Judicial review often operates long after it is needed, and for practical purposes, sometimes not at all. Dependent as judicial review is upon private initiative in testing validity, and on common law tests of adequate interest, the ordinary process of judicial review is seriously inadequate to serve the real needs of the public."

72 Regarding the distinction between institutional legitimacy and institutional competence, see P. Macklem, "Aboriginal Rights and State Obligations" (1997) 35 Alta. L. Rev. 97 at 104–105.

73 See *M'Naghten's Case* (1843), 10 Cl. & F. 200 at 204 (H.L.): "I feel great difficulty in answering the questions put by your Lordships on this occasion: - First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions… Secondly, because I have heard no argument at your Lordships' bar or elsewhere, on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument: - and Thirdly, from a fear of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials."

74 See *Quebec Secession Reference*, *supra* note 58 at para. 25: "the Court may deal on a reference with issues that might otherwise be considered not yet 'ripe' for decision"; *British Columbia (A.G.) v. Canada (A.G.)*, [1914] A.C. 158 at 162 (P.C.): "it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied." See also F.H. Easterbrook,

real-world implications of legislative or administrative acts in the absence of an actual case or controversy to highlight the possible problems.[75] That being the case, rule-drafting, in the absence of a real case or controversy, should be undertaken by Congress.[76]

A number of points reveal the frailty of this argument. While there is merit to the suggestion that superior courts should wait for issues to "percolate" in the lower courts before creating a rule, jurists rarely assert that, as a matter of *jurisdiction*, superior courts *must* wait until enough real cases or controversies arise such that the *best* judicial rule may be crafted.[77] Indeed, one might think that a court abdicates its constitutional responsibility to settle disputes if it refuses to adjudicate cases involving unsettled issues.[78] Yet one would expect to see such a limitation on courts' rule-making power, if it was based upon their exposure to a critical mass of real-life fact scenarios. The absence of percolation seems to matter in the sense that rules created in that void lack the "aura" of competence; it does not, however, matter in the jurisdictional sense. The reverse is true as well: the existence or putative irrelevance of percolation cannot, by itself, create or expand jurisdiction to generate new rules of law. On cannot suggest that, as a general proposition, courts need only observe *one* actual case or controversy in order to generate an appropriate rule. If that were true, one would rightly think that a single well-crafted hypothetical situation, sufficiently true-to-life, could serve as well as — if not better than — an actual case or controversy, at least for the purpose of formulating *some* constitutional rules.[79] Yet, again, this is not the law. Article III forbids advisory opinions by federal courts even in the presence of well-crafted hypothetical scenarios, and does not require superior courts to wait for issues to percolate before crafting rules. The wholesale prohibition against advisory opinions by federal courts seems premised not upon a concern for the courts' institutional competence to draft such opinions, but rather upon a concern that such opinions are *illegitimate*

"What's So Special About Judges?" (1990) 61 U. Colo. L. Rev. 773 (advocating a particularistic approach to judging as a means of preventing broad rules with far-reaching, and disastrous, consequences).

75 See Davison, *supra* note 67 at 273–74.

76 Regarding the lack of competence of the judiciary to craft broad legal rules that are unnecessary to the resolution of instant cases, see C.R. Sunstein, "Foreword: Leaving Things Undecided" (1996) 110 Harv. L. Rev. 6.

77 This is not to say that *no one* has argued that the Supreme Court's jurisdiction to create constitutional rules depends, in part at least, on the proper percolation of the issues involved. See *e.g.* A.M. Bickel, "Foreword: The Passive Virtues" (1961) 75 Harv. L. Rev. 40; and A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merril, 1962) (arguing that the Supreme Court should wait for all of the issues to percolate in the lower courts, thereby giving the legislative and/or executive branches an opportunity to respond to the issues with a rule of their own).

78 See G. Gunther, "The Subtle Vices of the 'Passive Virtues' — A Comment on Principle and Expediency in Judicial Review" (1964) 64 Colum. L. Rev. 1.

79 See "Giving Reasons," *supra* note 47 at 655.

exercises of power *notwithstanding* the judiciary's possible competence. Although institutional competence must be a necessary condition of legitimacy, the former is not co-extensive with the latter; other concerns — like the separation of powers doctrine — may mitigate against the assignation of institutional powers despite the institution's capacity to exercise those powers.

This is not to make the broader case that all forms of judicial rule-making are necessarily contrary to the dictates of Article III. Courts often create rules of law in the course of deciding particular cases. If one understands reasons for judgment, as does Schauer, to necessarily possess the characteristic of generality, then every decision involves the application of a rule.[80] To give a reason for a decision is to do more than decide the outcome of a particular case; it is to say that *all* cases resembling, in relevant respects, the instant case should be decided like the instant case.[81] If the rule can be applied, only with difficulty, to cases beyond the instant controversy, then one is tempted to regard the instant case as having been decided arbitrarily or capriciously inasmuch as the result appears not to flow from principle but whimsy. Reasons are necessary to give citizens the impression that courts are interested in the fair adjudication of particular cases and controversies; reasons can only perform this function if they make reference to principles and rules of relatively broad scope.[82]

Since the rule thus created in a given case will have application to cases not envisioned therein, one confronts the issue of institutional competence discussed above in the context of advisory opinions. There is some apparent tension between reason-giving — which, by definition, involves the laying down of general rules — and the prohibition against advisory opinions, which seemingly narrows the jurisdiction of the judiciary (or at least the federal judiciary) to the

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80 *Ibid*. at 655–56.

81 *Ibid*. at 641.

82 See M.C. Dorf, "Dicta and Article III" (1994) 142 U. Pa. L. Rev. 1997 at 2029 ["Dicta and Article III"]; M.C. Dorf, "Courts, Reasons, and Rules" in L. Meyer, ed., *Rules and Reasoning: Essays in Honour of Fred Schauer* (Oxford: Hart, 1999) 129 at 135–37; J.B. White, "What's an Opinion For?" (1995) 62 U. Chic. L. Rev. 1363 at 1367: "It is here, in the creation of legal authority, rather than in the facilitation of prediction, that the opinion performs its peculiar and most important task"; Stack, *supra* note 49 (arguing that authority is grounded in the transparency of the reasoning process by which rules are created); Wald, *supra* note 50 at 1372 (arguing that "modern judges write opinions … first, to reinforce our oft-challenged and arguably shaky authority to tell others — including our duly elected political leaders — what to do"); and *Ethics*, *supra* note 38. Compare Hartnett, *supra* note 53 at 126–27 (acknowledging that reasons "legitimize judgments" but claiming that they are "not necessary to the judicial function of deciding cases and controversies"). See also A. Bhagwat, "Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the 'Judicial Power'" (2000) 80 B.U.L. Rev. 967 at 973 [emphasis in original]: "in deciding if it is bound by a precedent of the [Supreme] Court, lower courts must ignore the reasoning of that decision and subsequent doctrinal developments which might bring the validity of that reasoning into question, focusing instead on the narrow holding of the case, and whether it has been *expressly* overruled."

adjudication of particular cases or controversies.[83] This tension subsides somewhat when one views the prohibition against advisory opinions as being driven by the broader concern of institutional legitimacy rather than the more narrow issue of competence. The judiciary's competence to decide actual cases or controversies is — rightly or wrongly — presumed by Article III. Inasmuch as courts have exclusive jurisdiction over the resolution of particular cases or controversies, they are free to generate defeasible rules that facilitate the adjudication of the cases before them. So long as the rules thereby created are necessary to justify the decision reached in the instant case, there can be no question of institutional legitimacy.[84] Of course, it is not technically necessary to issue any reasons and supporting rules for judgments; to decide a particular case may, as in most *certiorari* applications, require only the judgment rather than the reasons supporting it.[85] However, for reasons given above, the *de facto* authority of the judgment sometimes — if not often — rests upon the availability of reasons. Institutional legitimacy requires one to provide sufficient reasons to persuade others that there has been some balancing of competing reasons for action; this in turn obliges the judiciary to create rules that extend beyond the scope of the instant case (since a valid reason for deciding a given case in a certain way must provide an equally valid reason to decide all like cases). At the same time, any plausible claim to institutional legitimacy, in the American tradition, must start with the Constitution;[86] Article III in turn prevents the judiciary from creating rules that have little or nothing to do with the resolution of instant cases.

Canadian appellate courts have the jurisdiction to issue advisory opinions,[87] subject to the threshold question of their institutional *competence* to deal with

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83 See E.T. Lee, "Deconstitutionalizing Justiciability: The Example of Mootness" (1992) 105 Harv. L. Rev. 603 at 648–49; and "Dicta and Article III," *ibid*. at 57.

84 Of course, there are cases where courts create rules that are broader than necessary to resolve actual cases before them; when this occurs, one may rightly question whether the judiciary has overstepped the bounds of legitimate constitutional authority.

85 See Hartnett, *supra* note 53.

86 See J.H. Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*" (1973) 82 Yale L.J. 920 at 948–49.

87 *Ontario (A.G.) v. Canada (A.G.)* (1912), 3 D.L.R. 509 (J.C.P.C.); *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 101, reprinted in R.S.C. 1985, App. II, No. 5; *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53; *Quebec Secession Reference*, *supra* note 58. The constitutional courts of other countries are likewise not limited to deciding actual cases or controversies: see L. Favoreu, "American and European Models of Constitutional Justice" in J.H. Merryman & D.S. Clark, eds., *Comparative and Private International Law* (Berlin: Duncker & Humblot, 1990) 105 at 113. The European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights also all enjoy explicit grants of jurisdiction to render advisory opinions: see *Treaty Establishing the European Community*, art. 228(6); *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 at 36, Protocol No. 2; *Statute of the Inter-American Court of Human Rights*, art. 2 (*American Convention on Human Rights*, 18 July 1978, 9 I.L.M. 673, art. 64).

the particular matter brought before them.[88] This reflects an ideological difference between American and Canadian constitutionalism with respect to the proper scope of the judicial power and the separation-of-powers doctrine generally. American constitutionalism assigns the judiciary a specific function to the exclusion of all other branches of government, that is, the responsibility of deciding particular cases and controversies; in only exceptional circumstances can the executive branch of government interfere with a judgment ordered in a given case.[89] The judiciary is regarded as a check on the power of other branches of government and *vice versa*. The concern, reflected in the separation-of-powers doctrine, is that if a single branch of government accrued too much power it will become a tyranny;[90] the effects of oppressive exercises of power may be limited by setting narrow parameters on the power held by any single branch or office of government. Anglo-Canadian constitutionalism, on the other hand, conceives of the judiciary as an office of the Crown, as "the official [adviser] of the executive."[91] Thus the executive may enlist the judiciary to determine the constitutionality of various state actions; rather than functioning as a "check" on the executive branch, it would be more accurate to regard the Canadian judiciary as aligned with the executive branch.[92] This reflects an observation of the Supreme Court of Canada in the *Quebec Secession Reference* that the American

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88 See *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 545; *Quebec Secession Reference*, *ibid*. at para. 26: "Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law."

89 See H.L. Nevin, "The *Wheeling Bridge* Exception: Reopening Executory Judgments of Article III Courts" (2000) 67 U. Chic. L. Rev. 547.

90 See Federalist 47 (Madison), in C. Rossiter, ed., *The Federalist Papers* (New York: Mentor, 1961) at 301: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

91 *In re References by the Governor-General in Council* (1910), 43 S.C.R. 536 at 547, aff'd [1912] A.C. 571 (J.C.P.C.).

92 It has been suggested to me that this reading is problematic, given the Supreme Court's decisions in *Re Dagenais and Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 [*Dagenais*] and *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at 600 [*Dolphin Delivery*], in which the Court denied that a court order is governmental action within the meaning of s. 32(1) of the *Charter*. I think this denial should be taken with a grain of salt, since the judiciary is required to honour *Charter* values just as the legislative and executive branches are so required. Failure on the part of courts to act in accordance with *Charter* values will amount to an error of law. Where *certiorari* is invoked to remedy the error, the reviewing court will have available the remedial powers ordinarily available under s. 24(1) of the *Charter*. See *Dagenais* at paras. 17, 38–43, 209–12; *Dolphin Delivery* at 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at 184; *R. v. Robinson*, [1996] 1 S.C.R. 683 at para. 47; *R. v. Rahey*, [1987] 1 S.C.R. 588 at 633; and *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214 at 243.

emphasis on the separation of powers is not precisely mirrored in Canadian constitutionalism.[93]

In *Vriend v. Alberta*[94] and *R. v. Mills*,[95] the Supreme Court of Canada suggested that the legislature and the judiciary are engaged in a constitutional dialogue; the Supreme Court's consideration of constitutional issues does not preclude Parliament from creating legislation that conflicts with prior Supreme Court *dicta*.[96] It has since been remarked by various scholars that, by surrendering a measure of constitutional interpretive authority to Parliament, the Supreme Court effectively relinquished the judiciary's power to establish constitutional rules that protect individual and minority rights.[97] What the foregoing demonstrates, however, is that the Supreme Court of Canada was able to cede some of its power because it enjoys the benefit of an institutional position not enjoyed by the American federal judiciary. The federal judiciary in the United States must fight "tooth and nail" to retain whatever powers it has, owing to the narrow jurisdiction accorded to it by the Constitution. Since it has only a narrow constitutional authority to create constitutional rules — that is, it must create such rules only in the course of adjudicating particular cases or controversies and only to the extent necessary — it must inject those rules with especial potency; that is, the judiciary must claim exclusive jurisdiction as the final constitutional interpretive authority.[98] The Supreme Court of Canada is able to relinquish some of its interpretive authority because its power to generate rules is (at least in theory) less subject to scrutiny. Although the Supreme Court cannot create rules whenever it wants (it must wait for a particular case or controversy to arise, or for the Governor General to request an advisory opinion), its power to create rules, when appropriate circumstances arise, is far greater because it is less open to question. There may (and, indeed, should) be some debate as to the judiciary's competence in a given case or opinion to generate

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93 *Quebec Secession Reference*, *supra* note 58 at para. 15.

94 *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 139.

95 *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 57. See also *Little Sisters Book Store and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 268.

96 On the topic of constitutional dialogue in Canada, see P.W. Hogg & A.A. Bushell, "Constitutional Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75; P.W. Hogg & A.A. Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall L.J. 529; and B.P. Elman & J. Mason, "The Failure of Dialogue: *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*" (1998) 36 Alta. L. Rev. 768. For a discussion of constitutional dialogues generally, see G. Dor, "Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective" (2000) 11 Ind. Int'l & Comp. L. Rev. 1. For a skeptical treatment of the dialogue between courts and the Canadian legislature, see C.P. Manfredi & J.B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513.

97 See *e.g.* D. Stuart, "*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost?" (2000) 28 C.R. (5th) 275.

98 See *Cooper*, *supra* note 57; Alexander & Schauer, *supra* note 28. Compare Merrill, *supra* note 61.

rules of a certain scope, but there can be no question of its constitutional power to create those rules. To the extent that criticisms of judicial rule-making will most likely take on an empirical, rather than theoretical, tone (since it is on an empirical level that a court's competence to draft a given rule must be gauged), it may be small wonder that, as Choudry and Howse have noted, there has been little academic interest in developing a Canadian constitutional theory.[99] A theory of constitutional interpretation premised upon a notion of dialogue between the judiciary and other branches of government largely circumvents the problem of institutional legitimacy by cutting straight to the problem of competence. Whether or not a court can plausibly claim to be the most competent body to formulate a given rule may be a thorny question. For the purposes of this paper, however, what matters is that there seems to be nothing *prima facie* illegitimate about a court formulating rules. One wonders, then, what went wrong in *Marshall 1*, such that the Supreme Court's power to create and deploy one *particular* rule became the object of a vicious public attack.

IV. CAN FORMALISTS EXPLAIN *MARSHALL*?

At first, *Marshall* looked promising for formalism. The Supreme Court impugned the constitutional adequacy of various legal rules, specifically those contained in the *Fishery (General) Regulations* and the *Maritime Provinces Fishery Regulations*, not because of their content but because they are discretionary; that is, they are not rules at all. According to the Court, the legislative branch, in drafting the *Fisheries Act* as it had, failed to take adequate account of the principles at stake. The Mi'kmaq had a treaty right; that is, they enjoyed a benefit flowing from a legal rule created through negotiations with the Crown in 1760–1761 (and buttressed by section 35(1) of the *Constitution Act, 1982*). The fishery regulations, however, were potentially in conflict with that legal rule so created; Mi'kmaq Indians, attempting to use the legal rule created by the treaty, could find themselves arrested and punished.

Effectively, the government turned the legal rule created by the Treaty into something less than a legal rule; since the fishery regulations were discretionary, the legal rule created by the treaty likewise existed solely at the discretion of the executive. An untenable situation exists, for the Mi'kmaq may plan their lives with the understanding that the legal rule created by the Treaty remains operative, only to suffer punishment later. In the alternative, the discretionary nature of the regulations would have a "chilling effect" on the exercise of the treaty right; inasmuch as the legal rule, created by the Treaty, will have been constructively repealed without resort to proper authoritative channels, there is again a sense in which the state of the law has been thrown into confusion. In

[99] Choudry & Howse, *supra* note 56 at 144–45.

order for Mi'kmaq fishermen to plan their lives, they needed assurances through the implementation of a fixed set of rules that the Crown would either honour the treaty right (in which case the rules would be created pursuant to a series of negotiations between the government and the Mi'kmaq), or (through extra-constitutional means insofar as the notwithstanding clause does not apply to section 35(1)) explicitly deny that the rules, contained in the Treaty, would continue to have any legal effect. What was plain was that the extant situation, in which a legal rule both existed and did not exist, could not continue.

To that end, the Supreme Court struck down the regulations that watered down the rule created by the Treaty. The Court could, in theory, have devised (using its reading-in power) an elaborate system of rules to replace or supplement the regulations, a set of rules that accommodated the Mi'kmaq treaty right. This, however, would not have been an exercise of power within the Court's institutional competence and may very well have led to greater legal uncertainty in the future. The government made no petition for a suspended declaration of invalidity and, at any rate, this was not a case such as *M. v. H.*[100] where a declaration of invalidity would affect not only the provision impugned by the litigants but a slough of other provisions as well.

In *M. v. H.*, the majority specifically noted that an immediate declaration of invalidity would create widespread uncertainty and force citizens into litigation in order to determine their legal rights.[101] Narrowing the application of the fishery regulations would leave no such legal vacuum: the Mi'kmaq, and no one else, had a specific treaty right entitling them to fish. Moreover, the government provided no evidence that there would be any adverse impact — environmental or otherwise — flowing from an immediate declaration of invalidity.[102] When these factors are viewed alongside the fact that *Marshall 1* was a prosecution, and not a reference case — that is, that suspending the declaration of invalidity would mean that Donald Marshall Jr. must be found guilty of a criminal offense despite having a valid defense — it seems clear that the Court had little choice but to declare the fishery regulations invalid at least insofar as they applied to the Mi'kmaq.[103]

What is readily apparent, then, is that the *Marshall* Court fought for a formalist ideal; namely, the proliferation of clear, non-conflicting and comprehensive legal rules. The question, then (and, it is submitted, the burden

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[100] *M. v. H.*, [1999] 2 S.C.R. 3. In *M. v. H.*, the Court suspended the effect of its declaration of invalidity of the definition of "spouse" for the purpose of s. 29 of the *Ontario Family Law Act*, R.S.O. 1990, c. F-3, for a period of six months to enable the legislature to consider appropriate amendments.

[101] *Ibid.* at para. 147.

[102] *Marshall 2*, *supra* note 20 at para. 14.

[103] *Ibid.* at para. 13.

of answering lies upon the formalist), is why was the public's reaction so vitriolic? Can the formalist explain the *Marshall* backlash in a way that shows that formalism fits the political environment in which legal authority is allocated?

The formalist could argue that, notwithstanding the fact that the Court's hands were tied with respect to the possible remedies, the public believed that the Court should have created a set of legal rules that could render compatible the fishery regulations and the treaty right.[104] That is, the public may have simply wanted the benefit of rules, and felt that the *Marshall* Court had deprived them of this essential guidance. The difficulty with this reading is that it requires one to posit a public that cares about some rules (that is, those concerning the regulation of fisheries) but not others (that is, those governing the judicial process). Thus, such an answer does not unproblematically favour a formalist interpretation.

A second possibility is this: inasmuch as the Supreme Court made it clear that native fishing rights were subject to state regulation, but that this regulation must occur in the context of Aboriginal–state negotiations, it was incumbent upon the Court to carefully explain the scope and content of the treaty rights recognized in *Marshall 1*. If, as Saunders argues, the Court failed miserably in this regard, then the formalist could argue that the public did not collectively balk at a judicial rule so much as decry the absence of a clear rule that could guide negotiations between Aboriginal groups and the government.[105] These negotiations, in turn, might have filled the gap in the generality of the provisions read down in *Marshall*. Moreover, there is some scholarly support for the idea that the *Sparrow* test was devised specifically with a view to guiding the negotiation process;[106] if the Court failed to provide such guidance, then surely

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[104] See *e.g.* Cox, *supra* note 10 (quoting Mike Belliveau, Executive Director of the Maritime Fishermen's Union in Moncton, as complaining that *Marshall 1* "left us all up in the air." Belliveau's response to the uncertainty was rather peculiar inasmuch as he threatened to *stall* the negotiations by having non-native groups boycott the negotiation process: see K. Cox & D. LeBlanc, "East Coast fishermen's anger explodes as natives catch lobster out of season" *Globe & Mail* (4 October 1999) A5). See also M. Cutler, Letter to the Editor, *Globe & Mail* (6 October 1999) A15 (arguing that the Court ought to have suspended the judgment and left the existing legal framework in place while negotiations occurred). A number of commentators suggested that the *Marshall* furor was provoked by the absence of legal rules governing fishing rights, but assigned the blame for this absence to Parliament rather than the Supreme Court. See A. Picard, "Why the crisis over treaty rights? Because politicians left the job half-done" *Globe & Mail* (7 October 1999) A19; R. Pichette, "In the beginning, the Mi'kmaqs introduced the Europeans to the lobsters" *Globe & Mail* (11 October 1999) A9.

[105] See Saunders, *supra* note 7.

[106] See W.I.C. Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217 at 221: "The *Sparrow* judgment is nothing if not candid about the Court's strategy ... The Court, quite rightly, does not say where the solution lies, but it

the blame must be laid at its door. This reading is more appealing than the first, because it emphasizes the value of rules without suggesting that the Court ought to have created rules governing fisheries, no matter the cost to rules governing litigation procedure. It is possible, then, to regard the *Marshall* debacle as a formalist reminder that people need rules; that particular judgments must be made with an eye to the future; and that the failure to ground a particular judgment in a rule that provides real guidance to the public for all future cases (or, in this case, negotiations) may well be treated as lacking authority.

These answers are unsatisfying because the *Marshall* debate itself cannot easily support them. Much of the public furor over *Marshall 1* concerned the *basis* of the judicial rule created therein, as opposed to the comprehensiveness of the rule itself. Saunders admonished the *Marshall* court for failing to make transparent the chain of reasoning used to justify its conclusion.[107] This failure contributed to the public's perception of *Marshall* as little more than an instance of judicial activism.[108] Charges of judicial activism, it must be observed, amount not to a condemnation of the content or comprehensiveness of a legal rule, so much as an objection on jurisdictional grounds, an impugning of the Court's authority to make a particular legal rule.[109] The judiciary may be subject to charges of activism where the creation of a rule requires the court to stray beyond the realm of its institutional legitimacy. As noted above, Canadian challenges to the judiciary's rule-making authority will usually emerge out of some sense that the courts lack the institutional competence to engage in a

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has made it clear that in its opinion there must be a negotiated settlement. ... This aspect of *Sparrow* seems clear. Section 35 may not itself be the solution, but it can become the Court's vehicle to force a political settlement of the issues." See also Saunders, *ibid*. at 59–60: "The process and principles developed by the Supreme Court, beyond their primary use in reaching decisions on the particulars of the cases, also provide the basis for the setting out the necessary guidance for negotiators, as discussed above. The process, with its sequential steps, requires the concrete definition of the substantive scope of the right at the outset, which should allow its parameters to be adequately delineated for the purpose of assessing the range of entitlements. A finding of *prima facie* infringement obviously allows for at least a partial determination, although limited by the particular facts, of the level of government regulation (and thus management measures) which might be considered acceptable without further justification. The justification stage allows additional information on this issue to be provided, and indeed it has been suggested that part of the thinking underlying the development of the *Sparrow* test was to permit the Court to influence the course of negotiations, both through the details of decisions and the broader impact of putting parties on notice that the Court has the ultimate capability to intervene and construct 'solutions' for the parties."

107 Saunders, *ibid*. at 86–87.

108 See Rotman, *supra* note 22 at 631–32. See also R. Gwyn, "It's going to be a new day in court" *Toronto Star* (14 January 2000) A21; Editorial, "The burden of language in the Mi'kmaq case" *Globe & Mail* (6 October 1999) A14.

109 For the most recent and sustained criticism of the so-called "judicial activism" of the Canadian judiciary, see F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

meaningful process of fact-finding. That was certainly the case in *Marshall*, where the Court was harshly criticized for its selective use of historical evidence, among other things.[110] To be sure, Aboriginal rights cases will often challenge the institutional competence of the judiciary precisely because of the unique evidentiary hurdles that arise in the course of divining the (non-)existence of a treaty or practice within a culture that has traditionally relied upon oral rather than written narratives.[111] The judiciary cannot shy away from these cases merely because they are challenging, but, if it is to tackle them, it must do so in a manner that is transparent — that is, in a manner that lays bare its assumptions (and its reasons for adopting them) and renders them open to public scrutiny. There must not be a public perception that the Court is attempting to "get away with something," that its authority is grounded in nothing more than sleight of hand.[112]

Some complained that the Court ought not to have generated *Marshall 1*, but not for the substantive reason that the rule thereby created was faulty; rather, some implied that the Court should have known better than to issue a judgment — correct or not — that one might reasonably have predicted would result in ethnic conflict and economic turbulence in the Atlantic fisheries.[113] The unstated

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[110] Particularly damaging to the *Marshall* Court was criticism levied by the expert historical witness, upon whose testimony the Court primarily relied in drafting *Marshall 1*: C. Morrison, "Disagrees with Court: Says Testimony Misinterpreted" *The (Fredericton) Daily Gleaner* (18 September 1999) A3. See also McEvoy, *supra* note 23 at 86, 97; W. Wicken, "History's the Key to Understanding Marshall Ruling" *Telegraph Journal (Saint John)* (15 October 1999) A11; and B. Beal, "Don't blame the Mi'kmaq, blame history" *Globe & Mail* (10 November 1999) A21 (arguing that, in the furor following the *Marshall* ruling, insufficient attention was given to the Court's historical analysis).

[111] On the problematic historical analysis conducted by the *Marshall* Court, see R. Normey, "Angling for 'Common Intention': Treaty Interpretation in *R.* v. *Marshall*" (2000) 63 Sask. L. Rev. 645. On the general use of history in Aboriginal rights cases, see P.G. McHugh, "The Common-Law Status of Colonies and Aboriginal 'Rights': How Lawyers and Historians Treat the Past" (1998) 61 Sask. L. Rev. 393; P. Wallace, "Grave-Digging: The Misuse of History in Aboriginal Rights Litigation" (1999) 30 U. Miami Inter-Am. L. Rev. 489; McEvoy, *ibid*. at 106–109.

[112] See Saunders, *supra* note 7 at 87–88.

[113] This was certainly the tenor of Jeffrey Simpson's article, "In the fishery verdict, a win for chaos" *Globe & Mail* (30 September 1999) A16; Editorial, "The Supreme Court all at sea" *Globe & Mail* (5 October 1999) A14; M. Cutler, Letter to the Editor, *Globe & Mail* (6 October 1999) A15. See also R. Gwyn, "Judges will judge themselves" *Toronto Star* (19 November 1999) A29: "For weeks it has been obvious that the court blundered badly in its September decision to uphold a claim by a Mi'kmaq to possess an inherent right to fish (specifically for eel) without a licence, by virtue of a 250-year-old treaty between his forebears and the British military." See also T.W. McLorg, Letter to the Editor, *Globe & Mail* (13 October 1999) A19 (arguing that the Supreme Court should have delayed its release of the *Marshall* decision until the regular lobster season had opened, in order to remove "most of the sting"). The West Nova Fishermen's Coalition argument, in *Marshall 2*, *supra* note 20 at para. 45, was characterized by the Court as one that "aboriginal and treaty rights should be recognized only to the extent that such recognition would not

assumption, familiar to formalists, is that the rule of law is designed to promote stability; if legal directives cannot accomplish this goal, then the law should be silent, lest it do more harm than good. Like the formalist, this brand of argument appeals to tensions simmering beneath the surface of civilized society; unlike the formalist, it recognizes that legal rules may *exacerbate* these tensions. In a society where citizens increasingly identify themselves with subcultures rather than with a general Canadian culture, differences may not be worked out civilly.[114] The communitarian vision, of a society of like-minded individuals bound together by shared beliefs and traditions, has the flipside of an agglomeration of individuals, each identifying so completely with his or her respective distinct and separate community that meaningful communication across subcultures becomes virtually impossible. If the latter vision holds true — and the *Marshall* backlash presents little reason for optimism — then legal rules that require negotiations among different subcultures may be regarded as contributing to the factionalization and ultimate disintegration of civil society.[115]

This notion, that Canadian society is so fragile that it cannot even acknowledge its divisions, is such a bleak one that it seems scarcely worth considering as a contender; if true, then Canadian constitutional lawyers might as well pack up their practices and go home, for the end is truly nigh. Without taking that bleak stance, however, one is yet left with a discomforting thought: even if it is not the case that the Court should bite its collective tongue whenever

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occasion disruption or inconvenience to non-aboriginal people." The Court soundly rejected such a proposition, finding it to be a political rather than legal claim — one that had been implicitly rejected when s. 35 was inserted into the *Charter*. Some members of the public came to the Court's defense, finding that the justice of the decision outweighed the inconvenience and turbulence of its effects. See *e.g.* T. Palys, Letter to the Editor, *Globe & Mail* (6 October 1999) A15. Compare J.D. Gorrell, Letter to the Editor, *Globe & Mail* (13 October 1999) A19. See also B. Laghi, "Judges must be mindful of their impact: McLachlin" *Globe & Mail* (6 November 1999) A5 (reporting a news conference, conducted by McLachlin J., that "Judges with the power to shape Canadian society must pay heed to the social consequences their decisions could set off").

[114] See A.C. Cairns, "Why Is It So Difficult to Talk to Each Other?" (1997) 42 McGill L.J. 63.

[115] It bears noting as well that — quite apart from the fallout of the *Marshall* decision itself — there was much tension between Aboriginal and non-Aboriginal communities when the *Marshall* debacle swirled. At the time, battles were brewing on various legal fronts. The Manitoba government announced the formation of a "commission to implement the wide-ranging and politically touchy recommendations of the Aboriginal Justice Inquiry." See G. Sinclair, Jr., "Manitoba set to act on aboriginal inquiry" *Globe & Mail* (11 October 1999) A3. Provincial Court Judge John Reilly produced his report, which would later take him through his own court battles, that the suicide of an Aboriginal teenager could be traced, in part, to federal bureaucrats. See P. Cheney, "Judge lays blame for reserve suicides" *Globe & Mail* (22 Sepetember 1999) A3. The Federal Court of Appeal held that the National Energy Board failed to adequately consult with the Mi'kmaq people when it agreed to grant construction rights for a natural-gas pipeline in Nova Scotia. The decision delayed the project. See B. Laghi, "Native ruling could delay megaproject" *Globe & Mail* (22 October 1999) A1; and K. Cox, "Nova Scotia pipeline project up in the air" *Globe & Mail* (29 October 1999) A4.

a particular judgment would force Canadians to acknowledge the Other among them, it may be that *Marshall* reveals that the Court's true jurisdictional Achilles' heel lies not in its power to create general rules, *but in its power to issue judgments in particular cases*. If one supposes that some naysayers are correct, that the Court ought to have used whatever means at its disposal to stifle its opinion with respect to the *Marshall* case just because of the political turmoil that ultimately ensued, then one finds that the Court's institutional competence to create legal rules is less important than its competence to determine the effects of specific judgments.[116] That being the case, there is truly a need in future cases for the government to support the Court more vocally than it did following *Marshall*.[117] One wants to say that the Court's authority is not so tenuous as to depend upon the whims of politicians, but that is perhaps too much to ask in a constitutional tradition in which the Court's function includes that of "advisor to the Crown."

At any rate, these grounds of criticism do not support the formalist reading of *Marshall*. The first, that the Court engaged in judicial activism inasmuch as its reasoning was faulty or not apparent, rests upon inferences that the formalist hotly denies; namely, it argues that the judiciary has a practical responsibility, in the course of issuing judgments and creating legal rules, to make its reasoning clear and available to the public. To the extent that there was some dispute as to the Court's use of historical evidence, one could even make the claim that the Court's authority rests upon the *substantive* merits of the decision, that is, upon the substantive content of the evidentiary rules created by the Court. This would be a much stronger claim than that which was urged in Part II of this paper, and the empirical evidence weighs against the view that individuals' obedience or

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[116] Plainly, the *Marshall* Court did not understand its authority to be tenuous with respect to its adjudication of particular cases or controversies. In *Marshall 2*, *supra* note 20 at paras. 11–12, the Court specifically observed that the rules, constructed and applied in *Marshall 1*, were no more than what was necessary to resolve the immediate dispute between the two parties.

[117] See Rotman, *supra* note 22 at 640–41: "It remains open to question why the federal government did not take immediate action to either impose such limits or, alternatively, to issue a statement supporting the unrestricted exercise of treaty rights by Mi'kmaq people pursuant to the rights found to exist in *Marshall*. Since the *Sparrow* judgment in 1990, the federal government has often engaged in the legislative limitation of Aboriginal rights and has had significant experience in shaping its legislation to conform with the requirements of the *Sparrow* justificatory test. If the *Badger* test found to exist in *Marshall* is the same as the *Sparrow* test, but applied to treaty rights, then the federal government could have engaged in the very same process vis-a-vis the situation created by *Marshall*. It would seem that the federal government's lengthy silence during the east coast fishing dispute is similar to the politically-motivated, hands-off approach adopted by the federal government in other Aboriginal rights disputes, such as the Caldwell First Nation matter in southwestern Ontario."

respect of legal rules hinges upon substantive considerations.[118] Even if one regards such criticisms as primarily directed at the general procedural fairness of the Court's adjudication, however, rather than at the substantive content of specific legal rules constructed in the process of deciding *Marshall*,[119] it seems plain that formalism cannot account for them. On the formalist account, any criticisms directed at the *Marshall* Court ought to have taken the form of a particular plea for comprehensive rules whatever their content. The actual tenor of the debate, though, cannot support such a reading. Nor can formalism account for the second category of criticism directed at the *Marshall* Court: that the Court ought to have simply refused to decide the constitutionality of the impugned provisions given the expected public discontent. Such a view flatly contradicts the overarching assumption made by formalism that legal rules are necessary for individuals' exercise of freedom. If it is the case that legal rules are sometimes corrosive of civil society, or that they should not be applied where doing so presents a practical risk of conflict, then legal formalism fails, for, being ostensibly neutral with regard to political morality, it provides no hierarchy of rules, no means of judging the quality or content of particular legal rules. Formalism, therefore, could not say when a given rule would be worth the social cost flowing from its implementation or application.

In any case, even if the formalist argued that the criticisms leveled at the *Marshall* Court are not representative of the views of most Canadians, the response of the Supreme Court is also revelatory. As it was observed in the beginning of this article, *Marshall 2* did not justify its earlier ruling by appealing to the value of rules as such. Its admonition to the public, that it ought to have more carefully read the reasons for judgment in *Marshall 1*, could be understood as a call for greater public attention to the actual content of legal rules; but, if this was the message's intended meaning, the Court need not have gone so far as to issue a second set of reasons. The Court could have simply issued a press release to that effect, without making any claims as to the reasonableness of the particular legal rule created and applied in *Marshall 1*, relying only upon its constitutional — formal — authority to decide particular cases and controversies. Instead, the Court went much further, launching a vigorous defense of its reasoning, carefully noting what it said — and did not say — in *Marshall 1*, and restating the chain of inferences that led to the initial judgment.

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[118] See *e.g.* T.R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990); E.A. Lind, "Procedural Justice, Disputing, and Reactions to Legal Authorities" in A. Sarat, *et al.*, eds., *Everyday Practices and Trouble Cases* (Evanston: Northwestern University Press, 1998) 177; J. Thibaut & W.L. Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale: L. Erlbaum, 1975); J. Thibaut & W.L. Walker, "A Theory of Procedure" (1978) 66 Cal. L. Rev. 541; T.R. Tyler & G. Mitchell, "Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights" (1994) 43 Duke L.J. 703.

[119] The difference is important only if one wishes to adopt a specifically substantive or due process theory of the rule of law. See *supra* notes 28–34 and accompanying text.

The Court clearly did not understand the assault upon its authority to flow from a general public desire for legal rules. The Court understood the criticism, directed at *Marshall 1*, as flowing from a public sense that the means by which *Marshall 1* was decided were procedurally unfair, that the Court had paid inadequate attention to non-Aboriginal interests when formulating the legal rule given effect by *Marshall 1*. The public wanted a sense of participation, a sense that its interests mattered to those in a position to draft legal rules, and so the Court, in *Marshall 2*, proceeded to show: (a) how certain remedies — that is, a suspended declaration of invalidity — were not available given the specific structure of argumentation in *Marshall 1*;[120] and (b) how the legal rules created and applied in *Marshall 1* were not created in an arbitrary fashion that gave insufficient weight to the interests of the non-Aboriginal public but, rather, were generated out of a chain of *bona fide* reasoning. The *Marshall* Court understood the central issue to be one of process, rather than comprehensiveness.

V. CONCLUSION

Thus, while it is not impossible to explain the *Marshall* backlash in terms that are friendly to the formalist cause, such explanations do not seem facially consistent with the actual criticisms leveled at the Court in the wake of *Marshall 1*, and the Court's response in *Marshall 2*. Given that there is little doubt as to the Canadian judiciary's institutional authority to formulate legal rules, one may well wonder whether *Marshall* does not signal a radical decline in the plausibility of the formalist theory of the rule of law. Even if one is inclined to accept formalism's premises as to when people *ought* to be willing to recognize *de facto* authority, it seems that there are, in the end, an insufficient number of formalists running around to make formalism anything more than a fishy constitutional theory.

[120] *Marshall 2*, *supra* note 20 at para. 12.

CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE?

by J. Hiebert (Montreal & Kingston: McGill-Queen's University Press, 2002) pp. 285

Janet Hiebert has written an important contribution to the literature on the *Charter*'s political impact.[1] The study is offered as an antidote to two types of "judicial-centric" approaches to the *Charter*. Most obviously, Hiebert is critical of the view that the *Charter*'s meaning is to be found exclusively in judicial interpretation. With one important exception, she argues that there is a wide range of reasonable interpretations of the *Charter*'s substantive provisions, and that Parliament has a legitimate role to play in fleshing out the *Charter*'s meaning. In addition, she is also implicitly critical of those scholars who take a judicial-centric approach to studying the *Charter* by focusing almost entirely on what the Supreme Court has said about it. Hiebert's approach is to examine how the non-judicial branches of government have dealt with conflicts about the *Charter*'s meaning, both internally and in responding to judicial decisions. Consequently, the empirical core of her book is as much a study of legislative proposals and committee hearings as it is an analysis of Supreme Court judgments.

The book begins with a chapter laying out Hiebert's assertion that constitutionally entrenched bills of rights are as much an invitation to enhanced political scrutiny of proposed legislation as they are to judicial review of enacted statutes and other government action. Her point here is that "Parliament shares responsibility for interpreting the Charter,"[2] and that it should take this responsibility seriously by thoroughly scrutinizing proposed legislation for potential *Charter* violations. The purpose of this exercise, according to Hiebert, is not to "*Charter*-proof" legislation, or to ensure that it is defensible according to some minimally acceptable interpretation of rights, but to consider substantively whether proposed legislation is consistent with the values and principles embodied in the *Charter*.

This chapter is followed by one summarizing the current debate on the legitimacy of judicial review, and by another chapter setting out Hiebert's own understanding of the respective role of courts and the political branches in working through *Charter* conflicts. In the first of these chapters she criticizes two "extreme positions" in the legitimacy debate: fundamental rights theorists and *Charter* skeptics. In addition, she expresses doubts about the "dialogue metaphor" associated most closely with the work of Peter Hogg and Allison Bushell.[3] Finally, Hiebert rejects as both undesirable and unfeasible Miriam Smith's argument that political scientists abandon normative *Charter* analysis.[4] She thus uses her criticism of the "extremists" and the dialogue theorists to define her own normative position, which she develops in the third of her introductory chapters.

Hiebert describes her position as a "relational approach," one that relies on the assumption that "both Parliament and courts have valid insights into how

[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[2] *Charter Conflicts* at 4.

[3] See P.W. Hogg & A.A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75.

[4] *Charter Conflicts* at 22.

legislative objectives should reflect and respect the Charter's normative values."[5] However, the salience of non-judicial insights varies according to the nature of the rights conflict at issue. When these conflicts involve what Hiebert calls "core rights," judicial insights become more important; and the opposite is true where rights claims are less fundamental. As she recognizes, the distinction between core and peripheral rights derives from the early *Charter* reflections of Peter Russell and Charles Taylor. The difficulty with these earlier distinctions, and one that Hiebert does not really solve, is that the definitional distinction between these two types of rights is extremely ambiguous. While she defines core rights as those that protect the conditions essential to self-government and provides a list of such rights, it is precisely whether government action impedes self-government that is at issue in any *Charter* conflict. Thus, while everyone acknowledges that freedom of expression is essential to self-government, disputes are always about whether any particular regulation of expression undermines the capacity for self-government. In other words, the conflict is always about the extent to which a regulation affects the core purpose of a protected right.

This core-periphery dilemma is particularly evident in two of the book's empirical chapters: one dealing with tobacco advertising, the other with equality and sexual orientation. Hiebert is extremely critical (correctly, in my view) of the Court's judgment in *RJR MacDonald*,[6] nullifying the *Tobacco Products Control Act*.[7] In her view, the constitutional dispute was "not about rights at all," but a policy disagreement between economic interests and public health.[8] She is also critical of the government's "political reluctance to challenge the use of rights discourse" in the context of tobacco advertising.[9] It is a perfect, example, she implies, of courts blurring the distinction between core and peripheral rights, as well of a legislature abdicating its responsibility to assert independent judgment where only peripheral rights are involved.

By contrast, Hiebert praises courts for "advancing the policy objectives of lesbian and gay groups,"[10] while criticizing various governments for legislative inaction or outright hostility to the core rights claim of equality as human dignity. While Hiebert is certainly correct that the equality claims of gays and lesbians are stronger than the expressive freedom claims of tobacco companies, it is unclear on what principle she accepts the "new legal equality-rights paradigm"[11] developed in the sexual orientation cases, while rejecting what is in effect a new expressive freedom paradigm developed in a series of cases from *Irwin Toy*[12] to *Little Sisters*.[13] Moreover, it is unclear why legislatures are always wrong to defer in one area but right to do so in the other.

The tobacco advertising and sexual orientation chapters form the bookends of Hiebert's empirical analysis of legislative action and reaction when faced with *Charter* conflicts. The chapters in between

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5 *Ibid.* at 52.

6 *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199.

7 R.S.C. 1985, c. 14.

8 *Charter Conflicts* at 80.

9 *Ibid.* at 90.

10 *Ibid.* at 164.

11 *Ibid.* at 198.

12 *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927.

13 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

deal with criminal procedure, and consider sexual assault trials, the collection and investigatory use of DNA, and rules for search warrants. In these chapters Hiebert brings a wealth of detail and critical analysis to what legislatures did, either in reacting to judicial decisions or in crafting legislation that might infringe the *Charter*. One phenomenon that becomes evident in these chapters is the extent to which the *Charter* has become a device to cut off legitimate debate on key issues in the political sphere. This was particularly true in the development of DNA legislation, where government members ridiculed opposition criticism as "anti-Charter."[14] In general, the story that Hiebert tells in these chapters is one of haphazard use and consideration of *Charter* "reasons" in the development of legislation, with the most positive results coming in the area of sexual assault trials, and some of the least satisfactory results in the area of search warrants.

The principal innovation of *Charter Politics* is the attention it pays to the role of *Charter* arguments in the legislative process. In this sense, it complements James Kelly's work on the role of the *Charter* in executive decision-making.[15] The book is less innovative in terms of its theoretical argument. The argument against judicial hegemony in *Charter* interpretation goes back at least as far as Morton and Knopff's criticism of the "oracular" courtroom.[16] Moreover, other than exhorting courts and non-judicial institutions to take the other's role in *Charter* interpretation seriously, Hiebert does not offer any recommendations for promoting the relational approach in practice. Finally, there is very little consideration of the political dimensions of *Charter* interpretation, especially on the part of courts. Indeed, at one point she explicitly rejects political considerations as an explanation for judicial decisions.[17] However, as a national, final court of appeal, the Supreme Court is a political institution. It makes policy not as an accidental byproduct of performing its legal function, but because of a collective judgment about the social desirability of particular rules made within a context of institutional constraints. It seems difficult to understand the nature of judicial-legislative exchanges about the *Charter*'s meaning without some consideration of this institutional struggle for authority and power.

These minor points of criticism aside, *Charter Conflicts* deserves to be read by any serious scholar of the *Charter*'s impact on Canadian politics. Readers will learn from it empirically, and discover a great deal to discuss and argue about conceptually.

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[14] *Charter Conflicts* at 133, 140.

[15] See J. Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and Its Entry into the Centre of Government" (1999) 42 Can. Pub. Admin. 478.

[16] See F.L. Morton & R. Knopff, *Charter Politics* (Scarborough: Nelson Canada, 1992).

[17] *Charter Conflicts* at 63.

JUST CAUSE: FREEDOM, IDENTITY, AND RIGHTS

by D. Cornell (Lanham: Roman & Littlefield, 2000) pp. 205

Given that Drucilla Cornell's interlocutors in the field of American jurisprudence are people like Judge Richard Posner, whose short rebuttal to one of Cornell's essays is included in this book, her advocacy for the liberalization of a variety of social policies and laws is sorely needed. With respect to the common law doctrine of "employment at will," for example — the doctrine that states that "employment [is] terminable by either party, employer or employee, at any time and without grounds"[1] — Posner echoes Cornell's point that "employment at will happens to be the logical terminus on the road that begins with slavery and makes intermediates stops at serfdom, indentured servitude, involuntary servitude, and guild restrictions."[2] Unlike Cornell, however, who opposes the doctrine with "rational cause statutes," Posner immediately adds, "That should be a point in its favor. Hegel himself, as Cornell notes, would have thought employment at will a fine idea."[3] Against such rabid economic and political conservatism as this, one must no doubt begin simply by defending the *ideals* of freedom, equality and justice in the consideration of such issues as employment legislation, multiculturalism policy and language statutes. A book that sets out to do just that is welcome indeed.

Yet it is precisely because there *is* such a dire need for a sharp critical intervention in American legal discourse that this book is so disappointing. Structurally, the text is an unwieldy combination. It contains (not in this order) a short introduction, four brief occasional pieces (two commentaries on other papers, one response to a commentary, and a book review), three longer, sustained theoretical arguments (two of which are co-authored), and the chapter by Posner. The essays are arranged in two parts; the first concerns representation and the ideal in law and politics, while the second is focussed more directly on rights-related issues. All four of the short pieces by Cornell herself (which range from four to fifteen pages) have been previously published and all seem to appear in their original form. To some extent, they suffer from being taken out of context; required here was an effort to bring the reader up to speed by providing the substance of the debates in which they first intervened. As for the three substantive chapters, two have appeared elsewhere as well, and only one of them — chapter 8, which offers an argument against English-only language statutes, was originally written with William Bratton, and which first appeared in a longer version in the *Cornell Law Review* in 1999 — was significantly revised for inclusion in the present collection.

Taken together, the essays are loosely linked thematically, dealing as they do with fundamental ideals of political justice, and addressing as they do specific policy debates from a broad and multi-faceted philosophical perspective, but they do not form a coherent whole argumentatively. On the contrary, many of the essays leave one wishing Cornell had fleshed out her position more carefully and in a more organized way, rather than referring the reader to one or another of her previous publications. In fact, the endnotes make up the most significant portion of the text: a full thirty-eight pages out of a total of 205. This in itself indicates that there was much more the author felt could and should have been added to the original papers. Moreover, many of the notes contain substantial elaborations and arguments that belong directly in the essays themselves. These essays would be much more effective overall if Cornell had added more information about

[1] *Just Cause* at 119.
[2] *Ibid*. at 120–21.
[3] *Ibid*. at 121.

the debates to which she was responding, and if she had integrated some of the substantive notes and the elucidations that appear elsewhere.

So what of the theoretical arguments as they are given? Well, for those reasonably familiar with the canonical figures of Kant and Hegel, on whom Cornell relies extensively, this book may prove a frustrating read. The problem with Cornell's interpretation of both philosophers is that she attempts to retain some of their moral and political insights concerning the moral dignity of personhood and the ethical import of political community, but wishes at the same time to discard the philosophical justifications that originally grounded those insights and rendered them plausible. This requires, particularly in the case of Kant, an idiosyncratic and even distorted reading of such key texts as the *Critique of Judgment*,[4] and, in both cases and more generally, a highly selective focus that tends to de-contextualize central philosophical points.

Let me offer an example: Cornell claims a number of times that her argument concerning the need to reconceptualize the relationship between the individual and the state "does not rely on metaphysical or foundational notions of the subject."[5] If one consults the attached note to see how the claim is justified, one finds the assertion that she has argued *elsewhere* that there is a "difference between a metaphysical conception of the subject and our [Cornell's and Bratton's] political and moral interpretation of the free person."[6] The text in question here is Drucilla Cornell's *At the Heart of Freedom: Feminism, Sex, and Equality* where, again, one will find the same claim, but little in the way of careful argument.[7] Cornell writes there that "freedom of personality as a political ideal need not be rooted in a truth about the human condition, or in a metaphysical justification about autonomy."[8] At the same time, however, she also insists that "although we cannot be the fully authenticating source of our own values, in reality we should nonetheless be politically recognized as if we were. The abstract ideal person is normatively recognized as the node of choice and source of value."[9] Such an ideal does not entail an individualist anthropology, she went on to argue in the earlier book, because the notion of autonomy Cornell wants to defend is a relational, not an absolute one.[10]

For Kant and Hegel, the claim that the abstract ideal person is the "node of choice and source of value" was self-evident precisely because, for both, conceptions of moral and political justice were inextricably tied up with such metaphysical ideas as absolute truth (Hegel) and pure theoretical reason and transcendental subjectivity (Kant). Without the metaphysical justifications for the moral and political claims about personhood that these thinkers make, however, it is extremely difficult to see how, for example in the case of Kant, "autonomy" *per se* might still be justified as moral and political ideal or why, in the case of Hegel, citizens ought still to recognize the nature of a "properly constituted community,"[11] or indeed, why it is legitimate for the state to determine just what such a community entails. Without explaining more fully just how a *non*-metaphysical, yet nonetheless *moral* conception of either the person or the state can be justified, such claims are thinly defended assertions.

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4 I. Kant, *Critique of Judgment*, W. Pluhar, trans. (Indianapolis: Hackett, 1987).

5 *Just Cause* at 132.

6 *Ibid.* at 182, n. 20.

7 D. Cornell, *At the Heart of Freedom: Feminism, Sex, and Equality* (Princeton: Princeton University Press, 1998).

8 *Ibid.* at 39.

9 *Ibid.* at 38.

10 *Ibid.* at 62–63.

11 *Just Cause* at 96.

From a political point of view, this is not necessarily a strike against them. The claim that we must be treated as though we are abstract bearers of rights, for instance, is one which has been of inestimable value in the modern era. Indeed, in these politically ambiguous times, the ideals of freedom and human dignity cannot be emphasized enough. For those interested in thinking through the way that those ideals could better inform such social policies as language rights or multiculturalism, the arguments in this volume are therefore worth a look. And for those legal theorists interested in seeing how Kant's and Hegel's thought can be mobilized anew for a reinvigorated liberalism, there is much here to be mined. In short, despite its flaws, this book provides important conceptual resources that can be brought to bear on concrete legal and political debates that have only just begun.

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RESTRAINING EQUALITY: HUMAN RIGHTS COMMISSIONS IN CANADA

by R.B. Howe & D. Johnson (Toronto: University of Toronto Press, 2000) pp. 224

Howe and Johnson's *Restraining Equality* is an interesting and well-written book that focuses much needed scholarly attention on the human rights system in Canada. Those wanting to learn more about the organizational design and procedure of Canadian human rights commissions will appreciate the authors' careful comparative examination of Canada's provincial, federal and territorial human rights agencies. Students of law will appreciate the discussion of the distinction that is drawn between "rights administration" and "rights law and procedure." Students of human rights will find much that is interesting in the discussion of how the rise of human rights commissions facilitated the move from criminal to civil law standards of proof. Nevertheless, this informative volume is best understood as emerging from the fields of policy studies and public administration. The authors' purpose is, first, to identify and examine the forces that are responsible for the development and subsequent evolution of human rights legislation in Canada and, second, to offer their assessment of the response of human rights commissions to the challenges of fiscal restraint in the 1980s and 1990s. As such, the book's primary theoretical and analytical contributions lie in the lessons it offers for the academic analysis of public policy.

The authors' starting point for their examination of the forces responsible for administrative and policy change is the well-established if somewhat artificial contrast between society-centred and state-centred explanations. Having decided that the ideas and actions of state actors and the characteristics of specific state agencies are the factors that best explain the short history of human rights policy in Canada, Howe and Johnson conclude that state-centred explanations are most robust. Building, as this perspective does, on the earlier work of Canadian scholars such as Alan Cairns, Michael Atkinson and Grace Skogstad, there is little that is truly new in this analysis. At key points in the book, however, the authors deviate from this tradition and suggest that the *prime determinant* of change in human rights legislation and the patterns of spending by human rights agencies is the ideological orientation of the party and partisan decision-makers who hold political power.[1] This is a significant departure from the many studies that have taken up this question only to conclude that partisanship is not a primary determinant of policy. It is also interesting because party leaders and cabinets are not unambiguously "state actors," and the attention the authors draw to partisan ideology reveals an alternative theoretical orientation that highlights the policy significance of political ideas. Unfortunately the authors do not follow up on this.

Considering the attention focussed on "explaining" policy change, a disappointing dimension of the book is the discussion of "why" there was a shift toward fiscal constraint in the 1980s and 1990s.[2] At this point the authors seem to cast-off the assumption that there may be competing explanations, and they do little more than parrot the neo-liberal orthodoxy regarding the "demands" associated with the fiscal crisis of the state and the "new reality" of globalization and international

[1] *Restraining Equality* at 29–30, 92–94.
[2] *Ibid*. at 95–100.

competitiveness. None of this is adequately problematized.

When Howe and Johnson turn to offering their assessment of the response of human rights commissions to the challenges of fiscal restraint, their argument is, at bottom, that a decade of fiscal restraint was generally good for human rights policy. There are two reasons for this. First, fiscal constraint forced creative improvements in organization and procedure that can make human rights commissions more effective. Second, fiscal constraint thwarted the further development of more controversial programs associated with tackling systemic discrimination and implementing affirmative action. This assessment is contestable and, particularly in the case of the latter claim, somewhat provocative. All the same, Howe and Johnson seem ready to deny the provocative nature of their assessment. This denial is particularly obvious when we reflect on the way in which the authors characterize current policy debates regarding the future of human rights policy.

In the final chapter, Howe and Johnson praise the pluralist nature of the "creative tension" that now exists between "expansionists" who are highly rights conscious and wish to push the boundaries of human rights legislation, and the "contractionists" who fear that the human rights system has gone too far with its focus on systemic discrimination and affirmative action. It is in this context that the authors stress that new initiatives in the area of affirmative action have lacked broad public support. Unfortunately, Howe and Johnson's description of the pluralist nature of existing ideological tensions, and their analysis of related debates, ignores the ways in which power, politics and political economy influence the outcome of the "creative tension" between the expansionists and contractionists. Moreover, with the exception of a short discussion of Mike Harris's 1995 "common sense revolution" campaign,[3] there is no examination of the political and ideological struggles that aimed, during the 1990s, to demonize rights-seeking "special interests" and limit the extent of public support for positive initiatives in the area of systemic discrimination and affirmative action.

Howe and Johnson's *Restraining Equality* is a thoughtful and interesting book. Their style is cautious, systematic and ostensibly even-handed, but their conclusions are actually somewhat provocative. As such what is most interesting and enjoyable about this volume is the debate it has the potential to generate regarding how scholars can *explain* and *assess* the evolution of human rights policy prior to and during the period of fiscal restraint in the 1980s and 1990s.

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[3] *Ibid.* at 127.