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Implied Constitutional Rights and the Growth of Judicial Activism

by

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ABSTRACT

What accounts for the global spread of judicial activism? According to a legalist/institutional explanation, judicial activism is mandated by entrenched constitutional documents, and the spread of activism is thus explained by the spread of this kind of constitutionalism. A rival explanation, based on legal realism, holds that judicial activism is mainly a function of judicial inclination or judicial culture, not constitutional documents.

This study is grounded in the second perspective. In other words, it denies the legalist explanation for judicial activism, at least in its more simplistic versions. Does it follow from the obvious fact of judicial discretion, however, that inclination and culture are the sole explanatory variables? Are the insights of neoinstitutionalism of no relevance to the understanding of judicial behaviour? Or, despite the great weight of judicial culture, does institutional context continue to exercise a significant influence? In short, in the area of judicial behaviour, 'do institutions matter'?

The phenomenon of implied bills of rights provides an interesting context in which to explore this question. If judicial inclination and culture is everything, one would expect judges to invent the grounds for constitutionally based activism where they do not explicitly exist. That such inventions exist — in the form of implied bill of rights — is itself eloquent testimony to the explanatory power of judicial inclination. But this is not the whole story. Having established an implied bill of rights, do judges use it as comprehensively and aggressively as they would an explicitly entrenched constitutional document. If not, then claims that constitutional entrenchment explains judicial activism, while often used by judges in exaggerated ways, retain some force.

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CHAPTER 1: INTRODUCTION

Throughout the globe, courts have become important players in domestic policymaking Currently, judges in many diverse jurisdictions routinely make decisions which unti recently were the sole domain of legislators, administrators and executives. It is clear tha judicial activism, which "comes into existence when courts do not confine themselves tc adjudication of legal conflicts but adventure to make social policies,"[1] is now prevalen across the vast majority of liberal democratic states and appears to be spreading throughout the globe. For the most part, this trend is a relatively recent development, beginning shortly after the conclusion of World War II. And, as judicial activism has proliferated throughout the West, it has had a profound impact on the political order of many states.[2]

A brief survey of activism in liberal democracies illustrates how extensive the recent growth of judicial power has been across the West. Predictably, American courts rank among the most active.[3] However, the high degree of judicial activism presently observed in the United States is a relatively recent development. Although the power of judicial review had been developed by the American Supreme Court by 1803, Holland points out that "[i]n the 1950s and 1960s... the Court boldly undertook a new mission that

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[1] Kenneth M. Holland, "Introduction" in Kenneth M. Holland, ed., *Judicial Activism in Comparative Perspective* (New York: St. Martin's Press, 1991), p. 1.

[2] For example, Holland has noted that "judicial activism tends to erode both the parliamentary system and majoritarian democracy," ibid., p. 5.

[3] Ibid., p. 2.

resulted in judicial policy-making of unprecedented scope and impact."[4] Today, there are few policy areas which have not been affected by American Supreme Court rulings.

In Canada, the adoption of 1982 *Charter of Rights and Freedoms* ushered in a new era of judicial activism. "Since 1982, the [Canadian] courts have gained a new visibility and prominence. They have been thrust — and have thrust themselves — into the centre of a variety of political disputes."[5] Under the Charter, Canadian courts have engaged in extensive judicial policymaking on a scale which would have been unthinkable prior to the Charter. Other Commonwealth countries have experienced this phenomenon as well, although not to the same extent. The Australian judiciary, for example, became more powerful in the 1970s,[6] and in 1992, the High Court of Australia embarked on a substantial activist departure by protecting freedom of speech through constitutional implication.[7]

Similarly, continental Western Europe has experienced a marked increase in the judicialization of politics. Alec Stone has documented this transformation:

> Constitutional review has exploded into prominence in Western Europe. In the 1970s, Greece, Portugal, Spain, and Sweden joined Austria, the European Union, France, West Germany, and Italy as polities with effective review mechanisms. Yet before 1950, the power of European courts to control the constitutionality of legislation was nearly unknown.[8]

A particularly dramatic example of the growth of judicial power is provided by the

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[4] Holland, "Judicial Activism in the United States" in ibid., p. 12.
[5] Carl Baar, "Judicial Activism in Canada" in ibid., p. 53.
[6] Brian Galligan, "Judicial Activism in Australia", in ibid., p. 70.
[7] The Australian case is discussed at length below.
[8] Alec Stone, "The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe" *Policy Studies Journal*, Vol. 19, No. 1, Fall 1990, p. 81.

'revolutionary' 1971 decision of the French Constitutional Council. That ruli "elevat[ed] individual freedom to the status of a constitutional right and establish[ed] t *Conseil constitutionnel* as the protector of that freedom"[9] Writing in 1991, F.L. Mort noted the profound impact this decision has had on the French political order: "[i]n t past fifteen years the Conseil Constitutionnel... has risen from a politically obscure a insignificant institution to a central player in the governing process of France."[10]

Like France, Italy has also witnessed a dramatic rise in judicial power. This tre began in 1956 with the establishment of the Constitutional Court. Mary L. Volcans maintains that "*Activismo* is a term that has been attached to the judiciary in Italy on recently, and, as usually is the case elsewhere, carries a pejorative connotation... ."[11] fact, detractors of that court have "dubbed [it] critically as the 'third chamber' or t 'omnipotent legislature'."[12] While there is some debate as to the degree, German cour have also been characterized as significantly activist.[13]

Even in England, long considered a bastion of judicial deference, courts hav become more prone to activism. Despite the fact that English courts are not nearly a activist as most North American and Continental courts, judicial activism is a term that "i

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[9] Cynthia Vroom, "Constitutional Protection of Individual Liberties in France: The *Conseil Constitutionnel* since 1971" *Tulane Law Review*, Vol 63, 1988. p. 266.

[10] F.L. Morton, "Judicial Activism in France" in Holland, p. 133.

[11] Mary L. Volcansek, "Judicial Activism in Italy" in ibid., p. 117.

[12] Ibid., p. 121.

[13] H.G. Peter Wallach, "Judicial Activism in Germany" in ibid., p. 156. As proof consider the period between the first ruling (1951) of the Constitutional Court and 1987, when the Court nullified 270 Federal and 121 State laws (p. 156).

now applied regularly to the behaviour of English judges."[14] According to Jerold L. Waltman, this transformation has even been recognized by English judges. In a 1985 ruling, judge Lord Roskill acknowledged that there had been a profound increase in judicial activism in English courts: "[t]oday, it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950... there has been a dramatic and indeed a radical change... That change has been described — by no means critically — as an upsurge of judicial activism."[15]

Other examples of the increasing power of Western courts are provided by (but not limited to) Israel and to a lesser extent, Japan. "Judicial activism has become increasingly significant to law and politics in Israel. The evolution of Israeli jurisprudence since the establishment of the State in 1948 includes an expanding role for the judiciary in determining the shape and content of the law."[16] The Japanese Supreme Court, while tending to take a restrained approach to constitutional review, has nonetheless witnessed periodic bouts of activism.[17] It is also worth noting that more than a dozen countries in Latin America "have established or re-established constitutional courts with review powers... ."[18] The same is true of a number of newly democratized Eastern European states.[19]

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[14] Jerold L. Waltman, "Judicial Activism in England" in ibid., p. 33.

[15] Ibid., p. 33. Originally quoted from *Council of Civil Service Unions v. Minister for Civil Service* (1985) 1 A.C. 374.

[16] Gary J. Jacobsohn, "Judicial Activism in Israel" in ibid., p. 90.

[17] Hiroshi Itoh, "Judicial Activism in Japan" in ibid., pp. 192-195.

[18] Martin Shapiro and Alec Stone, "The New Constitutional Politics of Europe" *Comparative Political Studies*, Vol. 26. No.1, Jan. 1994. 397.

[19] Ibid., p. 397. Those states include: the Czech Republic, Poland, Hungary, Slovakia and Russia.

With only a few notable exceptions, most countries in the West have seen the growth in power of their judiciary. What is particularly striking about this development is that it has been observed in regimes with vastly different court structures, legal systems, political institutions and cultures. This raises the question as to what is the source of this phenomenon.

There are two primary explanations which attempt to account for the unprecedented growth of judicial power across liberal democracies. The first and most prominent explanation comes from what might be called the legalist/institutional perspective. This approach attributes the rise in judicial activism primarily to the spread of legally entrenched constitutions. Constitutions, especially those with entrenched bills of rights, mandate courts to take a more activist stance to protect and enforce their provisions; it follows that where courts have been constitutionally authorized to check legislative, administrative and executive power, one would expect to find more activist and more powerful judiciaries.

The second explanation posits that the international rise of judicial activism is better explained by judicial inclination or preference than by institutional factors. The heart of this approach is that changing judicial and legal culture, not changing documents, is what leads judges to assume a more activist posture toward the other branches of government. If there is an international rise in judicial activism, this cultural approach would lead one to focus on the international conduits of legal and judicial culture, rather than on the presence or absence of entrenched constitutional documents. For example,

one might hypothesize that as international linkages between domestic courts have increased, a wider legal culture has developed throughout most judiciaries which has facilitated the spread of judicial activism. Once operating in relative isolation, domestic judges and other members of the legal elite now have instant access to comparative legal decisions and academic publications. Furthermore, judges and lawyers may now easily communicate with their foreign peers to discuss domestic legal problems. The global rise in interest in human rights in the postwar era combined with the inspiration provided by an activist American Supreme Courts has undoubtedly influenced and legitimated the growth of activist judicial culture.

This debate between the legalist perspective and cultural explanations for judicial review may be seen as part of the larger debate between cultural and neoinstitutional approaches to political explanation. After a period in which various sub-political approaches — including cultural approaches — dominated the explanation of politics, neoinstitutionalism has largely succeeded in 'bringing the state back in' as an independent variable.[20] Institutions, including laws and constitutions, are no longer seen as epiphenomena, shaped by more fundamental social forces, but as powerful shaping forces in their own right. However, just as it was a mistake to neglect institutions in favour of cultural explanations so it is mistaken to push neoinstitutionalism to a similar extreme.[21]

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[20] See for example, Eric A. Nordlinger, *On the Autonomy of the Democratic State* (Cambridge, Mass: Harvard University Press, 1981) and Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).

[21] See for example, Alan C. Cairns, "The Embedded State" in Douglas E. Williams, ed., *Reconfiguations: Canadian Citizenship and Constitutional Change — Selected Essays by Alan C. Cairns* (Toronto: McClelland and Stewart, 1995).

If institutions explain much more than was thought by an earlier generation of scholars, they do not explain everything. If culture is not the master-explanation, neither is it irrelevant. Indeed, the relative weight of competing explanations may vary with the phenomenon being explained.

With respect to judicial power, certainly, institutional factors are clearly not a sufficient explanation. For example, while entrenched constitutions may facilitate judicial power they do not always produce it. There are plenty of examples of judicial restraint in the context of entrenched constitutions. Moreover, courts interpreting entrenched constitutions often vacillate over time between degrees and kinds of judicial activism. Indeed, so strongly does constitutional jurisprudence vary over time and among countries, that some observers conclude that an entrenched constitution is no more than "what the judges say it is,"[22] or that the constitution is simply a "blank slate" to the judiciary,[23] or that constitutional provisions are a set of empty balloons that are filled by judicial air.[24] These conclusions suggest that judicial inclination is not only important but predominant in explaining judicial behaviour, that the legal/institutional context makes little difference.[25]

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[22] Knopff and Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada), p. 162.

[23] Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada.* (Toronto: Thomson Professional Publishing Canada, 1987), p. 53.

[24] Peter H. Russell, "The Supreme Court and the Charter: A Question of Legitimacy," in David P. Shugarman and Reg Whitaker, eds., *Federalism and Political Community* (Peterborough: Broadview Press, 1989), p. 232.

[25] Charles Epp has developed an interesting argument which also downplays the importance of legal context. He maintains that "Bills of rights matter, but only if civil societies have the capacity to support and develop them." Epp is of the opinion that without a "support structure for legal mobilization," which includes organized group litigants, litigation financing and the structure of the legal profession, any bill of rights will have a limited impact. Epp's thesis, therefore, can be viewed as an interesting cultural explanation for judicial activism. Charles R. Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms." *American Political Science Review.* Vol. 90, No.4. Dec. 1996.

The same conclusion finds even more dramatic support in the many examples of judicial activism that arise in the absence of an explicitly entrenched legal foundation. The aforementioned rise of judicial activism in Britain, France, Israel, and Australia, for example, cannot be explained by newly entrenched constitutional documents. In each case, adventurous judges have found, or fashioned, the basis for their activism out of legal materials much less explicit than an entrenched constitutional document. In other words, if judicial inclination is really as 'predominant' as the 'blank slate' theory of constitutional jurisprudence suggests, if it is really everything and legal context nothing, one would expect to find examples of ingenious judges creating the basis of their own activism when an explicit constitutional mandate is lacking. And that is precisely what we do find. The most dramatic examples of such judicial ingenuity occur when judges 'imply' a bill of rights when none is explicitly present. This thesis investigates the 'implied bill of rights' experiences of four countries: Canada, Israel, France, and Australia.

Although the very existence of implied bills of rights supports the claim that judicial inclination plays a large role in explaining judicial activism, just how large is this role? Large enough to justify a complete rejection of the institutional explanation? If it turns out that implied bills of rights are used just as broadly and actively as their constitutionally entrenched counterparts, this would indeed mean that explicit institutional context plays a negligible role. On the other hand, the institutional explanation would retain some force if it turned out that judges inclined to activism nevertheless used implied bills of rights with greater caution and hesitancy than activist judges use entrenched

constitutional documents. This thesis is a preliminary exploration of these questions. It investigates the development of, and experience under, implied bills of rights in the aforementioned countries in order to shed additional light on the debate between the culture and institutional explanations for the rise of judicial activism in the Western world.

Chapter two outlines the legalist/institutional explanation for judicial activism, paying particular attention to how activist judges use it as a justification for their activism. The Chapter then shows how the variation of constitutional jurisprudence over time and among countries undermines the legalist account.

Chapters three through six then examine the implied-bill-of-rights experience in, chronologically, Canada, Israel, France and Australia. While the very existence of these implied bills of rights contributes further evidence to the case against the legalist explanation, these case studies explore the extent to which institutional factors retain some significant explanatory value. Thus, it will be particularly important to distinguish circumstances or periods in which judicial inclination to civil liberties activism appears to be high from those in which it is not. When the prevailing judicial culture is one of restraint, an implied-bill-of-rights option will by definition be rejected or downplayed. It is when judges are inclined to civil liberties activism that one can test for the residual weight of institutional context. Judicial inclination will reveal itself as truly predominant to the extent that activist judges fully embrace and rely on the implied-bill-of-rights option; conversely, legal context retains explanatory weight to the extent that activist judges are hesitant or cautious in resting their activism on an implied bill of rights.

There is, of course, a chicken-and-egg problem here. Is hesitancy or caution in the use of an implied-bill-of-rights option evidence of the weaker institutional support provided to activism by less formal legal materials, or is it simply evidence of a less activist judicial inclination, one that might have led to similar hesitancy in the application of an entrenched bill of rights? This is indeed a difficulty, and one that could be fully resolved, if at all, only in a study much longer and methodologically more complex than this thesis. Nevertheless, while conclusive answers may not be possible, informed judgement and plausible inference should at least enrich our understanding.

CHAPTER 2

THE LEGALIST/INSTITUTIONAL EXPLANATION

The legalist/institutional explanation for the increase in judicial power observed recently throughout the majority of Western states is that this phenomenon has been facilitated by the proliferation of written constitutions in many liberal democratic states. Indeed, the number of written national constitutions has drastically increased in the postwar era. Mary Ann Glendon observed in 1992 that the "overwhelming majority of the world's constitutions have been adopted within the past thirty years."[26] In fact, "[t]hree-quarters of the approximately 160 single-document constitutions have been adopted since 1965."[27] Many of these more recent constitutions include the entrenchment of fundamental political rights and freedoms, providing a mechanism for the judiciary to engage in the constitutional review of legislation.

It would appear at first glance that the growth of judicial activism and power is a natural consequence of the spread of constitutionalism. Where courts and judges operate with the benefit of an enumerated bill of rights, they have been mandated to engage in constitutional review to ensure the enforcement of those constitutional provisions; it follows that judges only take on an activist stance when dictated to do so as custodians of the constitution. Put simply, it would seem on the surface that documents rather than

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[26] Mary Ann Glendon, "Rights in Twentieth-Century Constitutions" *The University of Chicago Law Review* (1992) 59:519 p. 520.

[27] Ibid., p. 520n.

courts and judges account for the rise in judicialization of politics. This is often the argument maintained by judges in regimes with constitutionally entrenched rights, who have tended to justify taking a more activist stance by claiming that they are only acting in accordance with the constitution.

Explaining Charter Activism: An Example of Legalist Justification

Canadian judges, for example, have used the legalist perspective to justify their early activism under the 1982 *Charter of Rights and Freedoms*. The need for such a justification was particularly acute given how starkly the early Charter activism contrasted with the restrained treatment given to the 1960 *Canadian Bill of Rights*. In only five of thirty-four cases (15%) were *Bill of Rights* claimants successful, and in only one case did the Supreme Court of Canada actually strike down a law on *Bill of Rights* grounds over a twenty year span.[28] In contrast, in less than half that time, from 1982 to 1989, the Supreme Court had ruled on one hundred Charter cases with a success ratio of 35 percent, more than double the success rate of *Bill of Rights* cases.[29] More important, the Court struck down parts of 19 statutes in that seven year period.[30] "The great volume of cases, their higher success rate, the larger number of nullifications, and the overruling of pre-

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[28] F.L. Morton, Peter H. Russell, and Troy Riddell, "The Supreme Court's First Decade of Decisions: Judging the Judges, 1982-1992," in Paul W. Fox and Graham White, eds., *Politics: Canada*, eighth edition, 1995. p. 159.

[29] F.L. Morton., "The Political Impact of the Charter of Rights, 1982-1989," in M.O. Dickerson et al., eds., *Introductory Readings in Government and Politics*, 3rd ed. (Toronto: Nelson Canada, 1991), p. 376.

[30] Knopff and Morton, p. 20.

Charter precedents are all indicators of a new era of judicial activism ushered in by the Charter."[31]

The *Morgentaler* Supreme Court cases provide a vivid illustration of what these statistics suggest. Beginning in 1975, seven years before the Charter was adopted, Morgentaler argued that Canada's abortion law violated the provisions of the *Bill of Rights*.[32] The Supreme Court was unwilling to even address this argument and Chief Justice Laskin was the sole justice to even mention the *Bill of Rights* in his ruling:

> It cannot be forgotten that it is a statutory instrument, illustrative of Parliament's primacy within the limits of its assigned legislative authority, and this is a relative consideration in determining how far the language of the Canadian Bill of Rights should be taken in assessing the quality of federal enactments which are challenged under s. 1 (a).[33]

After ruling against him, the Supreme Court sentenced Morgentaler to eighteen months in jail.[34] By 1988, Morgentaler was back at the Supreme Court and attacking the validity of the very same legislation. However, this time, with the benefit of the Charter of Rights, he was successful.[35]

What explains the activist transformation of the Supreme Court under the Charter? Judges have rationalized the change by emphasizing the difference between constitutionally entrenched documents and ordinary legislation. The *Bill of Rights* was a

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[31] Ibid., p. 20.

[32] Peter H. Russell, Rainer Knopff and Ted Morton. *Federalism and the Charter: Leading Constitutional Decisions.* (Ottawa: Carleton University Press, 1993), p. 515.

[33] Ibid., p. 516.

[34] Ibid., p. 515.

[35] F.L. Morton, *Morgentaler v. Borowski: Abortion, the Charter, and the Courts* (Toronto: McClelland & Stewart, 1992), pp. 232-235.

mere statute, though it was sometimes referred to as possessing quasi-constitutiona status. In effect, judges argued that an entrenched constitutional document justifie activism while a mere statute did not. This argument clearly embodied the legalis perspective.

An excellent illustration is provided by the opinion of Justice Le Dain (supporte by the majority) in *R. v. Therens*. Le Dain was unequivocally of the opinion that th Charter required the Court to take on a more activist posture than was previousl acceptable under the *Bill of Rights*:

> Although it is clear that in several instances... the framers of the Charter adopted the wording of the Bill of Rights, it is also clear that the Charter must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection.
>
> In considering the relationship of a decision under the Canadian Bill of Rights to an issue arising under the Charter, a court cannot... avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the Courts have felt some uncertainty or ambivalence in the application of the Canadian Bill of Rights because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.[36]

The case of the *British Columbia Motor Vehicles Act Reference* also provides an instructive example of how legalism was used to justify the new judicial activism has under the Charter. In that case Justice Lamer insinuated that the Charter not only provided the Court with the means to take an activist stance, it mandated it to do so. The growth in

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[36] *The Queen v. Therens* [1985] 1 S.C.R. Quoted from Russell et al., p. 430.

judicial power, implied Lamer, had been authorized, requested and legitimated by the democratic process. This sentiment is made clear by his response to the claim made by the Ontario Attorney-General that the Charter had created a "judicial 'super-legislature' beyond the reach of Parliament, the provincial legislatures and the electorate:"

> This is an argument which was heard countless times prior to the entrenchment of the Charter but which has in truth, for better or worse, been settled by the very coming into force of the Constitution Act, 1982. It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.[37]

Implicit in this argument is that the growth in judicial power is a result of a new constitutional document, not the discretion of the judges; judges are the mere adjudicators of the constitution — neutral arbiters of its rules and regulations. In short, courts have been able to successfully justify an increase in their level of activism by maintaining that they are only enforcing the provisions of the constitution. These two judgements (*BCMV and Therens*) clearly demonstrate how the Canadian Supreme court justified its new activism under the Charter, despite its prior history of self-restraint.

As noted in the previous chapter, however, the legalist explanation is problematic for two primary reasons. First, historical and comparative evidence show that entrenched constitutional rights do not necessarily generate judicial activism. Second, judicial activism has been observed in states without an entrenched bill of rights. Taken together,

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[37] *Reference re British Columbia Motor Vehicle Act* [1985] 2 S.C.R. Ibid., p. 442.

these two facts suggest that constitutional documents can at best be considered facilitating mechanisms which may make judicial activism easier to develop. Chapters three through six examine the phenomenon of implied bill of rights. The rest of this chapter demonstrates the significance of judicial discretion — and thus judicial culture — under entrenched constitutional documents.

That entrenched constitutions do not always produce judicial activism is shown clearly by the shifting tide of judicial interpretation in the United States, by the reluctance of the Swedish judiciary to engage in judicial activism despite being constitutionally permitted to do so, and by the Canadian experience with the Charter since 1982.

The U.S. Example

Mary Ann Glendon points out that even in the birth place of constitutional review, the power to review government legislation was not widely employed until this century, despite the fact that the American Bill of Rights was adopted in 1792. "[I]t is worth recalling that American courts seldom exercised the power of judicial review claimed in *Marbury v Madison* until the turn of the century."[38] In addition, James Q. Wilson has shown that "[i]n the first seventy-five years of [American] history, only 2 federal laws were held unconstitutional: In the next seventy-five years 71 were..."[39] Furthermore, the 'modern' and most activist period did not emerge in the United States until after the court

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[38] Glendon, p. 521-522. The *Marbury v. Madison* decision was delivered in 1803.

[39] Ibid., p. 522n. Glendon quotes James Q. Wilson, *American Government: Institutions and Policies*. 83 (Heath, 3rd ed 1986).

crisis of the nineteen-thirties, and was not fully developed until the mid 1950s.[40] Indeed, the Bill of Rights had little impact throughout most of early American history. If constitutional documents were the root cause of the judicialization of politics, one would have expected the court to have developed a much more activist stance much earlier in its history.

Further evidence that changes in legal and political culture play a more important role in shaping judicial interpretation than legal documents is provided by observing the different types of activism engaged in by the U.S. Supreme Court in this century. The Court has engaged in two very distinct periods of vastly different activism in the last 130 years using exactly the same constitutional document. The first era of judicial review, defined by Holland as the 'period of right activism,' was dominant from 1865-1937, and exhibited increasing activism in its later stages. The judges in this first activist period "were political conservatives, attempting to preserve economic freedom. The justices paid little attention to the language of the Constitution or its framers' intentions."[41] One of the most definitive cases in this judicial era was *Lochner v. New York* (1905):

> In *Lochner* the Court struck down a New York law setting maximum hours for bakers as a violation of the employers and baker's 'liberty of contract,' a right nowhere mentioned in the Constitution, thus introducing the idea of 'substantive due process,' the doctrine that permits the Supreme Court to rule on the constitutionality of a statute even if it conflicts with no specific clause of the Constitution.[42]

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[40] Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law.* (New York: Basic Books, 1986.) pp. 6-7.

[41] Holland, "Judicial Activism in the United States," p. 17.

[42] Ibid., p. 17.

Lochner resulted in the invalidation of "scores of state and federal laws regulating business, such as minimum wage, maximum hour, and child labour laws on the grounds that they would be bad for the country."[43] By using the due process clause, "...with substantial assistance from a plausible yet disputable interpretation of the federal commerce power,"[44] the 'laissez-faire' Court successfully engaged in activism in an effort to fight back the legislative initiatives of the emerging Welfare state.

After 1937, the style and basis of judicial review in the United States began to change dramatically, culminating with an unprecedented level of activism beginning in the 1950s. Civil liberties, rather than economic rights became the basis of judicial activism.[45] After 1937, the Court ceased activist review of economic legislation; where it had earlier strongly resisted the welfare state, it now stood aside, leaving economic reforms intact. The Court thus abandoned all the constitutional doctrines it had earlier developed to oppose the formation of the welfare state. However, this new restraint on economic issues did not usher in an era of general judicial self-restraint. Rather, the Court reversed the basis of judicial review; whereas the Court had previously been restrained on First Amendment and equality issues and activist on economic matters, it now become restrained on economic issues and activist on political liberties.

By employing the free speech provisions of the First Amendment, legal rights, and the equal protection clause of the Fourteenth Amendment the Court greatly expanded its

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[43] Ibid., p. 17.
[44] Wolfe, p. 325.
[45] Ibid., p. 6.

policymaking capacity.[46] The Warren Court (1953-1969) "expanded the category of 'fundamental rights' dramatically and undertook to establish broad social policy in a number of controversial areas... It became the most activist Court in American history and left a profound imprint on American life and law."[47] In fact, the transformation of, and rise in, the prominence of judicial power in the U.S. over the last 45 years has been so profound that Wolfe maintains that "[i]f federal judges had tried in the early years of American history to do many of the things they now do routinely, they would have been impeached (probably on the grounds of insanity!)."[48]

Indicative of the Court's about face regarding judicial review was *Brown v. Board of Education* (1954), which reversed the 1896, decision *Plessy v. Ferguson*, and thus ended the official policy of school segregation.[49] This case has often been cited as signaling the beginning of the profound growth in the power of the American courts.[50] "And, in the 1960s, issue after issue was opened up to judicial cognizance and decision."[51] Moreover, "[b]y the 1970s, it almost seemed as if it were difficult to find an issue in which some federal judge somewhere might not intervene to lay down 'the law.'"[52]

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[46] Wolfe, p. 6.

[47] Ibid., p. 258.

[48] Ibid., p. 10.

[49] The activist ruling of the Court in *Brown* outlawing racial segregation in schools illustrates the profound contrast between the record of the 'modern' court and that of the 'laissez faire' court regarding the same civil liberties issue. In *Plessy v. Ferguson* (1896) the issue was whether a Louisiana law mandating separate accommodations for railway passengers based on race violated the Equal Protection Clause of the Fourteenth Amendment. By a margin of 8-1, the Court upheld the law on the grounds that the separation of the races did not result in unequal treatment. Archibald Cox, *The Court and the Constitution* (Boston: Houghton Mifflin, 1987), p. 253.

[50] Ibid., p. 7.

[51] Ibid., p. 7.

[52] Ibid., p. 7.

In sum, the jurisprudence of the U.S. Supreme Court can be divided into three eras: 1) an early period of judicial restraint; 2) a period of 'right activism'; and 3) the modern period of 'left activism.' The history of the Court, which has employed three distinct approaches to constitutional interpretation in three distinct periods with the same constitutional document, demonstrates conclusively the importance of judicial inclination in constitutional interpretation. The self-restraint of the early U.S. Supreme Court demonstrates that judicial activism is not a necessary corollary of constitutional rights. Compared with the activism of the modern court, it illustrates that necessarily vague constitutional passages do not dictate how activist or restrained a court should be. The profound reversal of the jurisprudence of the 'laissez-faire' Court by the 'modern' Court reinforces this point. Because the document itself did not change, changing attitudes of judges must account for much of the profound increase in the power of the American judiciary.

The Swedish Example

Another compelling piece of evidence against the argument that the proliferation of formal constitutional rights is solely responsible for the rise in judicial power across the West is provided by those few countries in which the power of judicial review formally exists but is seldom exercised. Kenneth M. Holland, writing in 1991, noted that "[j]udicial review is expressly provided for in Swedish... law, but the Supreme Court of Sweden has never

found a law of the Rikstag to be repugnant to the constitution."[53]

Sweden represents one of the last bastions of judicial restraint, yet Swedish courts have, for some time, been legally entitled to engage in constitutional review.[54] Chapter II, Article 14 of the 1979 Swedish *Instrument of Government* reads as follows:

> If any court, or any other public organ, considers that a provision is in conflict with a provision of a fundamental law or with a provision of any other superior statute, or that the procedure prescribed has been set aside in any important respect when the provision was inaugurated, then such provision may not be applied. However, if the provision has been decided by the Rikstag or by the government, the provision may be set aside only if the inaccuracy is obvious and apparent.[55]

The last sentence in the Article clearly represents an attempt to check the growth of judicial power. Nevertheless, according to Joseph P. Board, given the powers outlined in the *Instrument of Government*, combined with other judicial tools,

> there are ample powers available to the Swedish judiciary, abundant enough to support a posture of judicial activism, especially in the area of civil rights and liberties, which have been expanded and made more manifestly a part of the constitution in the past two decades; yet, any examination of the record of Swedish courts in the actual exercise of judicial power would suggest that they simply have been unable or unwilling to realize their potential.[56]

Board attributes the reluctance of the Swedish judiciary to take an activist stance to Swedish political culture, particularly "belief in popular sovereignty, political

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[53] Holland, "Introduction," p. 2.

[54] Ibid., p. 2. See also, Joseph. P. Board, "Judicial Activism in Sweden" in Holland ed., pp. 179-18. Although not officially adopted into the Swedish constitution until 1979, the Supreme Court had claimed the existence of the power of judicial review as early as 1963. Board, pp. 178-179.

[55] Board, p. 179.

[56] Ibid., p. 179.

democracy, and parliamentary supremacy."[57] This and other cultural factors, he argues, have prevented the legal transplant of judicial review from the United States and other states with activist judiciaries.[58] Another salient factor when considering the predominance of judicial discretion is Swedish legal culture:

> It is quite clear that Swedish judges see their role see as one calling for considerable restraint. They regard themselves largely as engaged in the technical examinations of laws, and vigorously would eschew any role as policy-makers.... The fact of the matter is that Swedes have not been inclined to make heroes of their judges for the simple reason that judges have not done much that seemed heroic.[59]
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> The Swedish judicial profession is essentially a civil service career, to be commenced when one is graduated from law school, rather than by appointment or election later in life after one already has achieved distinction as a practicing attorney. Furthermore, lawyers are not the dominant professional presence on the Swedish political landscape that they are in the United States.[60]

As a result, members of the Swedish judiciary do not possess the high status that their American or Canadian counterparts enjoy; Swedish judges have not yet been placed on a constitutional pedestal whereby they considered to be the sole and final authority on the constitution. Therefore, an activist posture taken by Swedish courts would most likely not be considered legitimate, by legislators and the public alike. In brief, "the [Swedish] legal culture is not conducive to activism and the law is not politicized for the simple reason that Swedish politics is not legalistic. Swedes do not turn naturally to the

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[57] Ibid., p. 180.
[58] Ibid., p. 180.
[59] Ibid., pp. 182-183.
[60] Ibid., p. 185.

courtrooms of the country when they desire to effect social change, but to the legislativ arena."[61] The Swedish Courts have yet to see themselves as part of a larger internationa legal tradition.

The Canadian Example

The debate between the legalist and cultural explanations for judicial activism has played a significant role in the Canadian debate about judicial power. While legalism has often been used, especially by judges, to argue that constitutional entrenchment mandates, even requires, greater activism, some Canadian scholars have been skeptical about such claims.

Such skepticism was evident in the early debate about what impact the newly adopted Charter would actually have. Although many pundits correctly predicted that the adoption of the Charter would transform the Canadian legal and political landscape, a number of commentators were of the opinion that the Charter would have only a very limited impact. Those taking the latter position believed that the conservative, self-restrained position of the Supreme Court regarding civil liberty litigation under the *Bill of Rights* would continue under the Charter. For example, Berend Hovius and Robert Martin wrote in 1983 that:

> [t]he entrenchment of the Canadian Charter of Rights and Freedoms will not transform the Canadian system of government. Instead, the Supreme Court of Canada will strive to ensure that the legislatures continue to bear the ultimate responsibility for determining social policy... . The approach of the court to the Canadian Bill of Rights was characterized by restraint, a restraint which was demanded by neither the status nor the wording of the Bill. There is nothing in the Charter which requires the abandoning of this

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[61] Ibid., p. 185.

tradition.[62]

In response to the claim that the Supreme Court would take an activist departure under the Charter, Hovius and Martin stated: "[w]e do not share this view. We believe that the courts... will seek to avoid such an institutional realignment... The history and traditions of the Supreme Court favour an attitude of restraint."[63] As mentioned above, this turned out not to be the case — Supreme Court Justices discarded the shackles of their past restrained outlook in favour of an attitude of activism. For Hovius and Martin, however, this would have to be explained by changing judicial disposition, not by changing legal documents.

This is precisely how a number of scholars have explained the early activism under the Charter. Contrary to the legalist explanation of Justices Le Dain and Lamer, scholars such as Knopff and Morton deny that the Charter itself was the source of the Court's new inclination for activism and instead see the transformation as being dependent on the predisposition of judges:

> The Canadian Bill of Rights... had little impact because the Supreme Court exercised great self-restraint in applying its provisions to the policies of the federal government. The political impact of the Charter thus depends on whether judges undertake their interpretive task in an activist or restrained frame of mind, and on the theories of constitutional interpretation they employ.[64]

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[62] Berend Hovius and Robert Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada," *The Canadian Bar Review* Vol. 61. No. 1. March 1983. p. 354.

[63] Ibid., p. 355.

[64] Knopff and Morton, p. 98.

For example, in the *Morgentaler* cases it would appear the presence of the Charter alone dictated the shift in interpretation. However, in his study of the abortion issue in the courts, F.L. Morton explains the reversal of the Supreme Court as reflecting changes in Canadian society and the attitudes of the individual judges themselves. Regarding the latter point, Morton notes: "the meaning of the Charter, and thus the 'existence' of a right, can vary from one judge to another. In many Charter cases, the policy preferences (conscious or otherwise) of a judge combined with his or her judicial philosophy are more likely to determine the outcome than the text of the Charter."[65] Similarly, Knopff and Morton maintain that:

> [w]hile the constitutional status of the Charter of Rights appears to have erased the Court's previous doubts about the legitimacy of its power to review and nullify Parliament's laws, the 1988 *Morgentaler* decision cannot by explained by the Charter alone. Equally important were developments in Canadian society, especially among legal and judicial elites....[66]

> Judges are not immune to these shifts in public opinion. The growth of feminist influence in political, educational and legal elites was a necessary precondition for the *Morgentaler* decision. The Charter provided Morgentaler a new weapon, buts its successful use was contingent upon a more receptive legal and political context.[67]

In their view, at least in the Canadian case, a general transition in elite judicial and legal culture, and Canadian political culture generally, explains the erosion of judicial deference in the Charter era much better than did the Charter itself.

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[65] F.L. Morton, *Morgentaler v. Borowski: Abortion, the Charter, and the Courts*, p. 305.
[66] Knopff and Morton, p. 263.
[67] Ibid., p. 265.

If judges were always unanimous and consistent over time in their activism, the debate between their legalist justification of that activism and the more skeptical view of the scholars would be a matter of 'your words against ours.' But the skeptical view gains credence whenever the judges themselves disagree, as they regularly do. Even more revealing is when entire courts vacillate over time between activism and restraint, or between different kinds of activism, as they have often done in the United States. Some scholars claim to notice just such a shift in the recent jurisprudence of the Supreme Court of Canada. The Court, they contend, has shifted decidedly in the direction of judicial restraint.[68] This has led even scholars strongly attached to legalism to acknowledge the importance of judicial inclination in explaining the actual exercise of judicial power.

David Beatty, for example, is famous for believing that the Charter is not a 'blank slate' to the judges, that its correct interpretation is eminently discoverable, and that judges who deny this interpretation are in fact behaving unconstitutionally.[69] Beatty, in other words, emphatically denies that the constitutional is just what the judges say it is.[70] However, he cannot ignore the power of what the judges say the constitution is, even when (in his view) they have got it wrong. Beatty believes, for example, that recent examples of judicial restraint by the Supreme Court constitute violations of the rule of law

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[68] Patrick J. Monahan & Michael J. Bryant, The Surpreme Court of Canada's 1996 Constitutional Cases: The End of Charter Activism. *Canada Watch: Practical and Authoritative Analysis of Key National Issues.* Vol. 5, No. 3-4 (March/April 1997), p. 41.

[69] David Beatty, *Consitutional Law: In Theory and In Practice* (Toronto: University of Toronto Press, 1995), pp. 89-102.

[70] Ibid., p. 11.

by the judges;[71] nevertheless he cannot deny the capacity of the judges to get away with such unconstitutional behaviour, and thus he cannot deny the reality and explanatory value of judicial culture:

> The way the Supreme Court of Canada has interpreted and applied the *Charter* provides yet more proof that a constitution is only as strong as the judges want it to be. It is the allegiance of those who actually sit on the Bench to the basic rules of the constitution, much more than the words in the text, that determines how 'free and democratic' a society really is.
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> If it was not obvious that bills of rights are not self-enforcing at the time the Charter was entrenched, it should be now. After watching the Supreme Court of Canada struggle in its role of 'guardian of the constitution' for fifteen years, it should be apparent that the only way to guarantee that our rights are respected is by appointing people who are wholly committed to the rule of law.[72]

Judicial Inclination or Institutional Context?

Even a cursory examination of the experience over time and across countries with entrenched constitutional documents reveals the weakness of the legalist/institutional explanation for the growth of judicial power. Constitutional provisions, as Beatty says, 'are not self-enforcing' and the disposition of the judges who 'enforce' them must thus be a large part of the explanation.

Judicial inclinations are clearly an important explanatory variable. But are they all important? Does the legal or institutional context make no difference at all? Must

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[71] David Beatty, "Lament for a Charter" in *Canada Watch: Practical and Authoritative Analysis of Key National Issues.* Vol. 5, No. 3-4 (March/April 1997), p. 68.

[72] Ibid., p. 68.

neoinstitutionalism be abandoned altogether with respect to judicial power? Is there nothing other than rhetorical camouflage to the frequent judicial claim that activism is justified by entrenched documents? Some light can be shed on these questions by an examination of implied bill of rights. The very existence of implied bills of rights suggests an answer to these questions that favours culture over institutions. But if this answer were clear cut and unequivocal, one would expect such bills to be applied as broadly and actively as an entrenched bill of rights, at least when there is evidence that the judges are in an activist mood. Let us see if that is the case.

CHAPTER 3

THE CANADIAN IMPLIED BILL OF RIGHTS

The doctrine of an implied bill of rights was first developed in Canada in the 1930s. This doctrine relied on two separate, but not unrelated, pillars which supported the claim that some fundamental rights not explicitly mentioned by the *BNA Act* are nevertheless protected by that Act. The first pillar was the implication of rights based on the system of representative democracy. As Canada was founded as a democratic state by BNA Act, it follows that free speech and public discussion must be protected in order to ensure that those democratic institutions function properly.[73] The second prong of the implied bill of rights doctrine is based on the preamble to BNA Act which established Canada with 'a Constitution similar in Principle to that of the United Kingdom.' This argument suggests that those civil liberties which were recognized in British constitutional law prior to 1867 became entrenched in Canadian constitutional law when the BNA Act was passed in that year. Therefore, as the right of free public discussion and religion (for example) was protected in Britain at the time of Confederation those freedoms were protected from governmental encroachment in Canada.

The history of the implied bill of rights doctrine in Canada can be divided into three periods: 1) a pre-war period, during which judicial restraint on civil liberties issues

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[73] This argument was employed successfully (aided by citations from relevant Canadian judgements) in the Australian implied rights cases more than fifty years after it was first suggested by Justices of the Canadian Supreme Court.

was the rule and the emergence of the implied bill of rights idea was thus a surprising and exceptional development; 2) the post-war decade of the 1950s, when concern about civil liberties was heightened and judicial activism on behalf of civil liberties became much more common; and 3) the period from the adoption of the *Canadian Bill of Rights* in 1960 to the entrenchment of the *Charter of Rights and Freedoms* in 1982, a period generally considered one of great judicial restraint on civil liberties issues. It is the middle period, the period of judicial activism, that will shed most light on the relative weight of judicial inclination and institutional context in explaining judicial behaviour.

The Implied Bill of Rights in the Pre-war Era — The Alberta Press Case

The first suggestion by members of the Supreme Court that the *BNA Act* contained an implied protection of civil liberties — and the only one in the pre-war period — can be found in *Reference Re Alberta Statutes* (1938).[74] The case itself represented only one of a series of ongoing conflicts between the newly established 'radical' provincial government in Alberta under the leadership of William Aberhart. His fledgling Social Credit party was elected in 1935, during the darkest days of the depression, on the platform of engineering a massive overhaul of the capitalist economic system according to the methods prescribed by the Scottish engineer Major Clifford Douglas. The full extent of Douglas' theories are complicated and do not need to be fully discussed here. However, the main tenet of his hypothesis was that the banks, through their control over the distribution of credit, were a

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[74] [1938] 2 S.C.R. 100. Hereinafter also referred to as the '*Alberta Press Case.*'

great burden to the economy and the primary cause of the depression. If the purchasing power of the individual relative to the value of goods produced was increased, Douglas maintained, the overall wealth of society could be increased greatly.[75]

Upon being elected, Aberhart was faced with the difficulty of implementing Douglas' social credit theory through provincial government. As monetary and banking policy clearly fall under federal jurisdiction, many of the initiatives central to the Social Credit platform were challenged by the federal government. As a result, in 1936-37, five pieces of Alberta legislation fell victim to the federal disallowance power, four were reserved by Lieutenant-Governor for approval by the federal cabinet and a further four were nullified through the courts.[76] Included in the disallowed bills was the *Judicature Act Amendment Act*, which forbade any court challenge to Social Credit legislation without the prior approval of a government agency.[77] Also disallowed was the *Bank Employees Civil Rights Act*, which, despite its name, had no association with the promotion of civil rights as it prohibited unlicenced bank employees from addressing grievances through the court.[78] Among those acts invalidated by the courts was the *Bank Taxation Act*, which was "clearly intended to drive the chartered banks out of the province,"[79] and the *Act to Ensure the Publication of Accurate News and Information Act*, which inspired the first

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[75] J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1976), pp. 61-70.

[76] Ernest Watkins, *The Golden Province: A Political History of Alberta.* (Calgary: Sandstone Publishing, 1980, p. 127-128.

[77] Mallory, p. 73.

[78] Ibid., p. 73.

[79] Rand Dyck, *Provincial Politics in Canada.* (Scarborough: Prentice-Hall, 1995), p. 534.

invocation of the implied bill of rights.

The preamble of *The Accurate New and Information Act* (The Press Bill), asserted that it is:

> expedient and in the public interest that the newspapers published in the Province should furnish to the people of the Province statements made by the authority of the Government of the Province as to the true and exact objects of the policy of the Government and as to the hindrances to or difficulties in achieving such objects to the end that the people may be informed with respect thereto.[80]

The punishment for non-compliance with the act was severe; the government was given the power to prohibit the publication of the guilty paper for a "...definite period of time or until further order."[81] The author, as well as the person considered to be the 'source,' of an article which contravened the *Act* could also be prevented from the further publication of articles.

The *Press Bill* also mandated the press to issue retractions or corrections at the insistence of a government agent. According to J.R. Mallory, "[t]he feature of the bill which most disturbed the press was the requirement which made mandatory the disclosure by a newspaper of its news sources and the names of writers of news stories or articles."[82] This regulation, of course, restricted the ability of a newspaper to gather information, as it was prevented from guaranteeing the anonymity of its sources.

At the Supreme Court, the case was ultimately decided on the grounds that the

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[80] *Reference re Alberta Statutes*, p. 142.
[81] Ibid, p. 143.
[82] Mallory, p. 77.

Social Credit Act was *ultra vires* the provincial government powers. As the *Press Bill* was dependent on the *Social Credit Act,* it was also declared, by default, to be invalid.[83] Despite maintaining that *The Press Bill* was invalid on federalism grounds, Chief Justice Duff, supported by Davis J., took the unnecessary step of considering the constitutionality of the impugned legislation against an 'implied' protection of free speech contained in the *BNA Act.*

In his famous and novel ruling, Duff C.J. argued that implications found in the *BNA Act* prohibited such a restriction on the freedom of the press as prescribed by the impugned legislation. Duff asserted that, "[u]nder the constitution established by the B.N.A. Act, legislative power for Canada is vested in one Parliament and that statute contemplates a parliament working under the influence of public opinion and public discussion."[84] Specifically, he cited the preamble of the Act[85] as supporting the right to free discussion of political matters:

> [t]he preamble of the statute... shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political

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[83] *Reference re Alberta Statutes*, p. 101. Five out of the six justices hearing the case were of this opinion. Although Cannon J. did not base his decision on that premise, he agreed that the *Act* was indeed unconstitutional.

[84] Ibid., p. 101.

[85] The pertinent section of the preamble of the BNA Act reads as follows: "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a Constitution similar in Principle to that of the United Kingdom.*"

proposals.[86]

Duff C.J. recognized that there were limitations to this new constitutional doctrine. He pointed out that the right to freedom of the press as implied by the preamble of the BNA act was subjected to the usual legal restrictions "based upon consideration of decency and public order" such as defamation and slander. Despite these limitations, the Chief Justice noted that: "it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life of parliamentary institutions."[87]

This passage strongly suggests that Duff C.J. was of the opinion that the implied rights in the BNA Act could also apply to the 'parliamentary institutions' at the federal level. On the other hand, Duff C.J., hinted that the federal government was responsible for ensuring that free speech was not infringed, "[t]he Parliament of Canada possesses authority for the protection of that right [of public discussion]..."[88] If Parliament has the authority to protect freedom of expression it may follow that the federal level is not constitutionally bound by the implied rights set out in the *BNA Act*. Ultimately, it is unclear if the Chief Justice was of the opinion that the implied bill of rights could be

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[86] *Reference re Alberta Statutes*, p. 133.
[87] Ibid., p. 133.
[88] Ibid., p. 101.

applied to federal legislation.[89]

Justice Cannon also used the notion of an implied bill of rights to rule against the constitutionality of the Press Bill. In his decision, Cannon maintained that:

> Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammeled publication of the news and public opinions of the political parties contending for ascendency.[90]
>
> As stated in the preamble of the *British North America Act*, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law.[91]

Cannon is clearer than Duff, however, on whether this doctrine applied to both levels of government. Clearly he meant it to apply to the Alberta government, but just as clearly he did not think it applied to Ottawa. Cannon maintained that "the federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs... ."[92] According to Cannon, the competence of the

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[89] Eric Cline and Michael J. Finley "Wither the Implied Bill of Rights? *A.G. Canada and Dupond v. The City of Montreal.*" (1980-81) 45 *Sask. Law Review*, p. 139. The authors note that "[w]hile... the Chief Justice spoke only of a federal jurisdiction to protect freedom of speech, not to infringe, it is unclear whether he intended to assert a limitation on legislative power applicable to parliament as well as provincial legislatures (p. 139)."

[90] *Reference re Albera Statutes*, pp. 145-146.

[91] Ibid., p. 146.

[92] Ibid., p. 101.

federal government to restrict that freedom was based on its jurisdiction over criminal matters. Nevertheless, he did explicitly endorse an implied constitutional right to free discussion.

What is one to make of this activist and unprecedented invocation of an implied bill of rights in the Alberta Press Case? Given that it was unnecessary obiter, it might well be taken to indicate an inclination toward civil liberties activism on the part of the three judges who supported the doctrine. If so, it would be dramatic evidence of the predominance of judicial inclination, and judicial ingenuity, over institutional context in explaining judicial behaviour. It would show that judges determined to protect civil liberties will not let the absence of a bill of rights stand in the way; indeed, they will create one where none explicitly exists.

In a sense, of course, the obiter implied-bill-of-rights opinions do show the power of judicial ingenuity. It is doubtful, however, that in this case that ingenuity was inspired by a genuine inclination to civil liberties activism. Carl Baar notes that prior to the *Press Case* "[t]he Court had no record of support for civil liberties. Duff, from British Columbia, had written opinions in previous years that reflected the anti-oriental sentiments of the Canadian west coast."[93] Baar argues that the judges resorted to the implied bill of rights doctrine not because of a genuine attachment to civil liberties, but because of the special political circumstances and context of this particular case.

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[93] Carl Baar, "Using Process Theory to Explain Judicial Decision Making" *Canadian Journal of Law and Society*. Vol. 1. 1986. p. 73.

Referring the matter to the court, which would surely find the legislation invalid, was in this instance the most favourable method of dealing with the radical Social Credit government of Alberta. Members of the governing federal Liberals in Alberta worried that further use of the federal prerogative of disallowance or reservation "would be seen as an attack on the region;" another example of Ottawa censuring Alberta. At the same time, the press, both from within and outside Alberta, pressured the government to act on the issue. Public sentiment also called for rapid government action.[94] Baar notes that the Prime Minister argued that the case should be referred by the government to the Supreme Court as "the government had a responsibility not to await a challenge for the private sector"[95] And it was the federal government lawyers, fearing that the court would only declare the impugned act to be invalid on federalism grounds (which could be seen as Ottawa's court continuing the federal attack on Alberta), who "explicitly made the free press arguments and linked them to the *BNA Act*."[96]

Given the repressive nature of the impugned act and the continued conflict between the federal and Alberta government, "it was both politically safe and politically heroic for the Supreme Court to defend civil liberties."[97] Russell, Knopff and Morton suggest the situation "was an inviting context for a new departure."[98] The *Alberta Press Case* must, therefore must be viewed as exceptional judicial departure in an exceptional

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[94] Ibid., p. 73.
[95] Ibid., p. 73.
[96] Ibid., p. 73.
[97] Ibid., p. 74.
[98] Russell, Knopff and Morton, p. 292.

case, not as a new activist approach to constitutional interpretation by the Supreme Court of Canada.

The Implied Bill of Rights and Judicial Activism in the 1950s

Shortly after the end of the Second World War, Canadian courts, particularly the Supreme Court, took a new activist stance, especially regarding the protection of civil liberties. In fact, the period is often referred as the 'golden age' of pre-Charter civil liberties.[99] The rise in interest in protecting fundamental freedoms in Canada has been largely attributed to two factors: the atrocities witnessed during the second world war, and the repressive and arbitrary war measures undertaken by the Canadian government from 1939-45. Both of these factors led to an increase in the support for formal protection of civil liberties within the legal and political elite. Tarnopolsky has described this situation as follows:

> What then brought on this brought on this increased interest [in civil liberties] after 1939? No doubt the events in Europe showed that civilized nations could revert to barbarity too easily, but few people thought that this could happen in countries with the English tradition of civil liberties. More immediate and important reasons were the measures taken by the government to fight total war.[100]
>
> Orders in Council poured fourth restricting economic freedom, freedom to criticize, freedom to move about. The government was omnipresent. It regulated every type of activity, private and public, and the fears which had arisen even before the war about "the new despotism" of increased administrative action in an increasingly welfare conscious state, grew even greater.[101]

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[99] Paul Weiler, *In the Last Resort: A Critical Study of The Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974), p. 193.

[100] Walter Surma Tarnopolsky, *The Canadian Bill of Rights* (Toronto: McClelland and Stewart Limited, 1975), p. 3.

[101] Ibid., p. 3.

Clearly, in this political climate there was substantial support for the Supreme Court to protect civil liberties.

While the invocation of an implied bill of rights in the Alberta Press Case is best understood as an aberration rather than evidence of strong support for civil liberties on the part of its judicial spokesmen, a genuine inclination to civil liberties can more plausibly be imputed to the Court during the 1950s. In a string of cases during this decade — all emerging out of Quebec — the Court engaged in what most commentators regard as civil liberties activism, though it was often couched in terms of federalism jurisprudence. Although it did not dominate these 1950s cases, the implied bill of rights doctrine played some role in them. The first significant post-war implied bill-of-rights cases, however, was not a Supreme Court case, but *R. v. Hess*, decided by the British Columbia Court of Appeal in 1949. We shall look first at *Hess* and then at the Supreme Court's activism.

Rex v. Hess

The 1949 case of *Rex v. Hess*[102] represents a unique invocation of implied rights contained in the constitution. The decision was delivered by O'Halloran J.A., of the British Columbia Court of Appeal, and revolved around the conviction of Irving Hess, who was originally given a three year sentence under *The Opium and Narcotic Drug Act (1929)*. The British Columbia Court of Appeal, however, overturned his conviction and ruled that

[102] *Rex v. Hess* (No. 2), [1949] 1 W.W.R. (B.C.C.A.) p. 586.

he was a free man.[103] Notwithstanding that ruling, Hess continued to be detained under the provisions of section 1025 of the criminal code of Canada. That section provided that an acquitted person may be held (at the discretion of the Attorney-General) until the Attorney-General decided whether or not to pursue an appeal of the case to the Supreme Court.[104] In ruling on the case, O'Halloran J.A. maintained that:

> [t]he purported powers in sect. 1025A of the *Criminal Code*... are all contrary to the written constitution of the United Kingdom, as reflected in *Magna Carta* (1215), the *Petition of Right* (1628), the *Bill of Rights* (1689) and the *Act of Settlement* (1701). Further the opening paragraph of the preamble to the *B.N.A. Act, 1867*, which provided for a constitution "similar in principle to that of the United Kingdom," thereby adopted the same constitutional principles, and hence sec. 1025A is contrary to the Canadian constitution, and beyond the competence of *Parliament or any provincial legislature* to enact so long as our constitution remains in its present form of a constitutional democracy.[105]

O'Halloran's decision focused on the independence and power of the judicial branch: "[i]t is part of the common law of England that Parliament shall respect the decisions of the Courts. If Parliament may assume the power to set aside a decision of the Court, or interfere with the enforcement of its judgements because it does not like a decision or a judgment then there is really no use for the courts at all in our constitutional sense..."[106] The competence of an act of Parliament "to deny an acquitted person bail...

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[103] *Rex v. Hess* (No. 1), [1948] 1 W.W.R. (B.C.C.A.) p. 577.

[104] Section 1025A of the Criminal code read as follows "...in any case where the Attorney-General has a right of appeal from the judgement of acquittal or setting aside of a conviction... *the person* so acquitted or whose conviction is set aside shall... *remain in custody until the expiration of the time limited for such appeal * * * and if an appeal is taken such person shall remain in custody until the determination of such an appeal...* ." Emphasis by O'Halloran J.A.. Ibid., p. 588.

[105] *Rex v. Hess* (No. 2), [1949] W.W.R. 586.

[106] Ibid., p. 587.

when there is no offence charged against him"[107] was, in O'Halloran's view, unconstitutional. However, the Justice felt he did not have the authority to strike down the law, and could only remedy the injustice by releasing Hess on nominal bail.[108]

This example occupies an awkward position among the other implied bill of rights cases for three reasons. First, despite coming more than a decade after the *Alberta Press Case*, it made no mention whatsoever of the doctrine established by Duff or Cannon. Second, as the decision was rendered at the level of a provincial court of appeal, its applicability and value as a precedent setting case is substantially diminished. Finally, the case is alone among implied bill of rights cases in that it concerned legal rights. Nevertheless, *R. v. Hess* stands out as the only successful invocation of the implied bill of rights. Furthermore, it is also remarkable as it dealt with the nullification of an executive action at the federal, rather than provincial, level.

The Quebec Cases

By 1950 the government of Quebec had established a dismal record regarding the protection of civil liberties. This was particularly so concerning the rights of political and religious minorities, especially communists and Jehovah's Witnesses.[109] As a result, seven

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[107] Ibid., p. 586.

[108] Ibid., p. 599. O'Halloran clearly states this position: "[v]iewing the power of detention in sec. 1025A as I do, I am of the opinion that [Hess] was illegally detained. But since the mode of the application to me did not provide the scope to give effect to that view magisterially, I invoke my inherent jurisdiction to grant the applicant bail on nominal terms..."

[109] See for example, Gary Botting, *Fundamental Freedoms & Jehovah's Witnesses* (Calgary: University of Calgary Press, 1993), Chapter 3, pp. 35-64.

constitutional cases involving repressive Quebec legislation eventually reached the Supreme Court in the 1950s.[110] In the majority (four) of these cases the court managed to protect civil liberties through 'interpretive avoidance.'[111] In those instances the Court "always assumed that the legislature intended to respect traditional rights and liberties. If a statute was open to two interpretations, one of which infringed a right or freedom, judges would exercise their discretion to choose the other interpretation."[112] The other three cases challenged Quebec legislation on federalism grounds, with two of those — *Saumur v. Quebec and Attorney-General of Quebec* (1953)[113] and *Switzman v. Elbling and Attorney-General of Quebec* (1957)[114] — involving an invocation of the implied bill of rights.

Saumur v. Quebec

In *Saumur v. Quebec and Attorney General of Quebec*, Saumur, a Jehovah's Witness, questioned the validity of a Quebec city by-law on constitutional grounds.[115] The

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[110] Russell. Knopff and Morton, p. 299. Those seven case were: *Saumur v. Quebec* (1953), *Switzman v. Elbling* (1957), *Birks v. Montreal* (1955), *Boucher v. The King* (1951), *Chaput v. Romain* (1955), *Roncarelli v. Duplessis* (1959), and *Lamb v. Benoit* (1959).

[111] F.L. Morton, *Law Politics and the Judicial Process in Canada.* Calgary: University of Calgary Press, 1992), p. 396.

[112] Ibid., p. 396.

[113] *Saumur v. The City of Quebec and Attorney-General for Quebec* [1953]. 2 S.C.R . p. 299. Hereinafter referred to as '*Saumur v. Quebec*' or simply '*Saumur.*'

[114] *Switzman v. Elbling and Attorney General of Quebec.* [1957]. S.C.R. at 285. Hereinafter referred as '*Switzman*' or the '*Padlock Case*'.

[115] *Saumur*, p. 299.

impugned legislation, which prohibited the public distribution in the city streets "of any book, pamphlet, booklet, circular, tract whatever without permission from the Chief of Police,"[116] had been employed to prevent Jehovah's Witness from distributing their publications.

The charge arose when Damase Daviau, another Jehovah's Witness, challenged the by-law to the Court of Appeal of Quebec, but abandoned his case after that court ruled against him. His cause was taken up by Laurier Saumur who pursued the constitutional challenge to the Supreme Court. Interestingly, Saumur had already made a career out of challenging charges laid against Jehovah's Witnesses, having himself been charged with over 100 "charges of seditious libel, seditious conspiracy, and peddling religious literature without a licence."[117]

One of the main issues in the case concerned the true pith and substance of the ordinance. The city argued that the law was designed to ensure the maintenance of orderly streets and sidewalks. Saumur replied that the true purpose of the law was to prevent unpopular organizations from distributing literature. His claim was "that in his capacity as a Canadian citizen he has an absolute right to the expression of his opinions, and that flows from his right of freedom of speech, freedom of the press and free exercise of his worship of God, as guaranteed by the unwritten British constitution, by the *B.N.A.*

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[116] Ibid., p. 299.
[117] Botting, p. 54.

Act generally, and by the statutes of Quebec..."[118] Saumur argued that such a violation civil liberties, was beyond the competence of the municipal government of Quebec.[119]

The judgement, a five-to-four split decision (with three distinct opinions), nullifi the by-law. Four of the justices (Rand, Locke, Kellock and Estey) maintained that tl impugned by-law was invalid on federalism grounds, with both Rand and Locke J quoting Chief Justice Duff's opinion in the *Reference re Alberta Statutes*.[120] Each these four Justices based his decision on the federalism grounds that civil rights, such freedom of religion and expression, were a federal subject matter beyond the competen of the provincial jurisdiction over property and civil rights as enumerated by s. 92(13) the *BNA Act*.

A majority of the Justices took the opposite and remarkable position of employin a liberal interpretation of the provincial power over civil rights — arguing that the by-la was within the legislative jurisdiction of the provincial government. However, the cas was ultimately decided by Justice Kerwin who argued that freedom of the press "was... civil right within the province,"[121] but was of the opinion that the municipal by-law coul not stand as it abrogated the provincial *Freedom of Worship Act*. Kerwin's nove argument, therefore, was that the Province's right to legislate over freedom of religio trumped the municipal by-law, which he declared to be *ultra vires* of the city of Quebec

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[118] *Saumur*, quoted from Neil Finkelstien, *Laskin's Canadian Constitutional Law*, fifth edition, Volume 2 (Toronto: Carswell, 1986), p. 925. Taken from the judgement of Rinfret C.J.C, Translated from the original French by Finkelstien.

[119] Botting, pp. 54-55

[120] *Saumur*. See for example, the judgement of of Rand, p. 330.

[121] Botting, p. 59.

but not of the province.[122]

Regarding the implied bill of rights in *Saumur*, Rand J. argued that freedom o religion and freedom of expression were not only protected against provincial attack b the federal division of power, but were also protected by implication from the preambl and structure of the *BNA Act*. With respect to freedom of expression, for example, h wrote:

> The Confederation Act recites the desire of the three provinces to be federally united into one Dominion "with a constitution similar in principle to that of the United Kingdom" Under that constitution, government is by parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion: government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under licence, its basic condition is destroyed: the government, as licensor, becomes disjoined from the citizenry. The only security is steadily advancing enlightenment, for which the widest range of controversy is the sine qua non.[123]

Here Rand hints at the possibility that the federal government may also be bound by the implied bill of rights. Eric Cline and Michael J. Findley note that "Rand, J.'s conception of freedom of speech appears to be inconsistent with any residual jurisdiction in the federal parliament to place substantive limits on free public discussion."[124] However, as these authors also point out, Rand's judgement clearly differentiated between the two levels of government; with the federal government having the power to control some aspect of religion and free speech such as "defamation... and the like, and the

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[122] *Saumur*, pp. 299-301.

[123] Ibid., p. 330. This passage is remarkably similar to (and clearly part of the inspiration for) the view taken in the Australian Free Speech Cases (1992).

[124] Cline and Finley, p. 139.

punishments of criminal law."[125] Nevertheless, from Rand's perspective "strictly speaki civil rights arise from a positive law: but freedoms of speech, religion, and the inviolabi of the person, are original freedoms which are at once necessary attributes on modes expression of human beings and primary condition of community life within a le order."[126] Thus, it might seem even the federal government is required to respect th original freedoms. This evidence notwithstanding, Rand's ruling in *Saumur* remain somewhat ambiguous regarding the application of implied rights to the federal Parliamen

Locke J. was just as strong in his support for the implied bill of rights as w Justice Rand. In his decision he cited the dicta of Duff C.J. and Cannon J. from t *Alberta Press* case at length, and indicated that he agreed with the principles establish by Duff. He maintained that "[t]he right to the free exercise of religious profession a worship without discrimination or preference, subject to... limitation... is a constitution right of all the people of the country... implicit in the language of the preamble of the *BN Act*."[127] Consequently it could not be infringed by any province, and especially th municipal level of government. However, Locke did not question the right of the feder government to curtail religious freedoms.

Switzman v. Elbling

Switzman v. Elbling and Attorney General of Quebec (1957) represented a challenge t

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[125] *Saumur*, p. 329.

[126] Ibid., p. 329.

[127] Ibid., p. 300. Locke J. was also of the opinion that the censorship of religious materials could also lead to the political censorship, which would also violate the preamble to the *BNA Act*.

Quebec's *Act Respecting Communist Propaganda* (the Padlock Law). Section 3 and 12 of the impugned Act stated:

> 3. It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.
>
> 12. It shall be unlawful to print, to publish in any matter whatsoever or to distribute in the Province any newspaper, periodical, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism.[128]

The punishment for the violation of s. 3 was "the closing of the house against its use for any purpose whatsoever for a period of not more than one year..."[129] by a peace officer acting on the order of the Attorney-General after it has been determined (by the Attorney-General) that s. 3 of the Act was duly infringed. The penalty for a violation of s. 12 was imprisonment.[130]

Although the *Act* only explicitly applied to those individuals holding communist and boshevik views, its range was significantly wide. Politically, the *Padlock Act* provided a means for the government, under the direction of Premier Maurice Duplessis, to persecute both political and religious minorities which it found distasteful. Gary Botting notes that "the legislative net that... [the Padlock law] provided was wide enough to catch a [Jehovah's] Witness as easily as a Communist."[131]

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[128] *Switzman*, p. 288.
[129] Ibid., p. 288.
[130] Ibid., p. 288.
[131] Botting, p. 165.

Eight of the full nine member panel of the Supreme Court found that the legislation was beyond provincial jurisdiction, with most indicating that such an act fell under the jurisdiction of the federal government's power over criminal matters.[132] Three members of the Court (Rand, Kellock and Abbott) held that the impugned act "constitutes an unjustifiable interference with the freedom of speech and expression essential under the democratic form of government established in Canada,"[133] thereby supporting the implied bill of rights doctrine.

In his decision, Justice Rand maintained that:

> the political theory which the [BNA] Act embodies is that of parliamentary government, with all its social implications, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate... This means ultimately government by the free public opinion of an open society, the effectiveness of which... is undoubted.[134]
>
> Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles.... This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's spirit than breathing is to his physical existence.[135]

However, it was the decision of Abbott J. in *Switzman* which represents perhaps the greatest endorsement of implied rights in the *BNA Act* ever articulated by a member of the Supreme Court. He asserted that the "right of free expression of opinion and of

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[132] *Switzman*, p. 285.
[133] Ibid., p. 285.
[134] Ibid., p. 306.
[135] Ibid., p. 306.

criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours... . That view was clearly expressed by Duff C.J. in *Re Alberta Statutes.*"[136] Abbott J. continued:

> The *Canada Elections Act*, the provisions of the *British North America Act* which provide for Parliament meeting at least once a year and for the election of a new parliament at least every five years and *Senate and House of Commons Act*, are examples of enactments which make specific statutory provision for ensuring the exercise of this right of public debate and public discussion. Implicit in all such legislation is the right of candidates for Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members.[137]

The most important aspect of Abbott's ruling was his firm and unequivocal assertion that in light of the fact that the Canadian constitution was declared to be 'similar in principle to that of the United Kingdom,' the right to freedom of expression *must* also be respected by the federal government: "as our constitutional Act now stands, *Parliament itself* could not abrogate this right of discussion and debate."[138]

As Russell, Knopff and Morton point out, the *Saumur* and *Switzman* cases (along with other civil liberties cases emanating from Quebec in the 1950) served to benefit the individual claimants, but "left the Canadian constitutional jurisprudence in relation to civil

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[136] Ibid., p. 326.
[137] Ibid., p. 327. Emphasis in original.
[138] Ibid., p. 328. Emphasis added.

liberties in a confused state."[139] Although some members of the court had endorsed the doctrine of an implied bill of rights, they had never formed a majority. And, "[t]he failure of the Supreme Court to establish clear, majority support for the jurisprudence of an implied bill of rights in the B.N.A. Act was an important contributing factor in the movement to establish a formal bill of rights in Canada."[140]

A Period of Restraint: 1960-1982

In 1960, the federal Progressive Conservative Party under the leadership of John Diefenbaker passed the *Canadian Bill of Rights* into law. The Bill addressed all of the concerns regarding civil liberties brought out by the implied cases. As noted in Chapter two, The *Bill of Rights* proved to be almost completely ineffective, and was successfully employed to invalidate an act in only one instance.[141] As an ordinary statute, the Bill could be amended or abolished by a simple majority of both Houses of Parliament. Perhaps more importantly, the Canadian *Bill of Rights* was only in force against federal legislation. As a result, at least one member of the Court continued to advance the ideas of implied rights contained in the constitution.

Even with a new Bill of Rights as a tool for judicial review, the period from 1960-1982 saw the Supreme Court take a marked posture of self-restraint. One reason for this shift was the gradual retirement of the most activists member of the Court. By the early

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[139] Russell et al., p. 318.
[140] Ibid., p. 318.
[141] *The Queen v. Drybones* [1970] S.C.R. 282.

sixties, most of those justices that had supported the implied bill of rights doctrine had been replaced by judges who, for the most part, took a highly restrained approach to constitutional interpretation, one which was not reversed until the passage of the Charter in 1982.[142]

Consistent with this general restraint, the implied bill of rights fell into disuse. While it had previously been used as an additional jurisprudential lever by some of the judges on a winning activist majority, its activist use in this period of restraint now appears only on the minority side, only in one case, and only by one judge. By the end of this era, it is referred to only to dismiss it. The two relevant cases are *Oil, Chemical and Atomic Workers v. Imperial Oil* (1963), and *Dupond v. Montreal* (1978).

Oil, Chemical and Atomic Workers v. Imperial Oil

During the 1960s, only in one case was the implied bill of rights doctrine supported at the Supreme Court level, and in that case only one member of the court, Abbott J., fully endorsed its invocation. The case in question was *Oil, Chemical and Atomic Workers International Union v. Imperial Oil and A.G. B.C.*[143] Brought to the Supreme Court in 1963, the case arose when the conservative Social Credit government, under the direction of Premier W.A.C. Bennet, passed legislation prohibiting the use of a mandatory check-off system by which members of the union made obligatory political donations through the

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[142] Keith Archer et al., *Parameters of Power: Canada's Political Institutions.* (Toronto: Nelson Canada. 1995.), p. 603.

[143] *Oil, Chemical and Atomic Workers International Union Local 16-601 v Imperial Oil Limited* [1963] S.C.R. 584. Hereinafter '*OCAW v. Imperial Oil*'.

payment of union dues.[144] Section 9(6) of the B.C. *Labour Relations Act* (1961) prohibited "a trade union from contributing to, or expending on behalf of, a political party, or a candidate for political office, directly or indirectly..."[145] The union challenged the constitutionality of the legislation on the grounds that such an action was exclusively the domain of the federal government. The case had significant political ramifications as the vast majority of these mandatory donations were in the form of contributions to the opposition New Democratic Party.

The majority of the Court ruled against the union. Of the three dissenters, only Justice Abbott fully supported Duff's doctrine, reiterating his position in *Switzman v. Elbling*. He maintained that "under our constitution, any person or group of persons in Canada is entitled to promote the advancement of views on public questions by financial as well as by vocal or written means."[146] Consequently, "any individual, corporation, or voluntary association such as trade union, is entitled to contribute financially to support any political activity not prohibited by law."[147] Furthermore, concurring with his judgement in *Switzman v. Elbling*, Abbott J. stated that:

> Parliamentary institutions as they existed in the United Kingdom in 1867 included the right of political parties to function as a means, whereby persons who broadly speaking share similar views as to what public policy should be, can seek to make those views prevail. It is common knowledge that political activities in general, and the conduct of elections in particular, involve legitimate and necessary expenditures by political parties and

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[144] Ibid., p. 584.
[145] Ibid., p. 584.
[146] Ibid., p. 599.
[147] Ibid., p. 599

candidates...[148]

> Whatever power a provincial legislature may have to regulate expenditures for provincial political activities, it cannot legislate to regulate or prohibit contributions made to assist in defraying the cost of federal political or electoral activities. Similarly,... *Parliament itself* cannot legislate to regulate or prohibit financial contributions for provincial political or electoral purposes except to the exercise of its powers under s. 91 of the *British North America Act.*[149]

Although *OCAW v. Imperial Oil* is somewhat of a marginal case regarding the use of the implied bill of rights, it nevertheless represents the second and final invocation (by a Supreme Court Justice) of implied constitutional rights which unequivocally deny the right of the federal Parliament to infringe on certain fundamental rights.[150] The implied bill of rights would not be discussed again by the Court until 1978, and never again would it be so strongly endorsed by any member of the Court.

Dupond v. Montreal

The doctrine of the implied bill of rights suffered its greatest and final rejection in the Supreme Court's ruling in *A.G. Canada and Dupond v. The City of Montreal.* (1978)[151] This case concerned a challenge to a City of Montreal ordinance enacted to "PROHIBIT THE HOLDING OF ANY ASSEMBLY, PARADE OR GATHERING ON THE

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[148] Ibid., p. 599.

[149] Ibid., p. 600.

[150] Cline and Finley, p.p. 130-141. The authors note that although Abbott's dicta in *Switzman v Elbling* and *OCAW v. Imperial Oil* represents the only clear application of the implied bill of rights to federal legislation, "it is virtually impossible to reconcile the opinions of Rand and Locke, JJ., in the *Saumur and Switzman v. Elbling* cases with a version of the doctrine which applied only to provincial legislation (p. 141)."

[151] [1978] 2 S.C.R 770.

PUBLIC DOMAIN OF THE CITY OF MONTREAL FOR A TIME-PERIOD OF 30 DAYS"[152] The stated purpose of the 1969 ordinance was to control and prohibit mass demonstrations and any other large gathering of people to counteract continuing acts and threats of political violence within the city and to inhibit general disorder.[153] The impugned by-law made mention of the danger previous demonstrations had posed to the inhabitants of Montreal and that there was a strong potential for similar violence to occur. The Quebec Court of Appeal found that it was well within the jurisdiction of the Municipality of Montreal to enact the ordinance and the case was appealed to the Supreme Court.

> The challenge to the impugned ordinance was based on two grounds:
>
> 1. They [the by-laws associated with the ordinance] are in relation to criminal law and *ultra vires* of the City of Montreal and of the provincial legislature.
>
> 2. They are in relation to and in conflict with the fundamental freedoms of speech, of assembly and association, of the press and of religion which are made part of the constitution by the preamble of the British North America Act, 1867, or which come under federal jurisdiction and are protected by the Canadian Bill of Rights...[154]

The decision could not have been a clearer repudiation of the doctrine of the implied bill of rights. Not only did Justice Beetz, in the majority, maintain that the impugned ordinance was federally *intra vires*, he went so far as to deny the existence of the implied bill of rights altogether. His first two comments on the issue are particularly

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[152] Ibid., p. 784.
[153] Ibid., pp. 785-786.
[154] Ibid., p. 788.

revealing:

> 1. None of the freedoms referred to [the fundamental freedoms of speech, assembly and association, press and religion] is so enshrined in the constitution to be above the reach of competent legislation.
>
> 2. None of those freedoms is a single matter within exclusive federal or provincial competence. Each of them is an aggregate of several matters, which depending on its aspect, come within federal or provincial competence.[155]

Although this appears to be the end of the Court's support for the implied Bill Rights, Cline and Finley, maintain that "[i]t is possible that His Lordship merely intended, in his first proposition, to make the observation that civil liberties are subject to limitations, even when they are given constitutional status."[156] In fact, as mentioned above, Chief Justice Duff in the *Alberta Press Case*, recognized that Parliament and even provincial legislation may regulate the fundamental freedoms such as 'laws concerned with defamation and sedition.' This doubt notwithstanding, the majority stance taken by Beetz J. was certainly no ringing endorsement of any implied civil liberties in the *BNA Act*.

Beetz J. was not even of the opinion that the impugned ordinates of the City of Montreal infringed any fundamental liberties: "[f]reedoms of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades, gatherings, demonstrations, or processions on the public domain of a city. This is particularly so with respect to freedom of speech and the press

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[155] Ibid., p. 772.

[156] Cline and Finley, p. 138.

considered in the *Reference re Alberta Statutes*...."[157] He continued, "[d]emonstrations are not a form of speech but of collective action. They are in the nature of a display of force rather than that of an appeal to reason; their inarticulateness prevents them from becoming part of language... ." Freedom of speech and the press demonstrations, rallies and the like are not, according to Justice Beetz's position 'the lifeblood of parliamentary democracy:'

> The right to hold public meetings on a highway or in a park is unknown to English law. Far from being an object of a right, the holding of a public meeting on the street or in a park may constitute a trespass against the urban authority in whom the ownership of the street is vested even though no one is obstructed and no injury is done; it may also amount to a nuisance... Being unknown to English law, the right to hold public meetings on the public domain of a city did not become part of the Canadian constitution under the preamble of the *British North America, 1867*.[158]

This passage is particularly insightful of the mindset of Justice Beetz on the matter of the implied bill of rights. Cline and Finley accurately assessed Beetz's interpretation of Duff's Doctrine: "[a]pparently, Mr. Justice Beetz is of the opinion that nothing which was prohibited by the Law of England as it stood in 1867 can be affected by the implied Bill of Rights. On that basis, of course, the implied Bill of Rights would not protect women's suffrage, or for that matter, universal manhood suffrage, neither of which existed in England in 1867."[159] As Russell, Knopff and Morton point out "*Dupond* appears to be

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[157] Ibid., p. 797.
[158] *Dupond*, p. 797-78.
[159] Cline and Finley, p. 142.

virtually the final nail in the coffin of the implied bill of rights."[160]

For all intents and purposes the adoption of the *Charter of Rights and Freedom* has ended the necessity for the Court to invoke the implied bill of rights to protec fundamental rights and freedoms. Nevertheless, Peter Hogg has suggested that th implied bill of rights may still be of some use even in the post-Charter era. This is s because "s. 2 of the Charter is subject to override under s. 33. If a law abridging freedon of speech had overridden s. 2, a challenger might want to rely on the implied bill of rights since the implied bill of rights (if it exists) would not be subject to override."[161]

Despite the passage of the Charter, a few members the Supreme Court have, i limited instances, referred to the doctrine of implied rights in the BNA Act whe considering cases involving civil liberties.[162] For example in *Dolphin Delivery* (1986),[16 Justice McIntyre made the questionable statement that "[p]rior to the adoption of th *Charter*, freedom of speech and expression had been recognized as an essential feature o Canadian parliamentary democracy,"[164] arriving at this conclusion by citing the dicta o Rand and Abbott JJ. in *Switzman v. Elbling* and the opinion of Duff C.J. in the *Alberta Press Case*.

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[160] Russell, et al., p. 334.

[161] Peter W. Hogg, *Constitutional Law of Canada*. (Toronto: Carswell, 1985), p. 638.

[162] See also the judgement of Dickson C.J. in *Re Ontario Public Service Employees Union* (1987) 41 D.L.R (4th) 1. p. 40.

[163] *Retail, Wholesale and Department Store Union Local 580 v. Dolphin Delivery Limited* (1986) 2 S.C.R. 573.

[164] Ibid., p. 584.

Judicial Inclination or Institutional Context?

If legalism/institutionalism has little to offer in explaining judicial activism — if, in other words, judicial inclination is utterly dominant — one would expect to find judges inclined to civil liberties activism, but who lacked an explicit bill of rights, to develop an implied bill of rights and then use it as actively and broadly as if it were explicitly entrenched. The Canadian experience with the implied bill of rights doctrines provides no support for this hypothesis.

The only period that constitutes a fair test of the hypothesis is the decade of the 1950s. The first and third periods appear to be eras of civil liberties restraint in which one would not expect to see the implied bill of rights doctrine to make much headway. Its inauguration during the first period, in fact, appears quite surprising, and is explained largely by the immediate political context of the *Alberta Press Case* rather than by any inclination to civil liberties activism.

During the 1950s, by contrast, a genuine civil liberties activism can plausibly be imputed to Supreme Court judges. True, some of the decisions were based on federalism grounds, but the federalism jurisprudence is so convoluted and opaque that it is difficult to avoid the conclusion that the judges were striving mightily to find ways to protect civil liberties rather than merely policing the federal-provincial division of powers — indeed, that the latter was largely a pretext for the former. This conclusion is strengthened by the fact that the concern with civil liberties issues in the legal and intellectual community was generally high during this immediate post-war period.

If the 1950s decisions are a genuine expression of civil liberties activism, however, they also indicate considerable reluctance to base that activism on an implied bill of rights. Indeed, the implied bill of rights doctrine, although always on the winning side during the 1950s, remains decisively in the background, never attracting the support of a majority of judges. The lesson that emerges from the jurisprudence during this period is that judges inclined to activism prefer to hang their most activist decisions — i.e., those that invalidate government actions — on explicit constitutional pegs whenever possible, even at the cost of distorting — perhaps even weakening — the true basis for those decisions. Paul Weiler has noted this tendency: "[o]ne can understand why judges would be driven to declare particular laws invalid in the federal system because of their impact on civil liberties."[165] On the whole, the 1950s jurisprudence suggests that many of the Court's judges were struggling to find a basis for civil liberties activism, but that they preferred to do so on a legal foundation more solid than an implied bill of rights, even if this meant a less coherent and thus less secure foundation for the very civil liberties they intended to promote. Although judicial inclination is a major factor in explaining activism, in short, institutional context appears to retain some independent explanatory value.

It is intriguing to ask what the 1950s Court would have done had Canada been a unitary state, so that federalism was not available as a basis for striking down infringement of civil liberties. In such circumstances, of course, the provincial cases that actually aroused the Court's activism would not have arisen. But what if Ottawa had violated the

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[165] Weiler, p. 193.

Court's civil liberties sensibilities? Would the implied bill of rights doctrine have fared better under such circumstances? In the absence of such constitutional alternatives as federalism, in other words, one might hypothesize that activist judges would more fully embrace an implied bill of rights. To investigate this possibility, we must turn from Canada to a unitary state which has also developed an implied bill of rights doctrine. Israel is such a state.

CHAPTER 4

THE ISRAELI DECLARATION OF INDEPENDENCE

Until recently the Israeli High Court had no formal powers of judicial review.[166] Nevertheless, the Court managed to expand its authority and jurisdiction substantially since Israeli independence was declared in 1948, without the benefit of a formal constitutional document. Hofnung has described the growth of judicial activism in Israel as an "evolutionary model of constitutional review,"[167] He asserts that "constitutional review was established over the years gradually, without a constitution and without explicitly granting the courts powers to review legislative acts. The Israeli experience shows that such a review may almost be as effective as in countries with well defined constitutional review."[168]

In Israel, until very recently, there was no explicit constitutional basis for activist civil liberties jurisprudence. Certainly, as Israel is a unitary state, federalism was not available as means for judicial review. Nor was there a single entrenched constitution in other respects. Instead, in accordance with the Harari Resolution of 1951, the Israeli constitution has been "drawn up in a piecemeal fashion by a series of basic laws....

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[166] David Kretzmer, "Judicial Review of Knesset Decisions" *Tel Aviv University Studies in Law.* Vol. 8, 1988. Kretzmer notes that only "[o]n three occassions the Supreme Court has indeed declared a statute of the Knesset invalid, but only on the narrow grounds that it was not passed by the special majority required under another statute. p. 95.

[167] Menachem Hofnung, "The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel" *The American Journal of Comparative Law.* Vol. 44. 1996. p. 601.

[168] Ibid., p. 601.

covering virtually all aspects of Israel's constitutional system."[169] In 1992, the Knesset enacted, and in 1994 it amended, the Basic Law: Human Dignity and Liberty. Thus, rights and liberties now have a more explicit constitutional status.[170]

For the first forty-odd years of Israel's history, however, this was not the case. During this period, whenever they were in the mood for civil liberties activism, Israeli judges turned to an implied bill of rights. In particular, they turned to the Israeli Declaration of Independence, which was not part of the formal constitution,[171] as a source of principles that could be used to underpin activist decisions. Given the unavailability of any other constitutional basis, did Israeli judges push this doctrine further than their

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[169] David Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" *Israel Law Review, Vol.* 26, No. 2, 1992. p. 239. The constitutional status of Basic Laws themselves is interesting. These statutes have been passed at irregular intervals throughout Israel's history. However, as Israel possesses a unicameral legislature in a unified state these Basic Laws can easily be amended by a majority of the Knesset. The new basic laws are somewhat more entrenched through stated entrenchment provisions. For example the Basic Law: Freedom of Occupation cannot be amended "except by a Basic Law enacted by a majority of Knesset members" (Meir Shamgar, "Judicial Review of Knesset Decisions by the High Court of Justice, Israel Law Review Vol. 28. No. 1. 1994, p. 54). Nevertheless, even these laws can be altered with relative ease. Therefore, the Basic Laws much more easily amended then federal constitutions, such as the American or Canadian constitutions.

[170] The full constitutional ramifications of the addition of this passage in the Basic Law have yet to be realized. Although, intuitively it would seem that this 'entrenchment' of the Declaration would enhance its use as an instrument of judicial review and secure its place as a fully constitutional document, that may not be the case. Interestingly, the Israeli High Court has not employed its new power of judicial review as expected. In fact, Menachem Hofnung argues that the opposite is true. The "grant of formal [judicial review] authority in 1992 has created a situation where the court's power to review future legislation and executive policies is in jeopardy (Hofnung, p. 587)". This has arisen because "the courts are no longer regarded as a neutral actor in the political arena, and consequently, minority groups are trying to write their own exceptions to the law and thus avoid the implications of judicial review. (p. 587)."

[171] The Basic Law: Human Dignity and Liberty (1992), as amended in 1994, brings the Declaration into the formal constitutional order through the following passage: " Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles of the Declaration of Independence of the State of Israel." Taken from the website of the Israeli Ministry of Justice.

Canadian counterparts? Perhaps in some respects, but ultimately only as a tool of interpretive avoidance, not actually to strike down a law, as activist judges regularly do under explicitly entrenched bills of rights.

Despite being originally rejected by the Supreme Court as a normative instrument for review of governmental action, the Declaration has since been widely accepted by the Court as containing the basic tenets of the State of Israel, which have guided judicial interpretation of the law. Without a doubt, the Declaration "has fulfilled an important role in reinforcing the protection of civil rights by the courts and has served the courts as a means of creating basic assumptions as to the democratic and the Jewish character of the State."[172] Not surprisingly, this has augmented both the power and the prestige of the Israeli judiciary.

Notwithstanding the obvious importance of the Declaration in Israeli legal history, the document occupies an ambiguous place in the legal order. "It is not a Constitution, nor is it a statute. The Declaration of Independence does not even directly and independently confer any right on the citizen, nor impose any duty on the government."[173] Operating in a legal system which (until recently) adhered firmly to the principle of parliamentary supremacy,[174] the Declaration has only been successfully employed as an

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[172] Shimon Shetreet, "Developments in Constitutional Law: Selected Topics. *Israel Law Review*, Vol. 24, Nos. 3-4, 1990. p. 411.

[173] Ibid., p. 412.

[174] The Israeli system of law has very diverse roots due to the history of the region, with influences emanating from Ottoman, French, Muslim, Jewish and English legal traditions. One of the most significant British contributions was the firm establishment of the constitutional principle of the supremacy of parliament. See, for example, Gary J. Jacobsohn "Judicial Activism in Israel" in Kenneth M. Holland, ed., *Judicial Activism in Comparative Perspective* (New York: St. Martin's Press), p. 91.

interpretive instrument in cases in which there is an absence of applicable legislation or in the presence of unclear or ambiguous statutes or regulations.[175] In such instances the Court has tended to take an activist stance and expand rights-based jurisprudence through interpretation of the following passage from the Declaration: "The STATE OF ISRAEL... will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex...." However, the Court has also had to balance contradicting tenets (discussed below) which are present in the Declaration. In particular, it has had to balance civil rights against issues of national security, which have been a constant concern throughout Israel's short history.

As the rise of judicial activism in Israel during its implied-bill-of-rights period has been 'evolutionary,' the growth in the power of the judiciary cannot be attributed to one or a few decisions. Rather, the court has seen its influence increase slowly through a myriad of decisions dealing with many aspects of the law. Nevertheless, while they are not clearly delineated, three jurisprudential periods can be discerned: first, a very brief period of relative restraint. Second, a period of experimentation in which the Court, for the most part, expanded its jurisdiction, despite some notable displays of judicial restraint. In the third period, beginning in the 1970s, the court firmly established and continued to enlarge

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[175] Kretzmer, "Judicial Review of Knesset Decisions," pp. 95-101. Kretzmer notes that at the time he wrote this paper (1988), only on 'three occasions [has] the Supreme Court... declared a statute of the Knesset invalid, but only on the narrow grounds that it was not passed by the special majority required under another statute. p. 95.

its capacity for activism.

A Brief Period of Judicial Restraint

The early period of the Court's jurisprudence reflected, in the main, a substantial degree of judicial self-restraint. David Kretzmer attributes much of this self-restraint to the inheritance from the British Mandate Supreme Court. He notes that in this period, "[t]he precedents cited were mainly British Mandatory precedents or English decisions. Furthermore, of the five judges on the first court, three were educated according to the British or European legal traditions."[176] Consequently, "in these early days, judges generally exhibited judicial restraint and tried to stay away from burning political issues."[177] For the most part, the court in this period did not even challenge administrative actions.[178] Nevertheless, interpretive avoidance was employed to establish some basic legal principles.[179] Not surprisingly, in this brief period of judicial restraint, the notion that the Declaration could provide a normative basis for judicial review was rejected by the Court.

One of the first Supreme Court decisions in which it was argued that the Declaration might provide a foundation for judicial review was *Zeev v. The Acting District*

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[176] Kretzmer, "Judicial Review of Knesset Legislation," pp. 99-100

[177] Hofnung, p. 592.

[178] Ibid., p. 589.

[179] Ibid., p. 589. See for example, *Begerano v. Minister of Police* 2 P.D. 80 (1949), which established the "right to engage in any business not prohibited by law (p. 592)."

Commissioner of the Urban Area of Tel Aviv (1948).[180] This case dealt with the requisitioning of a personal apartment in the city of Tel Aviv for use by an official of the government.[181] Zeev's case was based on the argument that the emergency regulations which authorized the confiscation of the apartment were in violation of the fundamental right to hold private property.[182] Zeev supported his claim to such a right by referring to the Declaration, specifically the following passage in the third section: "The State of Israel shall be based on freedom, justice and peace as envisaged by the prophets of Israel..."[183] It was argued that the Declaration should be considered the constitutional foundation with which the actions of the State must be consistent. Counsel for Zeev maintained that:

> The Declaration is part of the law of the land, because 'law' as defined in the Interpretation Ordinance, 1945, covers a Declaration such as this. This 'law' restores to the Citizens of the State all the freedoms to which a citizen is entitled. Since this so, the Declaration repeals those [emergency] regulations and the laws from which they are derived, which robbed the citizen of his freedoms. The Declaration opened a new chapter of independent legislation... It cannot be assumed that it was intended by this section to retain the previous restrictions, imposed in the time of the [British] Mandate which contradict the provisions of the Declaration.[184]

The Court, however, took a different view of how the Declaration should be

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[180] *Zvi Zeev v. The Acting District Commissioner of the Urban Area of Tel Aviv (Yehoshua Gubernik) and Another* in David E. Goitein, ed. *Selected Judgments of the Supreme Court of Israel*, Vol. 1 (Jerusalem: Israeli Ministry of Justice, 1962).

[181] Ibid., p. 68.

[182] Pnina Lahav, "Foundations of Jurisprudence in Israel: Chief Justice Agranat's Legacy" *Israel Law Review*, Vol. 24, No. 1. 1990. p. 228.

[183] *Zeev*, in Goitein. p. 71.

[184] Ibid., p. 71.

interpreted. Regarding the status of the document, the Court asserted that "the only object of the Declaration was to affirm the fact of the foundation and establishment of the State for the purpose of its recognition by international law. It gives expression to the vision of the people and its faith, but it contains no element of constitutional law which determines the validity of various ordinances and laws, or their repeal."[185]

In the same year, the Court had also rejected the use of the Declaration in a housing requisition case remarkably similar to *Zeev*.[186] In *Leon v. Acting District Commissioner of Tel-Aviv* the petitioner based his argument on Section 11 of the Law and Administration Ordinance (1948), which "provides that the law which existed in Palestine on May 14, 1948 'shall remain in force... subject to such modifications as may result from the establishment of the State'."[187] Because the State of Israel was founded on the principles of equity and freedom as set out in the Declaration, it was claimed that Israeli law should be made to conform with these values. In response, the Court took a very conservative interpretation of the relevant legislation and the significance of the Declaration; the High Court maintained that "...the 'changes due to the establishment of the state' are merely technical changes which do not require any discretion."[188]

With *Zeev* and *Leon* the Court firmly established its early preference for judicial

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[185] Ibid., pp. 71-72.

[186] This case is very similar to that of *Zeev* as Leon's residence was also requisitioned for use by a government official. Another case in which the Court took a restrained position along the same lines of *Zeev* was *El-Karbulti v. Minister of Defence*. Kretzmer, "Judicial Review of Knesset Decisions," (p. 96).

[187] *Leon and Others v. Acting District Commissioner of Tel Aviv (Yehoshua Gubernik)* (1948) in Goitein, p. 41.

[188] Kretzmer, "Judicial Review of Knesset Decisions," pp. 96-97.

restraint, arguing that if the Court ruled otherwise it "should be acting contrary to the law which binds us and whose amendment, if desirable at all, is a matter for the legislature."[189] Moreover, the court reaffirmed its deferential position to the Knesset by bluntly stating that ultimately "[t]his is undoubtedly a matter of housing policy in which this court cannot interfere."[190] The Court's attachment to the principle of parliamentary supremacy is particularly evident in the following passages:

> As we are indeed living in period of change and as we stand upon the threshold of the new State — we desire, in concluding this part of our judgement, to add a few general comments on the duty of a judge when he comes to interpret the law. The doctrine of the division of powers within the State is no longer as rigid and immutable as it was when once formulated by Montesquieu. In the field of jurisprudence the opinion has prevailed that in cases to which neither law nor custom applies it is for the judge to fulfil the function of the legislature rather than force the facts before him into the narrow confines of the existing law, which in truth contains no provision applicable to them...
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> ...But this principle only applies where in fact no law exists. It is a far cry from this to require that judges, in exercise of their judicial powers, should repeal laws which undoubtedly do exist but which are unacceptable to the public. We are not prepared to follow this course, for in doing so we would infringe upon the rights of the existing legislative authority in the country...[191]

A Period of Experimentation

Beginning in the mid 1950s the Israeli High Court gradually took on a more activist stance that it had originally taken. This period has been described by Prinha Lahav as a "period

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[189] *Leon* in Goiten, ed., p. 65.
[190] Ibid.,p. 67.
[191] Ibid., pp. 53-54.

of experimentation."[192] It was also a period of some ambivalence. Thus, while the Court slowly increased its jurisdiction and expanded its powers in some cases, it also displayed restraint in other, closely related cases. The relevant cases in this period are too numerous to discuss each one in detail. However, two cases — *Kol Ha'am* and *Yardor* — serve as contrasting examples of the Court's activism and restraint regarding the Declaration in this period; in the former case the Court sided with freedom, and in the latter case the court sided with national security concerns, both on the basis of the same Declaration.

Kol Ha'am

As in Canada, Israel's first activist invocation of implied constitutional rights dealt with freedom of political expression. In *Kol Ha'am v. Minister of Interior* (1953), Justice Agranat delivered an historic decision which revisited and re-evaluated the constitutional significance of the Declaration.[193] *Kol Ha'am* centred around the publication of the two newspapers of the communist party of Israel, the Hebrew Kol Ha'am and the Arabic version, Al Ittihad. The communist party at that time was becoming increasingly pro-Soviet and was thus perceived to be a potential threat to national security by the government. The communists, who were "initially rebuked because of [their] essential rejection of Zionism's nationalist component, loyally trumpeted Stalin's line at a time

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[192] Lahav, p. 231.

[193] *Kol Ha'am Company Limited v. Minister of the Interior* (1953) in Goitein. Hereinafter referred to as '*Kol Ha'am*.'

when the USSR was increasingly becoming anti-Semitic and anti-Israeli."[194] As a result, they represented a particularly tempting political target for the government.

The specific incident which brought the case to trial was the reaction of the two newspapers in question to an article published in the mainstream media. The respectable daily 'Ha'aretz' cited the Israeli ambassador to the United States (Abba Eban) as stating that if war broke out between the United States and the Soviet Union, "Israel could place 200,000 soldiers at the side of the United States in the event of war."[195] In response, Kol Ha'am published an article under the title of "Let Abba Eban Go and Fight Alone", while Al-Ittihad's headline read "The People will not Permit Speculation in the Blood of the Sons."[196] Both articles attacked the continuation of Israel's anti-Soviet policy, and were thus highly critical of Israeli foreign policy. In the Supreme Court ruling, the final three paragraphs of the Kol Ha'am article were presented as being indicative of the entire piece:

> Despite the anti-Soviet incitement, the masses in Israel know that the Soviet Union is faithful to the policy of the brotherhood of peoples and peace. The speeches of Comrades Malenkov, Beria and Molotov have once more confirmed that. If Abba Eban or anyone else wants to go and fight on the side of the American warmongers, let him go, but go alone. The masses want peace and national independence, and are prepared to give up the Negev in return for joining the 'Middle East Command'.
>
> Let us increase our struggle against the anti-nation policy of the Ben-Gurion Government, which is speculating in the blood of Israel youth.
>
> Let us increase our struggle for the peace and independence of Israel[197]

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[194] Lahav, p. 251.
[195] *Kol Ha'am* in Goitein, p. 92.
[196] Ibid., p. 92.
[197] Ibid., p. 93.

In response to these publications, the Minister of the Interior suspended the production of Kol Ha'am for ten days and Al-Ittihad for a period of fifteen days.[198] This action was possible as "from the British Mandatory regime the Government had inherited vast powers to whip the press."[199] Section 19(2)(a) of the Press Ordinance allowed the Minister to "suspend the publication of [a] newspaper for such a period as he may think fit..." if he deemed its contents "likely to endanger the public peace..."[200] The Supreme Court, therefore, was forced to reconcile the right of an individual to the freedom of expression with the State's desire to maintain law and order by curtailing criticism and inflammatory or provocative statements.[201]

In a unanimous, and unprecedentedly activist decision, the court quashed the suspension of the newspapers. Agranat's ruling was a many pronged defence of the right to freedom of expression, referring to both British and American jurisprudence and highly reminiscent of the implied bill of rights arguments made on behalf of freedom of expression in Canada. First, he defended the importance of free speech in a democracy: "The principle of freedom of expression is closely bound up with the democratic process."[202] Also, he noted that "Democracy consists, first and foremost, of government by consent... and the democratic process, therefore, is one of the selection of the common

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[198] Ibid., p. 92.
[199] Lahav, p. 251.
[200] *Kol Ha'am* in Goiten, p. 92.
[201] Ibid., p. 94.
[202] Ibid., p. 94.

aims of the people and the means of achieving them, through the public form of negotiation and discussion, that is to say, by open debate and the free exchange of ideas on matters of public interest."[203] The judgement also referred to the responsibilities of the press, and that reasonable restrictions are required as set out in law, such as punishment for slander.

Borrowing a quote from Sir William Haley, Justice Agranat summed up the issue: "[w]e have to face up to the fact that there are powerful forces in the world today misusing the privileges of liberty in order to destroy it... [However,] it would be a major defeat if the enemies of democracy forced us to abandon our faith in the power of informed discussion and so brought us down to their own level."[204] It followed that the argument for the collective good of national security should not automatically trump an individual's right to engage in free speech. The threat of national security may only be acted on only in the case of 'near certainty' of endangerment to the public peace.

The most important aspect of the decision, as far as Israeli jurisprudence is concerned, was the court's reliance on Israel's Declaration of Independence as a normative instrument for reviewing the action of the Minister of the Interior. According to Lahav, "[i]t was a difficult task since there was no constitution nor any jurisprudence which could comfortably support the theory"[205] Justice Agranat's famous invocation of the Declaration is as follows:

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[203] Ibid., p. 95.
[204] Ibid., p. 101.
[205] Lahav, p. 256.

> The system of laws under which the political institutions in Israel have been established and function are witness to the fact that this is indeed a state founded on democracy. Moreover, the matters set forth in the Declaration of Independence, especially as regards the basing of the State 'on the foundations of freedom' and the securing the freedom of conscience, mean that Israel is a freedom-loving State. It is true that the Declaration "does not consist of any constitutional law laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws" (Zeev v. Gubernik (3)), but insofar as it "expresses the vision of the people and its faith" (ibid.), we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State... for it is well-known axiom that the law of a people must be studied in the light of its national way of life.[206]

Therefore, in the absence of a 'clear and present danger' to the public peace associated with the publication of the impugned articles, the Court held that to suspend the communist newspapers was inconsistent with the principles contained in the Declaration.

Kol Ha'am represents a landmark case in Israeli law. The decision rendered by Justice Agranat represents the beginning of the growth of judicial power in Israel. The right to freedom of expression was confirmed as a necessary component of a democratic society and the court staked its sole claim to ensure its continued protection.

Nevertheless, it must be emphasized that the ruling in *Kol Ha'am* did not challenge the supremacy of Parliament; the Court did not strike down s. 19(2)(a) of the Press Ordinance. Rather, the Court merely stated that the section could be used only when it was highly likely that the public peace would be endangered, which it was not in this case. In other words, the Declaration was used as a basis for the technique of interpretative

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[206] *Kol Ha'am* in Goitein., p. 105.

avoidance, not for full-scale constitutional review.[207] Indeed, David Kretzmer maintains that during this period "the Court... remained steadfast in its attachment to the principle that parliamentary legislation is not subject to judicial review either on the grounds that it offends fundamental principles enshrined in the Declaration, or even that it is manifestly unreasonable."[208] As evidence he cites *Rogozinski v. Rabbinical Court* (1970) which dealt with a challenge to Knesset legislation which required the Jewish law to be applied to all marriages between Jews on the grounds that it violated the Declaration's commitment of "ensur[ing] complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex, [and] guarant[ing] freedom of religion, conscience, language, education and culture..."[209] In *Rogozinski* the court asserted that

> ...[i]t is clear that the law of the land which commits all matters of marriage and divorce of Jews in Israel... to the jurisdiction of the rabbinical courts, and provides that all such marriages and divorces shall be performed according to Jewish religious law, has preference over the principle of freedom of conscience, in the same way as any other express statutory provision has preference over anything else mentioned in the Declaration...[210]

Yardor

As mentioned above, judicial invocation of the Declaration was not restricted to civil

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[207] Other examples of Declaration-based activist cases in this era include *Freidi v. Tel Aviv Municipality* (1955), *Schtreit v. Chief Rabbi of Israel* (1963) and *Peretz v. Kfar Shmaryahu* (1962). The latter case established that even public authorities must conform to the principles of the Declaration. Kretzmer, "Judicial Review of Knesset Decisions," p. 97.

[208] Kretzmer, "Judicial Review of Knesset Decisions," pp. 97- 98.

[209] Ibid., p. 98. The text in quotations is taken directly from the *Declaration of the Establishment of the State of Israel.*

[210] (1970) 26 (1) P.D. at 135. Quoted from Ibid., p. 98.

rights concerns in this era. The Court has also found legal significance in the passage 'the establishment of a Jewish State in Eretz-Israel [the land of Israel]'. This section has, in some instances, been interpreted in a manner which is restrictive of fundamental rights. According to Jacobsohn, "opening up those parts that affirm the Jewishness of the State could endanger individual rights..."[211] which are at the same time protected by other sections of the Declaration. The case of *Yardor v. Chairman of Central Election Committee for the Sixth Knesset* (1965) illustrates how the Court in this period (and in contrast to *Kol Ha'am*) sometimes upheld national security provisions based on the Declaration.

In *Yardor* the Court had to deal with the decision of the Central Election Committee to disqualify the Arab list from participating in Knesset elections.[212] The apparent goal of the party in question "was to undermine the existence and integrity of the state of Israel and to restore 'the political existence' of the Arabs in Palestine..."[213] Furthermore, the Arab list had also been considered a subversive association, "many of whose members belonged to an illegal organization that denied the very existence of the state of Israel."[214]

Despite the dissenting opinions of Justice Cohn, who took the positivist view that the operation of the Arab list could not be suspended as the existence of such parties was

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[211] Jacobsohn, p. 100.
[212] Jacobsohn, p. 97.
[213] Yaachov S. Zemach, *Political Questions in the Courts: A Judicial Function in Democracies Israel and the United States* (Detroit: Wayne State University Press, 1976). p. 63n.
[214] Jacobsohn, p. 97.

not illegal under specific Israeli law, and Justice Sussman who argued (among other points) that the "...Committee may inquire into the qualification of the list according to an unwritten principle of law (the right to self-defence),"[215] the Court ruled that it was of central importance that the Arab list be banned. The decision was taken in view of 'fundamental supra-constitutional principles,' under which every State had the natural right to protect itself against those who purport to overthrow it."[216] The maintenance of the Israeli State must not be threatened, even through democratic means.

Interestingly, the Court, acting in a restrained manner, employed the Declaration as the basis for limiting electoral participation, specifically the passage "the establishment of a Jewish State in Eretz-Israel," which is mentioned numerous times in the Declaration.[217] In fact, in *Yardor* the Court found that the presence of the above-mentioned passage should be treated as "a constitutional axiom"[218] which must be respected and obeyed. The same Justice Agranat who decided *Kol Ha'am*, stated that '[t]here can be no doubt — and this is clearly learnt from the statements made in the Declaration of the Establishment of the State — that Israel is not only a sovereign, independent and peace-loving state characterized by a regime of the people's government, but was also established as a Jewish

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[215] Ibid., p. 97.

[216] Zemach, p. 63n.

[217] For example one such passage reads "...the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable."

[218] Zemach, p. 63n.

State in Eretz-Israel."[219] In *Yardor*, Agranat took a decidedly restrained position, and emphasized a decidedly different tenet of the Declaration than he had earlier in *Kol Ha'am*.[220]

The Recent Period of Judicial Activism

Beginning in the 1970s and culminating in the early 1980s, the Israeli Court clearly entered its most activist period. The tension of the preceding period between civil liberties and national security was resolved in favour of civil liberties. This has been attributed to number of sources, including a "changing of the guard at the Supreme Court" which saw the appointment of a majority of activist minded justices.[221] This change was also facilitated in part by greatly liberalized rules of standing.[222] Furthermore, in "the 1970s and 1980s the High Court began applying more substantive criteria in reviewing administrative decisions based on merits."[223] The Court also ruled that the decision of Knesset Committees came under its jurisdiction, and developed a doctrine of

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[219] Quoted from Jacobsohn, p. 98.

[220] Justice Arganat's shift in *Yardor* parallel's Canadian Supreme Court Justice Ritchie's shift between activism and restraint in his early Canadian Bill of Right jurisprudence. See for example his rulings in *Robertson and Rosetanni v. The Queen*, *The Queen v. Drybones* and *Attorney-General of Canada v. Lavell and Bedard*.

[221] Hofnung, p. 592.

[222] Ibid., p. 590. The cases which 'revolutionized' the rule of standing included: *Segal v. Minister of the Interior* (1980) 34 (4) P.D. 429; *Barzilai v. Government of Israel* (1986) 40 (3) P.D. 505; *Ressler v. Minister of Defence* 42 (2) P.D. 441 (1988). p. 590.

[223] Ibid., p. 590. As an example Hofnung cites the case of *El Moreh* in which the "High Court declared a government decision to confiscate land in the West Bank for building a settlement as null and void. While in the past, the Court was willing to approve such a decision if convinced that the executive had acted according to its jurisdiction and in good faith, this time the Court decided to view the government's decision on its merits (p. 590)."

reasonableness, both of which aided the growth of judicial activism in this era.[224] Moreover the Court "expanded its intervention capacity by judicial interpretation."[225]

Perhaps the best example of how the Court has emphasized the tenets of the Declaration which benefit civil liberties at the expense of those which support security measures is provided by *Neiman.*[226] In that case, which represents a clear reversal of the Court's decision in *Yardor*, the Court ruled on the legality of Central Elections Committee of the Eleventh Knesset decision to ban two extremist parties from upcoming Parliamentary elections.[227] The parties fell on both sides of the political spectrum with both the leftist Progressive Peace list and the right-wing Kach list being affected. As in *Yardor*, the Committee's decision was not based firmly in Israeli statute law, which "made no explicit provision for exclusion based upon a list's platform or objective."[228]

The unanimous decision of the Court was that both lists were legally entitled to participate in the contestation of Knesset seats. The activist oriented Justice Barak argued that the Committee's authorities were very broad.[229] Barak indicated that he supported the earlier *Yardor* ruling in the sense that he agreed that the Committee may exclude organizations that seek to destroy or fail to recognize the existence of the State.

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[224] Ibid., p. 590.

[225] Ibid., p. 590.

[226] *Neiman and Avneri v. Chairman of the Central Elections Committee for the Eleventh Knesset,* 1984.

[227] Jacobsohn, p. 96. Jacobsoln notes that "[i]n the two decades between Yardor and Neiman the Knesset did nothing in legislative response to the 1964 decision to uphold the elections committee." p. 98.

[228] Ibid, p. 96.

[229] Ibid, p. 98. Justice Aharon Barak has been considered one of the most activist members of the Supreme Court in the history of the institution.

Furthermore, he maintained that the Committee also has the authority to prevent the electoral participation of any association which denies the democratic tenets as set out in the Declaration. However, Barak qualified the authority of the Committee by returning to the *Kol Ha'am* standard that there must be a realistic possibility that the goals of such 'subversive' lists could be achieved if they were not prevented from participating in the election.[230] Under this qualification he said that neither the Progressive Peace List nor Kach could be prohibited from the electoral process.

Citing American constitutional decisions, Barak argued that a 'spacious interpretation' must be employed in the absence of legislation or the presence of unclear or ambiguous statutes.[231] Despite the lack of legislation on the subject, the High Court must interpret the law "in light of the [democratic principles of the] Declaration of Independence, which expresses 'the vision and creed of the people.'"[232] His decision further reinforced the legal importance of the Declaration in the Israeli legal order by asking the rhetorical question "[w]ould the State of Israel without the Declaration of independence be the same State of Israel."[233]

The decisions rendered in *Yardor* and *Neiman* reflect the tension that has arisen from use of differing sections of the Declaration base for judicial activism. However, in balancing the differing principles in the Declaration the Court, in the recent period of

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[230] Ibid., p. 99.
[231] Ibid., p. 99.
[232] Ibid., p. 99.
[233] *Neiman*, quoted from Jacobsohn, 102.

judicial activism, has clearly favoured the importance of the latter at the expense of, th former. According to Jacobsohn:

> ...the temptation to engage in an expansive statutory interpretation, would avoid characterization of the State's existence in terms that are potentially in tension with what many consider to be the primary role of the contemporary Israeli Court — serving as guardian of the democratic component of Israeli democracy. Judicial activism in Israel means pursuing the rights-oriented implications of the Declaration of Independence; as a result, American constitutional theory suggests attractive possibilities.[234]

It has since been firmly established that the Court will maximize the individual anc rights-oriented passages in the document over, and at the expense of, the more restrictive collectivist sections, specifically 'the establishment of a Jewish State in Eretz-Israel.'

In this activist period, judicial reference to the Declaration has been commonplace. In fact "the Declaration has taken root as the source of constitutional rights in Israel and is frequently being invoked by the Supreme Court."[235] Cases in which the Declaration has been used as a basis for activism to protect certain civil liberties are too numerous to discuss in detail but some prominent ones include: *Kahane v. Broadcasting Authority* (1987), which enhanced freedom of expression in broadcasting, *Poraz v. Mayor of Tel Aviv* (1988), which dealt with equality rights and *Dahaar v. Minister of the Interior* (1986), which reinforced the right of Israelis to travel abroad.[236]

The Court has also ruled that administrative action must consider that 'Israel is a

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[234] Jacobsohn, p. 100.

[235] Lahav, p. 257n.

[236] Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?", p. 240.

democratic state' as set out in the Declaration.[237] For example, the court has found that delegated legislative authority does not restrict the basic civil liberties embodied by the Declaration without explicit statutory provision to do so.[238] The freedom of journalists to protect the anonymity of their sources has also been established using the democratic principles contained in the Declaration.[239] Cases covering similar fundamental rights have also frequently benefitted from the Declaration.[240]

Even in this most activist period, however, none of the Court's civil liberties decisions invalidated a statute of the Knesset. As in the earlier period, the Court's activism has taken the form of interpretive avoidance.

Judicial Inclination or Institutional Context?

The Israeli case certainly provides plenty of evidence for the claim that judicial inclination trumps institutional context in explaining judicial behaviour. As in the case of Canada, the very development of an implied bill of rights attests to the flaws in the legalist perspective. In addition, the different — indeed, contrary — ways in which the Declaration has been interpreted provide further evidence for the cultural explanation. As with the American example discussed in Chapter two, cases like *Yardor* and *Neiman* clearly demonstrate that

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[237] See for example, *Saar v. Minister of Police* (1979) 34 (2) P.D. 69; *Levi v. Commander of Southern District* (1983) 38 (2) P.D. 13; *Leor v. Play Censorship Board* (1986) 41 (1) P.D. 421.

[238] Kretzmer, "Judicial Review of Knesset Decisions," p. 106. Such cases include: *Liperski-Halifi v. Minister of Justice* (1972) 27 (1) P.D. 719; and *Miterani v. Minister of Transport* (1981) 37 (3) P.D. 337.

[239] Ibid., p. 106. The case in question was *Citrine v. Disciplinary-Tribunal of Israel Bar* (1986) 42 (2). P.D. 337.

[240] Lahav. p. 269n.

judges can take very different approaches to constitutional interpretation using the same document, thus showing that it is the attitude of the judges that counts.

However, the Canadian reluctance to push the implied bill of rights doctrine very far suggested that institutional context continues to matter. Canadian judges clearly preferred to base their most activist decisions on explicitly entrenched constitutional provisions, such as the federal division of powers. This led us to ask whether activist judges would rely more heavily on an implied bill of rights, and push it further, when such alternatives as federalism did not exist. Israel provided a convenient case in which to test this proposition.

In the absence of any other explicit constitutional pegs, like federalism, on which to hang their activism, Israeli judges have indeed embraced the Declaration more wholeheartedly than Canadian judges embraced the implied bill of rights doctrine in the 1950s. Unlike in Canada, where the implied bill of rights was never invoked by more than a small minority of judges, many activist Israeli Declaration cases are successful, some even unanimous. In Canada, by contrast, the implied bill of rights was at best an additional (usually a secondary) justification for the outcome.

On the other hand, while Canadian civil liberties activism in the 1950s went so far as to invalidate statutes — to be sure, mainly on federalism, never implied bill of rights, grounds — Israeli Declaration cases have never gone that far. The Declaration has been used exclusively as a guide to interpretive avoidance, much as the *Canadian Bill of Rights* was in the few cases when it was used to uphold civil liberties claims without actually

striking anything down.

As judicial activism generally increased in Israel, so too did judicial reliance on the Declaration. However, the Declaration did not develop into a mechanism for judicial review of primary legislation — it remained only one of a number of activist tools employed by the judiciary. If judicial inclination is more important that the institutional context, one would have expected the Court, through judicial creativity, to promote the Declaration to full constitutional status to which even acts of the Knesset must conform. This did not happen. The history of the Israeli jurisprudence strengthens the conclusion that while judicial inclination may establish substantial activist jurisprudence without a constitution, the lack of an entrenched bill of rights remains a significant impediment to the development of full blown judicial review.

CHAPTER 5

IMPLYING RIGHTS IN THE FRENCH CONSTITUTION

Until 1971, the French Constitutional Council[241] could not be described as an activist court. In fact, before that year the Council could accurately be characterized as "a politically obscure and insignificant institution."[242] However, with a revolutionary 1971 decision, the Council, has become "a central player in the governing process in France."[243] In that ruling the Council invoked the preamble of the constitution as a basis for the protection of freedom of association against infringement by a government bill. Line one of the Preamble of the 1958 Constitution reads: "The French People solemnly proclaim their attachment to the Rights of Man and to the principles of national sovereignty as defined by the Declaration of 1789, confirmed and completed by the preamble of the Constitution of 1946."[244] With its decision of July 16, 1971, the Council managed to invoke, through implication, both these historical texts as instruments of judicial review.

To fully comprehend the implications of that decision it must be placed in the context of French legal history. Until the Decision of 1971, the supremacy of *la loi* over the constitution in the French constitutional order was firmly established. The longstanding French adherence to the principle of legislative supremacy as the expression

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[241] Known in French as the *'Conseil constitutionnel.'* Hereinafter referred to the 'Council.'

[242] F.L Morton, "Judicial Activism in France", p. 133.

[243] Ibid., p. 133.

[244] Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. (New York: Oxford University Press, 1992), p. 257.

of the popular will, combined with a distrust of the judicial branch of government dating back to the revolution, prevented the establishment of constitutional review of government legislation by the judiciary. This attitude is not surprising given that France has enacted nine separate constitutions since 1791, whereas the law has evolved gradually over time.[245] Cythia Vroom argues that the result of this aspect of French legal history is that "constitutions came to be seen as essentially political documents valid for the duration of the regime that created them."[246] Consequently the Decision of 1971 was a remarkable display of judicial activism, by which the Constitutional Council managed to effectively 'constitutionalize' the constitution and, as a corollary, dramatically increase its own power.

The Constitutional Council

In order to understand how the Council transformed the French constitutional order, a brief examination of the Council itself is required. The French Constitutional Council differs substantially from the Canadian or American Supreme Court in a number of ways. First, the Council does not represent the pinnacle of an adjudicative judicial hierarchy; cases are referred to directly to it by parliamentarians or the state executive.[247] Consequently, all cases heard by the Council are 'reference' cases and do not deal with

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[245] Cynthia Vroom, "Constitutional Protection of Individual Liberties in France: The *Conseil Constitutionnel Since* 1971" *Tulane Law Review*, Vol. 63. 1988., pp. 267-268.

[246] Ibid., p. 268.

[247] Morton, "Judicial Activism in France", p. 136.

litigation between two adversarial legal parties.[248] Therefore, the Council does not hear appeals from lower courts, and cases directed to the Council only consider the constitutionality of proposed statutory provisions. Originally, only four authorities (usually all members of the government) had the power to refer a case to the Council: the President of the Republic, the Prime Minister, the President of the National Assembly, and the President of the Senate.[249] A 1974 amendment to the reference procedure expanded that list to include any sixty members of the National Assembly or the Senate. Politically, this reform aided the opposition who, when possessing enough numbers, have used their reference power to stymie government initiatives conflicting with their own political agenda.

Second, the Council does not possess the authority to strike down existing legislation. Rather, it must approve or reject the bill (in part[250] or in full) prior to its promulgation into law. This 'a priori' judicial review allows the government to correct constitutionally defective legislation after the Council has declared it unconstitutional. The fact that a statute is immune from Council scrutiny once promulgated conforms to the longstanding adherence to the principle of the supremacy of the law in the French constitutional order as no law, once in effect, may be nullified except through legislative means. Cynthia Vroom points out that "[d]espite its drawbacks, a priori control offers

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[248] Michael H. Davis, "The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court" *The American Journal of Comparative Law*. Vol. 34, 1986. pp. 45-46.

[249] Morton, "Judicial Activism in France", p. 136.

[250] As a result, provisions of an act which (in the opinion of the Council) offend the constitution may be 'amputated' from the act, allowing the unaffected section of the bill to be promulgated.

certain advantages, chief among which is the certainty of knowing that a given law is constitutional *before* it goes into effect"[251] This is especially true when contrasted with the Canadian or American situation where "constitutional defects may be challenged at any time, no matter how many times a law has been applied in the past."[252] The fact that the Council may only act prior to promulgation may explain, in part, why the court has been able to fully employ its implied bill of rights.

Also, the membership of the Council is remarkably different from, for example, that of the Supreme Court of Canada. The Constitutional Council is composed of nine members who each serve on the Council for a period of nine years.[253] Consequently, the members of the Council do not enjoy the security of life long tenure. Furthermore, the Constitutional Council is composed of political appointees; the President of France and the Presidents of both the Senate and National Assembly appoint three members each.[254] Not surprisingly, the ideological composition of the Council is a factor in determining its decisions.[255]

The Constitutional Council was originally established by the constitution of 1958, primarily as mechanism to reconcile disputes between the executive branch and

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[251] Vroom, p. 272.

[252] Ibid., p. 272.

[253] Richard J. Cummins, "Constitutional Protection of Civil Liberties in France," *The American Journal of Comparative Law*, Vol. 33, 1985. p. 723. In addition to these nine, all former Presidents of the Republic are also entitled to sit on the Council for life.

[254] Ibid., p. 723-724.

[255] A note should also be made regarding the actual written decisions made by the Council. Its decision are made behind closed doors and no dissenting judgements are written. Although more recent rulings have had been longer, in the years immediately after the 1971 decision, the written judgments of the Council often did not require more than one to four pages (Vroom, p. 275n).

parliament. Indeed, it was intended to buttress executive power in its competition with parliament. As Alec Stone puts it, the intended primary function of the Council was to "facilitate the centralization of executive authority, and to ensure that the system would not somehow revert to traditional parliamentary orthodoxy."[256] The constitution also gives the Council responsibility for ensuring the legality of international treaties, organic laws,[257] and parliamentary standing orders — the latter two *must* be submitted to the Council for approval.[258] Article 61 of the constitution states "...that ordinary laws *may* be referred to the Constitutional Council...."[259] This last power, however, was in no way intended by the framers of the 1958 constitution to permit the Council to undertake judicial review in the name of protecting constitutionally supported individual civil liberties from legislative encroachment.[260] However, thirteen years after its creation, the Constitutional Council was actively engaging in just such judicial review of legislative acts.

Constitutionalizing the Preamble: The Decision of 1971

The decision of the Constitutional Council of July 16, 1971 proved to be the birth of judicialized politics in France. In that case, referred to by some observers as France's *Marbury v. Madison*,[261] the Council for the first time considered "ordinary legislation

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[256] Stone, p. 47.

[257] Ibid., p. 53. Organic laws are (generally), "legislation establishing or reforming the status or functioning of public authorities. (p. 53)."

[258] Ibid., p. 256. Emphasis added.

[259] Ibid., p. 256. Emphasis added.

[260] Vroom, p. 273.

[261] Morton, "Judicial Activism in France", p. 136.

proposed by the executive"[262] The decision was considered a "juridical revolution"[263] as it represented "the first censure inflicted by [the Council] upon the legislature"[264] and, as mentioned above, was not consistent with the longstanding French principle of the supremacy of the law as an expression of the public will. And, as in both Canada and Israeli, the first expression of implied constitutional rights involved the right to political expression.

The case concerned a decision by the French Council of Ministers to ban the political party 'La Gauche Prolétarienne' from participating in the political process.[265] This action was supported by a 1936 statute designed to prohibit the existence of private militias.[266] In reaction to that decision, supporters of the 'La Gauche Prolétarienne' formed 'Les Amis de la Cause du Peuple' and attempted to register this association as a 'new' political party.[267] The Prefect of Paris, however, acting on an order from the Minister of the Interior, denied 'Les Amis' the right to register on the basis that it represented only a reconstituted version of the forbidden 'La Gauche Prolétarienne.'[268] After 'Les Amis' were successful in having the Prefect's decision reversed by an administrative tribunal, the government took legislative action against the group. In "June

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[262] Stone, p. 67. Emphasis in original.

[263] Vroom, p. 274.

[264] George Haimbaugh, Jr., "Was it France's Marbury v. Madison?" *Ohio State Law Journal*, Vol. 35, 1974. p. 910. This passage is the author's translation of a quote taken form Jean Rivero's "Les principes fundementaux reconnus par les lois de la République: une Nouvelle Categorie Constitutionelle?" Recueil Dalloz Sirey (Chronique) (1972). p. 265.

[265] Ibid., p. 910.

[266] Stone, p. 67.

[267] Haimbaugh, p. 910.

[268] Stone, p. 67.

1971, attempting to obviate such problems for the future, the government introduced into parliament a bill which would have amended a 1901 law on association, by empowering a *préfet* to withhold recognition from any association which 'appeared to have an immoral or illicit purpose or to be trying to reconstitute an illegal association'."[269]

This controversial action led to a spirited debate in parliament, with some members of the Senate suggesting that the bill was unconstitutional, specifically under article 4 of the 1958 constitution, which states that political organizations may "form and exercise their activities freely."[270] Nevertheless, the National Assembly passed the bill despite the objections raised by the Senate. This having occurred, the president of the Senate, Alain Poher, reluctantly referred the legislation to the Constitutional Council in order to "throw some light on the matter."[271]

The Council, in its unprecedented ruling, annulled the government's proposed legislation on the grounds that it violated a right protected by the constitution. Where was this right to be found? Not in any substantive provision of the 1958 constitution, but in that constitution's preamble. In effect, the Council treated the preamble "as an operative part of the Constitution and not a mere declaration of intention..."[272] Moreover, the rights used to invalidate the government's legislative proposal were not actually contained in the preamble itself, but in historical documents referred to in the preamble. As noted above,

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[269] Ibid., p. 67.
[270] Ibid., p. 67.
[271] Ibid., p. 67.
[272] Ibid., p. 68.

the preamble of the 1958 French Constitution "solemnly proclaims" the attachment of the French people "to the Rights of Man and to the principles of national sovereignty as defined by the Declaration of 1789, confirmed and completed by the preamble of the Constitution of 1946."[273] Consequently, by interpreting the preamble to the 1958 document as possessing constitutional significance the Council added the provisions of both the preamble to the 1946 Constitution and the Declaration of the Rights of Man to the "bloc of constitutionality."[274] Considering the original constitutional design, the 1971 decision was indeed a constitutional revolution.

Together, the Declaration and the 1946 preamble have provided the Council with three distinct foundations for judicial review. The first to be used by the Council was the 'fundamental principles' clause of the 1946 preamble. This clause states: "The French people... *reaffirm solemnly the rights and liberties of man and the fundamental principles recognized by the laws of the Republic*,"[275] This clause, which is abbreviated as the FPRLR clause, has been interpreted by the Council as referring to "laws promulgated during the first three Republics, relating to rights and liberties."[276] As discussed below, the development of this type of represents substantial judicial creativity as the concept of 'fundamental principles' is vague at best.

The second source of judicial review developed by the Council is based on the

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[273] Stone, p. 257.
[274] Vroom, p. 275.
[275] Stone p. 257. Emphasis in original.
[276] Vroom, p. 275n.

1789 Declaration of the Rights of Man, which emphasizes individual liberties and equality over collective rights. As a result, decisions based on the Declaration tend to support the ideological right of the French political spectrum. Article 6 of the Declaration has been employed on several occasions by the Council: "...La loi applies equally to everyone, whether it protects or it punishes. All citizens being equal before it, are equally eligible to enjoy all honours, public places and employment, and without distinction other than that of their own virtue and talent."[277] Other principles enshrined in the Declaration include liberty, religious freedoms and freedom of communication. However, some passages of the 1789 document are popular with the left, "especially those articles which guarantee individual rights against abuses by judicial and administrative authorities."[278]

The third foundation for judicial review developed by the Council is composed of the substantive provisions of the preamble to the 1946 Constitution — i.e., those provisions other than the vague FPRLR clause. These substantive provisions clearly express the ideology of the left. For example, the document guarantees the right to strike, the right to work and requires the nationalization of monopolies. Not surprisingly, the many collectivist tenets of the 1946 document are in conflict with provisions contained in the Declaration. Indeed, they have generally been trumped by the more individualistic Declaration; only once, as we shall see, have the collectivist provisions of the 1946 document been invoked by the Council.

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[277] Stone, p. 259.
[278] Ibid., p. 72.

As there is a large jurisprudence regarding the Council's use of the preamble, only a few examples of each type of review is discussed. Furthermore, the early precedent setting decisions of the Council will be the focus of this chapter.

Fundamental Principles Recognized by the Laws of the Republic

The Decision of July 16, 1971

The foundational 1971 decision relied on the FPRLR clause of the 1946 preamble to guarantee freedom of association against the government's proposed legislation. It was the opinion of the Council that freedom of association, as protected by a 1901 statute, was an example of a 'fundamental principle recognized by the laws of the Republic," and thus prevailed over the offending statutory provisions:

> ...among the fundamental principles recognized by the laws of the Republic and solemnly reaffirmed by the preamble of the Constitution, it is appropriate to place the principle of freedom of association; that... principle is basic to the general provisions of the Law of July 1, 1901... by virtue of this principle associations are freely formed and may be rendered public subject only to the filing of a declaration; thus... even when they appear subject to dissolution or have an illegal purpose, they may not be subjected for their validity to prior administrative or even judicial sanction...[279]

After the 1971 decision the "*Conseil*... established itself as protector of that [individual] liberty and served notice that it would permit no legislative or administrative derogation from these principles [associated with individual liberties]."[280] In doing so, it

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[279] Decision of the *Conseil constitutionnel*, July 16th 1971. Taken from (and translated by) Cummins, p. 726.

[280] Vroom, p. 275.

significantly increased its own power and profile.

Stone notes that incorporating Fundamental Principles Recognized by the Laws of the Republic (FPRLR) has produced a curious situation: "the Council's decision enforces substantive constraints on parliamentary activity, constraints which it found in the work of parliament some seventy years before, when constitutional review did not exist!"[281] Furthermore, according to Stone, "[b]ecause the freedom of association is not listed as a fundamental right in the 1946 preamble, and because the FPRLR are only mentioned and not enumerated, the Council's ruling constituted unabashed judicial creativity (as *any* ruling based on the FPRLR would have)..."[282] This ruling set the precedent that the Council may protect liberties through implications found in the FPRLR, thus vastly expanding the constitution in a single stroke. As Stone points out "...because the Council had listed no other principles which might be contained in the corpus of the FPRLR, its discretionary power to discover more of them appeared virtually boundless."[283]

The decision of 1971 also "signaled to the opposition that constitutional review could be used to enshrine substantive rights important to it and to the detriment of the majority's legislative agenda."[284] Judicial review for this purpose was significantly aided by the 1974 amendment opening up access to the referral process to any sixty senators or deputies.[285] This amendment empowered minority parties by providing access to judicial

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[281] Stone, p. 68.
[282] Ibid., p. 68. Emphasis in original.
[283] Ibid., p. 68.
[284] Ibid., p. 69.
[285] Vroom, p. 276.

review of governmental legislation. Not surprisingly, "[t]he frequency of referrals [to the Constitutional Council] went from less than one per year to thirteen per year."[286] This also served to increased the prestige of the Constitutional Council and raise its importance within the political order.

The Decision of January 12, 1977

After the 1971 decision the Council reinforced its newly created power of judicial review based on FPRLR in numerous cases. In the January 1977 case the Council was called to examine government legislation which significantly augmented the power of the police to search vehicles for the purpose of controlling criminal activity.[287] After considering this controversial law, the Council was of the opinion that the bill violated the right of individual liberty, which it deemed to be a 'principle of constitutional value' protected by the judiciary.[288] It was the opinion of the Council that "judicial authorities can carry out this function only if the investigation of crimes (which may involve acts threatening individual liberty) is restricted to the judicial police, and only if the judicial police are restricted to the investigation of actual infractions."[289] The Council in this case found that the police powers were not sufficiently restricted to be constitutional.

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[286] Ibid,. p. 276.
[287] Ibid., p. 279.
[288] Ibid., p. 279.
[289] Ibid., p. 279. This is Vroom's assessment of the ruling, not the quoted opinion of the Council. Vroom notes that "France has a multilevel police system, with its functions generally divided into two categories: administrative police... and judicial police. The function of the administrative police is generally to maintain order through the prevention of disturbances. Administrative police traditionally have no authority to take any measures which would deprive an individual of his liberty.... [t]hat authority is accorded to the judicial police (p. 279)."

According to Vroom "[t]he decision of January 12, 1977 also had a significant impact on the development of constitutional jurisprudence because it affirmed the constitutional value of liberty in a broad sense, going beyond the immediate issue of vehicle searches."[290] The importance of this ruling was due mainly to the Council's view that an expanded number of fundamental rights which were not supported by the written constitution could be supported as FPRLR or as 'principles of constitutional significance'. Thus, the vaguely defined concept of freedom of the individual was expanded to include the right to privacy, the right of protection against arbitrary detention, freedom of movement as well as the sanctity of the domicile.[291] Therefore, this decision vastly augmented judicial discretion without any firm constitutional basis.

Decision of December 29, 1983

The decision of December 29, 1983 serves to demonstrate the precedent setting importance of the expansive ruling of January 12, 1977. Considering an aspect of fiscal law, this case dealt with the powers of tax officials to investigate suspect tax filings. "The law provided that special agents of the tax administration could obtain search warrants from a judge to investigate possible tax violations. It was required that the agent had to be accompanied by an officer of the judicial police, and the search had to take place in the presence of the occupant or two witnesses."[292]

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[290] Ibid., p. 280.
[291] Ibid., p. 280.
[292] Ibid., p. 290.

The Council, in its judgement, cited article 13 of the Declaration of the Rights of Man, which states that: "For the undertaking of public authority, and for the expenses of the administration, a communal contribution is indispensable: it must be equally divided among all citizens, according to their faculties."[293] The Council argued that "it necessarily results from these provisions having constitutional force that the exercise of individual rights and liberties can in no way excuse fiscal fraud or block its legitimate repression."[294] Despite this opinion the Council maintained that the terminology of the bill was too ambiguous to prevent misuse. The principle of the inviolability of the domicile, as discerned from the 1977 FPRLR decision discussed above, could not be abrogated by the provisions of such a vague law.[295] The Council asserted that:

> if the needs of fiscal action can require that financial agents be authorized to carry out investigations in non-public places, such investigations can only be conducted in conformity with Article 66 of the Constitution, which entrusts to the judicial authority the safeguard of individual liberty in all aspects, including that of the inviolability of the domicile; intervention of the judicial authority is required to carry out this responsibility and exercise its powers of control.[296]

The freedom of the individual, therefore, trumped the constitutional notion of equality with regards to taxation.

This case is useful for further demonstrating the almost unchecked ability of the Council to imply constitutional rights through vague constitution passages. As Article 66

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[293] Stone, p. 260.

[294] Decision of December 29, 1983. Quoted from Vroom, p. 290.

[295] Ibid., p. 290. An amputated version of the bill, without the offending provisions, was approved by the Council for promulgation. In 1984, the government reworked the fiscal law in order to conform to this ruling. Ibid., p. 291.

[296] Quoted from Ibid., p. 290.

of the Constitution entrusts the protection of individual liberty to the judiciary, the Council was able to apply its own broad interpretation of individual liberty, which is not specifically defined in the 'bloc of constitutionality' Article 66, therefore, provided a substantive basis for legitimating the Council's creative brand of activism.

The Decision of January 19-20, 1981

The 'Security and Liberty' decision of January 19-20, 1981 was also of significance to the Council's jurisprudence on fundamental legal rights, although it also indicates some judicial restraint.[297] The impugned legislation in this case was a law and order initiative which had the noble stated purpose of "reinforc[ing] security while safeguarding liberty."[298] Although the vast majority of the bill was approved for promulgation by the Council, the rejection and acceptance of certain sections of the bill helped develop jurisprudence regarding the constitutional status of legal and equality rights in France.

One of the nullified passages in the January 19-20, 1981 case was a provision of the impugned bill which would allow any presiding court judge to prohibit, for a two day period, any "lawyer guilty of causing a disturbance."[299] In its ruling the Council, relying on a vague FPRLR protecting the rights of the defence, declared the provision unconstitutional on the grounds that:

> [T]his measure, which could be taken even if the lawyer has not failed any of the obligations required by his professional oath, and even though he has

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[297] Vroom, p. 282.
[298] Ibid., p. 282.
[299] Ibid., p. 283.

> fulfilled his role as a defender, would violate, for the lawyer as well as the defendant, the rights of the defen[c]e which are found in the fundamental principles recognized by the laws of the Republic."[300]

Another section of the bill which was declared invalid regarded the reduction of penalties for some offences. As this provision only extended to those who committed such offences after the bill's passage and not to those who offended prior to the bill's promulgation, the Council felt that this represented discrimination and ruled that such reduction must also apply to "all cases *judged* after the law came into force."[301] This decision was based on Article 6 of the Declaration of the Rights of Man[302] which reads: ...La loi applies equally to everyone, whether it protects or punishes."[303]

Although some parts of the 1981 decision were clearly activist, others pointed in the direction of judicial restraint. The Council, taking a deferential position toward the legislature, upheld some other very controversial reforms to the Penal Code in the same case. For example, it was suggested by those opposed to the legislation that the provision of "automatic sanction and maximum sentences... violated the principle of proportionality between the severity of the crime and the severity of the punishment."[304] The Council was of the opinion that "[i]t is not the place of the *Conseil constitutionnel* to substitute its own judgement for that of the legislator concerning the necessity of punishment for the crimes

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[300] Decision of January 19-20. Quoted from Vroom, p. 283.

[301] John Bell, "Equality in the Case-Law of the Conseil Constitutionnel" *Public Law*, p. 440. Emphasis added in Original.

[302] Ibid., p. 440.

[303] Stone, p. 259.

[304] Vroom, p. 283.

he has defined, as long as no provision of... the law is manifestly contrary to the principle posed by article 8 of the Declaration of Rights of 1789."[305] The automatic sentencing provision of the bill was also attacked on the grounds that it denied a person the right to be sentences as an individual, rather than as a certain class of offender.[306] The Council disagreed with that assessment and maintained that:

> even if the principle of individualized sentences could be regarded as one of the fundamental principles recognized by the laws of the Republic, nothing therein prevents the legislator, in leaving to the judge or to authorities charged with determining the form of the execution of a sentence, a large power of discretion in fixing the rules assuring effective suppression of crime.[307]

If the 'legislator' is entitled to a 'large power of discretion' to trump certain fundamental principles then the status of FPRLR in the constitutional order is questionable.

Although use of the FPRLR as a normative basis for judicial review was common for the first decade of implied rights jurisprudence, it had almost disappeared by the early 1980s. Vroom notes that although in "the early years the *Conseil* in its decision tended to cite 'fundamental principles recognized by the laws of the Republic.' By 1981 this reference had nearly disappeared, as had the Conseil's rare reliance on 'general principles of law.'"[308] As time went on, the 1789 Declaration became the main foundation for the Council's civil liberties jurisprudence.

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[305] Decision of the Council (Jan. 19-20, 1981). Taken from (and translated by) Vroom, pp. 283-284.

[306] Ibid., p. 284.

[307] Ibid., p. 284.

[308] Ibid., p. 303.

The Declaration of the Rights of Man

The Decision of December 18, 1973

The first decision of the Council based on the Declaration of the Rights of Man was delivered in 1973.[309] The case concerned a regulation which allowed "tax inspectors to assess the tax due *ex officio* where they considered the returns of the taxpayer were insufficient."[310] The Council ruled that the law discriminated, as only those taxpayers whose assessment concerned income gained from revenue — and not those whose income was gained through capital — could appeal the report of the taxation agent.[311] This was held by the Council to conflict with the constitutional principle of equality before the law.[312] Surprisingly, the Council did not expressly rely on the provisions of the 1789 Declaration which protect equality of the individual before public burdens. However, Bell points out that principle was implied in the decision as "[t]he principle of equality before public burdens has long been recognized by the Conseil d'Etat and the specific value of equality in taxation was one of the earliest 'general principles of law' recognized by it."[313]

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[309] Bell, p. 435. This case is also known as *Ex Officio Taxation*.
[310] Ibid., p. 435.
[311] Ibid., p. 435.
[312] Ibid., p. 435.
[313] Ibid., p. 435.

The Decision of July 23, 1975

This case concerned the validity of a reform to the penal code.[314] The reform would have authorized the appointment of only one judge, rather than the usual three to hear some minor cases.[315] The Council struck down this provision because empowering a single judge:

> calls into question, especially when a criminal law is at issue, the principle of equality before justice which is included in the principle of equality before the law proclaimed in the Declaration of the Rights of Man of 1789 and solemnly reaffirmed by the Preamble to the Constitution... Respect for this principle prevents citizens in the same circumstances from being judged by jurisdictions composed under different rules.[316]

With this decision the Council invoked article six of the Declaration which states the law 'must be the same for all, whether it protects or punishes.'[317]

The Nationalizations Case

The controversial Nationalizations case of 1982 helped define the shape of future judicial activism. The details of this case are complicated and are well documented elsewhere.[318] The importance of this case for this thesis was that Council maintained that although the government, under the provisions of article 34 of the constitution, possessed the authority

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[314] Vroom, p. 277.
[315] Ibid., p. 277.
[316] Ibid., p. 278.
[317] Ibid, p. 278. Vroom notes that the Council also argued that the principle of separation of powers did not a judge to delegate such powers.
[318] See for example, Stone chapter 6, or Morton, pp. 137-139.

to undertake a programme of nationalizations, this "does not excuse the legislator, in the exercise of his competence, from the respect of principles and rules of constitutional value which are binding on all organs of government."[319] Furthermore, the right to private property was deemed to have 'full constitutional value.' The Council ruled that article 17 of the 1789 Constitution "not only consecrated a 'fundamental right' whose 'preservation constitutes one of the objectives of public society' but that it occupies the same [constitutional] rank as liberty, security and the resistance to oppression.'"[320] The Council also maintained that the right of commerce (or capitalism) itself had constitutional significance. The court also asserted that other principles enumerated the preamble of the Constitution, especially the tenets of the 1946 Constitution, could only 'complement' those rights contained in the Declaration of the Rights of Man. In sum, the Nationalizations case both affirmed that the legislature must defer to constitutional norms as dictated by the council and that the Declaration of the Rights of Man would be interpreted as the paramount constitutional document, above all others.[321]

The outcome of the case was that the nationalizations could proceed with an increase in compensation payed to the shareholders of the companies affected. However, the case was also essential in re-defining the jurisprudence of the Council; the Council, whose membership at the time consisted of judges appointed by the Right, chose to

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[319] Vroom, p. 305.

[320] Stone, p. 160. Single quotes represent direct (translated) quotes from the Council's decision. Square brackets added by Stone.

[321] Vroom, pp. 303-304.

emphasis the liberal-individualist provision of the 1789 document at the expense of the more collective/socialistic tenets contained in the 1946 constitution. This, of course reflected the political environment of the time. In effect, the decisions of the Council made after the Socialist came to power in 1981 served the political purpose of delaying the reforms of the new government.

The Collectivist Provisions of the 1946 Preamble

Stone notes that in the first twenty years after the decision of July 16, 1971 only once did the Council recognize a formal passage of the 1946 preamble as possessing constitutional significance.[322] The July 1979 case dealt with the right to strike which was well expressed by the preamble to the 1946 constitution:

> Every man may defend his rights and interests by union action, and may belong to the union of his choice.
> The right to strike is exercised according to the laws which regulate it.[323]

Specifically, the bill was concerned with employees of state television and radio station. According to existing strike provisions, unions were required to "file one day in advance a notice of intent to walk out or suffer financial penalties. Upon receipt of the notice, management was then empowered to require personnel to remain on the job in order to assure 'minimum service'"[324] To counter this requirement, the unions initiated a

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[322] Ibid., p. 72.
[323] Ibid., p. 258.
[324] Ibid., pp. 74-75.

policy of filing notices of intent to strike informing management that only those "employees required to provide minimum service were to strike."[325] These 'sliding notices' led to an environment of instability in the workplace as "management was ... led to invoke minimum service procedures, but employees suffered no penalties since virtually all personnel remained on the job."[326] Simply put, the impugned legislation in this case was designed to stop the practices of the issuance of 'sliding notices' by the union.

In its ruling, the Council amputated provision of the bill which would have required striking employees to remain on the job.[327] The decision was based on the grounds that:

> ...the recognition of the right to strike may not be understood to have the effect of forbidding the legislature from specifying necessary limitations to this right in order to assure *the continuity of public service*, which, like the right to strike, is a principle possessed of *valuer constitutionnel*.[328]

Stone notes that by removing the provisions of the impugned bill forcing striking worker to stay on the job, the Council put "the two principles on equal footing;"[329] although the Council recognized the right to strike as having constitutional significance, it balanced that right with a newly created right regarding the 'continuity of public service.'

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[325] Ibid., p 75. This action was an ingenious attempt by the unions to circumvent regulation restrictions strikes in the state-run broadcasting industry. As *only* those workers required to provide minimum service in case of a strike filed notices this policy created maximum confusion and instability without any financial penalties as all non-essential workers (the vast majority) would have stayed on the job.

[326] Ibid, p. 75.

[327] Ibid., p. 76.

[328] Decision of 25 July, 1979. Quoted from and translated by Stone, p. 76. Emphasis added by Stone.

[329] Stone, p. 76.

The latter represented the effective 'constitutionalizing' of a rule of law which was wholly the product of administrative jurisprudence.[330] Stone maintains that this was unnecessary as the Council could have made its ruling based on the provision of the preamble which states that "the right to strike is exercised according to the laws which regulate it" and declared the bill to be a legitimate regulation of the right to strike.[331]

The Decision of November 23, 1977 provides an excellent example of how the Council has normally dealt with the 1946 preamble.[332] The case concerned a government bill designed to "strengthen state support of the private [Catholic]... school system."[333] This act was highly controversial and appeared to violate the terms of one of the principles enumerated in 1946 preamble: "The nation guarantees equal access to the child and the adult to instruction, to professional training, and to culture. The organization of free and secular public education at every level is a responsibility of the State."[334] The Council, however, allowed the promulgation of the law on the grounds that such an act could be protected by implication through an FPRLR established by the 1931 finance law, which declared that education was a 'fundamental principle'.[335] This case clearly exemplified the ambiguousness of the FPRLR and the wide scope of creativity and selectivity it provided as the basis of Council decisions. As was usually the case, an FPRLR was employed to trump the tenets of the 1946 preamble.

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[330] Ibid., p. 76.
[331] Ibid., p. 76.
[332] Ibid., pp. 72-73.
[333] Ibid., p. 72.
[334] Ibid., p. 258.
[335] Ibid., p. 74.

Judicial Inclination or Institutional Context?

The remarkable transformation of the French Constitutional Council from an obscure institution to political prominence is yet another expression of the growth of judicial power in liberal democracies. The case of France is an especially useful example as it illustrates that judicial activism can arise without the benefit of an entrenched constitution in a state outside the common law tradition. The history of the Council demonstrates conclusively that a formal bill of rights is not a necessary prerequisite for court to develop an activist posture.

The Council's use of FPRLR and 'general principles of law' as grounds for judicial review serves as an excellent example of a judiciary implying rights in the constitution, a practice that was definitely unintended by the founders of the Council. Even the use of the 'bloc of constitutionality' as a normative basis for judicial review represents a substantial and unprecedented rise in judicial power in France. The Council's creativity, especially with such things as FPRLR, certainly adds to the evidence that can be invoked by those who insist on the importance of judicial inclination in explaining judicial activism.

Furthermore, two aspects of the French experience might suggest the complete predominance of judicial inclination as an explanatory factor: first, unlike the Israeli High Court, the Council goes beyond interpretive avoidance to actual invalidation on the basis of implied rights. Second, the Council's activist decisions are more numerous and extend over a broader range of issues than the implied bill of rights jurisprudence of the other

countries. For example, the implied bill of rights jurisprudence in Canada, Israel and Australia is restricted, in the main, to political freedoms. In contrast, the French Council has ruled on legal, social and property rights issues, among others. In other words, the French experience might be taken to suggest than an activist court can indeed go as far with implied constitutional rights as with explicitly entrenched constitutional documents, suggesting that judicial inclination can triumph completely over institutional context. On such an interpretation, the fact that Canadian and Israeli judges failed to go as far would be explained by their comparative lack of activist resolve, not by the residual impact of institutional context.

One should not dismiss institutional factors too quickly, however. First, the institutional factor of 'a priori' review may make activism easier to indulge in than in an adjudicative context. The fact that the Council only considers legislative initiatives before they become law may make it less hesitant to nullify Parliamentary initiates. Second, the institutional context also turns review into a very partisan exercise, which may foster activism — review is often triggered by the parliamentary minority and undertaken by judges sympathetic to that minority because they were appointed when the parliamentary minority was previously a majority. In fact, the council has often provided significant opposition for the government. The partisanship of the Council may make it less reluctant to challenge the government. Indeed, if a majority of the Council, in other words, is affiliated with a defeated parliamentary majority it may be expected to stall and frustrate the policy aims of a new government. If the French Council is an exception, in other

words, its exceptional character may be explained as much by institutional considerations as by judicial culture.

CHAPTER 6

THE AUSTRALIAN IMPLIED BILL OF RIGHTS

Australian courts have become increasingly powerful in recent decades. By the 1970s, the courts had established "an elaborate system of administrative law for judicial review of Commonwealth administrative decisions"[336] However, it was not until 1992 that the High Court of Australia took the radical and unprecedented step of recognizing that the constitution contains an implied protection of political discussion. Prior to the activist decisions delivered in *Australian Capital Television Pty Ltd v The Commonwealth*[337] and *Nationwide News v. Wills*[338] (collectively known as the Free Speech cases), the Court had, for the most part, remained loyal to the doctrine set out in the *Engineers' Case* which firmly established that the Constitution should be interpreted in a literal manner. The rulings in the *Free Speech* cases represent a rejection of that literalist approach and symbolize the beginning of a new era in Australian constitutional law. Also indicative of the Court's new activism was the landmark decisions rendered in *Mabo v. Queensland*, also delivered in 1992.[339] Although that case did not rely on an implied bill of rights doctrine, it had profound political and constitutional significance as the Court in that case

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[336] Brian Galligan, "Judicial Activism in Australia" in Kenneth M. Holland, eds. *Judicial Activism in Comparative Perspective* (New York: St. Martin's Press, 1991), p. 70. Galligan notes that Australia had already developed a unique "judicial system of industrial arbitration during the first half century of federation. (p. 70)".

[337] (1992) 66 ALJR 695. Hereinafter referred to as '*Australian Capital Television*' or '*ACTV.*'

[338] (1992) 66 ALJR 658. Hereinafter referred to as '*Nationwide News*'.

[339] No. 2. 66 175 CLR 1.

dramatically redefined and expanded the legal basis for Native land claims.[340]

The basis of the newly discovered implied right to freedom of political expression in the Australian constitution rests squarely on the premise that Australia was founded as a representative democracy. As in Canada, this was understood to imply protection for the practices which support the democratic state. In particular, as political communication and discussion are essential to the maintenance of Australian democracy as entrenched in the constitution, the right to free political speech must also enjoy the same constitutional protection. This argument was well summed up by Gaudron J; "[t]he provisions of the Constitution directing elections are predicated upon a free society governed in accordance with the principles of representative parliamentary democracy."[341] Consequently, the Court has ruled there is an implied right to engage in the political process through unrestricted discourse on matters of public concern.

Implications in the Constitution Prior to The *Free Speech* Cases

Although the *Freedom of Speech* cases represent the first successful use of an implied constitutional right to political expression in Australia, it was not the first time that such a doctrine was endorsed by a member of the High Court. In numerous earlier cases Murphy J, had "attempted to infer from the structure and context of the Constitution a

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[340] For the full implications of *Mabo* see for example, Peter Butt "*Mabo v. Queensland:* A Summary" *Australian Law Journal*, Vol. 67 No. 6. June 1993.

[341] *Australian Capital Television*, p. 734.

general, though unexpressed, Bill of Rights.[342] This was based on the view that the Constitution assumed a free and democratic society."[343] However, Murphy went much farther than the Court did in *ACTV* or *Nationwide News*. He maintained that in addition to freedom of expression the constitution could protect the individual rights of freedom of movement, prevent discrimination, and prohibit cruel and unusual punishment.[344] He also supported the view that such an implied bill of rights should be interpreted as covering all levels of government in Australia.[345] Justice Murphy's position in *Ansett Transport Industries (Operation) Pty Ltd v. Commonwealth* (1977)[346] is indicative of his opinion on the subject:

> Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States... . From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution... . The freedoms are not absolute, but nearly so... . The freedoms may not be restricted by the Parliament or State Parliaments except for such compelling reasons.[347]

Murphy's doctrine, however, was never supported by fellow members of the Supreme

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[342] Michael Coper. *Encounters with the Australian Constitution* (North Ryde, N.S.W.: CHH Australia Ltd, 1987), p. 349. Coper notes that "[t]he idea that the Constitution contains certian implied rights and freedoms was not invented by Justice Murphy, but it was embraced by him with a vengence."

[343] Zines, "A Judicially Created Bill of Rights?" *Sydney Law Review*, Vol. 16, p. 166. Other such cases include *McGraw-Hinds (Aust) Pty Ltd v Smith* and *Miller v. TCN Channel Nine Pty Ltd.*

[344] Ibid., p. 166.

[345] Ibid., p. 166.

[346] *Ansett Transport Industries (Operations) Pty Ltd v. Commonwealth* (1977) 139 CLR 54.

[347] Ibid., p. 88. Quoted from Zines, pp. 166-167.

Court in the cases in which he invoked it.[348]

Justice Murphy, referred to as the "the lone judicial freedom fighter,"[349] was often the lone dissenter[350] and invoked his implied bill of rights doctrine whenever possible.[351] When Murphy *was* on the majority side of the Court, more often than not it was for different reasons than the other members of the majority.[352] During the decade (1975-1986) that Murphy sat on the bench he was by far the most activist-minded member of a Court that tended to be restrained in civil liberty litigation.[353] In some respect the activist Murphy can be compared to Justice Abbot of Canadian Supreme Court, who also stood out as an activist member of a restrained court, and who continued endorsing the implied bill of rights after it had been abandoned by all others.

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[348] Zines, p. 167. Zines notes that "Murphy J's attempt to put a full-scale Bill of Right into the Constitution by the process of implication was not taken up by other High Court judges, but some judges have made tantalizing suggestions from time to time that the nature of the polity might make certain types of laws invalid. (p. 167). Writing in 1987, Micheal Coper asked: "Is there a Bill of Rights in the Constitution? No; only five flimsy freedoms and, instead of a constellation of implied rights, the occasional glimpse of a solitary supernova — the Murphy supernova." p. 357.

[349] Coper, p. 328.

[350] Ibid., pp. 319-329. See for example, *Attorney-General (Victoria) v. Commonwealth* (1981) and *R. v. Pearson* (1983).

[351] Ibid., p. 348. Coper maintains that during the ten years that Murphy was on the bench, "for those... who endeavore[d] to keep a breast of all the latest constitutional developments it became necessary to go beyond the usual boundaries and to scour even the most mundane cases lest Justice Murphy had said: 'the point was not raised, but it may be that there is an implied constitutional right in these circumstances to...'"

[352] Ibid., pp. 351-352. See for example, *Miller v. TCN Channel Nine Pty Ltd* (1986). p. 351.

[353] Ibid., p. 328. In the later part of Murphy's tenure he was joined by Justice Deane who also endeavored to protect individual rights and freedoms. However, his approach was not nearly as radical or vehement as was Murphy's.

The Free Speech Cases of 1992

As is often the case, the dissents of one era become the majority judgements of another. Although Murphy stood virtually alone in promoting the implied bill of rights doctrine during his own tenure on the Court, the Court adopted part of his doctrine after he left. It is surprising, however, that Murphy was not once cited by any of the judges comprising the majority in the 1992 freedom of expression cases.

The first case in which an implied constitutional protection of free speech was significantly supported by the Court, *Nationwide News*, involved a challenge to the constitutionality of section 299 of the *Industrial Relations Act* of 1988.[354] The impugned section of the Act provided that:

> "(1) A person shall not: ...
> (d) by writing or speech use words calculated: ...
> (ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute."[355]

The punishment for violation of the section was "$500 or imprisonment or both (in the case of a natural person) or a fine of $1000 (for a body corporate)."[356]

The specific issue at hand dealt with an article which appeared in *The Australian* (November 14, 1989). In that publication, "Mr. Maxwell Newton described the members of the then Industrial Relations Commission as 'a corrupt and compliant judiciary in the

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[354] *Nationwide News p.* 658.

[355] Ibid., p. 658.

[356] Bell et al. "Implying Guarantees of Freedom into the Constitution: *Nationwide News* and *Australian Capital Television.*" *Sydney Law Review.* Vol 16, 1994.., p. 288.

official Soviet-style Arbitration'"[357] The article went on as follows:

> [l]ocal trade union soviets, with the benefit of monopoly powers conferred on them by the State and *enforced by the corrupt labour 'judges'* in many industries regulate the employment of each individual, who may not work unless he first obtains the union card from the local union soviet... So, in Australia, as in Eastern Europe or in the Soviet Union itself, the ministry of labour controls on workers' right to work, *enforced by pliant 'judges'*, have produced declining real wages.[358]

The company responsible for publishing *The Australian*, Nationwide News, was duly charged with violating section 299 of the *Industrial Relations Act*, which they challenged on constitutional and implied-bill-of-rights grounds.[359]

Although the implied bill of rights doctrine played a role in *Nationwide News*, the case was ultimately decided on the basis of explicit constitutional provisions. In particular, the Court decided that the federal Parliament could not authorize the legislation under section 51(xxxv) of the Constitution, which allows Parliament to pass legislation concerning "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."[360] Furthermore, three of the seven justices "considered the protection offered by the express guarantee of freedom of intercourse enshrined in section 92 of the Constitution"[361] as reason enough to limit government authority in this area. As in Canadian implied bill of rights cases, however, a minority of judges came to the same activist conclusion on the basis of an implied freedom

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[357] Ibid., p. 288.
[358] *Nationwide News* p. 690. Emphasis added by McHugh J..
[359] Bell et al., p, 289.
[360] *Nationwide News* p. 658.
[361] Bell et al, p. 289.

of communication regarding public and political matters. Only three Justices of the Court ruling on *Nationwide News* dealt in any length with the matter of implied rights in the constitution.

According to the joint decision of Deane and Toohey JJ, the Australian constitution is built on three fundamental legal principles: federalism, the separation of powers and, most importantly for this case, representative democracy and responsible government.[362] They maintained that the latter is of substantial legal significance:

> [i]n implementing the doctrine of representative government, the Constitution reserves to the people of the Commonwealth the ultimate power of governmental control. It provides for the exercise of that ultimate power by... electoral processes... . [T]he general effect of the constitution is, at least since the adoption of full suffrage by all that States, that all citizen's of the Commonwealth who are not under some special disability are entitled to share equally in the in the exercise of those ultimate powers of governmental control.[363]
>
> The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. The actual discharge of the very function of voting in an election or referendum involves communication.[364]
>
> It follows... that there is to be discerned in the doctrine of representative government which the Constitution incorporates an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth....[365]

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[362] Ibid., p. 291.
[363] *Nationwide News*, p. 679-680.
[364] Ibid., p. 680.
[365] Ibid., p. 680.

Deane and Toohey further asserted that this 'implied' protection of freedom of communication can be found at two levels. The first of these levels is the communication which is required between the people and their political representatives. The second implication of freedom of political speech is the protection of communication between the people of the Commonwealth: "[i]nherent in the Constitution's doctrine of representative democracy is an implication of the freedom of the people of the Commonwealth to communicate information, opinions and ideas about all aspects of the government of the Commonwealth..."[366] Deane and Toohey were also of the opinion that although this freedom relates 'most obviously' to the Commonwealth government it also extends to all levels, including State, Territorial and local government.[367]

The ruling of Brennan J. suggested that "[f]reedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege; it is inherent in the idea of a representative democracy."[368] There was no doubt in Justice Brennan's mind that with representative democracy must come free speech: "...where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government."[369] Furthermore, "[o]nce it is recognized that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to

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[366] Ibid., p. 681.
[367] Ibid., p. 681.
[368] Ibid., p. 669.
[369] Ibid., p. 669.

sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains."[370]

As indicated, *Nationwide News* has the look of many Canadian implied-bill-of-rights cases, in which no more than a minority of judges ever endorsed the doctrine, and even then did so only in support of more explicit constitutional reasons for reaching the desired activist result. This Canadian experience suggested that judges much prefer to hang their activism on explicit constitutional pegs. If *Nationwide News* were the only evidence, the Australian experience would lead to a similar conclusion. But *Nationwide*'s companion case, *Australian Capital Television* (*ACTV*), also decided in 1992, strikes out in a different and much more activist direction.

In *ACTV* the High Court examined a challenge to the validity of a section of the *Broadcasting Act* of 1942, which had been recently amended by the *Political Broadcasts and Political Disclosures Act* (1991).[371] The addition of Pt IIID to the Act "was intended to prohibit political advertising by means of radio or television."[372] Specifically, Section 95B "purported to prohibit publication of advertisements of political matter (as defined) during an election period in relation to a federal election or referendum."[373] Other sections extended the ban to both State, Territory and local elections. Although secondary parties were also affected by the legislation, current affairs programmes, talk shows and other

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[370] Ibid., pp. 669-670.
[371] *Australia Capital Television*, p. 695.
[372] Ibid., p. 695.
[373] Ibid., p. 695.

similar broadcasts were not restricted during the prohibitive period. Furthermore, so-called free time broadcasts for official political parties in allocated segments were also excepted from the ban. However, this requirement represented an imposition on broadcasters who were now compelled by the legislation to provide air time for political announcements at no cost.[374]

According to a government report which initiated the legislation, the goal of the new regulations was threefold.[375] First, the law was designed to "eliminate possible corruption of the electoral process through a need to raise exorbitant funds for television and radio advertising."[376] Second, it was intended to ensure that the electorate would be better informed by not allowing short campaign advertisements, as their "brevity tends to trivialise the subject."[377] Also, the Act was to "create a level playing field for use of the airwaves, since financial capability would no longer be the basis for allowing access to the electronic media."[378]

As in *Nationwide News*, the *ACTV* challenge was based on both explicit and implied constitutional grounds. Here, too, it was argued that the impugned act contravened "the guarantee of freedom of intercourse given by s. 92 of the Constitution."[379] In addition, it was argued that the act infringed an "implied constitutional freedom of discussion concerning matters arising out of or in the course of

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[374] Bell et al., p. 295.
[375] Ibid., p. 294.
[376] Ibid., p. 294.
[377] *Australian Capital Television* p. 712.
[378] Bell et al., p. 294.
[379] *Australian Capital Television*, p. 695.

elections or referendums at all levels of government."[380] To the extent that judges really do prefer base their decisions on explicit constitutional provisions, one would expect the judges to follow the route mapped out in the Canadian cases and in their own judgement in *Nationwide News*. That is, one would expect them to rely mainly on the explicit section 92 argument, bringing implied rights in, if at all, only as ancillary support. In a startling departure from everything our analysis to this point leads one to expect, the Court did the opposite. Instead of relying heavily on the section 92 argument, the Court chose not to address it at all and declared the law invalid solely on implied-bill-of-rights grounds. A full six out of seven High Court justices hearing the case supported the view that the act

> was invalid in its entirety because of its severe impairment of the freedoms previously enjoyed by citizens to discuss public and political affairs and to criticize federal institutions — freedoms embodied by constitutional implication in an implied guarantee of freedom of communication as to public and political discussion; and because of its substantial interference with the function of the States and its purporting to control them in the exercise of the function.[381]

The arguments of the Chief Justice give some insight into this radically new interpretation of the Australian constitution. Regarding the invocation of a theory of implied rights, Mason C.J., maintained that "implications have a place in the interpretation of the Constitution and our avowed task is simply the revealing or uncovering of implications that are already there."[382] Considering the protection of free political speech, Mason stated that "[f]reedom of communication... is so indispensable to the efficacy of

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[380] *Australian Capital Television* p. 695.
[381] Ibid., p. 695.
[382] Ibid., p. 701.

the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision."[383] The Chief Justice emphasized the scope of the implication, asserting because of the importance of political discussion in a democratic state it is necessary "that the implied freedom of communication extend to all matters of public affairs and political discussion."[384]

McHugh J. argued specifically that the passage 'directly chosen by the people' contained in both s.7 and s.24 of the Constitution (which concerns elections to the Senate and House of Representatives respectively) could be widely interpreted; "responsible government... [is] referring to a process... . The process includes all those steps which are directed to the people electing their representatives — nominating, campaigning, advertising, debating, criticizing and voting."[385] Therefore, "the people possess the right to participate, the right to associate and the right to communicate. That means that, subject to necessary exceptions, the people have a constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting."[386]

The opinions of the other Justices constituting the majority were similar. Brennan J. held that "the legislative powers of the Parliament are so limited by implication as to preclude the making of a law trenching upon that freedom of discussion of political and

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[383] Ibid., p. 704.
[384] Ibid., p. 696.
[385] Ibid., p. 743.
[386] Ibid., p. 743.

economic matters which is essential to sustain the system of representative government prescribed by the Constitution."[387] Deane and Toohey referred mainly to their decision in *Nationwide News* but maintained that "it is an implication of the doctrine of representative government embodied in the Commonwealth Constitution that there shall be freedom within the Commonwealth of communication about matters relating to the government of the Commonwealth."[388]

With the exception of the lone dissenter, Dawson J., who did not agree that the constitution could be interpreted to protect free speech, the ruling of all members of the Court endorsed the existence of an implied right to free speech inherent to the Constitution. However, they also recognized some limitations on this newly found right. For example, most members of the Court maintained that the implied right to freedom of expression contained in the constitution is not absolute, and may be trumped by other competing rights and interests.[389] Deane and Toohey maintained that restriction on the constitutional right to free speech may be justified if it is enacted in the public interest. To be declared to be in the public interest such a law must be held to be either conducive to free speech or "not go beyond what is reasonably necessary for the preservation of an ordered and democratic society or for the vindication of claims of persons to live peacefully with dignity."[390]

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[387] Ibid., p. 708.

[388] Ibid., pp. 715-716.

[389] Arthur Glass, "Freedom of Speech and the Constitution: *Australian Capital Television* and the Application of Constitutional Rights" *Sydney Law Review*, Vol. 17, 1994, p. 32.

[390] Ibid., p. 34.

Brennan J. was of the opinion that any "restriction [regarding the right to freedom of expression] must serve some other legitimate interest and it must be proportionate to the interests to be served."[391] Moreover, "[t]he proportionality of the restriction to the interest served is incapable of a priori definition: in the case of each law, it is necessary to ascertain the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served."[392] Such a test of proportionality, if adopted as precedent, could significantly curtail legislative authority while simultaneously augmenting the power of the Court.

Given the obvious parallel between this Australian implied-bill-of-rights doctrine and its Canadian predecessor, it is not surprising that the Australian judges looked to Canada for supporting precedent. Regarding his ruling in ACTV, Mason C.J. stated that:

> Much the same view was taken in Canada under the *British North America Act* 1867 which contained no express guarantee of freedom of speech or freedom of communication. The preamble to that Act manifested an intention to bring into existence a Constitution for Canada similar in principle to that of the United Kingdom.[393]

Mason summarized the decision of the Supreme Court of Canada in the *Alberta Press Case*, *Switzman v. Elbling* and several *Canadian Charter of Rights and Freedoms* cases[394] as paralleling that of *Australian Capital Television*. Mason went on to suggest that "[w]hat is presently significant is that the implied freedom of speech and expression in

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[391] *Australian Capital Television*, p. 708.

[392] Ibid., p. 708.

[393] *Austalain Capital Television*, p. 704.

[394] Ibid., p. 704. Charter cases specifically referred to included: *Re Ontario Public Service Employees' Union* (1987) 41 DLR (4th) 1 and *Dolphin Delivery* (1986) 33 DLR (4th).

Canada is founded on the view that it is indispensable to the efficacious working of Canadian representative parliamentary democracy."[395] Gaudron J. in *ACTV* also noted Canadian experience in this area as did Brennan, Deane, Toohey and McHugh in *Nationwide News*.

Just as one can readily understand the desire of the Australian judges to cite the Canadian experience in justification of their newly activist departure, one should not be surprised to find them citing it selectively. What Justice Mason failed to mention was that his court was pushing the doctrine of an implied-bill-of-rights much further than Canadian judges ever did. As we have seen, no claim regarding the existence of implied rights ever enjoyed the support of a majority of the Canadian Supreme Court. Rather, it was endorsed only by a few (albeit prominent) Canadian Supreme Justices in a handful of cases over a forty year period. Nor did Justice Mason acknowledge that the doctrine had virtually died out — indeed, that it had been explicitly rejected by the Supreme Court — in Canada by the late 1970s. No doubt, Justice Mason did not want to draw attention to the fact that *ACTV* stands out as the most activist implied-bill-of rights we have encountered thus far. It is the first case in which implied rights were used by a large majority of a high court as the sole basis for actually striking down a duly promulgated piece legislation.

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[395] *Australian Capital Television*, p. 704.

Post *ACTV* Cases

ACTV is also the *only* implied-bill-of-rights case that has exhibited this degree of activism. The *Nationwide News* and *ACTV* precedents have generated three subsequent cases in Australia, but while activism was certainly involved, in none of these cases did the High Court repeat its *ACTV* activism-style invalidation of legislation. Two of the cases — *Theophanous v Herald & Weekly Times Limited*[396] and *Stephens v. West Australian Newspapers Limited*.[397] — raised the question whether the law of defamation should be reformulated in light of the implied freedom of communication. In other words, did this freedom provide publishers with greater protection against defamation charges than they has previously enjoyed? In clearly activist decisions, the Court agreed that the defamation law should be liberalized in light of the implied right. Furthermore, the Court made it clear in these decisions that the implied right of communication applied not only against the Commonwealth but also against the states. However, since defamation law is common law (i.e., judge made law), this activism simply involved judges reworking their own precedents; it did not involve the nullification of a piece of legislation.

The third decision, *Cunliffe v. The Commonwealth*,[398] involved a challenge to the *Migration Act* on the grounds that it infringed the freedom of communication by allowing only registered agents to provide immigration assistance. Although a majority of the High Court found that freedom of communication does indeed extend to the provision of

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[396] (1994) 124 ALJR 1.
[397] (1994) 124 ALJR 80.
[398] (1994) 68 ALJR 791.

immigration assistance — thus making it clear that this freedom is not limited to 'political communication' narrowly defined — the court found that the freedom was not infringed by this legislation. In its bottom line result, in other words, this was a restrained decision that upheld legislation, not an activist invalidation of legislation.

Judicial Inclination over Institutional Context?

In the Australian implied bill of rights experience, it would appear that judicial inclination has largely trumped institutional context. The court, displaying a new interest in civil liberties activism, reversed the Court's earlier rejection of implied constitutional rights and freedoms as endorsed by Justice Murphy. Although the Court's decision in *Nationwide News* appears on the surface to be similar to the 1950s Supreme Court of Canada, with the majority of judges preferring to hang their activism on more explicit constitutional pegs, the Court's decision in *ACTV* clearly demonstrates that a majority of Justices were willing to support an implied bill of rights as the sole basis for striking down an actual legislative act. Indeed, those in the majority did not even find it necessary to consider the relevant explicit constitutional provisions in this case.

The Court's ruling in *ACTV* appears to be the most activist implied-bill-of-rights decision examined in this thesis. The Court's nullification of a statute represents the development of a type of constitutional review as effective as one would expect to see under an entrenched bill of rights. With that ruling, the members of the High Court of Australia went further than their Canadian, Israeli and French counterparts. As discussed

above, a majority of Canadian judges, although able to defend civil liberties through activist decisions based on federalism or interpretive avoidance, were unwilling to rest their activism solely on implied bill of rights grounds. In Israeli, despite a more frequent and unanimous invocation of an implied doctrine, the High Court never once invalided a parliamentary act based on the Declaration. And as judicial review in France is 'a priori' it is technically impossible for the Constitutional Council to strike down a law. *ACTV* provides convincing evidence that ingenious judges inclined to activism can indeed create as effective a mechanism for judicial review as one would expect in an entrenched constitution.

However, while *ACTV* is the most activist implied bill of rights decision, it remains the only one of its kind. At this point, it is probably too early to tell if *ACTV* represents the foundation for a new activist departure. Those inclined to the 'new departure' view can point to the fact that the Australian High Court has been much clearer about the application of the implied bill of rights to all levels of government than the Canadian Supreme Court ever was. Also, it has been willing to broaden the concept of freedom of expression beyond its most obviously political meaning, something the Canadian Court never did. When one combines these facts with the landmark *Mabo* decision and with the *ACTV* invalidation, one must certainly conclude that this is a court with more markedly activist inclinations than its predecessors — and a court willing to act on these inclinations despite the absence of clear constitutional support. On the other hand, in the only post *ACTV* case in which the Court had the opportunity to repeat its adventurous invalidation

of legislation (*Cunliffe*), it did not do so. Furthermore, the Court was reluctant to admit how radical a departure *ACTV* was, as indicated by their attempt to assimilate the Canadian precedent, and to cover how much they were departing from that precedent. These facts, combined with the Canadian and Israeli experiences, would no doubt be called in evidence by those inclined to think that *ACTV* will turn out to be a Drybrones-like exception. However, the jury is still out on what the future holds for the Australian implied bill of rights.

CHAPTER 7: CONCLUSION

JUDICIAL INCLINATION v. INSTITUTIONAL CONTEXT

What accounts for the global spread of judicial activism? According to one explanation — the legalist/institutional explanation often used by judges themselves — judicial activism is mandated by entrenched constitutional documents, and the spread of activism is thus explained by the spread of this kind of constitutionalism. A rival explanation holds that judicial activism is mainly a function of judicial inclination or judicial culture, not constitutional documents. Based on legal realism, this cultural perspective points to the fact that the same constitutional documents give rise, over time, to starkly contrasting periods of activism and restraint and to quite different kinds and styles of activism. Thus documents cannot be a controlling factor. There is obviously great scope for judicial discretion, and judicial inclination or culture must significantly affect how judges exercise that discretion.

This study is grounded in the second perspective. In other words, it denies the legalist/institutional explanation for judicial activism, at least in its more simplistic versions. Does it follow from the obvious fact of judicial discretion, however, that inclination and culture are the sole explanatory variables? Are the insights of neoinstitutionalism of no relevance to the understanding of judicial behaviour? Or, despite the great weight of judicial culture, does institutional context continue to exercise a significant influence? In short, in the area of judicial behaviour, "do institutions

matter"?[399]

The phenomenon of implied bills of rights provides an interesting context in which to explore this question. If judicial inclination and culture is everything, one would expect judges to invent the grounds for constitutionally based activism where they do not explicitly exist. That such inventions exist — in the form of implied bills of rights — is itself eloquent testimony to the explanatory power of judicial inclination. But this is not the whole story. Having established an implied bill of rights, do judges use it as comprehensively and aggressively as they would an explicitly entrenched constitutional document? If not, then claims that constitutional entrenchment explains judicial activism, while often used by judges in exaggerated and self-serving ways, retain some force.

Perhaps not surprisingly, a close examination of the implied bill of rights phenomenon does not support the complete rejection of the neoinstitutionalist perspective. Yes, the development of implied rights reveals the power and scope of judicial ingenuity and creativity. But no, implied bills of rights have not, on the whole, been used in as activist a manner as explicitly entrenched documents tend to be.

In Canada, even when the activist disposition appeared to be strong, the implied bill of rights was never used in an activist fashion by more than a small minority of judges, and then only as an ancillary support for more explicitly constitutional grounds for reaching the same conclusion. Prior to the Charter, Canadian judges obviously preferred

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[399] R. Kent Weaver and Bert Rockmen, eds., *Do Institutions Matter? Government Capabilities in the United States and Abroad* (Washington D.C.: Brookings, 1993).

to hang their civil liberties activism on the explicitly constitutional pegs of federalism.

In Israel, where such explicit constitutional alternatives were not available, activist courts did indeed rely more often, more heavily, and more unanimously on implied rights, but only as the basis for 'interpretive avoidance,' never as the basis for the kind of outright invalidation of legislation that characterizes judicial activism under entrenched constitutions.

A first glance, France seems to be a counter example to the trend observed in Canada and Israel. The French Constitutional Council clearly does use implied rights to support outright invalidations, and does so with relative frequency. But the Council engages only in 'a priori' review, and thus invalidates only *proposed* legislation, not acts that have been promulgated and are thus already in force. This institutional arrangement may make the members of the Council less hesitant to censure the legislature. Institutional factors may stimulate the activism of the Council in other ways as well. Because members of the Council are relatively temporary political appointments, and because the political opposition in the legislature often has the power to trigger a constitutional challenge, the Council's decisions are politicized to a greater extent than is common for adjudicative courts in common law countries. In effect, the Council, like Canada's Senate, may have been appointed by political partisans who now find themselves in opposition, and who turn to their allies on the Council for support. In such a politicized context, one might predict a higher level of activism (however, the Council might also want to avoid overtly political activism in order to appear 'judicial'). In short, the

activism of the French Council, far from denying the importance of institutional context, seems to be explained in part by that very context. Thus far we have little reason to reject the neoinstitutionalist claim that institutions matter.

But what of the recent Australian experience? Here, for the first time, we find a substantial Court majority using implied rights to strike down a piece of existing legislation. The Court did so, moreover, even though the same result could have been grounded on more explicit constitutional alternatives. *ACTV* is an obvious exception to the general pattern. What is its significance? Is it the proverbial exception that proves the rule? Or does it cast doubt on the rule itself.

One way to present *ACTV* not as the exception that proves the rule, but as a new departure that replaces the rule, is to present it as the culmination of an historical trend. Certainly, one of the remarkable dimensions of the implied bill of rights phenomenon, when one orders the examples chronologically from Canada through to Australia, is that, on the whole,[400] activism seems to increase over time. For example while the implied bill of rights doctrine failed in Canada from 1938 to 1982 (when it became redundant in light of the Charter), a very similar argument succeeded in 1992 in Australia. In Israel, the Declaration became increasingly important as the High Court's activist inclinations increased. It also took the French Constitutional Council thirteen years before its first invocation of implied constitutional rights, perhaps indicating that it was not inclined to do

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[400] There are, of course, occasional set-backs and retreats, such as the Canadian Court's retreat from activism during the 1960s and 1970s. Nevertheless, the overall pattern seems to hold.

so in the years between 1958-1971. This trend is not all that surprising given that judicial activism, as discussed in the introductory chapter, began to grow rapidly in the 1970s and 1980s throughout the globe. Perhaps the previous caution with respect to implied bills of rights is not explained by the residual effects of institutional context, but simply by the fact that an activist judicial culture had not yet developed to the point now manifested in Australia. One might hypothesize, for example, that a culture of activism is developing (and accelerating) on a world wide basis, with the judiciaries of particular countries taking turns advancing the project the next step up the ladder. In this view Australia, building on the work of others, has taken the final pioneering step, thus making it easier for others to follow.

A plausible case can certainly be made for such an interpretation. It seems probable, for example, that the rise in judicial power, and more specifically, the emergence of implied bills of rights, can be traced (at least in part) to the increasing amount of communication that takes place between Western courts and legal communities. Globalization has its effects in this as in most other aspects of human existence.

In particular, the use of comparative jurisprudence provides examples for judges, especially those seeking to take an activist departure. When presented with a similar case, a supreme court benefits from the experience of foreign courts which have already dealt with such an issue. Richard Rose refers to this phenomenon as lesson-drawing: "[w]hen policymakers seek the resolution of a pressing problem, the starting point is a question: What to do? A search of one's own experience and what is done elsewhere is undertaken

instrumentally, in hopes of finding an answer."[401] Although when Rose refers to 'policymakers' he is speaking primarily of bureaucrats, politicians and government leaders, his concept of lesson drawing is easily extended to judges and other court officers.[402]

Regarding the parameters of the dynamics surrounding lesson-drawing, Rose accurately asserts that:

> [i]n the policy process a lesson can be defined as *a program for action based on a program or programs undertaken in another city, state, or nation, or by the same organization in its own past.* Lessons can be drawn across time, as in frequently invoked "lessons of history." An organization's own past is one fruitful source of experience, but lessons can also be drawn across space.[403]

Similarly, courts, although relying heavily on lessons drawn from legal precedents in their own institutional history, may also examine the experience of the courts of other states which are dealing or have already dealt with a similar case or problem. This is especially true when members of a constitutional court feel a desire to throw off the shackles of past precedent set a new course for constitutional interpretation.

Rose argues that "[t]he first step in drawing a lesson is to search for information about programs [or, for that matter, constitutional court rulings] that have been introduced elsewhere to deal with a problem [or case] similar to that confronting the

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[401] Richard Rose, *Lesson-Drawing in Public Policy: A Guide to Learning Across Time and Space* (Chatham, NJ: Chatham House Publishers, 1993). p. 19.

[402] Invariably, policy literature regarding policy change based on theories of learning is concerned primarily with politicians, bureaucrats, interest groups and similar actors. Changes in judicial policymaking have been somewhat neglected by this literature. A good survey of 'learning-centred' policy literature is provided by Colin J. Bennet & Michael Howlett, "The Lessons of Learning: Reconciling Theories of Policy Learning and Policy Change," in *Policy Sciences* 25: 275-295, 1992.

[403] Rose, p. 21. Emphasis in original.

searchers..."[404] Such a search across space, Rose argues:

> is influenced by the level of government at which a problem arises. Local officials tend to turn to parallel agencies in other cities or counties; [U.S.] state officials to other state capitals; and national policymakers, in addition to examining their own past, may look to counterparts in foreign countries. In an international system that is becoming increasingly open, ideas can flow across national boundaries as well as state and local boundaries.[405]

Arguably, the search for relevant information it is also influenced by the branch of government seeking to draw a new lesson. Consequently, when the Supreme Court of Canada (for example) searches across space for information, it looks toward its peers at the highest level of the judicial branch in other states.[406] "In local government [drawing lessons] can mean looking at the next county; for a [U.S. state] governor it is likely to mean looking at a nearby state. But for national policymakers, other countries are often the logical place to look."[407] The most logical place for the Supreme Court of Canada to look would be at the activity of other constitutional courts. This is especially true given the hierarchical structure of most Western courts; it is unlikely that the highest court in the land would look toward lower courts for the lesson-drawing required to advance a new perspective in constitutional interpretation: "[l]esson-drawing cuts across territorial

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[404] Ibid., p. 28.

[405] Ibid., p. 29.

[406] This is not to say that domestic factors are not important in shaping legal culture and constitutional interpretation. It is obvious that members of the legal elite, including Supreme Court Justices are also influenced and constrained by domestic forces such as interest groups, wider societal factors, political culture, and public opinion (to name a only a few). Law schools, which serve to educate future lawyers and judges, also play an integral part in developing legal culture (see for example, Mary Ann Glendon *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*. (Cambridge, Mass: Harvard, 1994)). It could be argued that legal academics also are becoming more internationally connected, and perhaps contributing to a larger international legal academic community.

[407] Rose, p. 17.

boundaries but remains within the boundaries of a given policy community." [408]

Rose maintains that the efficacy of these 'policy communities' has been augmented by recent developments in information technology. He is certainly correct in his assertion that access to information across national boundaries is increasing rapidly: "[i]nternationally, the flow of information about public policies has been radically accelerated by modern technology moving people and information from one continent to another... . International telephones and fax lines permit the instantaneous exchange of ideas across oceans, and their use is accelerating."[409] The same is true of e-mail, the world wide web and other forms of computerized electronic communication. Judges, lawyers and other court officials in modern states now have easy access to the jurisprudence of foreign courts through a variety of means. With today's technology court officials and academics (who advise court officials and judges, appear as expert witnesses and publish commentary on the activity of the court) in different countries can discuss possible rulings and inquire about possible precedents with their foreign counterparts. More importantly, members of the highest constitutional courts and other experts can correspond instantly with their foreign counterparts to discuss their experiences. It is not surprising, therefore, that the general rise in judicial power witnessed over the past forty years has coincided with vast and fundamental changes in information and transportation technology.

Furthermore, it is not now uncommon for judges, lawyers and academics from one

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[408] Ibid., p. 7.
[409] Ibid., p. 3.

country to contribute articles to the law journals of another. An excellent example of this sharing of legal ideas or legal 'cross-fertilization' is an article which appeared in the *Israel Law Review* in 1994.[410] The piece, entitled "Canada's Legal Revolution: Judging in the Age of the Charter of Rights", was written by Antonio Lamer, the Chief Justice of the Supreme Court of Canada and delivered as a lecture to the Supreme Court of Israel in that same year. On concluding his address, Lamer proclaimed: "I delight in the opportunity to share our experience with you and to be part of a broader international dialogue between jurists of our respective countries which can play such an important role in helping us to face the challenges which we share."[411] Given that Israel, at that time, was in the process of undergoing significant constitutional change, one wonders what influence the words of Canada's chief justice had on the process. This type of address is not an isolated example of direct dialogue between members of the West's highest constitutional courts and confirms the existence and acknowledgment of a judicial policy community at the highest level of constitutional jurists.

The degree to which judicial cross-fertilization has taken place is perhaps best exemplified by the degree of foreign citations found in the judgements of domestic Western courts regarding constitutional cases. Canadian Charter cases often rely heavily on American precedents, as do Israeli and Australian cases. Furthermore, when the High Court of Australia fundamentally re-interpreted the Australian constitution to construe the

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[410] Antonio Lamer, Canada's Legal Revolution: Judging in the Age of the Charter of Rights" *Israel Law Review* (1994) 28, p. 579.

[411] Ibid., p. 588.

existence of certain 'implied' fundamental rights and freedoms it directly quoted jurisprudence from the Canadian implied bill of rights cases. Charter jurisprudence of the Canadian Supreme Court also appears to be gaining international interest in foreign courts.[412] The use of foreign law by national courts has also been a factor in transplanting and thus legitimating the notion that courts should take an activist posture in civil liberty cases and, as a corollary, increase the power and prestige of their own institution.

In their analysis of the use of comparative law by common law judges, Thomas Allen and Bruce Anderson suggest that comparative law can be effectively employed as a justifying and legitimating instrument in judicial policy-making:

> Judges use comparative law in the process of reaching decisions and also in the *process of justifying their decision*. In the actual decision-making process, comparative law is used by Judges to help them discover that some sort of legal issue has emerged in a case and to help them formulate and classify legal issues. Also, comparative law is used as a source of possible solutions to domestic legal problems when a Judge examines a foreign legal system to discover how it has solved similar problems.
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> In the process of justifying decisions, Judges use comparative law to help test which one of a number of proposed solutions is the most suitable option and then to justify the solution that has been selected. [Furthermore,] comparative law is used as a rhetorical device to give arguments greater authority and persuasive *power* when a Judge draws analogies between his or her own decision and the work of a distinguished foreign jurist...[413]

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[412] Adam Dodek, "The Charter... in the Holy Land?" *Constitutional Forum*. Vol. 8, No. 1. p. 5. Dodek argues that the "*Charter* attracts considerable interest in countries such as Great Britain, Australia, South Africa, and Israel (p. 5)."

[413] Thomas Allen and Bruce Anderson, "The Use of Comparative Law by Common Law Judges. *Anglo-American Law Review*. Vol. 23. No. 4. Oct-Dec. 1994. p. 437-438. Emphasis added.

The use of foreign law might be especially compelling in light of "changes in economic structure or social values [which] may prompt a Judge to question whether or not an established precedent is, and should be, valid law."[414] Moreover, "[l]egal developments in another country may provoke a Judge to ask questions about whether issues in domestic law need to be examined even though domestic law is settled and accepted by the population."[415] Foreign law might also be useful in pointing out defects in domestic law. Consequently, judges may be driven to employ comparative precedents to support their own ideological values.

One way judges use foreign law to support their own ideological values is to make selective use of foreign jurisprudence. Judges in this position will tend to cite only those foreign precedents which reflect their own values, and ignore conflicting jurisprudence. For example, Harvie and Foster, after examining the Canadian Supreme Court's use of U.S. Supreme Court jurisprudence, found that "there is a tendency in the [Canadian] Court to cite United States law when it helps, or at least, does not stand in the way of a result it wishes to reach, but not otherwise."[416] They also concluded that this tendency reflects an ideological bias of the members of the Court: "[t]he Court's somewhat

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[414] Ibid., p. 438.

[415] Ibid., p. 438.

[416] Robert Harvie and Hamar Foster, "Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the Charter," *Osgoode Hall Law Journal* (1990) 28:729. p. 778. It should be noted that in their 1992 follow up study, Harvie and Foster observed that this situation had improved: "the Supreme Court is referring to United States precedent with increasing sophistication, and Canadian judges are becoming less inclined to treat American law as a grab bag of handy one-liners to be quoted without reference to context." Harvie and Foster, "Different Drummers Different Drums: The Supreme Court of Canada, American Jurisprudence, and the Continuing Revision of Criminal Law Under the Charter," *Ottawa Law Review*. (1992) 24: 39. p. 112.

selective approach is matched by its relatively consistent approach to liberal values."[4] Obviously, the selective use of foreign law results in a substantial misrepresentation c how a foreign court has dealt with any legal issue.

Foreign law may also be used to either reinforce or alter domestic jurisprudence.[4] However, comparative examples would be particularly useful to members of a Suprem Court in justifying a reversal or modification of established constitutional precedent. A legal transplant may serve to legitimize substantial changes in the constitutional orde "[a] Judge with an audience which seeks to break with past traditions would be mor likely to make extensive use of comparative law."[419] Comparative law is also useful for court concerned with its reputation: "a court such as the Supreme Court of Canada, whic presumably wants to see, or sees itself, as part of an international tradition will us comparative law in order to place itself within that international tradition."[420]

Although it is easier for judges to apply foreign law when that law comes from state with a similar legal tradition (e.g., the former dominions in the Britis Commonwealth), judges are not necessarily restricted to borrowing from such countries. Alan Watson has postulated that jurisprudence can also be borrowed from countries with substantially dissimilar legal and political systems; he feels that it is the concept associated

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[417] Harvie and Foster, "The Ties that Bind?", p. 779.

[418] Allen and Anderson note that "...comparative law is unlikely to carry the legitimacy that would justify a Judge in relying solely on it as a basis for a decision. Politically, it could be seen as an abdication of responsibility... Comparative law may be a useful aid in reaching and justifying a decision, but ultimately the decision must find its basis of legitimacy elsewhere. (p. 459)."

[419] Ibid., p. 457.

[420] Ibid., p. 457.

with the law that is important rather than the particulars of the law itself. "What... the law reformer should be after in looking at foreign systems [is] an *idea* which could be transformed into part of the law of his country. For this a systematic knowledge of the law or political structure of the donor system [is] not necessary...."[421] Successful borrowing could be achieved even when nothing was known of the political, social or economic context of the foreign law."[422] Allen and Anderson are in agreement with this point of view:

> In practice, the Judge may fail to understand the foreign system or misinterpret the foreign rule, but nonetheless provide a suitable solution to a domestic problem. The scholarship may be poor, but if the solution is suitable then comparative law has served the purpose the Judge hoped it would. When used in this manner, comparative law is irrelevant only if it fails to provide possible solutions to domestic legal issues.[423]

This can lead to problems. A misunderstanding of the foreign law in question may cause the misapplication of those laws as well as the principles behind them. "The danger is that litigants may find that a Judge decides a case on the basis of an incorrect or insufficient understanding of a foreign legal system."[424] However, due to the cost, in both time and money, a complete and satisfactory examination of a comparative legal system is often prohibitive.

If it is indeed the case that a legal concept can be transplanted with minimal regard

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[421] Alan Watson, "Legal Transplants and Law Reform" *Law Quarterly Review* Vol. 92, 1976. p. 79.

[422] Ibid., p. 79.

[423] Allen and Anderson p. 444.

[424] Ibid., p. 450.

for varying legal traditions then it is quite possible that the 'idea' that it is the legitimate role and duty of the judiciary to engage in judicial policymaking can transcend formidable institutional barriers. In the case of the development of implied constitutional rights this lends significant insight. In fact, it would indicate that courts, and larger legal communities, operating without the benefit of a formal bill of rights could still borrow ideas from those that have such a bill. The expression of those concepts, however, may have to be substantially altered to mesh with the domestic constitution order and legal system in general. This would also require a high degree of judicial creatively to depart from established legal norms and precedents. Not surprisingly, this is exactly what has taken place in the attempt to create implied rights in constitutional or founding documents of the four states examined above.

Nor, in this view, would it be surprising to find that the international borrowing of concepts and precedents had an incremental dimension, with initial steps in one country leading to further steps in another, and so on, contributing to the gradual growth of an international culture of judicial activism sufficient to sustain a case like *ACTV* in a country without an explicitly entrenched bill of rights. Understood in this way, *ACTV* would appear as the initiation of a new stage in judicial activism, rather than as an unlikely-to-be-replicated exception to the institutional constraints on activism inherent in the lack of entrenched rights.

While one cannot *a priori* exclude the possibility that the *ACTV* case in Australia does indeed represent the flowering of a world historical judicial culture of activism, thus

demonstrating the ultimate dominance of culture over institutions, some caution is in order. It is equally possible, as suggested in the previous chapter, that *ACTV* might turn out to be a Drybones-like exception to a more general rule of comparative restraint in employing implied rights. If so, the more general pattern of judicial behaviour with respect to implied bills of rights, would demonstrate the continued influence of institutional context.

In support of this more cautious interpretation of *ACTV*, one might emphasize that this case, like so many of the other ground breaking implied bill of rights cases, concerned the bedrock political freedoms essential to a liberal democracy. It is striking, in fact, that, without exception, the first case in which an implied bill of rights doctrine is supported by high court judges in all four countries surveyed in this study concerned the right of political expression, and many subsequent cases either also concerned this right, or closely related rights such as freedom of political association. One plausible explanation for this is that freedom of political expression is universally proclaimed as essential to the functioning of liberal democracies; the popularity of the right to freedom of expression among the citizenry of liberal democratic states has perhaps provided an incentive for constitutional courts to become activist in the name of defending the values associated with this undisputed right. Furthermore, it is unlikely that judicial review in defence of these values would attract a hostile reaction or negative publicity. In fact, taking an activist posture to government action on the grounds that it violates established, internationally popular principles of political freedom has undoubtedly served to deflect

criticism of the unprecedented judicial activism associated with development of an implied bill of rights doctrine.

In other words, *ACTV* can be seen as a relatively easy case in which to take the activist plunge of striking down legislation. Furthermore, to the extent that rights must be implied from requirements of representative government, activist decisions may be confined within the boundaries of these relatively popular rights. True even freedom of expression can be stretched far beyond its obviously political limits, and the Australian Court has begun to travel down this road in *Cunliffe* (though it did not strike down the relevant law). This might lead the Court into such politically treacherous waters as the censorship of obscenity, which would be a much sterner test of its activist resolve. The real sign that activist inclination has utterly trumped institutional context, however, would be for a court in a country like Australia to 'discover' implied rights that could sustain activist decisions on, say, the subject of abortion, and for that Court to render a *Roe* or *Morgentaler*-like activist decision. Then one might truly say that institutions don't ultimately matter, that judges can 'find,' create, and apply implied rights as broadly and comprehensively as they do entrenched bills of rights. Until such a case — or more accurately, a pattern of them — emerges, we cannot dismiss the continuing relevance of institutional context. Certainly, the general experience with the implied bill of rights phenomenon, *ACTV* notwithstanding, suggests that institutions *do* matter.

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