

CONSTITUTIONAL JURISPRUDENCE, POLITICS, AND MINORITY LANGUAGE RIGHTS

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This paper addresses the problem of which decision-making process should resolve the constitutional question of minority language rights: the judicial process or the political process? The first part of the paper deals with the possibility of impartial judicial decision-making, examining first, the two principal criticisms of the constitutional jurisprudence of the Privy Council and second, a recent American approach to fundamental values in the American constitution. It is argued that neither Canadian nor American scholarly literature has been successful in formulating an unassailable constitutional jurisprudence of judicial impartiality. The second part of the paper examines the constitution as a political document, considering the views of the federal political parties on reforming minority language rights. The paper concludes with an examination of the political reality: Quebec's *Official Language Act*.

Constitutional Jurisprudence and Minority Language Rights

Impartial Judgments

Earlier in this century, Frank Scott discussed whether the Privy Council or the Supreme Court of Canada should be the final appellate body for preserving what he argued were constitutionally-guaranteed minority language rights. He wrote that the "problem is how to secure absolutely impartial judgments in cases involving disputes between two sections of our population divided by race into French and English, and by religion into Catholic and Protestant."² Under a jurisprudential view which characterized the constitution as a mere statute subject to the limits of statutory interpretation, the Privy Council, according to Scott, interpreted the *B.N.A. Act* "to safeguard not minority rights but provincial rights."³

Thus in *City of Winnipeg v. Barret*⁴, the Privy Council supported a Manitoba act which abolished the denominational system of public education established by law since the union, reducing to "within very narrow limits the protection afforded by that sub-section⁵ in respect of denominational schools."⁶ In *Maher v. Town of Portland*,⁷ it refused to recognize parish schools as denominational schools in New Brunswick. In the

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1. The Anglo-Canadian literature has not addressed this issue. For early discussion of the minority language rights question, see J. Cappon, "Secretarianism in the Canadian Constitution" (1905), 4 Can. L. Rev. 305; S.W. Dyde, "The Canadian Constitution and the School Question" (1905-06), 13 Queen's Q. 59; D.D. Skelton, "The Language Issue in Canada" (1916-17), 24 Queen's Q. 438; see also *infra* n. 2, 16-18, 46. For recent discussion, see F.R. Scott, "Language Rights and Language Policy in Canada" (1970-71), 4 Man. L.J. 243; A.S. Brent, "The Right to Religious Education and the Constitutional Status of Denominational Schools" (1974-76), 40 Sask. L. Rev. 239; P. Riley, "The *Official Language Act* of Quebec" (1976-77), 7 Man. L.J. 93; P. Devine, "Language Rights in Canada and Quebec's *Official Language Act*" (1977), 35 U.T. Fac. L. Rev. 114; F.C. Muldoon, "Entrenched Language Rights" (1977-78), 8 Man. L.J. 629. See also *infra* n. 21, 37.
2. F.R. Scott, "The Privy Council and Minority Rights" (1930), 37 Queen's Q. 668, at 676. For a recent discussion of whether the Supreme Court of Canada is biased in favour of federal rights, see P.W. Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?" (1979), 57 Can.B.Rev. 721.
3. Scott, *supra* n.2, at 677.
4. [1892] A.C. 445.
5. The *Constitutional Act of Manitoba, 1870*, 33 Vict. c.3, s.22(1). The B.N.A. Act equivalent is s.93(1).
6. The Privy Council's observation of the *Barrett* case in *Brophy v. A.G. of Manitoba*, [1895] A.C. 202, at 215.
7. Reported in G.J. Wheeler, *Confederation Law in Canada* (1896) 362.

MacKell case,⁸ it held that Ontario separate schools could not select their language of instruction. And in the *Tiny* case,⁹ it decided that Ontario's separate schools could neither give higher education, nor share in legislative grants for that purpose without the express permission of the Council of Public Instruction.

In the face of these decisions, Scott concluded that the belief at the time that the Privy Council was the judicial protector of minority rights was a "popular myth."¹⁰ He recommended the abolition of the Council as the final appellate body in favour of the Supreme Court of Canada, arguing for a number of reasons that the Canadian body would be more impartial. He was aware that, although neither *Maher* nor *MacKell* went to the Supreme Court of Canada for a decision, but rather directly from the provincial courts to the Privy Council, the judgment of the Supreme Court in *Brophy*¹¹ favoured minority rights only to have its decision reversed by the Privy Council and in *Tiny* the Supreme Court was equally divided on the issues.

Scott's concern over the judicial reaction to minority rights in a constitutional context is indicative of the view in democratic society that "the judiciary bears special responsibility for protecting minorities from legislation injurious to them."¹² The concern results from the fact that a political struggle has been resolved through compromise in a legal document, the constitution, and that document is, therefore, forever politically charged.¹³ At the time the document is formulated there is a concern that the majority may in the future employ its power, under democratic principles, with insufficient respect for the minority, whether, for example, that minority be the Anglophone in Quebec or the Francophone in Ontario and Manitoba. As a result, a constitution is adopted which safeguards against the danger of democracy by insulating from the vacillations of the political process certain interests which are thought to be fundamental to achieving the resolution of the political struggle. In the Canadian context these may be that both the Anglophone in Quebec and the Francophone outside of Quebec enjoy certain language rights independent of the beliefs of the legislative majority of any particular Parliament or provincial legislature. The constitutional provisions which define the limits of majority power, however, are not self-enforcing. There is always the danger that the majority may act in defiance of their constitutional limits, thereby oppressing a minority. The provincial legislation giving rise to the Manitoba Schools Question, the Ontario Schools Question and Quebec's language policy come immediately to mind. There is a need, therefore, to enforce the limitations that the constitution imposes on legislative authority. Judicial review of the constitution is often seen as the authority to enforce these limitations.

8. *Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell*, [1917] A.C. 62.

9. *Roman Catholic Separate School Trustees for Tiny v. The King*, [1928] A.C. 363.

10. Scott, *supra* n.2, at 678.

11. *Supra*, n.6.

12. T. Sandalow, "Judicial Protection of Minorities" (1975), 75 Mich. L.Rev. 1162, at 1162. See also C. McClesky, "Judicial Review in a Democracy: A Dissenting Opinion" (1965-66), 3 Hous. L.Rev. 354. Dicey believed that federal systems need judicial review as a means of settling the inevitable conflicts arising within a federal regime: *Introduction to the Study of the Law of the Constitution* (1959) 175-80.

13. Cf. A. S. Abel, "A Chart for a Charter" (1976), 25 U.N.B.L.J. 20, at 20: "In 1841 the Union of the Canadas, in 1867 the British North America Act were responses to contemporary frictions. The decade of the 1960's saw a similar continuous frustrated groping. What has been going on for a century will continue to go on until either the sources of discontent are eliminated or the nation dissolves."

Scott does not dispute this need. The problem, as he sees it, is how the judicial review of the constitution will achieve impartial judgments when confronted with the matter of minority language rights. The difficulty is that when the constitutionality of provincial legislation respecting minority language rights is challenged the issue is not whether unconstitutional legislation should be enforced, but whether the legislation is unconstitutional. A dispute about the meaning of the constitution is at the heart of the controversy. The jurisprudential perspective from which the constitution is approached will invariably play a considerable role in defining the meaning of the constitution. If it cannot be established that one jurisprudential approach is more impartial or more objective than the others, then the need for judicial review of the constitution should be disputed. The question arises "why courts, rather than legislatures, should have final authority to resolve controversies about the meaning of the Constitution."¹⁴

Moreover, if one jurisprudential view is not unconditionally more impartial than another, the judicial decision which results from it will inevitably be all that more unacceptable to the losing party. It creates a "credibility gap"¹⁵ between the rights which the constitution proclaims and the reality of the practice in suppressing them.

For example, earlier in this century, the Ontario Legislature, assuming language of instruction to be a matter within its competence, imposed definite restrictions on the use of French as a medium of education and on the teaching of French as a language. The matter was reviewed by the Privy Council in *MacKell*. Their Lordships held that the local school boards in Ottawa could not determine the language of instruction in their schools because of a language regulation of the Ontario Council of Public Instruction which effectively eliminated the use of French as a language of instruction in the province. Section 93(1) of the *B.N.A. Act* did not apply since "the class of persons to whom the right or privilege is reserved must . . . be a class of persons determined according to religious belief, and not according to race or language."¹⁶ In other words, even if a religious group forms at the very same time a particular linguistic group, only the rights which it enjoys as a religious group are protected by s.93(1).

The response of the minority to what it thought had been preserved by the constitution was predictable. Senator Belcourt wrote of the decision a little later:

Is it conceivable that, when delegating to the Provincial Legislatures the powers of sec.93 of the B.N.A. Act, the Imperial Parliament for one moment contemplated that such a provision would or could be invoked for the purpose of justifying the abolition anywhere in Canada of the right to the use or the teaching of the French language, one of the official languages of the Dominion, a right which the Imperial authorities have at all times fully recognized and protected? Nor is it conceivable that the French-speaking population of Canada, one-third of the whole, would not

14. Sandalow, *supra*, n.12, at 1165.

15. N. MacDermot, "The Credibility Gap in Human Rights" (1976-77), 3 Dal. L.J. 262, at 262.

16. *Supra*, n.8, at 69. For a technical argument opposing the conclusions that a language regulation of the Ontario Council of Public Instruction effectively eliminates the use of French as a language of instruction, see Anon., "VI. Schools; Denominational Privileges" (1911-28) 1 Dominion Laws Annot. 542. The argument is based on a little known regulation made in 1851 by the Council. The author states at 544:

Now assuming that this Order in Council can be construed as authoritatively and generally recognizing the eligibility as teachers of those who spoke only French and no English . . . it might perhaps be contended that Roman Catholic French-speaking Separate Schools had a right by law at Confederation, that their teachers should not be objected to because they could, or did, only teach in French.

have at once and indignantly refused to join Confederation with such a power allotted to the provinces.¹⁷

In response to what may have been a justifiable outburst, Berriedale rebutted the Senator calmly and briefly by stating that "the Legislatures in Canada are free within their sphere to interpret the limits which they should put on the exercise of their powers, and the Law Courts have admitted their right"¹⁸

The minority Francophones in *MacKell* clearly did not believe that the meaning of the constitution had been correctly construed by the Privy Council. According to Senator Belcourt, the rights which the constitution proclaimed were being suppressed in practice. Undoubtedly, the Francophones shared Scott's suspicion that a Protestant and English final appellate body was less than impartial. Scott thought that more impartial judgments would be achieved if the final appellate court was the Supreme Court of Canada, arguing, among other things, that the Supreme Court would less likely be a prejudiced court than that of the Privy Council "since the former must have *at least* two members who are appointed from the Bar of Quebec, and who thus speak for the minority, whereas the latter is almost certain to be entirely Protestant."¹⁹

More recently, a member of the Liberal government took the question of obtaining impartial judgments through a more politically balanced court to its logical conclusion. Marc Lalonde, then Minister of State for Federal-Provincial Relations, defended a decision by the Prime Minister not to initiate a direct federal challenge of the *Charter of the French Language*²⁰ (hereinafter referred to as the *Official Language Act*) in the Supreme Court of Canada even though the federal government thought that the *Act* abridged certain fundamental rights. He argued that a challenge to the constitutionality of an aspect of the *Act* by a private party in the Quebec courts would be far more effective. He reasoned similar to Scott "that three of the nine Canadian Supreme Court justices are francophones, whereas most of the judges in Quebec are French-speaking."²¹ His strategy is that if a chapter of the *Act* is held to be unconstitutional at the Quebec court level, and on appeal to the Supreme Court of Canada the Quebec court decision is subsequently upheld, then the appearance of impartiality is stronger when compared to a direct federal government challenge in the Supreme Court.²² Whether there is real rather than apparent impartiality in this approach is another question.

This strategy has been successful in contesting one aspect of the Quebec legislation. It was held recently in the Quebec Superior Court decision in

17. N.A. Belcourt, "The Status of the French Language in Canada. New France — A Nation" (1924), 2 Can. B.Rev. 170, at 173.

18. K.A. Berriedale, "Notes on Imperial Constitutional Law" (1924), 6 J. of Comp. Leg. and Int'l. L. 193, at 201.

19. Scott, *supra* n.2, at 676.

20. S.Q. 1977, c.5.

21. C. Savren, "Language Rights and Quebec Bill 101" (1978), 10 Case Western Reserve J. of Int'l. L. 543, at 560.

22. Cf. J.R. Mallory, "The B.N.A. Act: Constitutional Adaptation and Social Change" (1967), 2 La Revue J. Thémis 127, at 136: "One reason for the decline in the role of the courts seems to be a distrust of the Supreme Court as a constitutional tribunal. It has been asserted that the Court, because of its two-thirds majority of common lawyers and the fact that it is appointed by the federal government, is not adequately representative to give fair and acceptable decisions on matters which affect the law and the rights of the province of Quebec."

*Blaikie v. A.G. of Quebec*²³ that the province was not acting within its legislative competence when it enacted Chapter III of the *Official Language Act* since that chapter makes French the official language of the courts and the National Assembly in Quebec and therefore contradicts s.133 of the *B.N.A. Act*. That decision, together with *R. v. Forest*²⁴ was appealed to the Supreme Court of Canada which upheld the decision of the Quebec court, noting that "on matters of detail and history, we are content to adopt the reasons of Deschênes C.J. as fortified by the Quebec Court of Appeal."²⁵

Lalonde's strategy, however, would be unlikely to succeed in regard to the education provisions of the *Official Language Act* in view of the decision of the Quebec Superior Court in the *Protestant Schools* case.²⁶ There the Protestant School Board of Montreal unsuccessfully challenged the constitutional validity of the education provisions of Quebec's previous *Official Language Act* (Bill 22).²⁷ The decision was not appealed since Bill 22 was subsequently replaced by Bill 101. A challenge to the constitutional validity of the education provisions of the new *Official Language Act* is likely to suffer the same fate in view of the formidable decision in *MacKell*. In the *Protestant Schools* case, *MacKell* was held to be valid in Quebec as well as in Ontario.

According to Deschênes, C.J., the *MacKell* decision applied to Quebec because of the virtual identity of the two provinces' early statutes on education: the *Lower Canada Act* of 1861²⁸ and the *Upper Canada Act* of 1859,²⁹ especially in regard to the general duties of the Council of Public Instruction in both statutes. The statutes empowered the Council to make regulations "for the organization, government and discipline of Common Schools" and for "the classification of Schools and Teachers."³⁰ Deschênes, C.J., stated that under both Acts the commissioner and local trustees had administrative power in respect to teachers and course materials but that this was subject to the regulations of the Council of Public Instruction. He was aware that in the *Lower Canada Act* there were references to the French and English languages in regard to the choice of books (s.21(4)) and the qualifications of teachers (s.110(5)) but immediately qualified this observation by noting that these references were only a recognition on the part of the legislature of the fact that there were two languages in the province at the time. This societal fact he maintained was not a law of society and added nothing to the meaning of a denominational school. Nor did it specifically extend the powers of the commissioner or the local trustees to choosing the language of instruction.

23. (1978), 85 D.L.R. (3d) 252 (Que. S.C.).

24. [1977] 1 W.W.R. 363 (Man. Co. Ct.). This decision held that Manitoba's *Official Language Act* of 1890 which made English the official language of the province was not within the province's legislative competence since it repealed s.23 of the *Manitoba Act, 1870*; s.23 reproduced and applied to Manitoba the provisions of s.133 of the *B.N.A. Act*.

25. *A.G. of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, at 1027.

26. *Le Bureau Métropolitain des Écoles Protestantes de Montréal c. Le Ministre de l'Éducation du Québec*, [1976] C.S. 430 (Que. S.C.).

27. S.Q. 1974, c.6.

28. Formally cited as *An Act Respecting Provincial Aid for Superior Education — And Normal and Common Schools*, Const. Stat. L.C., 1861, c.15.

29. Formally cited as *An Act Respecting Common Schools in Upper Canada*, Const. Stat. U.C., 1859, c.64.

30. *Upper Canada Act*, s.119(4); *Lower Canada Act*, s.21(3).

Although Deschênes, C.J. did not give reasons for his observation, there is strong support for it in s.21(4) of the *Lower Canada Act* which provides for the selection of books, etc. "due regard being had in such selection to Schools wherein tuition is given in French and to those wherein tuition is given in English." The "due regard" clause is not cast in the same way as the immediately following restriction in the subsection on the Council's power, a restriction which is no doubt legally binding: "this power shall not extend to the selection of books having reference to religion or morals." The "due regard" clause, therefore, is not a legally binding clause. If this is the case, then it is the Council of Public Instruction which has control over the regulation of the course of materials (s.21(4)) and indirectly over the course of study (s.65(2)). Therefore, it has control over the language of the materials and thus the Lower Canada and the Upper Canada statutes are in *pari materia*.³¹ In addition, as held in *MacKell* the dissent has always been connected to religion, not language. Deschênes, C.J. supported this view by quoting from s.71 of the *Education Act*³² that the right to dissent was exclusively connected to "a religious belief different from that of the majority."³³

If the *Protestant Schools* case were to come before the Supreme Court of Canada how would the Anglophone community react? By virtue of the doctrine of *stare decisis* the Supreme Court of Canada would be faced with a judicial review of the constitution based on Privy Council constitutional jurisprudence. Would the decision be impartial? Would it be purely political? The Anglophones might be as outraged as Senator Belcourt was regarding the outcome of *MacKell*. What jurisprudential approach would we recommend that the Supreme Court of Canada adopt in its review of the constitution respecting minority language rights?

Canadian Constitutional Jurisprudence and Minority Language Rights

The most obvious place to start is to attack the constitutional jurisprudence of the Privy Council for its unwillingness to treat the constitutional document as anything more than a statute. In his study on the critics of the Privy Council, Cairns³⁴ has outlined two jurisprudential approaches to construing the constitution: the fundamentalist and the constitutionalist approaches. The constitutionalist approach is characterized as flexible and pragmatic, seeking to keep judicial review of the constitution up to date. The fundamentalist approach criticizes the court for not providing "a technically correct, logical interpretation of a clearly worded

31. The Protestant School Board attempted to distinguish s.119(4) and s.21(3) on the ground that in the French version of the two Acts 'gouvernement' is used in the Upper Canada text and 'gouverne' in the Lower Canada text. Since 'gouverne' had a more restrictive meaning than 'gouvernement' at the time, it was submitted by the appellants that the Lower Canada statute ought to be interpreted strictly. This argument was not accepted by the court due to the priority at the time of the English version. It is one of several put forward by P.T. Howard, J. Martineau, P.M. Laing, and F.R. Scott in *Report of the Legal Committee on Constitutional Rights in the Field of Education in Quebec to the Protestant School Board of Greater Montreal* (1969); see also *Supplement* (1969) and *Second Supplement* (1973). Their views are criticized and others put forward in a study at the University of Montreal. See F. Chevrete, H. Marx, and A. Tremblay, *Les Problèmes Constitutionnels Posés par la Restructuration Scolaire de L'île de Montréal* (undated). See also H. Marx, *Avis sur Quelques Points de Droit Constitutionnel* (1975).

32. R.S.Q., 1964, c.235.

33. *Supra* n.26, at 450.

34. A.C. Cairns, "The Judicial Committee and Its Critics" (1971), 4 Can. J. Pol. Sci. 301.

document."³⁵ It places its emphasis on the literal meaning of the constitution together with considerable reliance on historical materials. In reviewing the Privy Council decisions in the minority language rights problem, the fundamentalist would claim that the Privy Council either got its history wrong or misinterpreted the clear phraseology of the constitution.

Cairns favours the constitutionalist approach. To his mind the fundamentalist approach is unsatisfactory because it relies heavily on historical material to establish its interpretation of the constitution with the result that it has two weaknesses: (1) the meaning of the constitution is fixed by the limits of pre-Confederation history without regard to contemporary society, and (2) it can be invoked to support almost any cause.

The constitutionalist approach, however, has judicial realism. In appreciating the impossibility of being completely faithful to a one hundred year old document and the undesirability to do so in contemporary society, it recognizes the need for a policy role for the courts in judicial review of constitutional provisions. Its failing, as Cairns conceives it, is the inability of those who support it to develop normative and analytical principles by which the judicial role in constitutional review may be implemented. As Sandalow points out in his discussion of judicial protection of minorities, "once constitutional law is loosed from its moorings in the historical document" it is necessary to establish "the process by which the norms to be expressed in constitutional law should be constructed."³⁶ The constitutionalist approach has failed to do this.

Cairns' bifurcation of the critics is no doubt helpful in organizing the volume of criticism on the constitutional jurisprudence of the Privy Council. It is, however, only a rough division and it would not be surprising to find that it is not always perfectly applicable.

Conklin, in a recent attempt to establish "impartial judgments" in the field of minority language rights, makes use of aspects of both approaches. His paper concerns the interpretation of s.133 of the *B.N.A. Act* which expressly protects the use of French and English in the proceedings of the federal courts, the Federal Parliament, and the Quebec Legislature.³⁷ In maintaining that the nature of the Canadian constitution is more than a document, Conklin argues that there is a need for the establishment of normative pre-suppositions on constitutional analysis. These normative pre-suppositions, he argues, are the basis of the constitutional obligation found in the constitution and are revealed in the "customary constitutional law"³⁸ of the period. Although he does not establish any criteria for deciding the validity of a customary constitutional right, other than the fact that it must have been "consistently acknowledged over a lengthy period of time,"³⁹ he proceeds to a lengthy historical analysis of the constitutional obligation with respect to language in pre-Confederation Canada.

35. *Id.*, at 302.

36. Sandalow, *supra* n.12, at 1194.

37. W.C. Conklin, "Constitutional Ideology, Language Rights and Political Disunity in Canada" (1979), 28 U.N.B.L.J. 39.

38. *Id.*, at 40.

39. *Id.*, at 50.

His analysis leads him to the conclusion that s.133 "did not create a new constitutional rule" but acts as "reliable evidence of the nature and extent of the State's constitutional obligations."⁴⁰ He argues that it is reliable evidence "because of the 'sense of obligation' which institutional history had consistently demonstrated toward the French religion, laws, customs and language over a hundred year period."⁴¹ The fundamentalist approach is evident here. Historical material is being heavily relied on to establish that s.133 protects the use of French and English in the courts and Parliaments. The narrow and clear language of the section, however, suggests that Conklin's conclusion will be free from Cairns' criticism of the fundamentalist approach that "legal scholars have displayed an ingenious ability to locate evidence for the kind of intentions they sought."⁴² Contrary historical evidence is unlikely to be persuasive.

There is still a more fundamental point to Conklin's analysis which eliminates Cairns' second criticism that the fundamentalist approach fixes the limits of the meaning of the constitution to pre-Confederation history without regard to contemporary society. In questioning why s.133 was so narrowly drafted so as to cover only the proceedings of federal courts, Federal Parliament and the Quebec Legislature, Conklin argues that "the courts and the Legislature constituted the major political institutions in 1867 wherein the citizen's rights were burdened or enlarged."⁴³ From this observation he then proceeds in the manner of Cairns' constitutionalist who urges for a flexible and pragmatic approach in order to keep the constitution modernized. He points out that the "dimensions of power which the Legislature and the Courts formerly exercised over the individual have gradually shifted to large, complex governmental bureaucracies and to corporate decision-makers."⁴⁴ He, therefore, concludes that the "normative pre-suppositions" underlying s.133 also ought to have applied to the new political institutions as they evolved, that is, to the government bureaucracy and the large corporations. The implementation of this conclusion does not appear to be denied by Laskin, C.J.C. in *Jones v. A.G. of Canada* where he states:

Certainly, what s.133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there is nothing in it or in any other parts of the *British North America Act, 1867* (reserving for later consideration s.91(1)) that precludes the conferring of additional . . . obligations respecting the use of English and French if done in relation to matters within the competence of the enacting Legislature.⁴⁵

The strength of Conklin's analysis of the section lies in its ability to mix historical impartiality and modernity. Normative pre-suppositions are established by history and given a modern relevance. For the constitutionalist, it provides a normative framework which was lacking. For the fundamentalist, it escapes a two-pronged weakness. The question arises whether his constitutionalist-fundamentalist approach can also apply to minority language rights in the issue of language of education under s.93 of

40. *Id.*, at 58.

41. *Ibid.*

42. *Supra* n.34, at 335.

43. *Supra* n.37, at 60.

44. *Id.*, at 61.

45. (1975), 45 D.L.R. (3d) 583 (S.C.C.), at 591. See also *A.G. of Quebec v. Blaikie*, *supra* n.25.

the *B.N.A. Act*. The problems posed by s.133 are straightforward in comparison to those of s.93. Under s.133 there is little dispute about what the minimum guarantee of language rights are, since the language of the section is narrow and clear; it is the maximum guarantee that is the controversial question. Under s.93 the question is whether there is any guarantee of language of education rights at all in view of the *MacKell* and *Protestant Schools* cases.

It is not the scope of this paper to attempt in Conklin's manner to establish a customary constitutional right to a choice of language of education through a lengthy historical analysis of the right in pre-Confederation Canada. There are, however, points of interest which should be addressed in any future historical analysis.

First, unlike the text of s.133, the text of s.93(1) arguably favours an analysis of "customary constitutional law." Lefroy makes this point in his discussion of denominational privileges.⁴⁶ In dealing with the s.22(1) of the *Manitoba Act*,⁴⁷ which is equivalent to s.93(1) of the *B.N.A. Act*, the Privy Council in *City of Winnipeg v. Barrett*⁴⁸ discussed the implication of the additional words "or practice" to the Manitoba section.⁴⁹ It stated that it was not easy to define precisely what the addition meant; however, "the word 'practice' is not to be construed as equivalent to 'custom having the force of law'."⁵⁰ Lefroy argues that the implications of this *obiter* comment for s.93(1), which reads "right or privilege by law", is that the words (and those of the Manitoba section) "must at least mean a right by 'custom having the force of law'."⁵¹

Second, there is the question of the level of education to which the customary constitutional right would apply, assuming that such a right exists. This point is similar to the minimum/maximum guarantee issue of s.133. If it is established that the customary constitutional right existed in pre-Confederation Canada and was enjoyed at primary and (perhaps) secondary school levels, it may be argued under Conklin's thesis that in contemporary society it should also apply to tertiary education. This conclusion may be in conflict, however, with the *Tiny* case,⁵² if that case is applicable to Quebec. There the Privy Council held that the Ontario separate schools could neither give secondary education nor share in legislative grants for that purpose without express permission of the Council. It may be contend-

46. A.H.F. Lefroy, "Annotation — Schools — Denominational Privileges — Constitutional Guarantees" (1915), 24 D.L.R. 492.

47. *Supra*, n.5.

48. *Supra*, n.4.

49. E. Sherrill makes the following comment as to the addition of the words "or practice" (*The Imperial Factor in the Manitoba School Question* (1970), dissertation at Vanderbilt University, at 88-89):

Section 22 of the Manitoba Act of 1870 (Appendix II) was patterned after section 93 of the British North America Act of 1867, and for the most part the wording was the same. The significant difference was that Catholics in Manitoba were granted what Catholics in the maritime provinces had been denied in London in 1867. Whereas section 93 of the British North America Act of 1867 protected only those denominational schools which existed by law at or after the union, section 22 of the Manitoba Act was intended to protect denominational schools which existed by law *or practice* at the union. Ritchot wrote in the margin of the draft copy of section 22, "This clause being the same as the British North America Act confers, as I interpret it, a fundamental principle, the privilege of separate schools to the fullest extent, and in that is in conformity with Article 7 of our instructions." It is likely the phrase "or practice" was added by Ritchot in consideration of a controversy developing in New Brunswick, where Catholics feared the loss of separate schools enjoyed by custom but not recognized in law.

50. *Supra* n.4, at 453.

51. *Supra* n.46, at 494.

52. *Supra* n.9.

ed that this decision is valid in Quebec as well as in Ontario since the powers of the Council in Lower Canada are drawn in substantially the same terms as those of the Council in Upper Canada, as regards the making of regulations for the "organization, government and discipline" of the schools and the "classification" of schools, trustees, and school libraries.⁵³ According to their Lordships, these expressions "imply a real control of the separate schools"⁵⁴ which includes the power to determine the grades of education.

Third, consideration would have to be given to whether the customary constitutional right enjoyed at the time was to be limited to English and French, Catholic and Protestant, or whether it is to be extended to other ethnic, religious and linguistic groups in our contemporary society. The rights which are protected by s.93(1) are "with respect to denominational schools." The importance of the consideration is that if "denomination" only applies to Francophone and Anglophone Christians and Chapter VIII of Quebec's *Official Language Act* is held to be *ultra vires*, then the Quebec government could still enforce its language of instruction policy in regard to non-Christians.

The immediate reaction is that only Protestants and Roman Catholics were protected at Confederation by s.93(1) and that, therefore, only Christians are protected. This is clear from the fact that "any class of persons" originally read "Protestant and Catholic minority" in s.43(6) of the Quebec Resolution, and from the fact that similar references are made in s.93(2) and (3). *Perron v. School Trustees of the Municipality of Rouyn and A.G. of Quebec* in fact relies on s.93(2) to conclude "that the religious denominations alluded to are solely those of the Catholics and of the Protestants."⁵⁵ *Perron*, moreover, also refers to the terms "religious majority" and "religious minority" defined in the *Education Act*⁵⁶ as meaning "Roman Catholic and Protestant majority or minority as the case may be." This definition, though a post-Confederation addition to the law, is declaratory of the old law in view of the Supreme Court of Canada decision in *Hirsch v. Protestant Board of School Commissioners of Montreal*.⁵⁷ where the Court held that the educational system in force in Quebec at Confederation permitted dissent only to these two Christian denominations. The Privy Council did not disagree with this view.⁵⁸

There is, however, an argument to be made for a wider interpretation to include non-Christians. This could be developed from the dicta in the Privy Council decision of *Maher v. Town of Portland*⁵⁹ where "parish schools" in New Brunswick were held not to be denominational and, therefore, not protected by s.93(1). In his judgment, James, L.J., defined the meaning of "denominational schools" in an unrestrictive fashion: "a 'denominational school' must *ex vi termini* mean a school established by and exclusively

53. *Upper Canada Act*, s.119(4); *Lower Canada Act*, s.21(3).

54. *Supra* n.9, at 387.

55. (1956), 1 D.L.R. (2d) 414 (Que. C.A.), at 419.

56. R.S.Q. 1941, c.59, s.2(25).

57. [1926] S.C.R. 246.

58. [1928] A.C. 200.

59. *Supra* n.7.

belonging to a particular denomination. There might be a denominational school for Mahomedans or Parsees".⁶⁰ The Privy Council also used the 1861 definition in Webster's Dictionary: "a class, a sect, particularly of Christians."⁶¹

American Constitutional Jurisprudence and Fundamental Values

It has been mentioned that Cairns rejects the fundamentalist approach in favour of the constitutionalist approach, critical, however, of the fact that the critics of the Privy Council who espoused the constitutionalist approach "did not develop a consistent and meaningful definition of the judicial role in constitutional review."⁶² While there has been little interest in Canada in constitutional review, this certainly has not been the case in the United States. As Hart recently commented: "American jurisprudence . . . is marked by a concentration, almost to the point of obsession, on the judicial process, that is, with what courts do and should do, how judges reason and should reason in deciding particular cases."⁶³ His observation is especially accurate with respect to their constitutional jurisprudence. The "most abiding problem of our public law", Wechsler states, "[is] the role of courts in general and the Supreme Court in particular in our constitutional tradition; their special function is the maintenance, interpretation and development of the organic charter . . . that declares itself the 'supreme law'."⁶⁴

Since the constitutionalist approach has not formulated a constitutional jurisprudence which we may examine, it may be helpful to turn to the American literature on the subject. The American literature may articulate general principles which, when applied in the Canadian context, will lead to impartial judgments when the Supreme Court of Canada is confronted with the problem of minority language rights in the *B.N.A. Act*.⁶⁵

Our initial reaction is that we are faced with a vast body of literature on constitutional jurisprudence arguing that the source of decisional norms is, for example, the "original intent" of the constitutional text, or the language of the text itself, or the structure of government ordained by the constitution, or some metatextual source of value such as "conventional morality." The variations in approach are considerable. Like Cairns in Canada, however, there are American commentators who have discovered basic threads in the arguments which roughly separate the literature into

60. *Id.*, at 363.

61. *Id.*, at 362.

62. *Supra* n.34, at 338.

63. H.L.A. Hart, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream" (1977), 11 *Ga. L.Rev.* 969, at 969.

64. H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959), 73 *Harv. L.Rev.* 1, at 1.

65. *Cf.* L.P. Beth, "The Judicial Committee of the Privy Council and the Development of the Judicial Review" (1976), 24 *Am. J. of Comp. L.* 22, at 22-23:

It is difficult to apply the American conception of judicial review (the power of a court to annul acts of government on constitutional grounds) to the work of Britain's Judicial Committee. The difficulty stems from a definitional problem. As long as a territory remains in some sort of dependent relationship to Britain, it has in a sense two constitutions: its own local set of working political institutions (most likely approved by British colonial officers and the Colonial Office), and the broader set of limits set by Britain, which one may call very loosely "the imperial constitution." . . . Briefly, one may describe it as British law (statute, common and equity) tempered by a wise deference to the laws, customs and political realities of the dependency, and with an occasional salting of "natural justice."

two opposed and conflicting prescriptions for the judicial role of constitutional review.

In their recent articles on constitutional jurisprudence Perry⁶⁶ and Ely⁶⁷ dichotomize the approaches into the textual or interpretivist approach and the functional or noninterpretivist approach. The former approximates Cairns' fundamentalist category while the latter his constitutionalist category.

By the interpretivist approach, Ely refers to the belief that constitutional decisions should be derived from values that "are stated or very clearly implicit in the written Constitution."⁶⁸ By the textual, Perry means the approach where the text of the constitution is considered "as a source both of particular values and of a particular governmental structure, and interpreted, where necessary, in the light of any clarifying original understanding of the framers."⁶⁹ These approaches are analogous to Cairns' fundamentalist approach which "imposed on the courts the task of faithfully interpreting a document in terms of the meaning deliberately embodied in it by the Fathers of Confederation."⁷⁰

Ely compares the interpretivist approach to positivism and he considers one form of noninterpretivism to be natural law.⁷¹ The noninterpretivist approach must go beyond the set of references posited under the interpretivist approach "to enforce values or norms that cannot be discovered within the four corners of the document."⁷² There must be a "substantial injection of content from some source beyond the documentary language and the discoverable intention of those who wrote and ratified it."⁷³ We are, however, not free to make the constitution mean whatever we please for Ely insists that a constitutional decision must be rooted in the constitution,⁷⁴ though he does not explain how extra-constitutional factors can be so rooted.

Perry's functional approach is similar. The functionalist finds the text of the constitution "deeply relevant" and not to be ignored; however, it is "not necessarily decisive."⁷⁵ Perry states that a "governmental action not invalid in terms of the constitutional text nonetheless may be constitutionally invalid in terms of values not referable to the text."⁷⁶ Similarly, Cairns' constitutionalists were opposed "to the narrow statutory approach officially adopted by the Privy Council."⁷⁷ They argued for "incorporating a broader range of facts into the judicial decision-making process"⁷⁸ in order

66. M.J. Perry, "The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government" (1978), 66 *Georgetown L.J.* 1191.

67. J.H. Ely, "Constitutional Interpretivism: Its Allure and Impossibility" (1978), 53 *Ind. L.J.* 399.

68. *Id.*, at 399.

69. *Supra* n.66, at 1204.

70. *Supra* n.34.

71. *Supra* n.67, at 399, n.1.

72. *Id.*, at 399.

73. J.H. Ely, "Foreward: On Discovering Fundamental Values" (1978), 92 *Harv. L.Rev.* 5, at 5.

74. J.H. Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*" (1973), 82 *Yale L.J.* 920, at 949: If a "[neutral principle] . . . lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court had no business imposing it."

75. *Supra* n.66, at 1204.

76. *Ibid.*

77. *Supra* n.34, at 307.

to keep the *B.N.A. Act* up to date. Scott supported the functionalist-noninterpretivist approach praising the "clear recognition" by the American courts "that a constitution is primarily intended, not to rivet on posterity the narrow concepts of an earlier age, but to provide a living tree capable of growth and adaptation to new national needs."⁷⁹

It has been noted that Cairns favours the constitutionalist approach but criticizes it for failing to develop "a carefully articulated philosophy of the judicial role"⁸⁰ in constitutional review. We seek such a jurisprudence in order to discover general principles which, when applied to the problem of minority language rights in the *B.N.A. Act*, will lead to impartial constitutional decision-making. In the American literature Ely attempts such a task. His recent articles attempt to lay a foundation for the constitutionalist-noninterpretivist perspective to develop a "principled approach"⁸¹ not only in regard to constitutional jurisprudence generally, but also in regard to discovering fundamental values in the constitution. His concern for a principled approach to discovering fundamental values in the constitution is of particular interest. We will, therefore, investigate his preliminary work to discern whether an approach to minority language rights in the *B.N.A. Act*, other than Conklin's fundamentalist-constitutionalist approach, is forthcoming from his arguments.

Ely has proceeded through two stages in his investigation of a value-protecting approach to judicial review. First, he has examined the "allure" of constitutional interpretivism, arguing, however, that it is an impossible position. Second, and more importantly for us, he has criticized the general outlook that "constitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental,"⁸² that the court is "an institution charged with the evolution and application of society's fundamental principles," and its task, accordingly, is "to define values and proclaim principles."⁸³

Though it is not expressly mentioned, Ely's first stage is evidently a response to Berger's interpretivist approach as set out in his recent book, *Government by Judiciary*.⁸⁴ The book falls into two parts, the first, an historical enquiry into the original understanding of the 14th Amendment and the second, an essay in political theory where Berger elaborates his normative conception of the scope of judicial review. In view of Cairns' criticism, among others, of the historical approach to constitutional interpretation, the adequacy of Berger's approach is questionable; historical records are never complete and can never be conclusive. Moreover, there is the more important question of the extent to which history, however clear,

78. *Id.*, at 308.

79. Brady and Scott, eds., *Canada After the War* (1943) 77.

80. *Supra* n.34, at 338.

81. *Supra* n.67, at 402, n.12 and 448.

82. Sandalow, c n.12 at 1184; *supra* n.67, at 15.

83. A.M. Bickel, *The Least Dangerous Branch* (1962) 68, 109; *supra*, n.67, at 15-16.

84. R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977).

should control interpretation of the constitution.⁸⁵ Conklin is clearly of the view that it is important but restraining in the contemporary context.

The result of Berger's historical approach is the complete exclusion of the courts from the policy-making process. He argues that the constitutional text must be interpreted in accordance with the ascertainable intent of the framers, even if the text suggests a different meaning. If the court fails to do this it is effectively amending the constitution, a procedure from which it is specifically excluded by Article V of the constitution. According to Berger, since the intent of the framers of the 14th Amendment is ascertainable, the courts are obliged to follow it. Since they have not, we have a judicial amendment of the constitution or "government by judiciary," a position which he says should not be tolerated.

Ely's first stage of investigation is only relevant to us to the extent that it defines for future Canadian jurisprudentialists a scope for further enquiry in the Canadian context. Unlike Cairns who attacks the fundamentalist-interpretivist approach as being "replete with insuperable difficulties",⁸⁶ Ely finds the fundamentalist-interpretivist approach formidable. He sees three obstacles to proceeding against it. He overcomes these obstacles, or fails to overcome them according to Berger,⁸⁷ by arguments that are framed in terms of American history and American cases; these are unfortunately not relevant to the Canadian context. The three formidable obstacles, however, must be addressed in any Canadian investigation of the subject.

First, he notes that the interpretivist approach "better fits our usual conceptions of what law is and the way it works" since in interpreting a statute "a court will obviously limit itself to a determination of the purposes and prohibitions expressed by or implicit in its language."⁸⁸ The jurisprudential view of the Privy Council comes to mind here. It will be recalled that the fundamentalist dispute with the Privy Council jurisprudence was over "providing a technically correct, logical interpretation of a clearly worded document."⁸⁹ Either the Privy Council approach or the fundamentalist approach, therefore, "better fits our usual conception of what law is" than the noninterpretivist-constitutionalist approach.

Second, Ely justly considers that "vague and untethered standards inevitably lend themselves to the virtually irresistible temptation to intervene when one's political or moral sensitivities are sufficiently affronted."⁹⁰ This second point is of considerable importance to Scott who was aware of the political and religious factors in deciding minority language rights in the constitution between two races and two religions.

Third, Ely's most serious general objection is that the noninterpretivist approach is undemocratic. Ely notes that the noninterpretivist "would have

85. See J. tenBroek, "Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Debates and Proceedings of the Constitutional and Ratifying Conventions" (1938), 26 Calif. L.Rev. 437; J.G. Wofford, "The Blinding Light: The Uses of History in Constitutional Interpretation" (1964), 31 U. Chic. L.R. 502, *Cf.* "the argument that the Privy Council reached a result that 'the historian knows to be untrue'": E. McWhinney, "The Political Impact of the Canadian Supreme Court" (1974), 49 Notre Dame Law. 1000, at 1002 quoting Smith, (1927), 9 J. Comp. Leg. and Int'l. L. 160.

86. *Supra* n.34, at 334.

87. R. Berger, "Government by Judiciary: John Hart Ely's 'Invitation'" (1979), 54 Ind. L.J.277.

88. *Supra* n.67, at 402.

89. *Supra* n.34, at 302.

90. *Supra* n.67, at 403.

politically unresponsive judges select and define the values to be placed beyond majority control."⁹¹ The interpretivist, on the other hand, takes his values from a constitution which has been "submitted for and received popular ratification" and is, therefore, "ultimately from the people."⁹²

After presenting arguments to overcome these three formidable obstacles, Ely attacks the Berger position head on by arguing that an interpretivist approach is impossible since "Constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured."⁹³ Unlike Berger's emphasis on the "original intent" of the framers, Ely argues that the framers issued in the 14th Amendment, as well as in other amendments, an "open and across-the-board invitation to import into the constitutional decision process considerations that will not be found in the amendment nor even, at least in any obvious sense, elsewhere in the Constitution."⁹⁴ To discover the fundamental values articulated through the open-ended phraseology of the amendments necessitates, according to Ely, a principled approach. He therefore seeks to establish "a principled form of noninterpretivism . . . one that does not rely on the judge's assessment of society's fundamental values."⁹⁵ If a principled approach is forthcoming from his investigation, it will contribute to our understanding of how to achieve impartial judgments in the more restrictive context of minority language rights in s.133 and in s.93(1). If such an approach is not forthcoming, however, the question arises "why courts, rather than legislatures, should have final authority to resolve controversies about the meaning of the Constitution."⁹⁶

The comprehensiveness of Ely's investigation indicates that a principled approach will not be formulated upon further investigation. His starting point is Sandalow's and Bickel's statements that the judiciary is "an institution charged with the evolution and application of society's fundamental principles,"⁹⁷ that its task, accordingly, is "to define values and proclaim principles."⁹⁸ The question that he addresses is how this task is to be done. He discusses and rejects seven possible solutions to the problem.

First, he convincingly demonstrates that a divorce between a judge's personal values and the social consensus that activists would have him

91. *Id.*, at 405. Although politically unresponsive, they have had political responsibility and experience. Cf. D.B. Fowler, "The Canadian Bill of Rights — A Compromise Between Parliamentary and Judicial Supremacy" (1973), 21 *Am. J. Comp. L.* 712, at 735:

It has been noted that one of the factors favoring such a policy-oriented jurisprudence in the U.S. Supreme Court is the American tradition of appointing to it men with significant political experience. Although such political appointments have not been the practice in Great Britain, Australia or New Zealand, Canada has long maintained a pattern of political appointments to its high bench. But these have declined markedly in recent years, and a counter-trend has developed in the selection of persons of academic rather than political distinction.

The most recent appointment to the Supreme Court of Canada, however, has a political background. Mr. Justice Julien Chouinard of the Quebec Court of Appeal, who recently completed a study of bilingualism in air traffic control, was an unsuccessful federal Conservative candidate in 1968. He was Prime Minister Clark's choice for an appointment to the Senate and justice minister. But Chouinard, a former secretary of the Quebec cabinet, turned down the offer. *The Toronto Star*, September 19, 1979, at A14.

92. *Supra* n.67, at 411.

93. *Id.*, at 413.

94. *Id.*, at 415.

95. *Id.*, at 402, n.12.

96. Sandalow, *supra* n.12 at 1165.

97. *Supra* n.82.

98. *Supra* n.83.

divine is delusory, that what he is “really . . . discovering . . . are his own values.”⁹⁹ that judges are by no means “best equipped to make moral judgments, in particular that they are [not] better suited to the task than legislatures.”¹⁰⁰ Second, he rejects the natural law approach which is one form of noninterpretivism, arguing among other things, that although natural law thinking was current in the era when the constitution was formulated, it was far from a universally accepted theme; moreover, it had “a singular vagueness” such that you could “invoke natural law to support anything you want.”¹⁰¹ Third, he rejects Wechsler’s appeal for “neutral principles”, arguing that they tell us nothing “useful about the appropriate content of those principles or how the Court should derive the values they embody.”¹⁰² Fourth, he rejects the method of reason familiar to the discourse of moral philosophy because there does not exist a method of moral philosophy. Fifth, he rejects tradition because, like Cairns’ point about history, it “can be invoked in support of almost any cause.”¹⁰³ Sixth, he rejects consensus as a standard because “it simply makes no sense to employ the value judgments of the majority as their vehicle for protecting minorities from the value judgments of the majority.”¹⁰⁴ And finally, he rejects Bickel’s suggestion to predict “tomorrow’s values”¹⁰⁵ as a source of constitutional judgment because it is risky and the judiciary is no more qualified than the legislature in this activity.

The result of Ely’s investigation is not hard to predict. As he says in a later paper: “When we search for an external source of values with which to fill in the Constitution’s open texture . . . we search in vain.”¹⁰⁶ In the literature on American constitutional jurisprudence there are attempts, similar to Ely’s, to establish an unprejudiced value-principled approach to judicial decision-making. Ely’s result is, as Miller and Howell say of Wechsler’s appeal for “neutral principles”:¹⁰⁷ “his quest for neutrality is fruitless. In the interest-balancing procedure of constitutional adjudication neutrality has no place, objectivity is achievable only in part, and impartiality is more of an aspiration than a fact.”¹⁰⁸ Or as Braden concludes, in an earlier attempt to establish objectivity in constitutional law:

There is no objectivity in constitutional law because there are no absolutes. Every constitutional question involves a weighing of competing values. Some of these values are held by virtually everyone, others by fewer people. Supreme Court justices likewise hold values. The more widely held are the values in society, the

99. *Supra* n.73, at 16.

100. *Id.*, at 35.

101. *Id.*, at 28.

102. *Id.*, at 33.

103. *Id.*, at 39.

104. *Id.*, at 52.

105. *Ibid.*

106. J. H. Ely, “Toward a Representation-Reinforcing Mode of Judicial Review” (1978), 37 *Maryland L.Rev.* 451, at 451.

107. *Supra* n.64.

108. A.S. Miller and R.F. Howell, “The Myth of Neutrality in Constitutional Adjudication” (1960), 27 *U. Chic. L.Rev.* 661, at 671. *Cf.* B. Laskin, “Judicial Integrity and the Supreme Court of Canada” (1978), 12 *L.S.U.C. Gazette* 116, at 120:

I do not represent the federal government, nor do I represent Ontario, which is my home province; I represent no one but myself; I owe no allegiance, as a judge, to any person or to any interest; my duty, as I have already said, is only to the law and to the *impartial* and expeditious administration of justice under law. What is true of me is true of my colleagues; it is true of all our appointed judges. [emphasis added].

more likely the Supreme Court will hold them; the more controversial the values, the more likely the Supreme Court is to divide over them.¹⁰⁹

It appears that there are fundamental reasons why Cairns' constitutionalist, in recognizing the policy-making role in judicial review of the constitution, did not develop normative and analytical principles by which the judicial role might be implemented. We have already rejected the fundamentalist position as untenable. If we accept the fact that the principled approach of constitutionalism (noninterpretivism) is not forthcoming from Ely's investigations, where do we look for impartial judgments? In Scott's terms, what do we do when confronted with minority language disputes in the constitution between two races and two religions? Ely's investigations reveal the fact that "impartial judgments" are, as Miller and Howell say, "more of an aspiration than a fact." If there can be no principled approach to limit untethered judicial discretion, the question to ask is why the courts should have final authority to give meaning in the constitution to the controversy of minority language rights, when that controversy is fundamentally political?¹¹⁰

As argued earlier in this paper, the constitution is a compromise, in a legal document, of a political struggle and, therefore, the document is forever politically charged. Moreover, what the constitution safeguards are certain (minority) interests which are thought to be fundamental to achieving the resolution of the political struggle. These constitutional safeguards, however, which define the limits of majority power, are not self-enforcing and in order to prevent the majority from acting in defiance of their constitutional limits, thereby oppressing a minority, we have the mechanism of judicial review of the constitution. Ely supports this view in his embryonic third stage where he abandons a value-protecting approach in favour of "a participation-oriented, representation-reinforcing approach to judicial review."¹¹¹ He describes his new approach in the following manner:

The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust" as opposed to a "regulatory" approach to economic affairs — rather than dictate substantive results it intervenes only when the "market," in our case the political market, is malfunctioning Malfunction occurs whenever the *process* cannot be trusted, whenever: (1) the in's are choking off the channels of political change to ensure they will stay in and the out's will stay out, or (2) though no one is actually denied a voice or a vote, an effective majority, with the necessary and understandable cooperation of its representatives, is systematically advantaging itself at the expense of one or more minorities whose reciprocal support it does not need¹¹²

It is difficult to see how this new approach is not value-oriented. The issue now becomes *when* is the political market malfunctioning to warrant judicial intervention? Have not the English advantaged themselves from the legislation in the Manitoba and Ontario Schools Question? Are not the French advantaging themselves from Quebec's language policy? Surely when the highest court decides that our political market is malfunctioning,

109. G.D. Braden, "The Search for Objectivity in Constitutional Law" (1948), 57 Yale L.J. 571, at 594.

110. Cf. P.W. Hogg, "Constitutional Power Over Language," [1978] L.S.U.C. Lectures 229, at 249: "Provincial power over language is very extensive on any view, and the vigorous debate on Quebec's language law must continue to be conducted mainly at the level of politics rather than constitutional law."

111. *Supra* n.106, at 471.

112. *Id.*, at 486-87.

when it decides on these questions of minority/majority language rights in the constitution, it is making a value decision as well as a political decision. If this is the case, then Ely has unsuccessfully replaced the value-protecting approach. The problem of impartiality remains. Ely's awareness, however, that judicial review and the constitution are bound up with the political market suggests that, if we accept judicial objectivity in constitutional decision-making as unattainable, then the clear route is away from "a priori legal principles"¹¹³ to the political realm. I side with a recent exponent of the view that the constitution is out and out political.¹¹⁴ Griffith argues that there is no objectivity in constitutional law since government by laws rather than by men is an unattainable ideal. He argues that written constitutions "merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political."¹¹⁵ Thus he would deride Ely's attempt to establish a principled form of non-interpretivism: that "judges are seeking abstractions like justice or the conscience of the community or whatever is 'nonsense on stilts'."¹¹⁶ Appeals to "national consensus," to "community morality," to "fundamental legal principles," to "theories of justice," to "inherent rights" simply "mythologized and confused" a matter that "is political throughout."¹¹⁷ The conclusion, therefore, is that if it is a political decision, the decision must be taken by politicians. The advantage of politicians over judges "is not that politicians are more likely to come up with the right answer" but that they are "removeable" and "more vulnerable" than judges.¹¹⁸

Politics and Minority Language Rights

The Political Parties and Their Proposals

Each of the three main political parties has addressed itself to the reform of minority language rights in the debate on the reform of the constitution of Canada. Although the position of the now defeated Conservative government was never fully formulated, there is clear evidence that under Clark's leadership there would have been no reform of minority language rights. "The Kingston Communique," a joint statement by Joe Clark and the provincial Premiers Moores, Hatfield, Davis, and Lougheed, stated that minority language education should be handled by the provinces "since education is exclusively a matter of provincial jurisdiction."¹¹⁹ Clark

113. Cf. E. McWhinney, "Legal Eclecticism and the Development of a Bicultural Canadian Jurisprudence" in *Problèmes de Droit Contemporain Melanges Louis Baudouin* (A. Popovici, ed. 1974), 503 at 509:

This means, of course, that if we are correct in this diagnosis that the future development of Canadian jurisprudence is likely to follow essentially low-level, practical, problem-oriented methods, then we are not going to see any immediate postulation of asserted a priori legal principles. Instead, we should have a series of concrete legal solutions to concrete social problems, with the general principles being derived inductively from those problems and their own low-level solutions.

114. J.A.C. Griffith, "The Political Constitution" (1979), 42 M.L.Rev. 1.

115. *Id.*, at 16. Cf. Laskin, *supra* n.108, at 116:

What needs to be emphasized — and I should perhaps apologize for assuming that it needs to be said here — is that the Supreme Court, like other courts in our country, has been carrying out, has been and is still engaged in a *judicial* function, not a political function, not an executive function, not an administrative function.

116. *Supra* n.114, at 18.

117. *Id.*, at 17-18.

118. *Id.*, at 18.

119. Joe Clark *et al.*, The Kingston Communique (September 16, 1977) at 5 in A.C. Cairns, "Recent Federalist Constitutional Proposals: A Review Essay" (1979), 5 Can. Public Policy 348, at 351.

expressed a similar view in the House of Commons, saying that he had no intention of providing constitutional guarantees for official language minority groups if the premiers oppose such a move. Moreover, unlike the former Liberal government, Clark added that his government would not be publishing any proposals to change the constitution as an alternative to the drive for sovereignty-association by the Quebec government.¹²⁰

An opposing view is put forward by Ed Broadbent of the New Democratic Party. He argues that, as a matter of justice, there should be entrenched in the new constitution a Charter of Rights which includes minority language rights. He rejects, however, the particular Liberal Charter of Rights proposed in Bill C-60¹²¹ "as ridden with loopholes". He thinks that our judges are "too timorous to give credence to the stated seriousness of the government's intentions" in the Liberal Charter.¹²² Even if a Charter of Rights, including minority language rights is entrenched in the constitution, Broadbent concludes that it is irrelevant to Quebecois nationalism since it will do little "to lead in the future to the generation of feelings of unity toward Canada by the Quebecois."¹²³

The only fully articulated position among the three parties on minority language rights has been presented by the Liberals in Bill C-60, a federal bill on the reform of various aspects of the constitution. Minority language rights are guaranteed in sections 13-22 of the Charter of Rights and Freedoms to be entrenched in the constitution.¹²⁴ While ss.13-19 cover more explicitly matters similar to those of s.133 of the *B.N.A. Act*, s.21 of the charter deals with the language of instruction problem posed by s.93(1) of the *B.N.A. Act*. Under s.21(1) a parent (or a person standing in the place of a parent) who is a Canadian citizen resident in the province, has the right to have his or her children receive their schooling in French or in English, where the number of children warrants it, if the parent's language is the primarily spoken language of the numerically smaller of the two groups.

The Bill's language proposals satisfy the Liberals' objective to ensure throughout Canada equal respect for the French and English languages. Unlike Broadbent, Trudeau has argued that the "geographic area of each language community" contains "significant minorities of the other," that the existing "inadequacy of the language rights guaranteed by the Constitution . . . had jeopardized the progress of the French-speaking people of Canada, led them to withdraw in spirit into Quebec, and added strength to the separatist movement in that province."¹²⁵ Cairns attacks the Liberal Charter's guarantee of linguistic rights.¹²⁶ He argues that the linguistic guarantees minimize geography and stress the extent to which the major

120. *The Globe and Mail*, November 9, 1979, at 13.

121. Ss. 13-22.

122. Ed Broadbent, Opening Statement to the Joint Senate-House of Commons Committee on the Constitution, (August 15, 1978) at 3 in Cairns, *supra* n.119, at 352.

123. Ed Broadbent, National Unity Illusions Outlined, Speech to the Men's Canadian Club of Vancouver (October 4, 1977) at 2 in Cairns, *supra*, n.119, at 352.

124. See R.W. Kerr, "The Language Provisions of the Constitutional Amendment Bill 1978" (1979), 57 Can.B.Rev. 640.

125. P.E. Trudeau, A Time for Action: Toward the Renewal of the Canadian Federation (1978), at 9, 20 in Cairns, *supra*, n.119, at 355.

126. *Supra* n.119.

linguistic communities overlay provincial boundaries for specific political reasons. The Charter was simply "the latest expression of the basic federal strategy of the last 15 years to minimize differences between francophones within and without Quebec, and thus resist the priority role as the defender of French language sought by the government of Quebec."¹²⁷ Cairns' point is accurate. The Parti Quebecois has sought to maintain and promote its priority role as the defender of French language by the *Official Language Act* (Bill 101). This is the political reality. It pervades and penetrates Quebec society. It puts into practice, moreover, the Conservative view that minority language education is the province's concern. If it remains the political reality, then in some eyes it will "*de facto* be an amendment to s.93 of the *British North America Act*, i.e., of the Canadian constitution, even though it is a simple provincial statute subject to amendment or repeal at any time in the ordinary way."¹²⁸

Quebec's Official Language Act and Political Reality

The *Official Language Act* of the Quebec government, enacted August 26, 1977, is a broad linguistic blueprint for ensuring preeminence for French as the language of business, government, and education in Quebec. As has been mentioned, the language of government provisions challenged in *Blaikie* were held unconstitutional by the Supreme Court of Canada.¹²⁹ The language of instruction provisions (ss.72-80), however, have not been challenged although their counterparts in the previous Act were successfully upheld.¹³⁰ They provide that all elementary and secondary school children in the province must attend French-language schools. In derogation of this rule, there are a number of exceptions:

s.73. [t]he following children, at the request of their father and mother, may receive their instruction in English:

- (a) a child whose father or mother received his or her elementary instruction in English, in Quebec;
- (b) a child whose father or mother, domiciled in Quebec on the date of the coming into force of this Act, received his or her elementary instruction in English outside Quebec;
- (c) a child who, in his last year of school in Quebec before the coming into force of this Act, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school;
- (d) the younger brothers and sisters of a child described in paragraph (c).

Moreover, there are regulations promulgated pursuant to s.85 permitting education in English of the children of several categories of temporary residents of Quebec. Generally speaking, however, only the children of a

127. *Id.*, at 355.

128. P. Meyer, "Human Rights Declarations and their Place in the History of Constitutional Law: A Quebec Perspective" (1973), 8 *La Revue Juridique Themis* 275, at 280. *Cf.* E. McWhinney, "Social Revolution and Constitutional Revolution in Canada: Some Reflections on the Philosophy of Legal Change," (1966), 12 *McGill L.J.* 479, at 480: "The really fundamental changes, in Western constitutional law experience, have tended to come, not by direct change through formal amendment, or formal re-writing, but indirectly, or interstitially, through developing constitutional custom and convention."

129. *Supra* n.23-26 and text.

130. *Supra* n.27-33 and text.

parent who received his or her education in English are eligible under the regulation.¹³¹

In his study of language rights and Bill 101, Savren documented the English minority's reaction to the language of instruction provisions.¹³² The most open defiance of the legislation was a policy decision of the Quebec Association of Protestant School Boards asking the board members "to admit the child of any parent who requests such admission to an English-language school, whether or not Bill 101 permits the child's education in English."¹³³ As a result, soon after the start of the 1977-78 school year the Quebec government estimated that 2100 students on Montreal Island had illegally enrolled in English-language schools. Levesque called the situation one of "civil disobedience that cannot be tolerated" and remarked that "eventually, measures will have to be taken to counter it."¹³⁴

It is clear that under the Trudeau formulation the Levesque provisions could not stand. However, this is not necessarily the case under the present constitutional arrangement and Levesque could arguably present a strong position under s.93(1) if he were challenged. Although the purpose of s.93(1) is to protect the rights which diverse denominations had at the moment of union, this does not mean that the provinces may not make laws in regard to these rights: "It is possible that an interference with a legal right or privilege may not in all cases imply that such right or privilege has been *prejudicially affected*."¹³⁵ The two views of what "prejudicially affected" means are found in the decisions of the Supreme Court of Canada¹³⁶ and the Privy Council¹³⁷ in the *Barrett* case. There the issue was whether the Manitoba School law of 1890, abolishing the separate schools which had been established in 1871, was constitutional and whether the Manitoba government was prejudicially affecting the Roman Catholics by imposing a tax for public schools which they opposed. In the Supreme Court of Canada, the court, composed of three Protestants and two Roman Catholics, unanimously held the Manitoba law unconstitutional. The issue, as far as they were concerned, was not only whether s.93(1) protects the right in itself, but whether this right could be exercised in a practical way: "the value of the right depends upon the practical use that can be made of it. Whatever throws an obstacle in the way of that practical use prejudicially affects the right . . . the degree of interference is immaterial."¹³⁸ The Privy Council, overturning the Supreme Court decision, held that it is only the right itself which is protected. The ability to exercise that right in a practical

131. Contrast Quebec's new restrictions on parental rights in the education of their children with the observations in an early study: B.F. Loughery, *Parental Rights in American Educational Law: Their Bases and Implementation* (1957). In her chapter, "Parent-State Relationships in Canadian Education", Loughery gives the following overview of Canadian legislation involving parent-state relationships, at 186-87:

In the provinces that legally recognize the separate schools, this trend toward State monopoly is somewhat reduced by provision for parental participation. Parents not only may choose the school they desire their child to attend, but through delegation may select textbooks and teachers that conform to the way of life in which they desire their children reared. Quebec is notable among those provinces for legislative enactments that protect parental rights.

132. *Supra* n.21.

133. *Id.*, at 562.

134. *Ibid.*

135. *Ottawa Separate School Trustees v. City of Ottawa*, [1917] A.C. 76, at 81 [emphasis added].

136. (1891), 19 S.C.R. 374.

137. *Supra* n.4.

138. *Supra* n.136, at 422.

way, which was central to the Supreme Court of Canada decision, was not even addressed.

Even if the Privy Council view is rejected by a modern Supreme Court of Canada in favour of the "practical use" approach of the earlier Supreme Court, Levesque still has a persuasive argument. He could argue that the fact that the parents of students seeking instruction in English would be required to follow a certain procedure in order to invoke s.73 (see s.80) before their children could begin or continue their education in Quebec, would little affect in any practical way the families in Quebec whose mother tongue is English. Section 73, it could be maintained, in fact preserves the existing status of English language instruction in the province and therefore in no way prejudicially affects this right of the English-speaking minority. There is, therefore, no obstacle in the way of the practical use of that right as there was in the *Barrett* case. However, if the English-speaking minority cannot provide evidence to prove that the withdrawal of their rights has prejudicially affected them, as is required by the Privy Council view in *Barrett*, it still could be argued that in these circumstances such a withdrawal in itself necessarily operates to their prejudice:

To give authority to withdraw a right or privilege under these conditions necessarily operates to the prejudice of a class of persons affected by the withdrawal . . . It was argued that no evidence on behalf of the appellant board had been called to prove that the withdrawal of their rights, powers and privileges operated to their prejudice. In the opinion of their Lordships, no such evidence was necessary.¹³⁹

Even if Levesque's provision is struck down in regard to the English and Protestant minority, the provision is still operative in another respect. It will be readily noted that the education provision attempts to enlarge the French-speaking school system, as well as prohibiting the attendance at children of parents from other countries and from other provinces into the French-speaking school system, as well as, prohibiting the attendance at English-speaking schools of Francophones whose mother tongue is French. Addressing the immigration population was the result of a concern which Francophone demographers engendered among Francophones. They noted two factors *supra* which threatened the French identity: (1) the declining birth rate and (2) the influx of immigrants settling outside Quebec and in Quebec in the English community. Forseeing a decline in the percentage of Francophones in Quebec demographer Jacques Henripin recommended that immigrants to Quebec integrate into the French community.¹⁴⁰

The provisions of the *Official Language Act* embodying this recommendation are not certain to be constitutionally valid.¹⁴¹ However, they have

139. *Supra* n.135, at 82-83.

140. J. Henripin, "Quebec and the Demographic Dilemma" in *Quebec Society and Politics* (Thomson, ed. 1973) 155 from Savren, *supra* n.21, at 544. Note that the Parti Quebecois is not the only one in favour of immigrant integration. A proposal to guarantee anglophones and francophones education in their own language from coast to coast is winning general acceptance by Quebec Liberals; however, several riding associations want to restrict the guarantee to Canadian citizens, which would mean that immigrants, even from English-speaking countries, would continue to be educated in French: *The Globe and Mail*, February 14, 1980, at 10.

141. Though the Canadian *Bill of Rights* does not apply to provincial legislation, it is not certain that the discrimination against immigrants can be tolerated constitutionally in view of the exclusive jurisdiction of the federal government over "Naturalization and Aliens" (s.92(25)) and its undoubted authority to define Canadian citizenship and the rights and duties it entails by the Canadian *Citizenship Act*. On the other hand, s.95 establishes a concurrent federal and provincial legislative power over "Immigration into the Province" with the stipulation that in the event of their being both federal and provincial legislation in existence in the field, the provincial legislation shall apply only insofar as it is not repugnant to the federal legislation.

been enforced with some prejudice to the immigrants involved. Recently, a Quebec Superior Court judge turned down an injunction application by a Greek parent, who had been in Canada for 21 years, to have his child re-admitted to an English-language school. Biron, J., stated that the court had no jurisdiction over decisions by the Appeal Commission of the Department of Education which had refused to admit the child to an English school where he successfully passed his first year. The effect of the judgment, according to the report, was to compel the nine-year-old child to enter a French-language school at the kindergarten level.¹⁴²

There is evidence that the reaction to the *Official Language Act* within Quebec, which is 80% Francophone, is increasingly favourable. At the adoption of the *Act*, a study by sociologist Marvin Goldfarb revealed that 56% of Quebec Francophones objected to it.¹⁴³ However, a survey by the Centre de recherche sur l'opinion publique at the same time, using a considerably larger sample, found that 59% of Quebec Francophones supported the *Act*.¹⁴⁴ In the summer of 1978, Goldfarb again surveyed the Quebec Francophones to find that 30% had not heard of the *Act*, but of those who had heard of it, 68% favoured it. His survey also revealed that about 60% of the Quebec Francophones thought that the English were learning French "to continue economic domination" and 70% thought that the French were learning English "to overcome economic domination."¹⁴⁵

Such a trend supports the observation that "whichever party wins the next election, there can be no retreat from the objectives of the Language Charter. Whoever is premier will have no choice but to continue the francization of Quebec."¹⁴⁶ This is borne out too by the fact that the *Official Language Act* is not the first attempt to limit the language of instruction in public schools. The first bill "was introduced by the Union Nationale, the second by the Liberals, and only the third by the Parti Quebecois."¹⁴⁷

There is, therefore, a political reality in Canada and nowhere has this been expressed more clearly than in the Pepin-Robarts Report.¹⁴⁸ The report notes and accepts what it views as "a growing linguistic territorial concentration which is rendering Quebec increasingly French and the rest of Canada, excluding New Brunswick, increasingly English."¹⁴⁹ No doubt Quebec's *Official Language Act* is an important factor in this linguistic territorial concentration.

The report makes another important point as well. Outside of the areas which extend "from northeast New Brunswick, through Quebec, into adjacent parts of Ontario," the trend to linguistic assimilation of the French-

142. *The Toronto Sun*, September 6, 1979.

143. *Supra* n.21, at 559.

144. *Ibid.*

145. Moore, "Fact and Fantasy in the Unity Debate" (1979), 5 *Can. Public Policy* 206, at 214, n.3.

146. *Id.*, at 214.

147. *Ibid.*

148. Report of the Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (1979). Cf. La Forest, "Towards a New Canada: The Canadian Bar Association's Report on the Constitution" (1979), 57 *Can. B. Rev.* 493, at 499-502.

149. *A Future Together*, *supra* n.148, at 24. Eugene Forsey finds the Pepin-Robarts "concept of duality" unacceptable since it "seems to mean leaving both minorities defenceless." "The 'Third Option'" (1979), 57 *Can. B. Rev.* 472, at 483.

speaking minorities is so strong as to be virtually irresistible.¹⁵⁰ In other words, there is no Francophone community stretching from the Atlantic to the Pacific which must be protected, as the Liberals would have us think. The report casts doubt on the Liberal charter's purpose that a "geographic area of each language community" contains "significant minorities of the other" that must be protected.¹⁵¹ One commentator in fact has accused the Trudeau government of deliberately disregarding data which does not support its approach.¹⁵²

Therefore, Broadbent is closer to the political reality than Trudeau when he says that a charter, including linguistic guarantees, will do little to generate feelings of unity in Quebec toward Canada. This observation is borne out by another Goldfarb survey in mid-1978. Of the Quebec Francophones interviewed, 79% of them said that their attitude toward independence for Quebec would not be affected if the rest of Canada became fully bilingual. In addition, 69% said that separation would be an issue even if a mutually accepted version of bilingualism were a reality in Canada and the language issue was resolved to the satisfaction of both French and English Canadians.¹⁵³

While the Pepin-Robarts report recognizes the political reality of linguistic dualism in our country, it is not pessimistic about a solution to our problem. Among the recommendations in the report is the encouragement to emulate the Swiss in our appreciation of diversity and to consider more seriously the Swiss principle of linguistic territoriality. That principle has been succinctly articulated by Kenneth McRae:

Though it rests on a network of custom and jurisprudence far more than on positive law, the main principle underlying Swiss language rights is clear enough: it is territoriality, or the right of any locality to preserve its linguistic heritage even in the face of rapid social change that threatens linguistic stability. The incoming individual is expected to adjust to the language of the region, to deal with local authorities in the local language, and to send his children to local schools.¹⁵⁴

In an earlier study, McRae writes that the Swiss solution "may be worthy of reflection in other plurilingual countries where it is customary to take either a fatalistic or a majoritarian attitude towards the pattern of language usage."¹⁵⁵ As a former research member of the Royal Commission on Bilingualism and Biculturalism, McRae no doubt has Canada in mind. A more recent supporter conceives the resolution of the language problem by a restructured federation "on the Swiss pattern, with Quebec unilingual

150. *A Future Together*, *supra* n.149, at 46, 47, 51. *Cf.* Moore, *supra* n.145, at 220:

If the federalists really cared about the well-being of francophone minorities outside Quebec, they would not be pressuring others to support the token bilingualism policies of the Trudeau government. It is doubtful gain to francophones in North-Eastern Ontario to have the right to be educated in French at public expense if the language of work remains English. So long as the language of work remains English in these districts where francophones make up as much as seventy per cent of the population of some communities, the francophone student will be severely handicapped if he does not become completely fluent in English. If being educated in French denies young francophones fluency in English, as it must if French is the language in the home, their happiness is sacrificed on the altar of petty nationalism.

151. *Supra* n.125.

152. Castonguay, "Why Hide the Facts? The Federalist Approach to the Language Crisis in Canada" (1979), 5 *Can. Public Policy* 4, at 6-7.

153. *Supra* n.145, at 213, n.1.

154. K. McRae, "The Constitutional Protection of Linguistic Rights in Bilingual and Multilingual States" in *Human Rights, Federalism, and Minorities* (Gotlieb, ed. 1970) 211, at 217.

155. K. McRae, *Switzerland: Example of Cultural Co-existence* (1964 NO. 3) 577 as found in H. Marx, "Language Rights in the Canadian Constitution," [1967] *La Revue Juridique Thémis* 239, at 240, n.6.

French, New Brunswick divided into French, and English-speaking regions, the other provinces unilingual English-speaking and the federal government bilingual only in the national capital."¹⁵⁶ He adds that there is "considerable evidence that the Swiss option also would be warmly welcomed by a majority in the other provinces."¹⁵⁷ Whether or not the Swiss solution is welcomed by a majority in the other provinces, it must be conceded that given the political reality in Quebec, one of the necessary conditions for any reconciliation of Quebec with the rest of Canada is that it be a unilingual Quebec.

156. *Supra* n.145, at 206.

157. *Id.*, at 215.

