

CHARTER, CONSTITUTION, COURTS [1]

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Russell, Peter. *Constitutional Odyssey*. Toronto: UTP, 1993.

Thesis and Summary:

Peter Russell's book provides a sweeping summary of Canada's entire constitutional history, beginning in 1763 and ending with the aftermath of the Charlottetown Accord. The book is written as a chronological account of Canada's constitutional history, but it focuses on the five rounds of constitutional bargaining which began with the Fulton-Favreau "formula" and the Victoria negotiations. Taken broadly, Russell's historical narrative is largely accepted by most Canadian political scientists – perhaps because they've all studied this book!

Russell's historical story runs roughly as follows. Canada began as a colony of an imperial power and proceeded through four Constitutions (1763, 1774, 1791, 1840) before the *BNA Act* of 1867. Although the goal of the fathers of Confederation (particularly Macdonald) was a highly centralized federation (modeled on the British Empire), a variety of factors led to a provincial rights movement and a surprising amount of decentralization. The provinces managed to retain some of their power through the centralizing period of the Depression and WWII, and the era of executive federalism began in earnest after the war. Five rounds of constitutional bargaining then commenced, many of which failed (Victoria, Meech, etc.), but one succeeded (Charter). The most recent round of constitutional negotiations (which Russell calls the "Canada round") reveals the ascendance of the idea of popular sovereignty in Canada. Although the focus of the book is historical and descriptive, Russell's overall thesis is that Canada has evolved from a constitutional principle of Burkean Parliamentary sovereignty to one of Lockean popular sovereignty. He argues that the collapse of Meech and Charlottetown reveals (in different ways) Canadians' insistence on this point.

While Canadians may have come to accept the principle of popular sovereignty today, Russell argues that Canadians have nonetheless failed to constitute themselves as a sovereign *people*. The fundamental principles of the Canadian nation-state are still open to dispute, according to Russell, and it is agreement on such principles which makes a people a *people*. Russell doubts that this act of self-constitution can emerge in a Lockean manner in Canada (i.e. through referenda or mega-constitutional change), but he holds out the hope that Canada might live up to its Burkean past by evolving, organically, into a sovereign people.

Methodology and Theoretical Perspective

Russell's method is primarily historical and descriptive; theoretical material is largely confined to introductions, conclusions, and brief asides. Early in the book, Russell explicitly disavows any *explanation* of the recent changes in Canadian constitutional politics, insisting that his aim is to demonstrate "the simple fact that this fundamental change has taken place" (5). In this sense, Russell's work could be seen as preliminary to that of scholars (e.g. Neviite, Cairns) who seek to explain the sources and causes of these recent changes.

Still, Russell does not fully refrain from discussing causes and theoretical explanations. His approach is broadly institutional and focuses on the mobilization of various communities (women, aboriginals, ethnic minorities) during the patriation of the Canadian Constitution as a

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key moment in the shift toward popular sovereignty. Russell tends to emphasize political explanations rather than economic explanations. With some exceptions (e.g. his discussion of the rise of “Charter Canadians”), Russell’s approach could safely be called old-institutional.

Comparison with Other Readings and Contribution to the Literature

Constitutional Odyssey is a key text for many Canadian constitutional scholars, and because its focus is primarily descriptive (with the exception of the introduction, conclusion, and some brief interludes throughout), it seems to be relatively uncontroversial. Russell agrees with the general consensus (perhaps he was responsible for creating it?) that the death of Meech Lake and Charlottetown signals the death of elitist executive federalism as a means to mega-constitutional change in Canada. He is less hopeful than Mendelsohn about addressing major constitutional issues with innovative consultation mechanisms.

Relevant Exam Questions

This book is relevant for any questions dealing with the democratic deficit and the rise of “Charter Canadians” in Canada. It is also relevant for questions about the Charter’s impact on Canadian democracy and Canadian Parliament. It will also be useful for questions about federalism, particularly those related to the various strategies pursued by Quebec’s leaders throughout Canada’s constitutional history.

Detailed Notes:

Chapter One: The Question of Our Time

- 4 A profound difference between Canadian constitutionalism in the Victorian era and constitutionalism today: profoundly different views on constitutional legitimacy
Not as interested in the causes of the change so much as the fact that the change has taken place, and the results have been revolutionary
- 5-6 Whatever the merits of elite federalism, it won’t work today, because (1) the creed of popular sovereignty has replaced traditional elitist theories and (2) political leaders have lost the respect of the people

Chapter Two: The Sovereignty of the People

- 7 Popular sovereignty: a “theory of political obligation which holds that political authority is legitimate and ought to be accepted only if it is derived from the people”
- 9 The idea is that the constitution is a comprehensive statement of the basic principles of the people, and amendment of that constitution can be made by a process which reaches a level of consensus similar to that which produced the original
- 10-11 The opposing tradition: Burkean constitutionalism; an organic constitution; if the fathers of Confederation had a philosophical patron saint it was Edmund Burke; the question is whether Canadians are capable of re-establishing their country along Lockean lines

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Chapter Three: Confederation

- 12-13 (1) First Constitution in Canada: Royal Proclamation of October 1763; creates the Canadian jurisdiction and explicitly endorses assimilation
- 13-14 (2) Second Constitution in Canada: Quebec Act of 1774; grants religious freedoms to French Canadians and use of civil law; motivated by imperial strategy of containing the revolution in the American colonies; still, it established the recognition of a regime of cultural co-existence. Still no representative institutions
- (3) Third Constitution in Canada: Constitutional Act of 1791; divides Quebec into Upper Canada and Lower Canada each with elected assemblies; but executive power remains vested in British governor advised by chosen executive council; tensions ultimately led to 1837 rebellions
- 14-15 (4) Fourth Constitution in Canada: Act of Union in 1840, creating United Province of Canada with single legislature (old provinces are now Canada East and Canada West); long-term objective is assimilation; in 1848 responsible government is granted by an instruction given to governors by the imperial government (Russell's definition of responsible government: "the executive power of the government legally is vested in the Crown or the Crown's representative, the governor general or lieutenant-governor. The political rule or constitutional convention, however, is that the Crown does not act on its own initiative but on the advice (direction) of ministers who have the support of a majority in the elected house.")
- 16-17 (5) Fifth Constitution; BNA Act of 1867; many forces coalesced to create it: economic included economic incentives related to western expansion, removal of customs barriers, economic withdrawal of British empire; military threat of the Americans; the more proximate cause was frustration with the union system of government (thus primarily political rather than economic)
- 18-19 Confederation was not strictly a compact between two nations, since, legally speaking, neither nation had sovereignty, which rested with the imperial government; but it was a political agreement first between English and French in the Canadas and then with the Maritimers
- 26 Several provisions were manifestations of cultural dualism: English rights in Quebec, French rights in the federal legislature and the courts; denominational schools in Ontario and Quebec for minorities; Quebec allowed to continue with civil law; New Brunswick also received a special subsidy beyond those provided for other provinces

Chapter Four: Provincial Rights

- 35 As it turned out, it was not Nova Scotia or Quebec that spearheaded the provincial rights movement: it was Ontario, where support for confederation was highest; the reason for this is the pattern of partisan politics: Tories were in power in Ottawa, and Ontario Reformers and Quebec Liberals, seeking to organize a competing party, took up the provincial cause
- 36-37 It's not that the national government was weak during the early years; Macdonald was a strong nation-builder; but he contributed little to a Canadian sense of political community: relied on elites and economic motives
- 38 Reservation power: lieutenant-governor can refuse to sign a bill and reserve it for

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consideration by federal cabinet; if nothing happens within a year, the bill dies.

Disallowance: veto power: federal government can render provincial laws void (both powers mirrored the relationship between Canada and the imperial government)

- 48 As Robert Vipond has shown, provinces attacking federal intervention appealed to the same principles of self-government as the earlier politicians had done to object to imperial involvement in colonial affairs: the provincial rhetoric edged closer to popular sovereignty

Chapter Five: An Autonomous Community

- 62 Discussions of constitutional amendment were largely left to lawyer-politicians and were hardly prominent; it was only the question of how to grapple with the dislocations caused by the great depression that moved national elites to think about constitutional restructuring: thus the Rowell-Sirois Commission was created in 1937

One of the legacies of these changes is that the Canadian left became the leading advocate of strong national government – the CCF and the NDP viewed Canada as a national community and unimpeded by local majorities

- 64 All of the changes in the 1930s were one by one or “microconstitutional”, and the effect of all of them was centralizing, but most decisions were still made through a process recognizing the significance of the provinces (contrast with USA New Deal)

- 70 For the balance of power in Canada, the exercise of fiscal clout by the federal government was more important than any constitutional amendment during this era

Chapter Six: Mega Constitutional Politics, Round One: Fulton-Favreau to Victoria

- 72-74 Fulton-Favreau was the first agreement; changes in the division of powers and language stuff had to be unanimous; most other amendments subject to the 7/50 rule; ultimately criticism of the formula in Quiet Revolution Quebec meant Jean Lesage had to back out

- 82 One gesture toward a more inclusive process was the MacGuigan-Molgat Committee in 1970 which undertook public hearings across the country, but the executive negotiations took the lion’s share of the attention: “the people did not yet claim their sovereignty”

- 87-89 The Victoria Charter emerged in 1971 and all of its items would appear again in the debates even though it was quickly relegated to the historical dustbin; most important were democratic rights and language rights; fundamental freedoms; then a section on the supreme court; another amending formula; but the deal-breaker was jurisdiction over social policy;

Chapter Seven: Round Two: New Constitutionalism

- 98-99 René Lévesque came to power in November of 1976, promising to proceed to separation only after winning approval for independence in a referendum; this created urgency among English Canadians about the need for constitutional change

- 99-100 In 1977, Pepin-Robarts is created, supposed to tour the country; but Trudeau was preparing his own proposals (still tension between popular/parliamentary sovereignty)

- 106 Russell’s conclusion: incredibly naïve: underestimated the difficulty to agreement when a people disagrees about fundamental issues about the political community

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Chapter Eight: Round Three: Patriation

- 107-8 Two major changes: Trudeau is re-elected and Levesque loses the referendum; balance of power in the negotiations shifts
- 110-11 Kirby memorandum is leaked suggesting that unilateral action is possible; Trudeau presents the people's package – attempting to appeal to the people over the heads of provincial politicians
- 113-14 A crucial instrument in building legitimacy for the package was a parliamentary committee in 1980 and 1981 which considered and accepted changes; the committee held 267 hours of televised hearings; created a new public expectation about popular participation in constitution-making
- 119 Supreme Court decision requires a “substantial degree” of provincial consent, meetings begin in November 1981, patriated in April of 1982

Chapter Nine: Round Four: Meech Lake

- 133 The beginning of the new round took place at a ski resort north of Montreal; Gil Rémillard presented Quebec's five conditions for accepting the 1982 constitution: (1) recognition of Quebec as a distinct society (2) strengthened role in the field of immigration (3) role in selection of Quebec judges on the Supreme Court (4) opt out of federal spending programs in areas of provincial jurisdiction without fiscal penalty (5) veto on constitutional amendments related to Quebec's interests
- 134 This seemed reasonable enough, but in the spring of 1986 the major players didn't realize how much the conditions of constitutional politics in Canada were changing, and how the Charter Canadians – women's groups, aboriginal peoples, ethnic minorities – were serious about their involvement
- 136 After many hours of negotiation in April 1987 at Meech Lake, agreement had been reached, primarily by provincializing the relevant segments of Quebec's demands (with the obvious exception of the distinct society clause)
- 142 Opposition to Meech came primarily from outside Quebec; failed to resonate with aboriginals, those outside of French or English communities, and bitterly attacked by interest groups who saw their perilous victory in the Charter at state (esp. women's groups who played a key role in killing Meech in English Canada); even so, it is possible that Meech would have been adopted in the absence of the Quebec signs issue flare-up in 1988
- 147 For a majority of English Canadians, Charter rights had displaced provincial rights as the fundamental constitutional rights; Trudeau won the hearts and minds of English-speaking Canadians
- 153 Meech Lake represented a loss of faith (outside Quebec) in elected legislatures; for Quebecers, the crucial question was what *kind* of people (sovereign? Canadian?) the National Assembly should represent

Chapter Ten: Round Five: The Canada Round 1

- 157-58 Unlike Meech, public discussion (and lots of it) preceded negotiation; Quebec carried

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out formal consultations in 1990 and 1991 in the Allaire committee and the Bélanger-Campeau commission; in Allaire's understanding there's little emphasis on historical culture; it has more to do with the need for coherent and low-level units to compete in the "global village"

163-64 Mulroney took two uncoordinated steps in response to Quebec's consultations: the Spicer citizen's forum and a parliamentary committee chaired by Beaudoin and Edwards; ultimately the citizens' forum engaged 400,000 people, though aboriginal and Quebec participation was relatively low; English-Canadian nationalism (focused on Ottawa) and Quebec nationalism were both shown to be alive and well

166-67 The Beaudoin-Edwards Committee recognized the public dissatisfaction with closed-door executive federalism, but they rejected a constituent assembly too – recommended another parliamentary committee

Chapter Eleven: The Canada Round II: The Sovereign People Say No

190-1 On October 26 1992 the Canadian people acted as Canada's ultimate constitutional authority for the first time in history

The whole process was shaped like an hourglass, beginning with consultations, narrowing into the more traditional modes of executive federalism, and then widening out into a referendum; an even more serious flaw was the division of public consultation into two watertight compartments, Quebec and the ROC.

226-27 What alienated voters in the ROC most was the guarantee of 15% of House seats to Quebec; on October 26 1992 75% of Canadian voters turned out to vote, and the overall results were 54% no and 45% yes – Newfoundland, New Brunswick, PEI, and Ontario (barely) all voted yes.

Conclusion

228 The collapse of Charlottetown marks the end of constitutional "innocence" in Canada; it is now clear that we should not attempt to reach a consensus on major constitutional change unless it is clear that we must do so

229 There is no reason to believe that another effort at constitutional change would be successful even with a vastly improved process

231 Hopefully what will happen is that constitutional changes will be taken on in smaller packages and one at a time, like New Brunswick did, successfully, with its bilingualism provisions in 1993 (without a referendum)

234-35 Regardless of how things proceed from this point, it is now clear that Canadians have established their constitutional sovereignty; major constitutional changes will henceforth be put to the people in a referendum; but the question of whether Canadians have constituted themselves *as* a people remains open – they have not made a formal social contract; still, it may turn out that they are after all the people of Edmund Burke and not John Locke, and their social contract is essentially organic: this may be good enough ("some of us might settle for that")

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Peter Russell. “The Political Purposes of the Charter”. *CBR*: 61:1, 1983.

Thesis and Summary:

In this well-known article, Peter Russell suggests that the creators of the Charter were motivated by two overriding political goals: national unity and the protection of basic rights and freedoms.

Russell discusses those sections of the Charter which were most clearly intended to promote national unity (especially section six and the minority language provisions), but he argues that the most powerful nationalizing effects of the Charter will occur because (1) Charter debates, even when very contentious, will be national rather than regional debates and (2) the Charter will be interpreted by a federal institution – the Supreme Court of Canada – and will subject the entire country to the same national standards.

As for rights and freedoms, Russell argues that we must recognize the fallacious nature of any zero-sum conception of rights (i.e. “either my rights are protected or they are not!”) and accept that the real debates will concern how, in what ways, and which rights will be limited. Once we accept this fact, we will come to see that the legislative override provisions in the Charter are not such a bad thing. Russell concludes by arguing that the great danger posed by the charter is the judicialization of politics, and the subsequent withdrawal of those citizens (i.e. the great majority) who are not trained to discuss such debates in technical and legal language.

Methodology and Theoretical Perspective

Russell’s methodology here is historical and then predictive: he’s trying to draw on his knowledge of Canadian politics and the Canadian constitution in order to predict what the effects of the Charter will be.

Comparison with Other Readings and Contribution to the Literature

Russell’s arguments provide a nice foundation for thinking about two important aspects of the Charter: first, the relationship between the Charter and national unity (and thus also federalism), and second, the relationship between the Charter and the protection of basic rights and freedoms (and thus the effect of the Charter on Canadian legislatures). Many of those who have written about the Charter have followed up on this second issue (e.g. Morton/Knopff, Manfredi, Hogg and Bushell, and so on), arguing that Canadian politics have indeed become excessively judicialized. Above all, however, Russell’s article is just a useful, brief introduction to the major political issues raised by the Charter.

Relevant Exam Questions

This article is especially useful for any questions about the Charter’s effect on Parliament and the post-Charter relationship between Parliament and the courts. It is also relevant for questions about the relationship between the Charter and federalism (Russell’s introductory remarks about Trudeau’s intentions for the Charter are particularly useful here).

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Detailed Notes:

- 31 The Charter of Rights and Freedoms had two political purposes: national unity and the protection of rights

National Unity

- 31-32 In the mid-1960s through to the Confederation of Tomorrow Conference organized by John Robarts in 1967, the Liberal Government was not interested in constitutional reform; earlier, in 1964, patriation had nearly been achieved, but as long as Quebec's demands were at the forefront, constitutional change was not in Ottawa's interest
- 34 In 1965, writing as a legal scholar on Quebec, Trudeau advocated a Bill of Rights and suggested that abolition of disallowance and reservation would be a logical *quid pro quo*; the obvious implication is that the Bill of Rights would strengthen national standards on the provinces; in a 1967 speech to the Canadian Bar Association, he referred to a Bill of Rights as way to "test and hopefully establish the unity of Canada"; and in his final parliamentary speech on Charter, Trudeau said "lest the forces of self-interest tear us apart, we must now define the common thread that binds us together"
- 36 Will the Charter fulfill this national unity goal? The thirst for power in Quebec and the West has not obviously been quenched by the Charter; the mobility rights in section six aim to overcome the "balkanization" of Canada and the language clauses attempt to establish language rights for both official languages; note that section 33 does not apply to these rights, and they express the pan-Canadian nationalism which was a rival program to the nation-building of the Quebec independentistes
- 40-41 The nationalizing effect of the Charter will not be felt through those provisions, however; the strongest centripetal effect of the Charter will be felt through the process of judicial review; the decisions are bound to be controversial, but the debates they produce will be national and will transcend the regional cleavages which feature so prominently in Canada, and in interpreting the Charter, the Supreme Court of Canada will set uniform national standards

Protecting Rights and Freedoms

- 44-45 The Charter was pitched to the public in such a way that it could hardly be debated: after all, who *doesn't* support the protection of basic human rights? But the fact is that things are much more complicated, and the way the Charter will deal with questions of rights will have an important political effect.

Once you recognize the fallaciousness of a zero-sum conception of rights (either your rights are being violated or they are not), the hard issues about limits of rights appear, and the wisdom of the legislative override (s.33) becomes clearer

- 52 The principal impact of the Charter on the process of government: it will judicialize politics and politicize the judiciary; excessive reliance on litigation and the judicial process can weaken the sinews of democracy; the danger is not so much a judicial takeover as the problem that questions of social and political justice will be transformed into technical legal questions and most citizens will therefore withdraw from the debate

Alan Cairns, Selected Essays (Constitution and the Charter)

Cairns, Alan. *Reconfigurations*. McClelland and Stewart, 1995.

Cairns, Alan. *Disruptions*. McClelland and Stewart, 1991.

Cairns, Alan. *Constitution, Government, and Society in Canada*. M&S, 1988.

Thesis and Summary:

In “The Embedded State”, Alan Cairns argues that Canadian political scientists still think about Canadian government – and particularly Canadian federalism – as if it were 1867. In the contemporary world, the distinction between state and society which is useful when thinking about Canada in 1867 has become wholly inadequate. What we have today is a complicated and tangled web of relationships between state and society, one in which the actions of the state in the past have led the state to become “embedded” within society and have led society to become increasingly politicized in its relations to the state. Contemporary federalism prompts us to identify with different regions (province, country) for different purposes, and the Charter does the same (along with human rights commissions, affirmative action programs, etc.) with other types of identity. Whether the Charter identities are *caused* by state action remains an open question; what is clear is that the relationship between the two is tangled and complex and points toward the tendency of an ever-increasing number of recognized “identities”.

In “The Constitutional World We Have Lost”, Cairns repeats the claim of “The Embedded State” that things have changed profoundly in Canada since the early days. He outlines five key aspects of Canadian constitutional life in the past – avoidance of difficult issues, exclusion of certain voices, constitutional elitism, a low-profile constitution, and a connection with Britain – which have disappeared today. Cairns dates the transition from the “old world” to the new world to the time of John Diefenbaker; although Diefenbaker had an important role in ushering in the new constitutional world (the Bill of Rights, the enfranchisement of status Indians, and Diefenbaker’s own ethnic heritage played a role here), he was also a witness to other important changes in the same era, including Jean Lesage’s election in Quebec and the increasing role of the international community (especially the UN) in domestic politics.

In “Constitutional Minoritarianism”, Cairns provides another account of the changes which have emerged in Canadian constitutional politics since WWII. His general claim is similar to that in “The Constitutional World We Have Lost”, though here Cairns emphasizes the international aspects of the transformation: the rise of international social movements and the collapse of colonialism. Cairns concludes by predicting that “constitutional minoritarianism” – that is, the politics of minorities – is here to stay, because it is supported by state institutions, academic institutions, demographic factors, and prevailing intellectual currents.

In “The Fragmentation of Canadian Citizenship”, Cairns continues to argue that things are very different now: the past, he says, is another country. What he adds in this essay is the claim that Canadian citizenship is fragmented today in two important ways: first, by three different sociological nations (Quebec, the ROC, and Aborigines) and second by various types of minorities. To understand the problems with Canadian citizenship today we must understand

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both of these complex problems (here Cairns would seem to anticipate Will Kymlicka's well-known distinctions in *Multicultural Citizenship*).

"The Case for Charter-Federalism" is a brief essay which argues that Canada needs *both* federalism (to accommodate regional difference) and the Charter (to accommodate trans-provincial difference) in order to survive today. It concludes with the claim that just as we did not choose federalism in 1867 ("inescapable realities chose it for us"), we are forced to choose Charter-Federalism today.

"Reflections on the political purposes of the Charter" begins by outlining the political purposes behind Trudeau's ceaseless defense of the Charter, the majority of which have to do with dampening provincial identity (esp. in Quebec) while strengthening Canadian identity across the country, partially by ensuring that one can be either French- or English-Canadian in any part of the country. Cairns then explains some of the oddities of the new constitution (particularly its combination of popular sovereignty in the Charter and parliamentary sovereignty in its amending formula). The remainder of the essay is devoted to an explanation of the relationship between the Charter and Canada's two minority nations: Quebecois and Aboriginal peoples. Cairns outlines the reasons for resistance to the Charter among these groups, and suggests at the end of his essay that a careful balance between federalism (a federalism which incorporates Aboriginals) and the Charter is required.

"The Judicial Committee and its Critics", perhaps Cairns' most famous essay, attacks the two major schools of JCPC criticism: the "fundamentalists" and the "constitutionalists". Cairns argues that the famous JCPC decisions on federalism, which were consistently in favour of the provinces, were in fact in keeping with the sociological reality of Canada at the time. Although Cairns is well aware of the weaknesses of the JCPC (particularly their lack of an adequate legal theory and/or method and their distance from Canadian reality), he claims that the JCPC was remarkably reflective of Canadian reality. The critics of the JCPC, on the other hand, were given to a variety of mistakes: the fundamentalists embroiled themselves in all the incoherencies related to legal "originalism", and the constitutionalists, while operating on a sounder foundation, failed to adequately elaborate their theory (beyond consistent attacks on the court). Cairns concludes by claiming that these problems remain with us today.

Methodology and Theoretical Perspective

Cairns is often identified as an institutionalist or elite theorist (see, for example, Simeon's survey of Canadian federalism), and while this is undoubtedly true of some of his work (e.g. "The Governments and Societies of Canadian Federalism"), most of the works surveyed here are quite complex in their approaches. Cairns generally envisions a two-way causal arrow: *from* society *to* the state, and *from* the state *to* society. Cairns is very much concerned with those (e.g. the behavioural school) who over-emphasize social causes without understanding the real autonomy of the state. Cairns' approach is often historical and occasionally normative, though his normative commitment in these essays is largely restricted to the claim that Canada needs to combine federal accommodation with Charter accommodation if it is to survive.

Comparison with Other Readings and Contribution to the Literature

Cairns' contribution to the literature is wide and varied; nearly all of the more recent literature on the Charter, the constitution, and Canadian federalism deals explicitly or implicitly with Cairns. At the risk of oversimplification, here are a few examples of Cairns' contribution to the literature. The basic theoretical approach of the JCPC article is picked up and modified by Morton and Knopff in their book on the Charter (and is implicitly assumed by Morton/Knopff's critics, such as Miriam Smith). The "embedded state" article seems to have had an effect on a number of "literatures" in Canada, particularly those related to policy networks (i.e. the complexity of state-society relationship), federalism (e.g. institutional approaches such as Simeon's *Federal Diplomacy*), and the relationship between the Charter and Canadian identity politics. Cairns' arguments in "constitutional minoritarianism" and "the fragmentation" have been picked up by those who study multiculturalism, and seem to have had an effect on normative theorists such as Will Kymlicka (whose distinction between minority nations and multicultural ethnic groups parallels Cairns' distinction).

Relevant Exam Questions

Anything on the relationship between the Charter and federalism; anything on the rise of ethnic minorities and "Charter Canadians" in Canada; anything about regionalism and federalism.

Detailed Notes:

The Embedded State: State-Society Relations in Canada (in Reconfigurations)

- 33 The theme of the essay is that the tighter fusion of state and society in recent decades due to activist national and provincial governments fragments the state and contributes to multiplication and salience of socio-economic cleavages; the more we relate to one another through the state, the more divided we seem to become

We need to learn to think in terms of politicized societies caught in webs of interdependence with the state; the fusion of state and society makes all things political

- 34-35 The interaction between state and society is "a complicated multi-partnered dance" and actors in both are involved in an endless game of mutual influence

- 37-38 Our contemporary thinking about federalism is still along the lines of 1867, which is no longer appropriate; the federalism of 1867 was a response to regional diversities that were also to be incorporated into a new national community; in 1867 the reality of the provincial communities didn't coexist with a national community, but only the aspiration to create such a community – provincialism rested on historically generated territorial diversities

In the early days of Canadian federalism, provincial governments had little to do with provincial societies: tax was primitive, welfare was private, regulation was scant, etc. but today, the coexisting interventionist governments don't so much reflect underlying national communities as they recreate them

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43-45 The intent for the Charter was to be a nation-building and nation-preserving as well as rights-protecting instrument; but the complex process out of which it emerged produced a Charter in which many internal divisions and cleavages were accorded recognition; not only was the notwithstanding clause included, but also certain specific groups were singled out for constitutional recognition

By singling out specific groups, it fractures the possibility of common citizenship focusing on more abstract or general concerns; Thomas Flanagan's work on Canada's human rights commissions shows how the mandate (and the number of excluded peoples) has a tendency to expand

46 Conceptions of community and identity today are increasingly the result of state policy, sometimes as an intended consequence, and sometimes as a by-product of the massive role of the state in our day-to-day existence

47-48 In terms of ongoing programs, citizens and socio-economic interests are grouped first into national and provincial communities, and then subdivided by innumerable administrative units and the programs administered by them: the tendency is to view the public arena as another marketplace in which the currency is power and votes rather than dollars

49-50 Citizens now move according to the rhythms of government calendars; donations made before tax time, decisions made for tax purposes, government is evaded by the underground economy

51-52 Politicization of ethnicity meant that the ethnic distribution of power, income, status, and language was subject to political modification: thus Aboriginals have increased their political activity, stimulated by government funding and the opening up of the constitutional issue; similar developments among women, gays, and the handicapped

There are also international forces at play: the women's movement, Aboriginals, Gays are all linked with similar movements outside Canada; all of which derives from the explosion of group identities and the belief that the state is the agent for remedial action

54 Today we approach the state as fragmented selves, calculating whether we should emphasize our ethnicity, age, gender, region, language, sexual preferences, etc. As for whether state cleavages generate social cleavages or the reverse, this is a subject for case studies; as a whole, what seems to exist is that the state will recognize cleavages that are to its advantage and that private interests seek recognition and support and will redefine themselves if such a recognition is plausible; the overall tendency is for the state to recognize more identities and cleavages

56 It is a mistake to focus exclusively on Canada, since Canada is a player in a much broader movement, a global ideology that calls for the expansion of the state

57 It's too simple to speak about state autonomy; in reality the state is interdependent; as a result of past performance, it's linked in thousands of ways to interests in society that can no longer be described as private

57-58 From one perspective, the multiple fragmentation of society contributes to integration, since the non-territorial distribution inhibits regional tendencies and contribute to cross-pressures which reduces various demands;

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- 59-61 What now exists is a series of overlapping governmentalized societies in which the limits to political authority are set by the enduring interactions between society / economy and government; the difficulties of retreat and major change are demonstrated everywhere, including in the difficulties involved with bringing the deficit under control; the fragmentation of society generates an urgent need for political leadership and works against the appearance of such leadership

The claim is not that the state has “control” à la USSR, because the state power is so dispersed and fragmented that it can’t achieve anything approximating total control

The Constitutional World We Have Lost (in Reconfigurations)

- 98-99 The purpose of the essay isn’t to lament the loss of a constitutional world, but rather to illustrate the very great differences between the old constitutional world and the one that exists today; the constitutional world we have lost was “simplicity itself” compared to the constitutional world we have gained
- 101-03 The institutions of the constitutional framework were in place from the beginning: federalism, parliamentary government, constitutional monarchy, and the judiciary; federalism rooted itself deeply in Canadian society; its Quebec base of support was supplemented by the institutional self-interest of the political and administrative class that operated the provincial order of government
- 103-12 The constitution of yesteryear was by and large a living constitution that responded successfully to challenges within the system; but the older constitutional order rested on practices that are no longer feasible: avoidance of fundamental issues, presence of a “custodial mother”, restriction of the social base of the political order by exclusionary practices, employment of elitist politics
- (1) The avoidance strategy: conscious and habitual practice of avoidance, including the absence of an amending formula which left the issue of the location of sovereign power off the table, resting on four unresolved tensions: conflict between those who saw themselves as British and those who saw themselves as Canadians; conflict between federal and provincial governments; conflict between Quebec and the rest of Canada; conflict between Canada as a system of governments and Canada as a nation of citizens (exemplified in the debates after Meech Lake)
 - (2) The exclusion strategy: exclude certain segments from full membership in the community, including aboriginal peoples, women, ethnic minorities
 - (3) Constitutional elitism: with the exception of the conscription referendum, there was no equivalent in Canada to the widespread public participation beginning in the Quebec referendum in 1980 and through the 1992 demise of Charlottetown; formal constitutional change was not seen as a matter for citizens; in the absence of a Charter, there was no engagement with citizenry directly in terms of non-federal criteria
 - (4) A constitution without Charisma: low profile constitution and no Bill of Rights; the derivative status of the constitution contributed to its low profile
 - (5) Divided British-Canadian identity

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112-14 In many ways the Diefenbaker era led directly to our current constitutional world

- (1) The 1960 Bill of Rights signaled a weakening hold of parliamentary supremacy on the Canadian imagination and contributed to rights consciousness
- (2) Franchise extension in 1960 to status Indians which boosted political involvement and helped set the stage for aboriginal involvement in constitutional issues
- (3) Appointment of the first woman cabinet minister, Ellen Fairclough, in 1957, an early and mild response to perceptions about male dominance
- (4) Little sensitivity for French Canada, but a deep sensitivity for the failure to recognize Canadians who lacked founding people status (and a real pride about the eighteen different racial origins in his conservative caucus)

Diefenbaker was acutely aware of international developments, including the collapse of colonialism and the significance of the United Nations. There were also two other important developments during the Diefenbaker years:

- (5) The 1960 victory of the Lesage Liberals in Quebec is the conventional date for the beginning of modern, secular Quebec nationalism
- (6) Attenuation of deferral dominance from a centrifugal provincialism (supplementing Quebec's quiet revolution) which led directly to the Pepin-Robarts analysis that the twin forces of duality and regionalism were the major challenges in Canada

In short, Diefenbaker's constitutional world is our own in a way that King's and St. Laurent's constitutional world is not.

116-17 There's another important difference between then and now: our openness (forced, not voluntary) to international opinion – international opinion and the International Women's Year (1975) and the Decade of Disabled Persons (1983-1992)

118 The formerly excluded, who have not shed the mistrust derived from their past treatment, now join with traditional constitutional players to deal with issues that were formerly avoided, particularly who we are as a people and the location of sovereignty

Constitutional Minoritarianism (in Reconfigurations)

120-1 The salience of minority identities has been heightened by their inclusion in a rights-awarding Charter; and the coexistence of citizen rights and an elitist amending formula puts the question of sovereignty squarely onto the Canadian constitutional agenda

122-25 How did we get here? First of all, various social transformations in the 1960s and 1970s which had no real connection to the constitution got pulled into the constitutional debate as a result of the Charter project; these social transformations themselves derive from domestic and international phenomena: the ebbing of imperialism and the influence of cultural relativism has weakened the self-confidence of the male, white, straight, etc.

These changes would have occurred even if the constitution was totally stable, and by themselves they wouldn't have opened up the constitution; the coincidental opening of the constitution, and the fact that Trudeau saw a Charter as a way to weaken provincialism, produced a reciprocity of interest between Trudeau, looking for allies,

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and emerging minorities looking for status: they were encouraged to cast their objectives in constitutional terms

134-38 The new constitutional actors will have staying power for five reasons:

- (1) The groups have constitutional identities, status, rights, and claims; they will experience constant pressure and incentives (particularly among their elites) to be constitutionally involved
- (2) The social movements and intellectual tendencies lying behind them are connected to international transformations, which are constant reminders that minorities of various kinds are not alone
- (3) Scholarly infrastructure has developed that lends credibility to the grievances of the minorities; proliferation of journals, conferences, chairs, etc.
- (4) The “fact” of multiculturalism as a result of immigration, the high birth rate of the indigenous peoples, and other demographic factors
- (5) Each group’s activities will be imitated by other minorities which means there will be an overall orientation to the constitution which is sympathetic to minorities

The Fragmentation of Canadian Citizenship (in Reconfigurations)

158-9 Preliminary comments about the prominence of citizenship today:

- (1) Gradual waning of the British connection means that we’re now confronted with basic questions of sovereignty, identity, and our place in the world
- (2) Globalization means a destabilization of links between citizen and state unless they have a positive identification with that state
- (3) The threats to Canada’s existence raises the fundamental question of what community Canadians wish to give their allegiance to
- (4) Citizens are made as well as born: immigration makes citizenship an instrument for bridging cleavages between old/new Canadians
- (5) Behaviour that the modern state needs requires not coercion but autonomous civic behaviour, which alienated citizens will only grudgingly provide
- (6) Constitutional recognition demanded by Aboriginal peoples requires unique citizenship status
- (7) Charter of Rights was seen as an instrument to transfer sovereignty to the people
- (8) Constitutional crisis has undermined the authority of elites and of executive federalism; citizens cannot be treated as chattels

161-62 Canada is home for three sociological nations: Quebec, ROC, and Aboriginal; federalism fits only crudely with this three-nations reality: these are the first major challenges to the idea of a single standard of citizenship

175-83 The other major challenge comes from the political articulation of various social, ethnic, and gender diversities, which reflect three phenomena: (1) ethnic diversity in Canada is

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increasing (2) diversities based on gender, lifestyle, etc. are now politicized; (3) politicized identities assert that a person cannot represent a person not of that identity

The written constitution is no longer only a functional instrument for the management of federalism but also a powerful symbolic statement of inclusion or exclusion; the politicized heterogeneity is a problem for a representative system that presupposes that one person can speak for another

- 183-85 Yesterday's constitution was able to contain the less aggressive nationalism of Quebec by federalism and other accommodations; not so any longer for Quebec, aboriginals; the modernity that was to make us one has led to an explosion of particularistic self-consciousness; we must find a way to accommodate diversity without destroying our interconnectedness

The Case for Charter-Federalism (in Reconfigurations)

- 191-93 Federalism alone cannot accommodate the multiple Canadian conceptions of community and identity: Canada needs both the Charter and federalism as separate, tailored constitutional responses; the virtue of a Charter is that it gives recognition to individuals who are left out of the territorial accommodation of federalism

One way of assessing a post-Meech proposal will be the extent to which it balances territorial community with trans-provincial identities

Canadians have not chosen Charter-federalism. We did not choose federalism in 1867; inescapable realities chose it for us. We did not choose the Charter in 1982: the Charter formally expressed what we were already becoming

Reflections on the Political Purposes of the Charter (in Reconfigurations)

- 195 The many changes in Canadian constitutional culture since 1982 can't be defined as the effects of the Charter – this would ride roughshod over complex underlying forces and multiple causes; besides, the Charter itself is shaped by ideas, events, and so on

- 197-99 Trudeau was motivated in his Charter advocacy by four political purposes:

- (1) The language policy, particularly the s.23 minority-language education rights, was supposed to ensure a country-wide view of French Canada in opposition to the Québécois; the intention was to mute the Quebec claim toward an assertive provincialism; this has not occurred, though it has stimulated minority-language rights holders to see themselves as Canadians and to defend the Charter
- (2) Transform the base of the constitutional order: draw citizens out of provincialism and into a pan-Canadian sense of self; the Charter is intended to be a nationalizing, Canadianizing instrument; at a general level, this political purpose has been achieved, and the charter impedes constitutional changes that would considerably strengthen provincial jurisdiction
- (3) Attempt to relocate sovereignty in the people rather than in the governments of Canadian federalism; the original federal proposals combined the Charter with an amending formula with a referendum component which demonstrates the coherence of this view; but the actual constitution is contradictory: popular sovereignty as expressed in charter, sovereignty of governments as expressed in amending formula

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- (4) prominence of the Charter in federal proposals was a tactic to delay discussion of the division of powers until Ottawa's objectives had been achieved in terms of rights and reform of central institutions; allowed the federal government to appear friendly to the people while the provinces were just power-grabbers

200-03 One of the political effects of the Charter has been the drive for a more open, participatory process of constitutional reform: the Charter was shaped by a *de facto* alliance between the federal government and a diverse group of Charter supporters – women's groups, the disabled, ethnocultural organizations, and so on – the Charter was shaped by their vigilance in the 1980-81 Special Joint Committee hearings

Although rights-talk leads to a certain amount of clarity, it also threatens to diminish compromise and flexibility – both central to parliamentary government and federalism (though there are the escape valves of the notwithstanding and the reasonable limits clauses)

214 There are of course all kinds of complications involved in the application of the Charter to Aboriginal nations as well as Quebec, although the rejection of the charter by Quebec nationalists has less to do with a rejection of rights (e.g. Guy LaForest supports the Quebec Charter) but more to do with the nationalizing character of the Charter (and of course the means by which the Charter became law in Canada)

214-15 Those who hoped that the Charter would quiet federal-provincial tensions and dampen Quebec nationalism are disappointed; initially, students analysed the Charter in terms of its compatibility with federalism and parliamentary government; the jury is still out on federalism, and the task is to work out an accommodation which is respectful of both

The difficulty is to figure out how the Charter relates to nationalist Quebec and Aboriginal elites; but it's not right to say that the Charter was a mistake because of these problems: the mobilization sparked by the Charter indicates that the parliamentary and federal system was making insufficient contact with large numbers of Canadians

The Judicial Committee and its Critics (in Constitution, Government, and Society)

44-52 In general, there have been two opposed prescriptions for the judicial role, and each leads to a specific criticism of the Privy Council: the constitutionalists, who advocated a flexible and pragmatic approach; the fundamentalists, who advocated a technical and logical interpretation of the *BNA Act*

The fundamentalist criticism was that the JCPC misunderstood the act, and their argument had four main stages:

- (1) First they attempted to provide documented proof that the fathers of Confederation intended to create a centralized system: this was done primarily by ransacking the statements of the Fathers, especially John A. Macdonald
- (2) Then they attempted to show that the centralization was clearly embodied in the Act itself; show quite easily that the division of powers was designed to favor Ottawa
- (3) Definition of the judicial role requiring that judges do no more and no less than interpret the Act in a technically correct manner according to the intention of the Fathers of Confederation

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- (4) Then show the failure of the JCPC by contrasting their decentralizing decisions with the centralism of the Fathers

On the other side, critics of the constitutionalist school argued for a more generous, flexible, liberal approach that recognized the constitutional importance of judicial review; they delighted in the image of the “living tree” as applied to the BNA Act by Lord Sankey; these critics were strong on generalities and short on specifics, but based on the assumption that a large and powerful central government was necessary

- 52-55 How did the critics explain the actions of the JCPC? One explanation was legal: it was natural for the government to reduce the discretion involved in interpreting vague phrases (like peace, order, good government); sometimes they said that the JCPC was influenced by political considerations inappropriate for the court; others said that the JCPC was a hiding place for reactionary economic interests
- 55-58 There were, however, supporters of the JCPC as well; when doing so, they typically intermingled judicial and imperial arguments (the most important source of its support was imperial – pride and dignity from the empire of which Canada was a part)
- 58-66 Is it possible to justify the actions of the JCPC on sociological grounds? It is certainly not enough to praise it for its neutrality and impartiality, since it was clearly biased in favour of the provinces from the 1880s onward

“It is impossible to believe that a few elderly men in London deciding two or three constitutional cases a year precipitated, sustained, and caused the development of Canada in a federalist direction the country would otherwise have not taken.”

The fact is that courts are called into play by groups and individuals seeking objectives that can be furthered by judicial support: in the long run the centralization of the Fathers of Confederation was inappropriate for the regional diversities of a vast land and a large, geographically concentrated minority culture

In the old provinces of Canada and the Maritimes provincial loyalties preceded the new political system: Nova Scotia and New Brunswick were reluctant partners, and Lower Canada sought to obtain as much decentralization as possible; the ambitions of provincial politicians wrested concessions from the federal government; there was an almost inevitable conflict between federal and provincial, particularly when they belonged to opposite parties

Moreover, in response to the increasingly federal society, the centralizing features of the BNA Act fell into disuse: powers of reservation and disallowance were eroded with no intervention by the JCPC

In fact, the provincial bias of the JCPC was generally harmonious with Canadian developments; and there's more: in Ontario, Mowat and Macdonald were personally hostile to each other, from different parties, and had plenty to disagree about; and generally the late 80s and early 90s was one of the lowest points of national self-confidence in Canadian history; Mowat was greeted as a hero on return from his arguments with the JCPC

- 66-72 The JC had two fundamental weaknesses:

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- (1) The legal doctrine that guided its deliberations: treated the BNA as an ordinary law and analysed by the standard canons for the technical creation of laws; a serious policy role for the court is required given the written constitution; the court was caught in an inappropriate legal tradition for its task of constitutional adjudication; the JCPC had no sophisticated theory of its own role in the process
- (2) The isolation of the JCPC from the scene to which its judgments applied; relative ignorance and insensitivity to the Canadian scene, which was exacerbated by the shifting composition of the committee

Given these major weaknesses, the decisions of the JCPC were in fact surprisingly appropriate to Canada

A strong and effective court requires supporters, including good law schools, quality legal journals, a legal fraternity: the minimum conditions for a sophisticated jurisprudence; this was only imperfectly realized in the JCPC

72-84 Back to critics; first, major problems with the originalist (“fundamentalist”) approach:

- (1) Even if the task was a strict interpretation, you can disagree about whether they succeeded in this or not (refined textual analysis of 91 and 92 makes it tricky)
- (2) The relationship between the BNA Act and the Fathers who created it is complex; there may be a discrepancy between the intentions and the written result
- (3) There is the question of whether the Fathers’ intentions are relevant to the present day; society changes, and literalism is therefore inadequate
- (4) The new and developing areas of government, where uncertainty was greatest, had to be recognized in their novelty by the courts
- (5) The ability of the courts to work out the constitution can be included in the Fathers’ intentions for that constitution

The intentionist argument is part of a larger argument about the appropriateness of historical material for interpreting the Act, but the use of this pre-Confederation historical material would not have helped the JCPC

The standpoint of the constitutionalists is much more promising, recognizing a policy role for the courts in judicial review, but their statements were consistently inadequate: they never developed a consistent and meaningful definition of the judicial role in constitutional review.

85 Canadians still suffer from an inability to properly define role of the court in federalism

Morton/Knopff's *Charter Revolution* (and Miriam Smith's critique)

Morton & Knopff. *The Charter Revolution and the Court Party*. 2000

Miriam Smith "Ghosts of the JCPC" *CJPS* 35:1, 2002.

Morton & Knopff "Ghosts and Straw Men" *CJPS* 35:1, 2002.

Miriam Smith "Partisanship as Political Science" *CJPS* 35:1, 2002.

Robin Elliot "A Legal Critique" in *Insiders and Outsiders*, 2005.

Theses and Summaries:

Morton and Knopff's *The Charter Revolution and the Court Party* combines an empirical account of the "Charter revolution" in Canada with a normative critique of that revolution. On the normative side, Morton and Knopff are generally seen as right-wing; they are largely critical of feminists, gay rights advocates, and so on. It is perhaps more precise to say that Morton and Knopff are normatively conservative, in the sense that they prefer parliamentary supremacy, persuasion, and democratic debate to constitutional (or, in their minds, court) supremacy, rights talk, and the win-lose debates of the courtroom.

The more important and interesting aspect of Morton and Knopff's argument is the empirical story they tell about the Charter revolution in Canada. Their central claim is that institutions are important but must be understood in light of the constituencies which benefit from those institutions; the Charter, for example, is supported by a "Court Party" (comprised of judges, academics, and a variety of groups who benefit from legal rather than legislative activism). The "Court Party" would have been important in Canadian life even in the absence of the Charter, but the Charter has given that party an institutional point of entry into Canadian policy-making, leading to a strength and prominence which it would not have gained otherwise.

If the Charter is a means through which the Court Party gains power, rather than the cause of the Court Party, how did the Court Party arise in the first place? Here Morton and Knopff turn to three kinds of explanation. First, they draw from Inglehart and Lipset, arguing that the Court Party is a reflection of the values of postmaterialist elites. Second, they draw (implicitly) on neo-institutionalism, arguing that the Canadian state fostered the Court Party through a variety of incentives (including multiculturalism policy, women's commissions, and so on). Finally, they suggest that postmodern political thought has led to an emphasis on identity and knowledge-power which is in keeping with the general goals of the Court Party.

In her critique of Morton and Knopff's book, Miriam Smith outlines what she sees as the five most serious mistakes of the book, all of which are listed under "detailed notes" below. The general thrust of her critique is twofold: (1) Morton and Knopff confuse normative criticism with empirical analysis, leading to a muddled version of both, and (2) Morton and Knopff rely on an outdated empirical framework – pluralism – when they should be drawing on the more sophisticated approaches of those (led by Tarrow) who study social movements. Smith's second critique is more powerful than the first – Morton and Knopff would certainly have done well to more clearly identify the empirical arguments they are making in the book – though I would say that methodological confusion, rather than a rigid commitment to pluralism, is to blame for Morton and Knopff's empirical weaknesses.

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In their response to Smith, Morton and Knopff implicitly grant at least one of her criticisms (that they do not adequately prove that Charter groups are winning in court when they would otherwise be losing in the legislature), but they insist that Smith agrees with the two central claims of the book: that there has been a Charter revolution, and that the revolution can be explained only in terms of a supporting constituency. If nothing else, this article is a helpful quick summary of the overall theses contained in the book.

Smith closes out the debate with a brief rejoinder, in which she repeats her accusation about M&K's lack of solid and original empirical research (she's on firm ground here) as well as her argument that M&K ought to separate their normative concerns from those of the social scientist (M&K don't do a stellar job of blending normative and empirical concerns in their book, but Smith's critique here is very clearly self-contradictory). Smith then clarifies the (very limited) extent of her agreement with M&K: although everyone agrees that the Charter revolution is supported by a constituency, Smith examines this constituency using the rigorous analytical tools supplied by sociology and political economy.

In her more recent response to Morton and Knopff, Robin Elliot presents a thoroughgoing legal critique of the second chapter of *The Charter Revolution*. Elliot suggests that M&K's argument is based on a flawed understanding of constitutional interpretation (and she presents a good critique of the "originalist" or "traditionalist" school to which, she claims, M&K belong). She also argues that the major factual claims of the chapter (concerning standing and mootness, intervenor status, and issue-stretching) are in many cases wrong or inaccurate. Elliot does not deny that some of the SCC's decisions have been mistaken and/or self-contradictory, but she argues that M&K's book is severely distorted by flawed legal understanding, inadequate research, and over-commitment to what she calls a "neoconservative political agenda".

Methodology and Theoretical Perspective

In general, Morton and Knopff seek to downplay the role of the Charter as an institution which *creates* "Charter Canadians" and seek instead to understand institutional success or power in terms of the constituencies which support those institutions. To explain the rise of the Court party in the first place, Morton and Knopff draw on institutionalism, political economy, political theory, and the history of ideas. For Morton and Knopff, one must use an approach in which the causal arrow moves in both directions, from state institutions to society and from society to state institutions.

Smith argues that Morton and Knopff employ an unsophisticated empirical theory to explain their results and defends social movement theory (as it derives from sociology and political economy) as an appropriate alternative. She also claims that Morton and Knopff fail to distinguish between normative and empirical analysis as the social scientist ought to (focusing, of course, only on empirical analysis).

Comparison with Other Readings and Contribution to the Literature

The common tale here is to say that Morton and Knopff offer the standard right-wing critique of the Charter, the “Court Party”, and the rise of judicial power (and the standard left-wing critique is supplied by Mandel). For a centrist critique of both positions, see Ian Greene’s book for the Democratic Audit Series and Janet Hiebert’s *Charter Conflicts*.

What Morton and Knopff contribute to the literature (in addition to being the conservative standard-bearers in the debate about judicial activism) is a focus on the relationship between the Charter and “Charter Canadians”. They help us to understand that the causal arrow points in both directions: without the Charter, Charter Canadians would not have gained prominence, but without the pre-existence of the Charter Canadians, the so-called Charter revolution would never have occurred.

Relevant Exam Questions

These readings will be relevant for any questions about the relationships among the Charter, the judiciary, “Charter Canadians”, and the legislative/executive branches of government. It will also be relevant for questions about identity politics.

Detailed Notes:

Preface

- 9 How did an institution – the Supreme Court – which played a secondary role in Canada suddenly become so important? Most attribute it to the Charter, which is true but overly legalistic, since it’s not parchment that creates revolutions: leaders, elite cadres, and their supporters do

Judges themselves are the most prominent leaders of the revolution; they are promoted and supported by a coalition of interests that straddle the state-society divide

Chapter One: Introduction

- 13 Since the 1980s and 1990s, a regime of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy; judges have abandoned deference and many interest groups have turned to the courts; judicial arguments are increasingly shaping discourse and policy formation
- 15 A key change has been the shift from negative to positive remedies: whereas the court once declared laws invalid or unconstitutional, they now tell policymakers what they must spend money on: the courts have become more **activist** (opposing other branches) and more **innovative** in their interpretations
- 18-20 One approach is to explain judicial activism in terms of other factors, either the language of the Charter itself (à la Lorraine Weinrib) or the unwillingness of the legislature to make decisions (à la Justice McLachlin); the other approach is to deny activism, but this claim falls apart upon examination (especially in area of criminal law)

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- 21 At the heart of the Charter revolution is “extensive recourse to the courtroom as a policymaking arena, not necessarily the particular outcomes of litigation” – policymaking is judicialized and legalized and conducted in the vernacular of rights talk: “therein lies the Charter revolution”
- 21-24 **The role of judges:** The Charter is not so much the cause as the means through which the Charter revolution is carried out; a revolution can’t occur without leaders and the support of interested classes (evidence: Declaration of Independence didn’t cause the American Revolution); in fact, judges are more important in explaining the revolution than is the Charter itself; one might have expected things to remain the same after the Charter, but a new generation of lawyers had entered the profession; the judges maintain that the activism is required by the Charter itself; the key point is that an explicit Bill is not necessary for activism, nor does a Bill automatically lead to activism
- 24-32 **The Court Party:** Judges are not alone; they too are being pushed by the constituency, the court party; the infrastructure is a necessary precondition of the surge in judicial power since the adoption of the Charter; these “Charter Canadians” (who emerged in the Charter debates or sprang up after them) seek to “constitutionalize policy preferences that could not easily be achieved through the legislative process”
- Examples: Canadian Civil Liberties Association (CCLA); Women’s Legal Education and Action Fund (LEAF), EGALE, etc. – these groups generally don’t care about the particular case; they care about the policy consequences

Institutions are not neutral arenas for policy battles: different institutions privilege different types of resources which are not equally distributed; the courts help those with legal resources but less electoral clout; partisans will gravitate to institutions most open to their policy preferences

The current debate about judicial power is a reprise of the similar debate in the 1930s with the partisan positions reversed; today the political interests are national unity advocates, civil libertarians, equality-seekers, social engineers, and postmaterialists

Ideas drive the Charter because in postmaterialist societies, knowledge is power

Chapter Two: Judges and the Charter Revolution

- 33-34 Judges often present themselves (e.g. *Vriend*) as “trustees” of the Charter, but in fact the level of disagreement on Charter cases indicates that this is a legal fiction; the Charter is largely indeterminate about the questions that arise under it; the Supreme Court has transformed itself from an adjudicator of disputes into a “constitutional oracle”
- 34-53 Three main ways judges deny the claim that the Charter revolution is caused by judicial discretion, all of which turn out to be false:
- (1) The Charter gives effect to certain core values which judges cannot transform: the fact is that the core values were established long before the Charter (and the core values don’t arise as issues precisely *because* they are core values); what judges have to deal with are the peripheral meanings of Charter rights; precisely where

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dissensus prevails is where the judicial discretion emerges (and in fact judges have little power when core values are actually threatened)

- (2) Some parts of the Charter revolution are clearly required by the text: in some cases, the Charter does have implications (such as the exclusionary rule); outside these examples, the Charter revolution is more judicial than legal (e.g. no right to remain silent); the exclusionary rule is the most egregious example here'
- (3) Where the text is unclear, judges are guided by tradition and original intent: no, the judges reject traditionalist understandings; e.g. in the 1990 *Sparrow* decision, judges essentially removed the explicit limitation of aboriginal rights to "existing" treaties; in 1995 *Egan* ruling, sexual orientation is inserted (despite explicit rejections of this by Trudeau and others when the Charter was created); furthermore in *BC Motor Vehicle Reference*, Justice Lamer explicitly rejected original intent, calling the Charter a "living tree"

54-57 **Judicial oracularism**; the traditional understanding was that courts were dispute adjudicators; the dispute came first, and the constitutional issue second (which meant that the court might never address some constitutional issues); SCC has abandoned this view; the constitutional policy comes first; removed standing (requiring existence of real-world legal dispute) and mootness (requiring that legal dispute be a "live" dispute)

57-58 Charter provides the occasion for judicial policymaking, but the document itself is not the most important explanation; Judges have decided to treat the charter as granting them open-ended policymaking discretion; changed rules of evidence, mootness, standing, etc; SCC now functions more like a third chamber of the legislature than a court; SC justices have more power than all non-cabinet parliamentarians

Chapter Three: The Court Party

59 Judges are important, but an even more significant cause is the Court Party; these movements would have grown even without the Charter, but not so far so fast, because the Charter gave them a new venue to pursue their agendas; but without the Court Party, the Charter would never have gained its prominence (the underdevelopment of the Court Party explains the stuntedness of Diefenbaker's Bill of Rights)

59-80 Five main strands of the Court Party coalition:

- (1) Unifiers: see the Charter as the solution to Canada's national unity crisis (Trudeau is in fact the best example here. It's a counterweight to regionalism and provincialism, lead citizens to define themselves in terms of rights; Canadians are just as divided about Charter issues as regional ones, but these divisions cut across regions and are a counterweight to regionalism; regional critics have always complained that the Supreme Court is a kind of "disallowance in disguise"
- (2) Civil libertarians: in an earlier era, libertarians focused on economic liberty; today they're concerned with freedom of religion, expression, etc. Canadian Civil Liberties Association (CCLA) is the best example, second only to LEAF in interventions before the Supreme Court of Canada

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- (3) Equality seekers: left-leaning egalitarians concerned with social equality and identity: feminists, gay rights activists, environmentalists, etc. LEAF is the model here, though there are others; they aim to conflate state and society, though the SCC has been resistant to this move, restricting the Charter to governments;
 - (4) Social engineers; not a physically identifiable group or organization; informs most of the groups above; take the view that social evils are caused by defective institutions; can lead to populism (when corruption is seen as only affecting the elite) or democratic elitism (when the people are corrupted and must be educated by a vanguard elite); most social engineers today opt for the latter
 - (5) Postmaterialists: the modern court party is rooted in the postmaterialist class; with higher education, more wealth, etc. concerns shift to quality of life issues; postmaterialist concerns are more prevalent outside the working classes; thus these people are attracted to the nonmajoritarian power of the courts; to the extent that they can move their policy agenda into the courts, they can avoid the tensions of postmaterialism in electoral politics
- 80-84 The elitism of the court party: those who are supposed to be helped by the Court Party must first be led away from their false consciousness; the power of the knowledge elite is best articulated through an institution that emphasizes elite rationality: the judiciary
- 84-85 Note that corporate litigants can't be included in the Court Party – most corporate involvement is reactive and defensive and not aimed at the government; the court party has breathed life into the Charter, making its oracle, the judiciary, a powerful new player in Canadian politics

Chapter Four: The State Connection

- 87-89 As many people (including Cairns) have pointed out, the state plays a key role in developing and fostering social groups; language groups did not arise until *after* the passage of the Official Languages Act; multicultural associations began *after* the announcement of multiculturalism in 1971; these did not have grassroots support
- 90 Other examples: creation of the NAC on the status of women in 1971 (with funding for Status of Women Councils in 1974); public funding for National Indian Brotherhood
- 92-95 Secretary of State Funding: SOS funding is important for “Charter groups”; feminist, multicultural, and official language minority groups depend on government grants for 50 to 80 percent of their budgets; nearly all Charter interveners receive SOS funding
- 95-99 Court Challenges Program: funding OLMGs (anglophones in Quebec, francophones outside Quebec); the CCP then funded groups that shared the equality-seeking goals of the left, and has become a key funder for LEAF which is the leading recipient of CCP intervener funding
- 99-100 Funding for Aboriginal Rights litigation: one-time grant of \$3 million to pay for legal costs from Bill C-31; also the test case funding program
- 100 Academic research funding: SSHRC grants and others

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- 101-2 Legal aid: provincial programs to all who qualify; not specifically for the Charter, but since 75% of Charter cases involve criminal prosecutions, so still important
- 102-4 Provincial Law Foundations: some of these (especially BC) have been generous to court party interests, funding LEAF, environmentalists, and so on
- 104-5 Without the funding offered by the state, the Court Party groups could not operate at their current levels of influence; it provides office space, staff, research dollars, and so on; the Charter launched a new era of judicial power, but it was the culmination of a decade of state building (thanks to Trudeau's SOS citizenship policies)

Chapter Five: The Jurocracy

- 107 Court Party enjoys what is called "positional support" – access to information and decision-makers and even a formal or quasi-formal role in decision making
- 108-13 Courts: Judges are obviously the most important, and are very privileged, but we shouldn't ignore the role of clerks, many of whom have a great influence on the judges (some nice gossip here about Joel Bakan writing the *Oakes* test); the clerks provide a conduit to the leading law schools
- 114-16 Administrative tribunals: these can also have an important limiting effect on legislatures
- 117-23 Government legal departments: sometimes crown counsels are too ready to admit that a right has been violated; sometimes they choose not to appeal
- 128 Conclusion: Court Party enjoys significant positional support at both levels of government; the Court Party is not only heavily funded by the state, but is to a large extent *part* of the state through a set of alliances and policy networks that connect its interests to various state bureaucracies

Chapter Six: Power Knowledge: The Supreme Court as the Vanguard of the Intelligentsia

- 129-33 Begins with a description of the rise of law schools in Canada, and the more recent ascendance of postmodern theory and critical legal studies; all of which, they claim, is very much in tune with the Court Party. Canadian academic institutions also support the Court Party in a variety of other ways:
 - (1) Administrative support: host a variety of Court Party organizations such as the Human Rights Research Centre at the University of Ottawa, *Canadian Journal of Women and the Law*, and Charter litigation projects within some schools.
 - (2) Rights experts: Begins with Russell's claim that a generation of lawyers were exposed to the idea that Canada's restrained treatment was inferior to the USA; law schools now produce a steady stream of rights experts, uses Walter Tarnopolsky as an example of the "symbiotic relationship" between Court Party and academy
 - (3) Advocacy scholarship: scholarly commentary is extremely prominent now that the Supreme Court makes extensive use of academic material (includes a lengthy critique of the logic behind battered women's syndrome)

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- 147 Intellectuals based at universities are at the heart of the postmaterialist left; they now pursue their agendas through the courts, and through active participation in law schools and universities

Chapter Seven: What's Wrong with the Charter Revolution and the Court Party?

- 149 The primary objection to the Court Party: deeply undemocratic, eroding the habits and temperament of representative democracy
- 155 The real effect of the Court Party project is not to protect rights but to encourage rights claiming and to encourage the judicial creation of new rights; this change unduly lowers the “threshold at which citizens feel justified in abandoning the democratic process, be it through civil disobedience, appeal to the courts, or (in the extreme case) revolt and secession”
- 166 “To transfer the resolution of reasonable disagreements from legislatures to courts inflates rhetoric to unwarranted levels and replaces negotiated, majoritarian compromise policies with the intensely held policy preferences of minorities...as the morality of rights displaces the morality of consent, the politics of coercion replaces the politics of persuasion. The result is to embitter politics and decrease the inclination of political opponents to treat each other as fellow citizens – that is, as members of a sovereign people.”

Miriam Smith: Ghosts of the Judicial Committee of the Privy Council

- 5-6 Morton and Knopff’s examination of the courts is “mired in a series of fundamental problems” – it is dominated by normative questions, its empirical claims lack systematic evidence, and its theoretical approach is pluralist; the pluralist approach ignores the more complex issues related to group politics in Canada
- 8-17 Morton and Knopff make five main contentions, each of which is flawed:
- (1) Groups have obtained victories from the courts with the Charter that they would not have achieved through the regular parliamentary channels; there are all kinds of difficulties with this claim, not the least of which is identifying the actual goals of the groups and imagining the policy process in the absence of the Charter; Morton/Knopff are not clear enough even about what they mean when they say that a group has achieved a victory
 - (2) Litigating groups represent minorities (points of view or groups); but in fact Charter groups are broadly supported by most Canadians
 - (3) Claim that their approach is a form of institutionalist analysis because they emphasize the role of institutions in privileging some claims while weakening others; but they leave key empirical questions out (which groups have more “electoral clout” and why? etc.); plus, their approach is pluralist and ignore the fact that many groups which are “privileged” in the courts are far from privileged in ordinary life; they ignore structured social relationships of Canadian society

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- (4) Legislature is a centre of democracy and courts are elitist institutions; this is simply untrue, given party discipline, centralized political leadership, and so on; look at Savoie's work on the "court party" in Canadian politics
 - (5) Charter's influence reflects a postmaterialist value change, engineered by Charter-obsessed intellectuals; this is contradictory. Sometimes they claim that society is becoming increasingly postmaterialist (and Charter simply reflects this); sometimes they say that the postmaterialist approach is in the minority in order to show that Charter decisions are illegitimate.
- 17-21 Morton and Knopff should have looked at Mallory, who showed that the JCPC followed Canadian society, though lagged behind at times; the courts, according to Mallory, are slow to adapt to social change; Cairns follows up on this by arguing that the decisions fairly reflected the society at the time; Simeon and Robinson follow in these footsteps; even excluding Quebec, the ROC was not united behind a centralist social-democratic approach (particularly in the West); the moral of the story is that court decisions must be placed within a broader sociological context
- 21 What are the implications for the charter debate? we need to ground our understanding in patterns of power relationships in society:
- (1) Structure-based analysis: to what extent are Charter decisions driving social change or reflecting it? The sociological argument suggests that courts will not defend unpopular minorities over the long run; they'll follow the mores of the society
 - (2) Agent-based analysis: A complementary approach which explores the role of organized interests in litigation; don't assume that the goal is to influence public policy; instead, try to figure out what the litigation means to the social movement; understand the movements in more complex terms, and why groups are acting in seemingly irrational ways; groups may consistently win in court but lose when the court decisions are not enforced by other branches of government
- 28-29 Charter critics are wrong to focus on the Charter; important dimensions of litigation are simply ignored in Morton/Knopff (and in the normative debate in which they're engaged); we're still dominated by the same old debate about the legitimacy of the Charter's entrenchment, and "it's time to move on".

Morton and Knopff: Ghosts and Straw Men (Reply to Smith)

- 31-32 Smith does not challenge the two central claims of the book: (1) there has been a Charter revolution, and (2) this revolution can be explained only in terms of a supporting constituency; she accepts these claims
- 33 M&K do not believe that all is right with Canada's institutions, nor that Canadian parliament is functioning particularly well, but they deny that judicial power is the best cure for the ills
- 33-34 A clarification of the society-institutions debate: reject both legal and sociological determinism and argue for a more subtle interaction; in fact, Smith takes a more uni-directional approach, arguing that society affects courts, and that's it – the question is why the languor of Parliament isn't just as praiseworthy as the relative languor of the courts during the JCPC era

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- 37-38 The legitimacy of policy flux is built into parliamentary institutions; rulings on the constitution often imply the permanent victory of one side: this is at the heart of the objection to judicial power – not the view that some victories are won in court that would not be won in the legislature
- 38-39 The central claim of the book is *not* that the Charter revolution is driven by law but rather by societal influences, especially interest groups and social movements; the interest of the book is not how judicial power has benefited the Court Party, it's with how the Court Party has sustained judicial power; concerned "to chronicle those parts of the social landscape that come together in a systematic defense of judicial power"

Miriam Smith: Partisanship as Political Science

- 43-44 Once again, Morton and Knopff return to a tired debate and reveal that they are primarily concerned with normative – rather than empirical – questions.
- 44-45 As for their claim that they conducted serious empirical research, it's just false: they rely on secondary scholarship and limited uses of new and interesting data (most empirical research derives from the work of Leslie Pal and Ian Brodie)
- 46-47 Although everyone agrees that there's a supporting constituency, her understanding is rooted in political economy and sociology; their Court Party is cut off from society and political economy
- 48 The real debate here concerns facts and values, and the proper conduct of the political scientists – Canadian political science must become true social science, and take its place within comparative politics

Robin Elliott: Morton and Knopff's The Charter Revolution: A Legal Critique

- 117-18 M&K's argument can be distilled into two claims, one descriptive and one normative:
- (1) The descriptive claim: The SCC, aided by a coalition of social movements called the court party, has taken advantage of the discretionary nature of judicial review to convert the courtroom into a policy-making arena which is like a *de facto* third chamber of the legislature
 - (2) The normative claim: the Charter revolution is deeply undemocratic, not only anti-majoritarian but also eroding the habits and temperaments of representative democracy
- Elliott will focus her critique on the descriptive claim that the SCC played a role in fashioning the Charter Revolution, the argument for which is laid out in the chapter "Judges and the Charter Revolution"
- 118-23 The core argument here is that the policy-making role of the SCC is less a function of the Charter itself than of the choices made by the judges (though M&K also seem to think that the choices that have led the courts here were wrongly made)
- It's perfectly clear that the Charter leaves judges with considerable discretion, and no one would dispute this claim; it's perfectly true that the judges have been inconsistent in their interpretation of the Charter, not only on the matter of original intent but on other features as well; the problem is that the theory of interpretation upon which M&K's argument rests is flawed; first, though, two specific criticisms:

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- (1) M&K argue that judges used to consider original intent; in fact, common law courts strenuously resisted lawyers' attempts to get them to study the legislative history of ambiguous texts; this has only become more common in the last couple decades; by ignoring legislative history and intent, they would be true to past practice
- (2) The living tree metaphor, first used in the *Persons* case; the JCPC invoked the living tree to allow women appointment to the senate; M&K's argument, that the living tree metaphor was supposed to liberate legislatures from courts, is dead wrong

What is the underlying theory in M&K? It holds (a) that courts should be governed first by the text of the Charter and (b) that if the text is unclear, it should be interpreted in accordance with the intentions of those who drafted it or, if that too is unclear, in accordance with "traditional understanding"

The problems with this theory: (a) basically never happens; the Charter is almost never self-evidently obvious or clear and (b) original intent is terribly difficult, not only because different framers have different intents and the constitution is about deep agreements not settling disagreements; and it may well be that the framers *intended* for the courts to interpret the document (which is called "general intent" – and is quite plausible as an interpretation of the Charter)

- 123-28 The other key claim is that the courts deliberately modified rules of standing and mootness, intervener status in order to enhance its authority as a constitutional oracle; but standing and mootness have not been eliminated (the SCC has denied standing in two of four cases)
- (1) Standing: What M&K should have said is that standing is a less significant barrier today; but this change occurred in the decade *preceding* the Charter
 - (2) Mootness: the same: the SCC considered technically moot issues before the advent of the Charter; furthermore, M&K's evidence hardly proves that mootness is dead
 - (3) Intervenor status: Yes, the Court is much more willing to allow intervenors, but the question is why that happened. There was significant debate about the rules in the early years of the Charter; ultimately the policy changed because the Court decided that it was more likely to make informed decisions if it heard from a broader range of perspectives when making their decisions (especially in very difficult early years)
 - (4) Willingness to consider unrelated issues: their interpretation of the relevant cases (*R v. Big M. Drug Mart*, *Andrews v. Law Society of British Columbia*, *R. v. Smith*) is simply mistaken; the oracularism component is the weakest part of the book

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Hirschl, Ran. *Towards Juristocracy*. Cambridge: HUP, 2004.

Thesis and Summary:

Why have so many countries adopted Charters of Rights in the post-war era? The common answer is that such Bills/Charters are a reflection of a progressive movement away from majoritarian democracy and toward the accommodation of minorities and the improvement of the lives of have-nots. In *Towards Juristocracy*, Ran Hirschl disputes this common view, arguing that the increasing constitutionalization of countries such as Canada reflects an attempt on the part of political, economic, and legal elites to retain hegemonic power.

In chapter two, Hirschl lays out the theoretical basis for his “hegemonic preservation thesis”. After critiquing a number of rival views – evolutionary theorists, functionalist theorists, economic-institutional models, and “thin” versions of elite theories – Hirschl presents his own thesis, according to which constitutionalization occurs as a result of strategic interaction among three sets of elites: political elites (who have some incentive to protect a given set of policy options from majoritarian politics), economic elites (who want to preserve the private sphere from state intervention), and legal elites (who wish to enhance their prestige and reputation). In the third chapter, Hirschl begins to flesh out this theory by explaining how Canada’s elites were well-served by the Charter: legal elites by their gain in prestige, economic elites by enabling them to challenge regulations of various kinds, and political elites by creating a nationalizing institution (or strengthening it) – the SCC.

Hirschl then explains that the decisions of the SCC (with a few exceptions) have favored a negative, Lockean (or even Hobbesian) understanding of rights: rights as limits to the intervention into political life by the state. This interpretation has generally favored those who are already powerful within a capitalist democracy (particularly corporations), but it can also be helpful for those (such as same-sex marriage activists) who are advocating for negative rights. The Charter has been beneficial for those seeking enhanced individual freedoms, and it has been of benefit to certain marginalized identity groups, but it has failed improve the lives of those who are at the bottom end of the socioeconomic ladder.

In his conclusion, Hirschl states his argument in frank terms: “put bluntly, [constitutionalization] can best be understood as an attempt to defend established interests from the potential threats posed by the voices of cultural divergence, growing economic inequality, regionalism, and other centrifugal forces that have been given a public platform through the proliferation of representative democracy”.

Methodology and Theoretical Perspective

Hirschl’s book is comparative, drawing upon four related cases (Israel, Canada, New Zealand, and South Africa) in order to develop a theory of constitutionalization which he calls the “hegemonic preservation thesis”. According to Hirschl, constitutionalization occurs when hegemonic elites – political, economic, and legal – feel the need to insulate their status-quo policy preferences from the vagaries of democratic politics. Hirschl’s evidence for this thesis is primarily qualitative (political history, readings of key cases, etc.) and occasionally quantitative

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(measures of income inequality, percentage of negative rights cases versus positive rights cases, and so on). Unlike many works in this sub-field, which tend toward the polemical, Hirschl attempts to be rigorous in his construction and testing of his theoretical model. (However, in contrast to scholars such as Miriam Smith, Hirschl never recommends that normative concerns be separated from such studies, and he is himself quite obviously motivated by a normative commitment to egalitarian progressivism).

Hirschl's argument rests on the relatively uncontroversial assumption that those who possess power will not abandon that power willingly and will attempt to generate political outcomes which are in their own interests and stall political outcomes which run against their interests. Beyond this foundational claim, Hirschl's argument seems to rest on two further assumptions. First, he has to assume that there is in fact a clear difference between the interests of political, economic, and legal elites and the interests of the *demos*, i.e. that the *demos* is opposed to Lockean liberalism, capitalist markets, and so on and would overturn the status quo if it were granted the power to do so. Second, he has to assume that there is a clear difference between economic progressivism (which has been wholly unsuccessful in the constitutional/rights era) and identity progressivism (which has had very real success in the constitutional rights/era). Any/all of these assumptions may well be defensible, but Hirschl does not appear to provide a great deal of evidence in their defense within *Towards Juristocracy*.

Comparison with Other Readings and Contribution to the Literature

Hirschl occupies an interesting place in the debates about the Canadian Charter. With the exception of a few comments in his conclusion, Hirschl would seem to agree with Morton and Knopff regarding the ascendance of identity groups post-Charter; like Morton and Knopff, Hirschl argues that minority groups (and libertarians) have been successful in their Charter challenges. (In a sense, Morton and Knopff's work could be seen as a supplement to Hirschl's account of "legal elites" – but legal elites are only one part of the story for Hirschl, whereas they are pretty much the whole story for Morton and Knopff) However, Hirschl also agrees with Mandel (though Hirschl is considerably less polemical) about the negative socioeconomic consequences of the Charter. The reason for Hirschl's awkward fit within the literature has to do with his more sophisticated conception of rights: negative rights have done well in the Charter era, including rights such as same-sex marriage, because they are in keeping with Lockean individualism, but positive rights (such as a right to health care or a basic income) have not done well because they contradict such individualism.

In some respects, Hirschl's underlying argument about the causes of the Charter revolution in Canada resemble Morton and Knopff – both explanations are basically elitist in nature – but Hirschl identifies a broader set of political, economic, and legal elites behind the revolution.

Relevant Exam Questions

This book is relevant for questions about the relationship between Parliament and the judiciary before and after the Charter. It is also relevant for any questions about the politics of the Charter itself, the political changes wrought by the Charter, and the effect of the Charter on the "democratic deficit" in Canada.

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Detailed Notes:

Introduction

- 1 The world has recently witnessed an astonishing transition to *juristocracy*; according to many theorists, this has to do with the post-war consensus that democracy entails more than majority rule; typically described as progressive
- 5 The three questions of the study:
 - (1) What are the political origins of the recent trend toward constitutionalization; to what extent is it a reflection of a genuinely progressive movement?
 - (2) What is the impact of the constitutionalization of rights and the fortification of judicial review on attitudes toward progressive notions of distributive justice?
 - (3) What are the political consequences of judicial empowerment?
- 7-10 Six broad scenarios of constitutionalization in the post-WWII era:
 - (1) The “reconstruction” wave: political reconstruction in the wake of WWII (Japan, Italy, Germany, France)
 - (2) The “independence” scenario: part of decolonization (e.g. India)
 - (3) The “single transition” scenario: transition from a quasi-democratic or authoritarian regime to a democracy (Greece in 1975, Portugal 1976, etc.)
 - (4) The “dual transition” scenario; transition to democracy and market economy (e.g. Poland in 1986)
 - (5) The “incorporation” scenario: incorporation of international standards into domestic law in Denmark in 1993 and Sweden in 1995
 - (6) The “no apparent transition” scenario: no apparent fundamental changes in the regimes, but the adoption of new constitutions: Canada, New Zealand, Israel
- 11 The basic thesis: the most plausible explanation for voluntary self-imposed judicial empowerment, which is what the recent changes represent, is that political, economic, and legal power-holders believe that it serves their interests to abide by those limits; three elites in particular are supportive of the changes:
 - (1) political elites, who want to preserve their hegemony by insulating policy making from democratic politics while professing support for democracy
 - (2) economic elites, who view the constitutionalization of rights (esp. property, mobility, and occupational rights) as a way to promote free-market agenda
 - (3) judicial elites who seek to enhance their reputation and influence

Strategic legal innovators – political elites in association with economic and judicial elites who have compatible interests – determine the timing, extent, and nature of constitutional reforms

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- 12 Elites that have disproportionate access to the legal arena are in fact better served by the courts and who find strategic drawbacks in majoritarian decision-making processes

Chapter One: Four Constitutional Revolutions

- 17-30 Introduction to the four cases:

- (1) Canada, 1982: the Charter contains detailed language intended to discourage courts from taking narrow views of the guarantees; quantitatively, the impact of the Charter has been revolutionary: constitutional cases rose from 5.5% (1972-1981) to 21.3% (1982-1991), of which 80% were Charter cases; this cannot be attributed solely to the Charter (willingness of national political actors to transfer policy-making authority; statutory change which shifted SCC from “appeals by right” to “discretionary leave”, granting the court more discretion; change in rules of standing and intervener status)
- (2) Israel, 1992: The new Basic law is basically an official bill of rights; as in Canada, the effect of the new Basic Laws have been significant, and the scope of the issues brought before the court has changed significantly
- (3) New Zealand, 1990: Until the NZBORA, New Zealand was thought of as one of the last bastions of true Westminster government; the NZBORA is an ordinary statute, but in practice they provide the basis for judicial review (and has been elevated by the NZ Court of Appeal to a de facto constitutional status)
- (4) South Africa, 1993-1996: Once again, the court became very important in the transition to multi-racial democracy in South Africa

Chapter Two: The Political Origins of Constitutionalization

- 31-38 Three major theories of constitutional change:

- (1) Evolutionist Theories: stresses the inevitability of judicial progress; some claim that it's a part of a transition from one socioeconomic stage to another; the most widely-held version emphasizes the trend as the byproduct of the emphasis on human rights after WWII; another view is that confidence in technocratic government has waned, leading to a desire to restrict the discretionary power of the state; the outcome is successful efforts by minority groups to protect themselves
- (2) Functionalist Explanations: Transformation is an organic response to pressures within the political system itself; emphasis on a wide number of state agencies and the expanding administrative state: active judiciaries are necessary to monitor the ever-expanding administrative state

These two theories account for some factors, but none of them accounts for the precise *timing* of the constitutional reforms; they consistently fail to explain why one country reaches a given stage before another one; both explanations overlook interventions by important and specific power-holders

- (3) Institutional economics models: constitutional transformation as a mechanism to limit collective action concerns; courts may also serve an efficient “police patrol” mechanism; the problem is how prosperous democracies address these issues before the establishment of judicial review, nor why they choose it at a certain point in time

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38-49 The “hegemonic preservation thesis”: the realist, strategic approach focuses on power holders self-interested incentives for deference to the judiciary; it makes four preliminary assumptions:

- (1) Legislative deference to the judiciary doesn’t develop separately from concrete social, political, and economic struggles; the expansion of judicial power is part of these struggles and can’t be understood apart from them
- (2) When studying the political origins of constitutionalization, we must take into account events that did *not* occur; can’t understand constitutional reform without understanding constitutional stalemate and stagnation
- (3) Political and legal institutions produce differential distributive effects: privilege some groups and individuals over others
- (4) Courts do not hold the purse strings but still constrain the flexibility of decision-makers, so the voluntary transfer of power to the courts seems to run counter to the interests of power-holders in legislatures and executives: the best explanation would seem to be that it is in the interests of those power-holders to abide by those limits

How might a political power-holder benefit from the expansion of judicial power? (1) delegating policy-making authority to courts may reduce decision-making costs and shift responsibility; it may be attractive for disputes that they don’t want to address (e.g. same-sex marriage in Canada) and (2) when politicians seek to gain support for contentious views by relying on the SC’s image as professional and apolitical

These strategic considerations can be understood in both a “thin” and a “thick” version

- (1) “Electoral Market” logic: judiciary increases the durability of laws by making legislative changes more difficult and costly; judicial independence is weaker in countries ruled by a single party; under uncertainty, a party is more likely to want to support an independent judiciary to make their laws harder to change
- (2) A “thick” version must capture a broader picture. This is the “hegemonic preservation thesis” which suggests that judicial empowerment is best understood as the by-product of a strategic interplay between: threatened political elites who wish to insulate policies from democratic politics; economic elites who advocate open markets, deregulation, etc; and judicial elites who seek to enhance their reputation

The thick version is counter-intuitive, but it suggests that elites can insulate their increasingly challenged policy preferences against popular political pressure (has striking parallels in work about regulatory bodies and other semi-autonomous institutions)

Chapter Three: Hegemonic Preservation in Action

53-74 Detailed discussion of the case of Israel

75-82 The Political origins of the Canadian Charter

The origins of the constitutional battle can be traced to the rise of Quebec nationalism in the 1960s; Trudeau, sincerely committed to protecting individual rights but also part of a broader strategic response to the threat of Quebec separatism

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Canadian Government wanted constitutionalization to shift debate away from regional concerns and toward questions of individual rights and to subject the provincial governments to core policy standards interpreted by a national institution: the SCC

All previous attempts to emphasize rights had failed (the “implied rights” of the Alberta Press case, Diefenbaker’s Bill of Rights, the rights in the Victoria Charter) because federal power-holders were disinclined to replace parliamentary sovereignty with constitutional supremacy; the victory of Levesque’s PQ in 1976 changed all this

The momentum of the 1980 referendum failure allowed Trudeau to initiate unilateral patriation, and ultimately to bring the Constitution Act in 1982 with all the provinces except Quebec

Most theorists emphasize the deep commitment of political leaders (esp. Trudeau) to the protection of civil liberties and the functional necessity (i.e. political ungovernability) as the major catalysts for the Charter: political decision-makers were unable to cope with the contentious problems; still, there is also some consensus that it was in the interests of political elites who found majoritarian politics not to their advantage: attempt to fight the growing threats to the Anglophone, protestant, business-oriented establishment posed primarily by Quebec separatism

As in other cases, the Charter was supported by domestic industrialists and American economic conglomerates who viewed the Charter as a means for deregulation; economic corporations have also been by far the most active organized interest litigants, using the Charter to challenge regulations on banking, trade, foreign ownership, and consumer/environmental protection; the SCC has indeed generally tended to favor the national government; above all, the court has become an important, if not the most important, decision-making arena for dealing with Quebec secessionism

82-89 Details from New Zealand

89-99 Details from South Africa

Chapter Four: Constitutionalization and the Judicial Interpretation of Rights

108-18 Criminal due process rights: the greatest part of judicial activity under the Charter has been criminal procedure questions; in Canada, examples include *Askov* (1990) and *Stinchcombe* (1991); there has been a general trend toward a generous interpretation of procedural rights; indeed, the protection of formal procedural rights is considered the signal triumph of rights adjudication in all four case countries

118-25 Demarcating the private sphere: all four courts have used the new framework to fortify and expand the boundaries of the private sphere, most of which reflect a judicial commitment to a small-government worldview; the courts have drawn on expression and privacy provisions to minimize government involvement and censorship

125-39 Subsistence social and economic rights: rights to education, health care, housing, etc. and many libertarians say they’re not rights at all; Canadian activists have attempted to initiate the entrenchment of a social charter; even in those cases which seem to promote positive rights, such as *Schachter* and *Eldridge*, the negative character of the Charter’s equality rights remains largely unaltered

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- 139-46 Workers' Rights: freedom of association, occupation, expression can be interpreted in favour of labor unions and workers' rights, or they can protect the private sphere by granting priority to economic association and free bargaining; in Canada, association has been interpreted in such a way as to deny it meaningfully to workers; the SCC has also made clear that workers have the right *not* to join a union; an exception is *Dunmore* (2001) in favor of agricultural workers, but it's unclear whether this is a trend.
- 146-48 Some themes can be drawn out of these changes:
- (1) Common tendency toward a narrow conception of rights which emphasizes Lockean individualism and antistatism; conceptualize the rights as negative liberties
 - (2) Judicial interpretation depends on the ideological atmosphere and their interpretation in present-day capitalist democracies often reflects and promotes a certain range of meanings
 - (3) All of the fundamentals of neoliberal thinking owe their origin to ideas of anti-statism, protection of the private sphere, and so on – the national courts and more in favour of rights along these lines; even progressive adjudications with regard to sexual preference are based on the same logic of negative rights: so social injustice may be reduced only in those areas congruent with Lockean liberalism

Chapter Five: Rights and Realities

- 153 In zealously protecting the private sphere, the constitutionalization of rights has served as effective means for shielding the economic sphere from the potential hazards of regulation and redistribution
- 168 Any simple and sweeping claims about the positive effects of constitutionalization need to be viewed skeptically; there is much to question here. Whereas the constitutionalization of rights does have crucial importance in affirming marginalized identities and enhancing individual freedoms, its impact on the socioeconomic status of disenfranchised groups is often exaggerated

Chapter Six: Constitutionalization and the Judicialization of Mega-Politics

- 169 Political deference in all four case countries has reached unprecedented heights, and includes the transfer of crucial nation-building challenges (such as the future of Quebec and the Canadian federation)
- 179-82 The SCC has become a key player in the debates about Quebec's place in the federation, and in nearly all of its important rulings, the SCC has sided with the policy preferences of the federal government: the *Patriation Reference* (1981), the *Quebec Veto Reference* (1982), the *Quebec Protestant School Board* (1984); the federalists in particular have been able to translate the question of Quebec's political status into a judicial question
- 195-99 Something similar has happened with Aboriginal rights, which have also been judicialized; the SCC has become the central arena for claims to recognition, land, and voice by Canada's indigenous population: many of the issues are not primarily legal dilemmas: the effect is to lure activists away from political processes and the pacifying

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nature of the system defuses claims to restorative justice that have potentially revolutionary implications (such as indigenous peoples' rights)

- 210 In principle, delegation to the courts may reduce legislators' impact and control, and judicial empowerment may allow judges to become less accountable; however, national high courts tend to adhere closely to prevalent worldviews, national metanarratives, and the interests of influential elites, and when they do deliver groundbreaking rulings, they are not likely to transform a political community, since they won't survive the resistance of a still more powerful political sphere; thus the goal has been achieved: policy preferences have been insulated against popular political pressures without risking the perils of delegating power to courts

Conclusion: The Road to Juristocracy and the Limits of Constitutionalization

- 213 The goal in the book has been to advance a notion of judicial empowerment through constitutionalization as driven primarily by political interests to insulate certain policy preferences from popular pressures; at the very least, it's a convenient refuge for politicians seeking to avoid making difficult no-win decisions

Constitutionalization is seldom driven by politicians' genuine commitment to progressive social justice or universal rights: in many cases, it's an attempt to maintain the status quo and to block attempts to challenge it; this is part of a larger attempt on the part of political elites to insulate policy-making from democratic politics

- 217 "Put bluntly, it can best be understood as an attempt to defend established interests from the potential threats posed by the voices of cultural divergence, growing economic inequality, regionalism, and other centrifugal forces that have been given a public platform through the proliferation of representative democracy"

Hogg and Bushell “The Charter Dialogue Between Courts and Legislatures”.

Hogg, Peter W. and Allison Bushell. “The Charter Dialogue Between Courts and Legislatures”. *Osgoode Hall Law Journal*. 35:1, 1997.

Manfredi, Christopher and James Kelly. “Six Degrees of Dialogue: A Response to Hogg and Bushell”. *Osgoode Hall Law Journal*. 37:3.

Thesis and Summary:

Hogg and Bushell argue that the Charter is democratically legitimate. The relationship between the courts and the legislatures is a *dialogue*: in 80% of the cases Hogg and Bushell studied, a court’s decision to strike down a given statute was followed up by a legislative response (a new law, an amendment, etc.). Even the language of legislation today (especially in preambles) reflects the fact that legislatures think of themselves in dialogue with courts on the interpretation of the Charter. Lawmakers have a wide variety of means (including means within the Charter itself such as s.1 and s.33) to “push back” when their legislation is struck down by the courts.

In their critique of Hogg and Bushell, Christopher Manfredi and James Kelly first point out that the “dialogue” metaphor, which influenced the Court itself in *Vriend*, originated with Hogg and Bushell’s well-known article. They then critique the article on empirical and normative grounds. They offer a number of arguments (of varying quality), the most compelling of which are (1) that the dialogue between Courts and Parliament exists but is considerably less extensive than Hogg and Bushell claim and (2) that Hogg and Bushell improperly assume that the judiciary has a monopoly on the interpretation of the Charter.

Methodology and Theoretical Perspective

The methodology in this well-known article is clear and straightforward: Hogg and Bushell examined sixty-five cases in which a court struck down a law on Charter grounds; this included every Supreme Court case and a number of important lower-court cases.

Comparison with Other Readings and Contribution to the Literature

Hogg and Bushell’s argument is an alternative to the much more common view (see Morton/Knopff, Manfredi, and even, to some extent, Hiebert) that judicial power in Canada is improperly taking over the legislating and policy-making role of legislatures and executives. Hogg and Bushell’s article forms the basis of Hiebert’s normative understanding of the proper relationship between courts and legislatures.

Relevant Exam Questions

This article is especially useful for any questions about the Charter’s effect on Parliament and the post-Charter relationship between Parliament and the courts.

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Detailed Notes:

The Concept of Dialogue

- 79-80 Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between judiciary and legislature as a dialogue; in such a case the judicial decision causes a public debate

How Dialogue Works

- 80-81 The court may have forced a topic onto the legislative agenda that the legislature might have preferred not to deal with, but the final decision is a democratic one

The dialogue can only take place if the judicial decision can be reversed, modified, or avoided, but it turns out that this is the normal situation; in most cases, minor amendments are all that is required to respect the Charter

It is rare, in fact, when a constitutional defect can't be remedied; the Charter acts as a catalyst for a two-way exchange between the judiciary and the legislature on the topic of human rights and freedoms; rarely raises a barrier to the wishes of the democratic institutions

The Definition of Dialogue

- 81-82 Surveyed sixty-five cases in which a law was struck down for a breach of the *Charter*, including all SCC decisions and several important lower court decisions; then surveyed whatever "legislative sequels" might exist to those decisions

A dialogue, then, is a case in which a judicial strike-down is followed up by a legislative body

Features of the Charter that facilitate Dialogue

- 82-91 Four features of the Charter that facilitate dialogue:

- (1) Section 33: the power of legislative override; it has become relatively unimportant because of a political climate resistant to its use
- (2) Section 1: the reasonable limits clause: all the rights can be limited by a law that meets the standards of this section as laid down in the *Oakes* test: (a) law must pursue an important objective (b) must be rationally connected with the objective (c) must impair the objective no more than necessary (d) must be proportionate – policy makers can usually devise a less restrictive alternative
- (3) Qualified Charter rights: some of the rights are framed in qualified terms: "unreasonable" search and seizure; "arbitrary" detention; "cruel and unusual" punishment, and so on; Parliament is forced to review its investigatory powers and include more elaborate safeguards; here again a productive dialogue
- (4) Equality rights: there are a number of ways to comply with a violation: include the excluded in a benefit, get rid of the benefit altogether; but the section leaves the door for dialogue since the option of getting rid of the benefit is always there

Features of the Charter or situations where dialogue is precluded

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92-96 Three situations where dialogue is precluded:

- (1) Where section 1 does not apply: sometimes there is no room for “reasonable limits”; very rare that this happens, but an example is the *Quebec School Boards* case, in which section 1 and section 33 didn’t apply so they were forced to comply
- (2) Where the objective of the law is unconstitutional: the actual *purpose* of the law is unconstitutional, e.g. *R v. Big M Drug Mart Ltd.* which struck down the federal *Lord’s Day Act* because the purpose violated freedom of religion
- (3) Where political forces preclude legislative action: the issue is so controversial that legislative action is precluded, as in *Morgentaler*

The Nature of the Dialogue between Courts and Legislatures

96-98 Most decisions have legislative sequels: 80% of the decisions which struck down laws have generated a legislative response; this legislation is a conscious response to the words spoken by the courts; even on a more restrictive understanding of dialogues, a strong majority of cases were responded to by a legislature

99-101 Legislative responses are usually prompt: in 75% of cases, the legislature responds to the court within two years; the only real exception was *Quebec School Boards* where the nine-year delay could be seen as a protest of the decision

101-04 Legislatures are engaging in “Charter-speak” – the language of the laws themselves, particularly in statutory preambles and purpose clauses, suggests that the legislators are engaging in a self-conscious dialogue; a good example is *Daviault*

104-05 Even when a law is upheld, dialogue may occur: the Charter does not give judges a veto over the democratic will of the legislature; in *Thibaudeau*, for example, the legislature acted even though the law was upheld; the Charter dialogue continues outside the courts even when the courts hold that there’s not a Charter issue to talk about

Conclusion

105 The critique of the Charter based on democratic legitimacy can’t be sustained: the decisions of the court leave room (almost always) for a legislative response and they usually get one; judicial review is therefore the beginning of a dialogue on how to reconcile the individualist values of the Charter with the accomplishment of various social policies

Christopher Manfredi and James Kelly: A Response to Hogg and Bushell

515-21 Empirical Issues with Hogg/Bushell’s argument: four points:

- (1) Can’t use judicial nullification as the sole indicator of judicial interference with the democratic will – nullification is becoming increasingly less important; must also consider other remedies such as “reading in”
- (2) Case selection: the study does not explain why the lower court cases were selected for “importance” and the sample is not representative; can’t draw conclusions from the data
- (3) Can’t treat SCC and lower court cases as equivalent; the question is whether dialogue becomes more one-sided as cases progress through the judicial hierarchy;

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furthermore, legislative sequels in areas like campaign spending and abortion have not fared well in the courts

(4) Can't say that one legislative sequel is a response to a number of cases: if we adjust the data, we get a significantly lower number than the percentage reported by them

Furthermore, many of the legislative sequels could be characterized as simple compliance with the judicial decisions; if we reclassify judicial nullifications in terms of "positive" and "negative" dialogue, we find that there is in fact an institutional dialogue, but not one as extensive as they suggest

522-24 Normative issues : the question is what degree of judicial distortion of policy is acceptable; when a legislature must subordinate its understanding to that articulated by a court, this is policy distortion, not dialogue; furthermore, many legislative sequels occurred *before* a final court decision, which suggests that courts are at least as interested in asserting their supremacy as engaging in a dialogue

Most importantly, Hogg/Bushell assume that there is a judicial monopoly on correct interpretation; but you can't say that the judiciary has such a monopoly

524-25 The dialogue metaphor (which influenced Frank Iacobucci in his decision on *Vriend*) largely comes from the Hogg and Bushell article; it's important to critically examine it; in fact, the Charter dialogue is far more complex and less extensive than Hogg and Bushell report

Manfredi, Christopher. *Judicial Power and the Charter*. Toronto: OUP, 2001.

Thesis and Summary:

In *Judicial Power and the Charter*, Christopher Manfredi attempts to explain the dangers involved in what he calls the paradox of liberal constitutionalism. The paradox is this: “if judicial review evolves such that political power in its judicial guise is limited only by a constitution whose meaning courts alone define, then judicial power is no longer itself constrained by constitutional limits”. Thus, although a liberal-constitutional order requires judicial involvement, that involvement creates the possibility of excessive judicial control. In Canada, Manfredi argues, the gradual weakening of any checks on judicial power (through the courts’ interpretation of section one and the gradual enfeeblement of the notwithstanding clause) means that the problem of judicial power in this country is quite grave.

In the central chapters of the book (chapters three through five), Manfredi examines a large number of Supreme Court Charter cases dealing with fundamental freedoms, legal rights, and equality rights. In every case, Manfredi argues, one can see evidence of growing judicial supremacy and a hubristic understanding on the part of the judges about the Court’s freedom from those limits which the Court is itself created to enforce.

In the final chapters of the book, Manfredi assesses the SCC’s contribution to democracy in Canada, arguing that it has largely been negative. The SCC has created incentives for interest groups and social movements to challenge the outcome of political processes rather than engaging directly with those processes. Only an effective override clause, such as the actual use of the section 33 notwithstanding clause, will ensure that Canada remains a state in which the constitution – rather than the judiciary – is supreme.

Methodology and Theoretical Perspective

Manfredi’s methodology is almost exclusively legal-historical: he attempts to prove his argument by analyzing dozens of cases, particularly Charter challenges which reached the Supreme Court. His theoretical perspective is based on a classical understanding of constitutional liberalism, one influenced by early American constitutional theory and still prevalent today, according to which the constitution in a liberal democracy is supreme and the judiciary exists as a check on the power of the legislature and the executive.

Comparison with Other Readings and Contribution to the Literature

Judicial Power and the Charter offers a committed and consistent attack on the post-Charter judiciary in Canada. Manfredi shares with Morton and Knopff a preference for Parliamentary rather than judicial policy-making, arguing that the post-Charter judiciary allows certain groups to access the policy-making process without engaging in the to-and-fro of democratic debate in federal and provincial parliaments. He agrees with Hiebert about the need for Parliaments to assert their role in the interpretation of the Constitution; however, where Hiebert sees some bad examples (e.g. DNA evidence) and some good ones (e.g. Rock’s response to the *Daviault* case), Manfredi sees only bad examples and the ever-increasing power of the judiciary.

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Unlike those (e.g. Morton/Knopff, Hirschl, Mandel) whose criticism of the SCC is partially based on the particular *outcomes* of SCC cases – that is, whether certain groups such as the poor or women or gays and lesbians “won” or “lost” – Manfredi’s focus is the structural paradox at the heart of liberal constitutionalism, namely that the need for a constitutional check on legislatures and executives creates the possibility of excessive judicial control.

Relevant Exam Questions

Like Hiebert’s *Charter Conflicts*, this book is relevant for any general questions about the Charter and judicial “activism”. It will be particularly useful for questions about the Charter’s effect on Parliament and the post-Charter relationship between Parliament and the courts.

Detailed Notes:

Introduction

- ix The book explores liberal constitutionalism and rights-based judicial review. On one hand, review is in keeping with liberal constitutionalism because it’s a check on legislative and executive power; on the other hand it can be anti-democratic, modifying the constitution without participation or even public awareness

The argument of the book: judicial power has continued to expand as the legitimacy of the notwithstanding clause has been further eroded: judicial supremacy is overtaking constitutional supremacy.

- x The book resists two camps:
 - (1) Those on the left and in the critical legal studies movement, who claim that the individualistic nature of rights, and the conservative nature of the judiciary, means that the Charter impedes progressive social change: best exemplified by Michael Mandel and Allen Hutchinson
 - (2) Those who celebrate judicial review as the essence of democracy because the political process is inadequate: Dale Gibson is an example of this

Chapter One: Judicial Review and the Paradox of Liberal Constitutionalism

- 4-5 In *Vriend v. Alberta*, the SCC asserted it’s judicial power in two ways: first, rather than striking down the statute, it read sexual orientation into it; second, it articulated its view of the relationship between legislatures and courts, namely that it was a trustee of the charter and scrutinize the work of the legislature and executive in the name of the “new social contract” that was democratically chosen

The reason for the more aggressive understanding of judicial review (cf. *Morgentaler* 1988) is that the principal constraint on that power – the notwithstanding clause – has atrophied through lack of use

- 5-11 The evolution of judicial review in the United States

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- 11-18 The basic legitimacy of judicial review in Canada has been less controversial than in the USA for historical and structural reasons:

Imperial context of BNA Act and the need to enforce the division of powers between the federal and provincial governments was a foundation for justifications of judicial review

What about rights in Canada?

- (1) Judges purported to find an implied bill of rights in the *BNA Act*; this is first raised as a possibility in 1938 in the *Alberta Press Case*, and was explicitly articulated by Douglas Abbott in *Switzman v. Elbling* 1957; the argument was that the “similar in principle” part incorporated civil liberties enjoyed in the UK in 1867; second, freedom of speech is necessary for democratic institutions. But these claims were not powerful enough to provide a foundation for judicial review
- (2) The 1960 Bill of Rights: it was clear that the court had no intention of giving teeth to the Bill, which was part of the worldwide post-WWII movement to declare the existence of fundamental rights and freedoms; it applied exclusively to the federal government and it discouraged creativity in definition and enforcement; and of course it wasn’t constitutional

- (3) Charter of Rights and Freedoms in 1982

- 21-24 The paradox of liberal constitutionalism: counter-majoritarianism and judicial finality are the reasons why judicial review continues to be controversial in liberal democracies, but judicial review is a key element of liberal constitutionalism. Thus the paradox is this: “if judicial review evolves such that political power in its judicial guise is limited only by a constitution whose meaning courts alone define, then judicial power is no longer itself constrained by constitutional limits”.

Why might one be skeptical about this paradox or its dangers?

- (1) The SCC hasn’t actually granted that many requests to nullify federal or provincial statutes; it seems to be a record of caution; but this is many more than the US Supreme Court, and the SCC has other tools beyond nullification
- (2) The SCC has conceded the inappropriateness of judicial policymaking and emphasized sections one and thirty-three; the effectiveness of these sections is unclear (section one has been interpreted in a way that expands judicial power)
- (3) Dahl’s argument that the moral insights of judges aren’t out of step with the society for very long – a weak argument (see chapter seven)
- (4) The negative impact of judicial decisions can be addressed by crafting new legislation or amending the constitution – a weak argument (see chapter seven)

Chapter Two: The Dimensions of Constitutional Interpretation:

- 25-26 The two general schools: interpretivists (which seeks to discover the pre-existing meaning of the constitution) and non-interpretivists (which seeks to confer meaning on the text of the constitution)

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- 26-31 Interpretivism and Non-Interpretivism: they have emerged as distinct ways of justifying judicial review in constitutional systems; judicial review is an instrument of majority rule for interpretivists; non-interpretivism elevates judicial review above majority rule by assigning it a unique function that's absent from constitutional/legislative process
- 31-35 The Canadian Supreme Court has enthusiastically embraced non-interpretivism in the post-Charter era, beginning with their first Charter decision *Law Society of Upper Canada v. Skapinker* 1984; by taking the "living tree" argument out of its context; Justice Bertha Wilson embodies this modern view of judicial review more than anyone
- 38-42 Interpreting "reasonable limits" – this was intended as a substantial check on judicial power, but it was watered down between 1980 and 1982; it has been further weakened because it, too, is subject to judicial definition; the court's unwillingness to follow self-imposed limits on judicial review, and control over meaning of section one, allows it to expand and contract the limits as it wishes

Chapter Three: Fundamental Freedoms

- 53-54 Because of the existence of section one, the Canadian Court has been able to accept the broadest possible meaning of fundamental freedoms and devote most of its energy to issues about the applicability of section one
- 59 Freedom of religion decisions: the founders of liberalism attempted to keep religious conflicts from becoming political conflicts; the *Constitution Act* did not prevent secular authorities from favoring religion over non-religion but the Charter changed the political status of religion in Canada; it's unclear whether the blunt instrument of judicial review is up to the task of establishing a new compromise
- 68 Freedom of expression cases in Canada have a disjointed quality; in some (*Keegstra*, *Butler*) the Court justifies infringements on expression on the basis of minimal empirical evidence of harm, in others (*Zundel*, *RJR-MacDonald*) the Court requires strong evidence of concrete harm before accepting the reasonableness of an infringement under section one
- 74 Most important for understanding the relationship between constitutionalism and judicial review is the declaration in *Dolphin Delivery* that the judiciary does not form part of government; the idea that the court is exempt from the limits which it is created to enforce

Chapter Four: Legal Rights

- 82 The court's decisions in *Operation Dismantle* and the doctrines of standing and mootness in abortion cases indicate that the Court's self-perception has changed; it has claimed a much wider field of competence for itself, meaning that decisions become more dependent on political factors
- 95-96 In *Seaboyer*, *Daviault*, *O'Connor*, and *Carosella* the SCC expanded the rights of defendants in sexual assault cases; in each case the court refused to accept constraints on judicial discretion (note that he characterizes *Daviault* as a struggle between Parliament and the SCC, whereas Hiebert sees it as a shared responsibility)

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- 102 The great theme in the realm of legal rights is the growing paramountcy of judicial discretion, which has become the centerpiece of its Charter jurisprudence

Chapter Five: Equality Rights

- 111 Prior to the Charter, the court was very cautious about equality rights, which was largely a result of judicial uncertainty about their power to give the Bill of Rights paramountcy over other federal legislation
- 115 The story of section 15 and the SCC is one of “equality-seeking” in which groups have sought recognition under that section in order to extract policies from governments
- 133-35 Three important characteristics stand out in the SCC’s equality rights jurisprudence since 1995:
- (1) The increasing importance of status and recognition in defining discrimination: distinctions can be discriminatory even when they don’t generate tangible, material disadvantage
 - (2) An unprecedented degree of judicial hubris cloaked in democratic humility: claim that the judicial role was a deliberate decision by the provincial and federal legislatures and that they are the trustee of the Charter: they are the guardian of the democratic values and principles of the Charter
 - (3) A growing tendency to label every political loss by an equality-seeking group as evidence of discrimination: blur the difference between discrimination and the ordinary vicissitudes of democratic politics

Chapter Six: Democracy, Public Policy, and the Charter

- 139 The important and deep question is whether the Charter enhances or threatens democratic participation in Canada
- 163 The tension between traditional adjudication and Charter adjudication results from the fact that most of the Charter questions in the SCC can’t be resolved through the authoritative application of pre-existing norms; the *Oakes* test shows that the Court must exercise political judgment in resolving its most important cases
- 168 The SCC has been less concerned with regulating the political process than with policing the outcome of the process: the court’s impact on democratic participation has been small (with the exception of extending the vote to very small groups such as prison inmates)
- By effectively endorsing regulation of campaign spending the Court has made it easier for those in power to erect barriers to entry for potential new players in the process (?)
- The Court’s jurisprudence has created incentives for groups to challenge the results of the political process rather than having contributed their participation in that process

Chapter Seven: Confronting Judicial Supremacy

- 177-78 According to Hogg and Bushell, the empirical evidence refutes the critique of the Charter based on democratic legitimacy, since the court’s decisions leave room for a legislative response (Hogg and Bushell show that 80% of SCC Charter strikedowns were addressed by a legislative sequel)

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Hogg and Bushell's argument suffers from several flaws, including the use of judicial nullification as the sole indicator of judicial interference; biased case selection; improper inclusion of lower court decisions in the data set; treatment of cases that produced a single sequel as evidence of multiple ones; in fact the Charter dialogue is more complex and considerably less extensive than they claim

Second, there's a problem when legislators choose policies that are less effective but more easily defensible than other alternatives; besides, most legislative sequels occurred *before* a final court decision, indicating that the court was still interested in asserting their supremacy

181-88 Section 33 is controversial because of the political circumstances out of which it emerged; in 1982 the Quebec legislature amended all existing Quebec statutes to include a notwithstanding clause; the use of the clause by the government of Saskatchewan to pre-empt a constitutional challenge of back-to-work legislation; these actions by Quebec and Saskatchewan increased the voices calling for the repeal of 33

The SCC's decision in *Ford* signaled to governments that section 33 would be subject to very minimal judicial scrutiny (NB! An important check on his argument!) – the decision was *Ford v. A-G Quebec* and it held that blanket overrides were acceptable

As the likelihood of using the override has declined, assertions of judicial power have increased; the Court can be less reticent about asserting control

194-95 The opposition to the notwithstanding clause is due to historical accident and three conceptual errors:

- (1) Historical accident: use by Quebec which most found unacceptable *before* the SCC had rendered a politically unpopular Charter decision, which limited the ability of governments to use the notwithstanding clause
- (2) First conceptual error: misunderstanding of the constitutional role of legislatures: the task of interpretation is not exclusively the courts' task; legislatures also have a legitimate role to play
- (3) Second conceptual error: misunderstanding of the legislative process as characterized by the haphazard adoption of measures motivated by majority tyranny; yes, judicial review is an important check, but the cure may be worse than the disease, since courts suffer from pathologies too
- (4) Third conceptual error: misunderstanding of the nature of Charter adjudication, which rarely involve disputes about fundamental rights and almost never address fundamental moral principles: they are about the application of the least-restrictive-means component of the *Oakes* test

It is unrealistic to expect judges to be self-restrained in their exercise of political power; a structural check on judicial power is needed in order to ensure constitutional supremacy rather than judicial supremacy

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Hiebert, Janet. *Charter Conflicts*. Montreal: MQUP, 2002.

Thesis and Summary:

Hiebert's central argument in *Charter Conflicts* is that "Parliament shares responsibility for interpreting the Charter", an argument which is both normative (i.e. ideally, all legislation would be carefully considered in terms of Charter rights and conflicts before being passed) and empirical (i.e. Parliament *does* in fact consider the Charters when legislating).

According to Hiebert, the executive thinks carefully about the risk of Charter challenges when drafting legislation (the justice minister is responsible for these risk assessments, giving him/her added power in the Charter era). Parliament, on the other hand, is largely left out of the process, and the Charter review carried out by the Justice Committee is inadequate. This weakens the position of the government when it defends legislation against Charter challenges.

Hiebert rejects the arguments of those on both extremes of the Charter debate: those who (following Dworkin) conceive of rights as trumps and judges as best or even exclusively equipped to interpret those rights, and those who lament all forms of judicial activism and defend a very narrow view of the judicial role. Instead, Hiebert advocates a "relational approach", which gives responsibility for the Charter to both Parliament and the courts. To make the relational approach work, Hiebert argues, Parliament must be more rigorous in considering the Charter implications of legislation, and the courts be more sensitive to the extent to which Parliament has considered those implications when rendering their judgments.

To give some empirical weight to her arguments, Hiebert then turns to five case studies. The example of the SCC's ruling in *RJR-MacDonald Inc.* (1995) was, she argues, an example of a failure of shared responsibility: the court insinuated itself into the legislative role (on a right of marginal importance – tobacco advertising as free expression) and Parliament's policy was then distorted by undue fear of Charter challenge. However, the case of sexual assault trials is more promising; in those trials, courts have accepted the role of Parliament in interpreting the Charter, and Parliament has been willing to challenge the court's decisions by drafting new legislation. In the case of debates about DNA acquisition, Hiebert suggests that governments are sometimes too inclined to "wave the Charter flag" in order to eliminate opposition without actually considering the deeper arguments made by opponents. Gay and Lesbian equality debates reveal a final principle of the relationship: if legislatures delay unnecessarily, courts will become increasingly impatient, and increasingly active, in their responses to those legislatures.

Methodology and Theoretical Perspective

Theoretically, Hiebert's approach is primarily normative: she is presenting a case for a particular relationship – which she calls "shared responsibility" – between Parliament and the courts when interpreting the Charter. Hiebert's argument is designed to chart a course between Charterphiles and Charterphobes. Hiebert's empirical evidence provides examples of the complications involved in bringing this relationship about. But the primary concern, once again, is normative: in order to avoid the possibility that Parliament will renege on its responsibility to make difficult

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decisions in the context of representative, democratic dialogue, we must argue that the responsibility for interpreting the Charter is shared by Parliament and the courts.

Methodologically, Hiebert employs a case-study approach, examining five case studies which she suggests are illustrative of the relationship between the executive/legislative and the judicial branches of government. Her focus is on SCC cases and government legislation; Hiebert admits that the secrecy involved in executive reviews of legislation (within the Department of Justice) prevents her from coming to a more detailed understanding of the effect of the Charter on legislation in Canada.

Comparison with Other Readings and Contribution to the Literature

Hiebert's goal is to find a middle course between the pro-judiciary and anti-judiciary arguments which have dominated in the literature. Unlike Morton and Knopff, Hiebert is not opposed to judicial "activism" *per se*, and sees the courts as playing a crucial role in the interpretation of the Charter (and her discussion of gay and lesbian rights, together with her criticism of constitutional literalists, indicates that she thinks the court can take an expansive view to its interpretive role). However, like Morton and Knopff, Hiebert worries that a judicial-centric approach to the Charter will tempt Parliaments to avoid difficult decisions until forced by the courts to make them.

Beyond her interesting normative arguments about the proper relationship between Parliament and the courts, Hiebert's case studies are a useful contribution to our understanding of the extent to which the Charter has affected the various branches of government. Hiebert's case studies suggest that the executive has been profoundly affected by the Charter; the Justice Department considers the Charter while drafting legislation (and even before the legislation is drafted). The increasing inclusion of preambles within legislation is a testament to the government's awareness of the relationship between that legislation and the Charter. The legislature has been less affected by the Charter, Hiebert suggests, because of the limitations of the cabinet-dominated (or PM-dominated) and strictly-disciplined environment of the House (like many others, Hiebert calls for an increased role for the legislature, particularly by strengthening its committees).

Relevant Exam Questions

This book is relevant for any general questions about the Charter and judicial "activism". It will be particularly useful for questions about the Charter's effect on Parliament and the post-Charter relationship between Parliament and the courts.

Detailed Notes:

Introduction

ix-xi This book examines the Charter's effect on legislative decisions:

(1)The Charter has changed the political environment and the climate of governing

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- (2) Only a fraction of legislative initiatives are subject to Charter litigation; whether and how the Charter constrains state power depends on how legislators view their responsibility under the Charter
 - (3) Judgment of whether the Charter is helping or hurting in Canada is closely linked to how it affects political behaviour; is it a convenient refuge for elected politicians? or does it mean that Parliament will become part of a dialogue on rights, giving more sensitive thought to their implementation
 - (4) If legislative decisions are based on careful consideration of rights and values, and the judiciary invalidates those decisions, the s.33 override might gain more public acceptance
- xii The normative position of the paper: Parliament shares responsibility with the judiciary for determining how the Charter should direct social conflicts; rejecting a judicial-centric approach for resolving Charter conflicts; this is not so much an anti-judiciary position as a pro-Parliament position, since only Parliament can define what programs and services are needed for the public interest

Chapter One: Political Scrutiny of Charter Conflicts

- 3-4 Judicial review creates tensions for parliamentary systems, though an emphasis on parliamentary supremacy today might seem odd; to say that the entrenchment of the Charter is an abandonment of this principle, though, is to underestimate the continued importance of Parliament in resolving Charter conflicts
- 4-7 The Canadian Bill of Rights: attempted to infuse political decision making with a greater sensitivity to rights; it was supposed to prompt government to think about rights when developing legislation (and the justice minister was supposed to report inconsistencies with the Bill of Rights); the strength of the Bill of Rights was supposed to rest on self-scrutiny and parliamentary evaluation; in fact, however, self-scrutiny was much less vigorous before the Charter, partly because there was no real threat of judicial nullification
- 7-10 Judicial scrutiny under the Charter: the minister of justice has a similar reporting requirement under the Charter, obliging him/her to certify that bills have been considered in light of the Charter. How it works: the department is responsible for drafting all government bills; they receive a memorandum with the objectives of the proposal and any Charter concerns, and Justice lawyers then undertake “risk assessments” concerning the Charter (sometimes in numerical terms); initially, public officials resented the justice department’s new power, but once legislation started to be nullified, they changed their tune
- 10-11 Human Rights Law Section of the justice department tries to encourage Charter discussion as early as possible; another form of anticipating judicial review is the increasing use of legislative preambles which state the intentions of the law; because of the necessity of a report to parliament (the justice minister has to do this if he/she feels the bill conflicts with charter), there’s a strong incentive to work things out in advance
- 11-12 Donald Savoie’s argument about the centralization of power in the hands of the Prime Minister; fine, but a shortcoming is that it doesn’t consider the Charter’s affect on

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power relations, or the significance of bureaucratic judgments on Charter issues – since Justice has a monopoly on Charter advice, it has a stronger influence than other depts.

12-14 So why haven't there been any reports to Parliament? Some (such as Russel) say it's because of the inherently limited nature of the executive checking itself. But you also have to consider two other factors:

(1) The government is reluctant to appear indifferent toward the Charter; pragmatically, risky legislation would be vulnerable to political embarrassment and Charter challenge if even the government admitted that it was opposed to the Charter

(2) Unless a bill is patently inconsistent with the Charter, it can usually get through, especially because of section one of the Charter

15-18 That's executive scrutiny; what about Parliamentary evaluation? It's basically impossible for Parliament to determine the risks of Charter conflict due to the secrecy of the executive review process; this is a problem because of the philosophical nature of Charter conflicts: valid differences of opinion exist and Parliament could play a role in this, but Parliament is very weak in the post-Trudeau era

Bills are assessed in terms of the Charter by the Justice Committee (House of Commons Standing Committee on Justice and Legal Affairs) and the Standing Senate Committee on Legal and Constitutional Affairs; but they are often pressed for time and information and are denied requests for access to information

This affects the judicial review; judges may be reluctant to believe that Charter concerns were really considered by Parliament, which weakens the government when trying to defend legislation against Charter challenge

Chapter Three: The Legitimacy Debate

22 A good critique of Smith: it's impossible to set aside normative considerations in this debate, since empirical and normative considerations get all mixed together here

23-33 Critique of the extreme position in defense of fundamental rights: basically, this position (e.g. Lorraine Weinrib) claims that judges are better equipped than legislators for the task of figuring out the meaning of rights and the legitimacy of state actions; Ronald Dworkin is the epitome of this position; this position assumes wrongly that Parliament is always the one threatening rights, and it overlooks the philosophical (what she means is *contested*) character of judgments about rights; the possibility of a very real and legitimate *range* of reasonable interpretations illustrates the ongoing importance of Parliament

33-42 Critique of the extreme position which is skeptical of the Charter: Morton, Knopff, Manfredi invoke liberal constitutionalism to assess judicial power: they worry that judicial review interferes with democratic responsibilities to make difficult choices between competing perspectives; most of these critics argue that this requires a narrow judicial approach, but this overlooks (again) the discretionary quality of legal judgments as well as the various problems entailed in any claims about liberal "neutrality"

43-51 The Alternative: Shared Responsibility: a dialogic model of the relationship between the legislature and the judiciary; it is implicit in the work of Peter Russell and others,

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but there are lots of problems with the dialogic model; the constitutional responsibility should instead be considered in relational terms; coordinate responsibility

Chapter Three: A Relational Approach to Charter Judgments

- 52 Both Parliament and the courts have valid insights, but their judgments may be different; each body must satisfy itself that its judgment respects Charter values
- 53-55 Different vantage points and different responsibilities:
- (1) Parliament: consideration of rights is part of, but not the singular or discrete focus of, legislative judgment; the Charter is incorporated into a larger policy inquiry; Parliament must have an important responsibility to interpret rights and resolve conflicts between rights; this is more than just “Charter-proofing” legislation
 - (2) Judiciary: enters the dispute later and is only concerned with whether the legislation is consistent with the Charter
- 60-61 Parliament must be especially cautious when it turns out that a piece of legislation has violated a “core right”, one of the fundamental rights which allow for democratic self-government in Canada
- 62-64 Use of the legislative override: extremely contested and controversial, but a relational approach allows us to understand when it might be appropriate; the override should not be used pre-emptively
- 65-71 What changes when we view the Charter in relational terms?
- (1) Parliament: The government should encourage more robust parliamentary scrutiny of bills when they have Charter implications by alerting Parliament about legislation which incurs a substantial Charter risk; a report should form a key part of second-reading debate and committee debate, and committees should have time
 - (2) The Courts: The courts should distinguish core rights from marginal rights, and the courts should be sensitive to whether the government has consciously reflected on Charter values and undertaken measures to reconcile conflicts

Chapter Four: Tobacco Advertising

- 73 This is an excellent piece of ammunition for Charter critics, since the SCC’s 1995 ruling in *RJR-MacDonald Inc.* elevated tobacco advertising to constitutionally protected expression, suggested that their judgment is superior to Parliament, and Parliament responded very meekly to the invalidation of the Tobacco Products Control Act of 1989
- 74 The legislation was written in such a way as to suggest that the Charter had been considered and that the matter was one of substantial concern; the Court, since a 1990 reference case, had emptied “expression” of any meaning, claiming that the Charter protects all expression regardless of the message
- 77-79 Justice McLachlin’s majority ruling was problematic and troubling for a number of reasons, not the least of which was her suggestion that the legislation should have proceeded in a different fashion

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- 79-80 Just La Forest's dissenting judgment suggested that Parliament had a reasonable basis after twenty years of research and experimentation to assume what they did, and reminded the majority that courts are not specialists in policy making
- 80-84 It is worrisome that Parliament's strategy was evaluated against judicial interpretations of whether the means were more restrictive than another hypothetical possibility
- 84-88 Parliament introduced a weaker version of the legislation that had been struck down; the health minister explained that policy developers had examined the court decision line by line, particularly McLachlin's speculative comments about lifestyle advertising; basically the SCC distorted the policy issue in this case
- 89 After threats from the tobacco industry, the legislation was amended to allow for sponsorships which had been received before April 1997 (e.g. race sponsorships)
- 90 All in all, this is an example of a *failure* of shared responsibility: the government did not contest the claim that tobacco advertising constituted expression, and judges evaluated the legislation on whether the objective was rationally connected to the means; this led to policy distortion on an issue which is an extremely marginal rights claim

Chapter Five: Sexual Assault Trials

- 91-94 After the SCC struck down the rape-shield provisions in the criminal code, Parliament introduced a new law with a preamble which explained the significance of the legislation; this preamble is a more honest way to justify a piece of legislation than relying on government lawyers to speculate later about the reasoning behind the bill
- 97-99 In the *Daviault* case, the majority ruled that extreme intoxication can be a defense (when one is so intoxicated as to be akin to an automaton); public reaction was overwhelmingly critical, and even got a critical comment from the U.S. State Department; especially critical because five individuals got acquittals within six months of the decision
- 102-07 The government responded with Bill C-72, which was focused on the equality rights of women; implicitly (but quite boldly) critical of the SCC; made it clear that intoxication cannot be used as a defense; Allan Rock made it clear that the department had thought long and hard about the constitutional implications (and had abandoned an earlier plan to introduce "criminal intoxication" into the criminal code); the committees heard three scientists, all of whom claimed that the courts had misunderstood the concept of automatism, and so the legislation expressed doubt about the basic assumption underlying the court's decision
- The bill contained a lengthy preamble, and Rock expressed hope that the preamble would be useful to the courts
- 109-12 Bill C-46 was another example of a response to the courts; some have called it a point by point repudiation of the majority judgment; in challenges of the bill, the courts have recognized that Parliament does have a valid role in interpreting how the Charter applies to social conflicts

Chapter Six: Regulating the Collection and Uses of DNA

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- 140-43 There is a tension between law-enforcement objectives (which emphasize the need for DNA samples in order to investigate crimes) and privacy and search/seizure objectives; the problem is that a polity may be giving too much responsibility to courts to determine reasonable answers to legislative questions; the result is that Parliament is tempted to renege on its responsibility to make principled decisions

This issue, in the end, was a poor example of the process, and there was a lack of careful political judgment about reconciling conflicting values; need to defend the legislation with assumptions, values, and objectives rather than merely “waving a charter flag”

Chapter Seven: Rules and Exemptions for Search Warrants

- 150 The *Feeney* decision: police need warrants to enter a private dwelling, except in cases of “hot pursuit” and other unspecified cases; the minority opinion diverged substantially, in fact illustrating incredible range of possibility for interpreting Charter; basically what happened was that the court read into the Criminal Code a warrant requirement for searches of homes
- 154-56 Bill C-16 amended the Criminal Code to address the *Feeney* ruling, but allowed for a much larger range of conditions under which no warrant is required; the bill was rushed through because they wanted to do it before the suspension of the court’s judgment (six months) expired; thus the government’s approach was not as risk-averse as in the case of the DNA data bank, suggesting that Parliament does not accept a judicial-centric view of constitutional judgment

Chapter Eight: Equality Claims of Lesbians and Gay Men

- 180 The legislative delays on these issues resulted in frustration in the court, and the SCC made decisions in 1998 (*Vriend v. Alberta*) and 1999 (*M v. H*) which made it clear that the court was no longer willing to defer to legislative inaction
- 199 Although legislatures are better suited than courts to undertake consultation, dialogue, and research, but if they are too slow in changing social policy, courts will become impatient and more active in proffering remedies

Chapter Nine: Assessing the Charter’s Influence

- 201 The skeptical claim is that a bill of rights is either ineffective (because the courts alone cannot enforce their decisions when others do not agree with them) or unnecessary (because the other branches of government will adequately change with the times)
- 203 The judicial and political reaction to the equality claims of gays and lesbians challenges the skeptical thesis: governments have generally waited to be compelled by judicial rulings before they’ll make changes to be more inclusive
- 209-10 The Charter has significantly influenced the way the judiciary understands its role, seeing itself as the guardian of the constitution
- 216-17 The Charter has provided an incentive for broader reflection on whether its values are actually being respected in legislative choices

Conclusion

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- 218-19 The Charter has had a significant impact on legislative agendas; the argument in the book is for shared parliamentary and judicial responsibility in resolving Charter conflicts. The reason for shared responsibility is to prevent Parliaments from reneging on their responsibility to make decisions about compelling legislative purposes
- 223-24 A judicial-centric approach is characterized by risk-aversion and charter-proofing on the part of legislatures, which can be seen in the case of the DNA debates; another lesson is that more time is required than is sometimes provided by the Supreme Court

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Greene, Ian. *The Courts*. Vancouver: UBC Press, 2006.

Thesis and Summary:

Ian Greene's book attempts to evaluate the courts along the lines of three democratic "benchmarks" (the standard benchmarks of the Canadian Democratic Audit Series). His story is one of progress: although the courts originated in pre-democratic times, they are slowly becoming more democratic. Democracy for Greene is an ideal to which we must aspire (and which we will never fully achieve), and although the Canadian court system is far from perfect (Aboriginals, for example, are seriously underrepresented in the legal profession), it has consistently improved throughout Canada's history.

Greene clearly wishes to discuss more than the classic "judicial activism" debate, though he does address that debate directly in his fifth chapter. He claims that the courts simply cannot avoid some amount of "law-making" or "activism", and supports his claim with six brief arguments of varying quality (see notes on pp.147-9 below). Generally, though, it is clear that Greene sees recent court decisions on same-sex issues, gender equality, etc. as a good thing.

Against those (on the right and the left) who criticize the courts for post-Charter activism, Greene argues that the Canadian legislature has been all too willing to avoid difficult decisions. If the Canadian Parliament was performing its democratic function more adequately, he suggests, judges would feel less compelled to take up a "policy-making" role.

Methodology and Theoretical Perspective

Greene's arguments are based on a careful and thorough reading of the secondary literature as well as over one hundred interviews with Canadian judges (the interviews were conducted for earlier research, but Greene draws on them in the book).

Theoretically, Greene is less interested in examining the courts within the framework of the judicial activism debate; he is more interested in examining the democratic performance of the courts (and the professions which relate so closely to the courts: lawyers, judges, etc.) as *institutions*: how inclusive are courtrooms? how many judges are women? etc.

Comparison with Other Readings and Contribution to the Literature

Greene deliberately attempts to navigate between the extremes of Mandel (on the left) and Morton/Knopff (on the right), claiming that both have to some extent "missed the point". His argument is that courts are primarily dispute-resolvers but cannot avoid "law-making"; given this assumption, the question is the democratic performance of the courts in both functions.

Greene is an admirer of Peter Russell's scholarship and cites virtually all of the major "names" within Canadian legal scholarship approvingly.

Greene's contribution to the literature is threefold: (1) He has attempted to provide a basic and accessible account of the relationship between the Canadian courts (understood broadly) and the

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development and health of Canadian democracy; (2) he has argued that the “judicial activism” debate is only one means for examining the democratic performance of the courts, and it is a highly limited means at that; and (3) he has claimed that judges simply cannot avoid “law-making” functions, particularly when Canadian legislatures today are so hesitant to pronounce on difficult and controversial policy issues.

Relevant Exam Questions

This book will be relevant for exam questions about the democratic deficit, the development of “Charter Canadians”, the relationship between Parliament and the Courts, and the impact of the Charter on Parliament.

Detailed Notes:

Introduction

- xi Democracy requires an independent judiciary (*a basic assumption of the work*); democracy requires a judiciary which is *not* accountable so that it can settle disputes about laws enacted by elected legislatures
- xvi The focus of the work is not judicial activism, which is less important than the question of “the extent to which the courts and those who populate them – including the judges but not forgetting court staff, lawyers, prosecutors, litigants, and witnesses – reflect three key indicators of democracy: participation, inclusiveness, and responsiveness”.

Chapter One: Canada’s Courts in Context

- 3-7 Courts in historical context: Canada has inherited both of the great European legal traditions (common law and civil law); Canada has also inherited the structure and judicial recruitment process of the English court system; Because a law-clarification function can’t be avoided, the courts inevitably take on a “law-making” or “policy-making” role
- 7-12 Canadian court system: An overview of the Canadian court system, including areas of jurisdiction, the basically unitary nature of the court system, the distinction between indictable, hybrid, and summary conviction offenses
- 12-16 Impartiality, appointment, and education: judicial appointments largely based on patronage until 1967 when Trudeau (as Justice Min.) sets up review by Canadian Bar Assoc. Gradually committee appointment systems have emerged (though none exists for Supreme Court choices or promotions to provincial appellate courts)
- 16-17 Courts’ primary role is to resolve conflicts; secondary roles include checking the other branches of government, filling in gaps in legislation

Chapter Two: Public Participation in the Justice System

- 20-27 Public participation in judicial selection: originally no participation; now many provinces provide for lay participation in selection and/or screening of appointments; same with federal appointments (though there’s more room for patronage left at the

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- Federal level); explores some possibilities for participation in Supreme Court appointments; laments lack of public participation and excessive deference to lawyers
- 27-29 Citizen monitoring and the “open court”: most courts are open, but as a tool for accountability this is limited; few courts are really scrutinized by the public (or even by the media)
- 29-32 Participation in court administration: few laypeople involve themselves in court administration (most don’t even know who’s responsible for the courts); but legal associations are involved and their opinions are taken seriously; some arguments have been made for administration by judges themselves (with citizen advisory committees) but judges still mostly regarded as practicing a “private professional craft” rather than a public service
- 32-38 Participation in court proceedings: The jury system should be reformed so as to actually allow for representative participation or it should be abolished
- 38-39 Public input into adjudication has become easier because (1) the rules of standing have been broadened since the 1970s and (2) intervenors are more frequently allowed; these are often prov. or fed. governments or public interest groups (CCLA, LEAF, NCC, etc.)
- 39 The problem with intervenors as enhancing democracy is that it’s hard to obtain intervenor status (knowledge, money, etc.) and they often represent a narrow area of specialized interests (cites Morton and Knopff here); studies show that the majority of intervenors are corporate interests (more than half) and “Charter Canadians”
- 41-46 Expert witnesses; often “hired guns” for the litigant. *Ford v. Quebec* 1988 in which social science was critical of public opinion that ban was needed and social science won; *R v. Askov* (1990) shows the power of social science evidence (and the inability of judges to easily understand social science research)

Chapter Three: Inclusiveness

- 51-52 Judges can’t be expected to be representative (demographically speaking) of the entire population, since they’ll be older and richer than the average simply by virtue of their careers. But they should be as representative as possible.
- 55-58 Women are underrepresented among lawyers but overrepresented in the legal field (they’re often paralegals and secretaries); Aboriginal peoples are seriously underrepresented; visible minorities are underrepresented, often indicating difficulties for new immigrants to get into law school
- 62-65 Among judges, women are underrepresented, as are Aboriginals and minorities
- 74 The courts are gradually becoming more representative of the population; if present trends continue, they will be by around 2025; the only concern is that the court will continue to be dominated by “high achievers” (who typically come from wealthier backgrounds); more lay participation is needed

Chapter Four: Responsiveness to Expectations

- 76 In order to be responsive to the public, the most important thing is for judges to be independent of outside influence
- 93 There is some debate about whether judges should take greater responsibility for administration; there have been some innovative recommendations

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- 93-103 Discussion of judicial discipline including provincial and federal examples; Canadian Judicial Council (and provincial versions) discipline judicial misbehaviour
- 106 Still need more public participation in judicial discipline, though they've come a long way; there are serious backlogs in courts which indicates changes are needed in administration (recommends that the courts have greater role in administration)

Chapter Five: Responsiveness to Canadian Democracy

- 109 The debate today is wide-ranging; critics on the left (such as Michael Mandel) say that the court is making the rich richer and the disadvantaged worse off; critics on the right (such as Morton/Knopff) say that Charter litigation has been "captured" by left-leaning interests. Greene's view: in a sense, both perspectives are correct, but in another sense, both miss the point
- 111-46 Lists a large number of court cases along with basic descriptions of the cases; the goal is to allow the reader to make up his or her mind about whether the courts have encouraged democracy and adequately represented the Canadian public: general conclusions on each topic: (1) Inclusiveness: courts have been stricter about inclusion than legislatures; legislatures have dragged their feet on provisions for birth fathers, deaf people, prisoners, etc.
- 147-49 Have the courts gone too far? There are a number of weaknesses with the argument that the courts have been too activist in dealing with policy issues: (1) If the courts interpret the Charter conservatively, future policy changes will become more difficult; (2) Courts cannot easily refuse to decide on issues that come before them, and Canadian rules of justiciability are broad; (3) Canadian debate leading up to the establishment of the Charter generally favoured an activist role of the judiciary; (4) the legislature seems quite content to let the judges decide on some issues; (5) various groups have chosen to take certain issues to the court rather than the legislature; (6) the court has generally shown itself to be open to reasoned argument
- 149 Concludes by saying that it's disturbing that more citizens would want issues to be decided by the courts rather than elected legislatures; judges would welcome more involvement from the legislatures and many judges are activist because legislatures are reticent to tackle difficult rights issues

Chapter Six: The Courts and Democracy

- 155 An important summary of the basic approach of the book: "Interesting though the judicial activism debate is, let's not forget the primary purpose of courts: to resolve legal disputes according to law, fairly, impartially, and expeditiously.
- 155-7 Conclusions on participation: although progress has been made, public involvement in judicial selection and court administration is more limited than it ought to be
- 157-60 Conclusions on inclusiveness: most Canadian law schools are trying to recruit women, Aboriginals, and the disadvantaged; they're underrepresented but situation is improving
- 160-2 Conclusions on institutional responsiveness: Canadians expect impartiality and responsiveness; delay continues to be a problem, though procedures for selecting judges and disciplining judges have improved (more work needs to be done on promotions)
- 162-3 Conclusions on decision-making responsiveness: Charter has led to greater inclusion of

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visible minorities, mentally and physically handicapped, gays and lesbians, and
Aboriginal Canadians

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Heard, Andrew. *Canadian Constitutional Conventions*. Toronto: OUP, 1991.

Thesis and Summary:

This book provides a description of the most important constitutional conventions in Canada. It covers Canadian Governors-General, Canadian legislatures, Cabinets, Federalism, and Judiciaries. The underlying argument of the book is that Canada's constitutional laws could not function adequately without a wide variety of unwritten constitutional conventions. In the final chapter, Heard provides a taxonomy of conventions beginning with the most important ("constitutional conventions") and ending with the least important ("usages")

Methodology and Theoretical Perspective

Beyond the basic argument mentioned above, Heard's book is largely atheoretical. His methodology is based on extensive secondary scholarship and qualitative primary research.

Comparison with Other Readings and Contribution to the Literature

Heard's goal is to revise the standard understanding of conventions which has grown out of A.V. Dicey's classic *An Introduction to the Law of the Constitution*. For those outside these specific academic debates, the work is useful primarily because it provides an accessible description of the most important constitutional conventions in Canada.

Relevant Exam Questions

This book could be useful for questions about the adaptability or flexibility of the Canadian constitution or parliamentary government. It's also useful as background for questions about the function of Canada's major institutions.

Detailed Notes:

Chapter One: The Role and Nature of Conventions

- 1 Section 52 of the 1982 *Constitution Act* declares about two dozen British and Canadian statutes and orders-in-council to be our Constitution; but the whole constitution is composed of three elements: the formal constitution, the legal rules relating to the three branches of government, and constitutional conventions
- 2-3 Two trends today: an attempt to draw a boundary between law and convention; and a propensity to seek legal regulation of rules that are normally governed by convention; if conventions become increasingly justiciable, there is some danger that the democratic nature of constitutional evolution might be eroded
- 5-10 How to distinguish between law and convention? The common answer is to say that conventions can't be enforced by the courts and are political in nature; others have claimed that the two are inextricably intertwined; the fact is that conventions *have* been discussed and defined in a number of cases

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10-11 How do conventions arise? Two ways: through some practice or through the explicit agreement of the relevant actors;

15 The task of the book: to provide an insight into the nature of the conventional rules at work in the Canadian constitution and what the terms of the conventions actually are

Chapter Two: Conventions of the Governors' Powers

16-17 Some of Canada's most important conventions ensure that the GG and LGs power is actually exercised in practice by the Prime Minister and Cabinet; the general tenure of the GG is now five years, and the convention dictates that the selection lies with the Prime Minister personally

17-19 On "paper", the GG's power is immense, but it is limited by some of the most firmly established conventions: the GG appoints to the Privy Council as PM the leader of the majority party in the House; appoints only those ministers chosen by the PM; only current members of the Privy Council can partake in decision-making process; GG is bound to act on the "advice" of the Cabinet almost always; but the GG may retain some power through its right to "be consulted, to encourage, and to warn".

19-20 The specific circumstances in which a GG can exercise emergency powers are controversial; particularly during elections or parliaments that have lost confidence (basically related to the power to appoint the PM, since the appointment of the PM is the one act that is not done on formal advice)

22 In the case of minorities, there are two schools of thought: some think that the GG should invite the leader of the largest party to try to form a government and then let the party leaders sort it out; if they can't sort it out, a new election should be held (there's an additional complication when the opposition party had less votes than a smaller party, as in 1975 Ontario election): it is crucial in all of this to recognize that the *legislature* ultimately decides who will govern

26 It is worth briefly noting the degree of flexibility that a GG or LG would have in the event of an extreme emergency (such as a bomb in parliament), in which case the conventions would cease to be relevant, in which case the GG could exercise almost total personal judgment

26-28 Dismissal: a governor can dismiss if (1) the government has lost an election but refuses to resign or (2) the government has lost a vote of confidence and refuses to resign; this is really only means in the constitution to prevent a government from clinging to power; governments have been dismissed in Canada due to corruption only twice (Mercier government in Quebec in 1891, BC Government in 1903); there is still great debate over whether the GG can dismiss a government as the guardian of the constitution

29-34 Summoning and dissolution: little controversy that the GG can summon the legislature when they're delaying or avoiding meeting; as for dissolution, it's quite controversial because the GG would have to force the PM to agree (and then accept the PM's "advice"); Ed Schreyer contemplated this during the patriation crisis in the early 1980s

40-44 What about the abuse of GG or LG power? The check here is dismissal (as opposed to the British, who can only resort to forced abdication or the abolition of the monarchy); it's not clear whether the advice to remove a governor has to come from Cabinet or just

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the PM; in Canada it's been the Cabinet, though there are alternative examples elsewhere in the commonwealth; it's generally assumed that the Queen would have no right to refuse the Cabinet's recommendation that a new GG be appointed

- 46-47 Conclusion: conventions are important in the practical use of governors' extensive legal powers; convention has allowed for an adaptation without the need for constitutional amendment; still, much controversy remains on the prerogative power of the GG in times of crisis; many would argue that the GG has the duty to protect the constitution

Chapter Two: Cabinet, Ministers, and the Civil Service

- 48 The cabinet is barely present in positive law; the principles of individual and collective ministerial responsibility are mostly informal rules

- 48-50 Cabinet formation: the Cabinet has no specific genesis in law, but it is a committee of the Privy Council (of s.11 of Constitution Act 1867); ministers are first made a member of the PC for life (the PC also contains honorary appointees, such as premiers, opposition leaders, statesmen, judges, and some royals, but only cabinet ministers can participate in the committee known as the Cabinet)

The Cabinet members must be MPs or Senators; in Canada it's been a convention that they be representative of all of the provinces (exception: PEI) and of both languages

- 50-52 Responsible government: two general aspects: (1) individual ministerial responsibility for their own departments and personal activities and (2) collective responsibility of Cabinet as a whole

- 52-62 Individual responsibility usually includes two particular meanings:

- (1) Informational answerability: members of the legislature can ask questions of the ministers (an oral question period is provided for in the standing orders of the Canadian House of Commons; also provision or written questions); but the minister doesn't have to respond according to the rules, and there are other rules in place that limit the potential for answerability
- (2) Culpability: political culpability and legal liability of ministers for actions in their departments; in the past thirty years, academics have disputed the claim that ministers are culpable for everything in their departments; TM Denton claims not to have found a single resignation because of malfeasance by departmental officials; the vast majority of ministerial resignations occur due to morally or legally compromising positions of the minister himself/herself
- (3) Must also consider bureaucratic neutrality here, which has come under some pressure more recently; the prevalent practice is to respect the anonymity of the officials in the departments, though there are a few examples of ministers throwing officials under the bus

- 62-74 Collective responsibility of the Cabinet as a whole is at the core of our government: the cabinet is responsible to the monarch, to itself, and to the elected chamber of the legislature (ministers are legally servants of the Crown, and hold office at the governor's pleasure)

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- (1) Cabinet Solidarity: cabinet must retain a public posture of unanimity and respect the confidentiality of the materials and discussions held in reaching the decisions; ministers present a united face in public and all vote in favour of government policies; in Canada, breaches of solidarity have been rare, and even resignations over disagreement have been quite rare
- (2) Cabinet confidentiality: state secrets and ministerial disagreement is all kept confidential to allow for free and open discussion (though most cabinet documents are made public after thirty years)
- (3) Cabinet confidence: most important rule of the parliamentary system is that government must resign when it loses confidence of the legislature; these notions arose from resignations of governments in England between the two Reform Acts of 1832 and 1867; a government must resign if it loses a clearly worded motion of non-confidence; or a matter previously declared to be one of confidence; a defeat on financial matters, pretty much any supply or tax matter (though Pearson's refusal to resign in 1968 is an exception here)

Chapter Four: The Legislatures

- 78-79 A fundamental principle is the presence of political parties: only through parties does the election of members translate into a cohesive government; this is so important that a method of pairing has long operated so that votes are kept roughly proportionate to the overall party standings (though occasionally the temptation to catch the opponent off-guard is too strong, as in the demise of the Meighen government)
- 79-82 The whole shape and tenor of Canadian legislatures is forged by the operation of disciplined parties; party deviations are not permitted on matters of confidence; most research has shown that party discipline comes more from peer pressure than from the threat of discipline by the party whip
- 82-84 The party caucus: each party has regular caucus meetings to discuss party strategy and policy; this is the forum for internal debate; the internal cohesion of parties is achieved without the benefit of any written rule
- 84-87 Party government and the Charter; there is some debate about the extent to which the Charter applies to the internal workings of parliament; Heard argues that it's better to keep the internal workings outside of what's reviewable by the courts
- 87-99 Relations between the Senate and the House of Commons; there is very little variation in Senate amendments between times when the Senate is controlled by a different party and times when it is not; the size of the government majority is the most significant factor; the Senate therefore seems to play a role in constraining majority governments; there are no general principles for Senate amendment, except that it should not frustrate the general purpose of the legislation put before it; it is also a convention that the bill presented for royal assent must be the same in both Houses

Chapter Five: Federalism

- 101-05 Reservation and disallowance: until WWII, fairly active use made of reservation and disallowance; in the Trudeau years, disallowance and reservation fell into disuse (Trudeau had concluded that they were obsolete before he even came to office); in the

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1980s, academics agreed that reservation and disallowance were basically extinguished (though some, such as Forsey, pointed out that they hadn't been officially abolished in 1982 Constitution Act)

- 105-08 Lieutenant-Governors: appointed by GG and subject to instruction by the GG (i.e. federal Cabinet), thus seen after confederation as national officials (in much the same way that the Governor General was an agent of the imperial government); court decisions (such as JCPC decision in 1892) have emphasized that LG is an agent of the Crown and not of the national government (buttressed by decision of Supreme Court in 1848); post-1982 there's little to suggest subordination of the LG
- 108-10 Federalism in central institutions: representative cabinet, regional appointments to the supreme court, examples of intrastate federalism in Canada
- 110-16 Federal provincial conferences and agreements; these FMCs are governed by informal rules and are supplemented by other meetings; more generally, there is a firm expectation that the governments will observe their intergovernmental agreements

Chapter Six: Judicial Independence

- 121-25 Removal of judges: security of a judge's tenure is the first requirement of an independent judiciary: very few judges have actually been removed; the protection for legal tenure continues to rest on informal understandings of what constitutes misbehaviour, and these conventions are important in protecting judges
- 125-27 Judicial immunity; you can't sue a judge for a wrongly decided case; the judge is still liable for criminal activities and personal wrongs; still, there may be times when judicial testimony would be a good thing
- 127-30 Third-party interference: informal rules protect judges from outside pressure – ministers shouldn't question a judge directly; there are certainly questions here about how judges are to interact with other judges and law clerks
- 130-34 Limits on activities of judges: can't engage in public debate on decisions or express personal decisions on major political issues; some exceptions in Canada (such as Thomas Berger's criticisms of the 1982 patriation" which led Berger ultimately to decide to resign
- 134-36 Appointment of judges: some provinces have made progress in reducing patronage in judicial appointments process, but more could be done here

Chapter Seven: The Variety and Character of Conventions

- 142-45 There are four interrelated factors that combine to produce distinct types of rules:
- (1) The importance of the principle lying behind the rule: Canada as self-governing, democratic, responsible, federal
 - (2) Degree of agreement among actors, constitutional observers, and general public about the principle that a rule supports
 - (3) Degree of agreement about the specific terms of the rule; there may be agreement about the general formulation of a rule or the specifics of a rule

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- (4) How close the rule comes to embodying the principle it supports; is it a primary rule (responsible government, say) or a subsidiary rule which supports one of the primary rules?

145-49 There are also various categories of constitutional rules:

- (1) Those basic to the constitution, whose violation or alteration would produce significant changes in the operation of the constitution: *fundamental conventions*
- (2) Those which must be observed but whose specific terms could be altered without drastic changes to the practical operation of the constitution: *meso-conventions*, because they lie alongside fundamental conventions
- (3) Rules which describe a desirable manner of behaviour but which can be occasionally disregarded without significant impact: *semi-conventions*
- (4) Proposals of behaviour which lack full acceptance and whose existence may even be hotly contested: *infra-conventions* (e.g. GG's ability to force an election)
- (5) Patterns of behaviour that are little more than habit, convenience, or symbolism: *usages*. Some sense of obligation but no sanction if not respected beyond the general pressure of one's peers.

149-50 What must we ask when classifying conventions: What reason could be given to justify the obligation? If nothing other than tradition, habit, etc. then it's clearly a *usage*; if something more, it climbs higher

156 If we ignore the interrelationship between law and convention, we'll overlook the fact that the conventions allow the constitutional laws to function acceptably; the most important conventions depend on a healthy marriage between law and politics

The “Mendelsohn Debate” – Public Brokerage and Its Critics

Mendelsohn, Matthew. “Public Brokerage”. *CJPS* 33:2, 2000.

Lusztig, Michael. “A Response”. *CJPS* 33:3, 2000.

Ajzenstat, Janet. “Two Forms of Democracy”. *CJPS* 33:3, 2000.

Mendelsohn, Matthew. “A Reply”. *CJPS* 33:3, 2000.

Theses and Summaries:

Matthew Mendelsohn’s article attempts to correct what Mendelsohn sees as a widespread misunderstanding of the Charlottetown failure. For most political scientists, the failure of the Charlottetown Accord represents a public rejection of (1) elite accommodation and executive federalism and (2) all attempts to accommodate Quebec. According to Mendelsohn, only (1) is correct. If Canadian political scientists realized that there are options between the extremes of elite accommodation and majoritarian democracy – namely, deliberation and “public brokerage” – they would see that Constitutional change is not impossible in Canada. The true lesson of Charlottetown is that executive federalism is discredited and a new model of public brokerage is needed to replace it.

According to Ajzenstat, Mendelsohn’s article is based on the assumption that “anti-partyism” is the only defensible form of democracy; Ajzenstat and others are not anti-democrats, they are *liberal* democrats. As such, they believe in representation. They also fully support participation, but they object to giving citizens a *formal* share of law-making power. Ajzenstat concludes with a critique of Mendelsohn’s interpretation of the Confederation debates, which she claims are biased by Mendelsohn’s “anti-partyism”.

Michael Lusztig defends his own position against Mendelsohn’s critique, largely by turning that critique (quite successfully) back on Mendelsohn himself, and then presents some additional criticisms of Mendelsohn’s position. Mendelsohn’s own approach, Lusztig argues, is normative theory cloaked in empirical garb, and would require considerably more empirical work before it could be defended. Above all, Mendelsohn is guilty of conceptual fuzziness, and he fails to explain how models of public brokerage would really look at the level of constitutional amendment.

In his response to Lusztig and Ajzenstat, Mendelsohn corrects a few misperceptions (above all, he explains that he is attempting to combine “anti-partyism” with “liberal democracy”, an attempt which is inevitable in a world of declining deference).

Methodology and Theoretical Perspective

Mendelsohn provides a thorough criticism of other political scientists – Lusztig, Ajzenstat, etc. – but his own arguments require more empirical verification than Mendelsohn supplies. Janet Ajzenstat responds to Mendelsohn largely at the level of normative theory, pointing out the normative assumptions which underlie Mendelsohn’s claims.

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Michael Luszti's response to Mendelsohn is more empirical, offering criticisms of Mendelsohn's evidence and the logical adequacy of his model. Luszti points out briefly that Mendelsohn seems to be mixing normative and empirical claims.

Comparison with Other Readings and Contribution to the Literature

In this debate, Mendelsohn attempts to shake up the widely held view of the collapse of the Charlottetown Accord, namely that executive federalism was discredited and that the accommodation of Quebec was rejected. The first is true; the second is a result of inadequate models of public deliberation. Thus this debate contributes to the literature on the effects of the "decline of deference".

All of the authors in this debate (with the possible exception of Ajzenstat, though this is somewhat unclear) accept Neil Nevi's claim that Canadians are less deferential today and demand increased participation and involvement.

Relevant Exam Questions

This debate is most relevant for exam questions about the Canadian "democratic deficit", the responsiveness of Canadian institutions to the "decline of deference", as well as any questions dealing with lessons from the failure of the Charlottetown Accord. It is also relevant for questions about executive federalism.

Detailed Notes:

Matthew Mendelsohn: Public Brokerage: Constitutional Reform and...

- 245 Canadian political scientists have incorrectly diagnosed Canada's failure to resolve long-standing constitutional conflicts: they haven't properly distinguished executive federalism from accommodation and brokerage, assuming that the two must go together
- 246 Since executive federalism is discredited, these scholars assume that the only other option is majoritarian democracy, which can't adequately address Canada's complexity; but this is wrong. Yes, executive federalism is discredited, but there are new models of "public brokerage" which allow for the accommodation of mass publics
- 248 **Executive federalism and accommodation:** most important traditions in the study of Canadian politics have avoided citizens and focused on institutional accommodation; plus, Canada's constitutions (1774, 1791, 1840, 1867) have not been concerned with public participation (the fathers of Confederation has little interest in increasing democracy in Canada)
- 250 The basic point: (1) Canadian political scientists have not seriously studied citizens and (2) they have assumed that the management of regional/linguistic conflict requires elites
- 251 The simple fact is that elite accommodation is dead: citizens are less deferential, the Charter created the expectation that groups would be consulted (creating precedents), and several provinces require referendums before constitutional amendments
- 252 **The Charlottetown Accord:** Most assume that the rejection of the Accord was a

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simultaneous No to executive federalism *and* the accommodation of Quebec (cites Courchene, Luszti, Watts, Atkinson, Ajzenstat); all of these scholars agree on three points: (1) accommodation in a democracy can be conducted by elites only (2) participation renders constitutional change impossible (3) such participation was responsible for the demise of Charlottetown (then critiques Atkinson, Luszti, Ajzenstat in detail)

258-61 The real question is whether there are any other kinds of integrative public processes which might have mobilized opinion differently; first of all, we must note that it's *not* necessarily the case that elites are more open to rational compromise: in fact they are more ideological and strategic than mass publics; often the options are seen as either one extreme (elitist, integrative, executive federalism) or the other (popular, participatory, aggregative, referendums)

261-71 **Public Brokerage:** The *sine qua non* of executive federalism – a deferential public – is no longer operative; so where do we go from here? Need to consider (1) theories of deliberative democracy and (2) practical models of citizen engagement
(1) Deliberative democracy: the idea is to reach agreement through discursive conversation rather than strategic conversation; there are a number of criticisms of deliberative democracy, but deliberative institutions can be used even in deeply divided societies; the mechanisms of Charlottetown were “public venting” and “tell and sell”, not truly deliberative
(2) Models of public brokerage: the constituent assembly has been suggested in Canada; other more experimental models include the deliberative poll (you take the poll after deliberation), citizen juries; other countries have used deliberative techniques in constitutional processes, including South Africa (constituent assembly), Australia (people's convention on republicanism)

271 We need to realize that (1) yes, elite accommodation is suspect in Canada today but (2) this doesn't mean that constitutional change is impossible. We need to realize that there is more than referenda for consulting the public

272 The current process is so dysfunctional because nobody has any control: the insiders are basically impotent and feel like outsiders, and the outsiders feel like they have no genuine control; what we need is a different theoretical framework to generate a different set of answers.

Janet Ajzenstat: Two Forms of Democracy

587 Underlying Mendelsohn's argument is “anti-partyism” and assumes that true democracy is anti-partyist democracy

588 What Mendelsohn misunderstands is that the Canadian Parliament represents another *kind* of democracy – a liberal democracy – according to which all citizens are free to put themselves forward to represent their fellow citizens (with whom they are equal); it's not that Ajzenstat and others object to interest groups and public participation – they object to giving citizens a *formal* share of law-making power at the constitutional level

591 Mendelsohn's anti-partyism is on display in his assessment of the Confederation debates; he claims that they weren't ratified by the people, but most colonies held general elections on the issue (except Red River, which was annexed, and Nova Scotia, which was ratified by a stale parliament)

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592 The fathers of Confederation were not anti-democratic in our sense; they were anti-democratic in that they were opposed to republicanism which they saw as “mob rule”; they debated elected Senates, referenda, and other things, and “democratic control of government was perhaps their major concern”.

Michael Lusztig: A Response to Mendelsohn's...

594-97 Defending the “conventional wisdom” attacked by Mendelsohn: Mendelsohn makes four criticisms of the argument, to which Lusztig must respond:

- (1) Lusztig’s argument is inductively derived: this is true, and in fact quite normal when attempting to construct a model; M.’s argument here is a methodological quibble
- (2) Lusztig’s argument is tautological: well, actually it’s based on the prediction that (1) executive federalism is dead and (2) therefore constitutional amendments in Canada will fail – both of these claims are clearly falsifiable; moreover, Mendelsohn’s argument is unfalsifiable too
- (3) Lusztig’s argument lacks empirical support: wrong, he supplies plenty
- (4) Lusztig’s argument wasn’t tested against alternative hypotheses: fine, but this is another methodological quibble, and besides, Mendelsohn didn’t exactly construct an experiment himself

597-600 Contra Mendelsohn: Two major criticisms:

- (1) success with public brokerage at the local level tells us basically nothing about potential at the constitutional level; moreover, it seems that the commissions, forums, and fact-finding missions of Charlottetown are precisely the kinds of brokerage techniques Mendelsohn is hoping for, and the only reason he dislikes it is because it failed: it’s basically normative political theory disguised as political science
- (2) A difficult to amend constitution militates against public brokerage because people will want to satisfy their interests and the stakes are high; an easy to amend constitution would weaken the principle of the constitution itself, making constitutional brokerage little more than an alternative form of legislative process

Matthew Mendelsohn: Reply to Ajzenstat and Lusztig

604 Mendelsohn begins by summarizing the many and various ways that Ajzenstat has misunderstood his argument; Mendelsohn objects to the distinction between “anti-partyism” and “liberal democracy” – Mendelsohn is interested in blending the two

605 Regarding Ajzenstat’s historical criticisms: stands by the claim that *BNA Act* lacks a tradition of popular sovereignty; Ajzenstat ignores the central claim of the article, which is that executive decision making is now widely discredited and the public is now inevitably involved in constitution making

608 Concludes by listing some examples of public brokerage on a large scale, and accuses others of suffering from a lack of international knowledge and imagination