

Who Guards the Guardians? Institutional Checks on the Power of Judicial Review : Canada in a Comparative Perspective

F.L. (Ted) MORTON*

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* Professor, Department of Political Science, University of Calgary.

The adoption of the *Canadian Charter of Rights and Freedoms* in 1982 launched a new era in Canadian politics. It overturned the settled British-Canadian tradition of parliamentary supremacy and replaced it with a regime of constitutional supremacy, in which the courts provide us with authoritative — if not the final — answers as to the applied meaning of our new constitutional rights. The enhanced power of the courts has raised new questions about old arrangements. Separation of powers, judicial independence — constitutional conventions whose meanings were once well established — are now in flux. Elected leaders complain that judges are usurping their legislative role. Judges complain of unfair and excessive criticism. Settled and widely shared expectations about the proper role of judges vis-à-vis government — and vice-versa — are being challenged.

This turmoil — while unsettling — should not be surprising. We are still adjusting to the consequences of the institutional shifts of power occasioned by the adoption of the Charter in 1982. Canada has embarked on a new constitutional course, and there are bound to be some political storms. As before, we will learn by experience.

We can also learn, however, from taking a comparative view of how other Western democracies have dealt with basically the same problem — the question that is as old as Plato's *Republic* and has accompanied all attempts to wed liberal democracy with judicial review of constitutionally entrenched rights: "Who guards the guardians?" Our own debate can be enriched — and moderated — by a knowledge that the problem we are addressing is not unique to Canada.

Of course, we did not walk into this new "Charterland" blindfolded. We had the advantage of being able to examine two centuries of American experience with its *Bill of Rights* plus our own twenty-two year experience with the 1960 "Diefenbaker" *Bill of Rights*. While disappointment with the latter led the Framers to entrench the Charter, fear of American-style judicial activism led to the inclusion of the section 33 legislative override. Entrenchment was intended to elicit greater judicial vigor in the interpretation and enforcement of rights. Section 33 was intended to provide a readily usable political check should this vigor become excessive. In 1982, the Framers of the Charter thought that this arrangement struck an appropriate balance between our legislatures and our courts.

Suffice it to say that the two sides of this equation have not flourished equally. The Supreme Court has used the Charter to achieve a new era of judicial activism unparalleled in Canadian history,¹ but various attempts to curb or check this activism with the legislative override power have been mired in controversy.

While I am an admirer of the section 33 override, this is neither the time nor the place to defend it.² Rather, I will try to place the Canadian debate over the legislative override in a broader comparative context. We are not the first democracy to try to balance judicial review of constitutional rights with democratically accountable government.

In addressing the question that has been put to this panel — “Ways of legitimating or limiting judicial control” — I cannot resist noting that one of the principal ways is self-limitation, or judicial self-restraint. As the eminent American historian Robert McCloskey has written of the US Supreme Court,

*The Court tacitly acknowledges an informal but very real limit on its jurisdiction: the most explosive issues are “non-justiciable”. Sometimes the most explosive issues will also be the most “important”, and the Court is likely to play a rather modest role in national affairs. But this modesty is brought on by knowledge of the explosiveness of the question rather than by awe at its importance.*³

For better or for worse, our own Supreme Court has not chosen this path — at least not yet.

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1. Under the 1960 *Bill of Rights*, the Supreme Court of Canada invalidated only one statute in 22 years. Between 1982 and 1998, the Supreme Court has struck down 58 statutes, 31 federal and 21 provincial. In addition, it has rewritten the rules of police investigative procedure and admissibility of evidence in criminal cases. See F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont. : Broadview Press, forthcoming).
 2. For my defense of the section 33 override, go to the website of the Alberta Civil Society Association : www.pagusmundi.com/acsa.
 3. R.G. McCloskey, *The American Supreme Court*, 2d ed. (Chicago : University of Chicago Press, 1994) at p. 57.

I. THE UNITED STATES

The American experience with judicial review is long and rich with instructive examples. For over two centuries, the American Supreme Court has repeatedly thrust itself into the middle of the major controversies of the day : states' rights and slavery before the civil war; then government economic and social regulation; and more recently, racial segregation in the schools, capital punishment and abortion. More often than not, the American public has rejected the Supreme Court's "solutions" to these great issues.⁴

In reacting to the perceived excesses of judicial review, American presidents and Congress have utilized four main options : direct reversal through constitutional amendment;⁵ partial reversal through new legislation;⁶ the appointment of new judges with a judicial philosophy more in keeping with the governing national coalition;⁷ and the removal of appellate jurisdiction over volatile political issues.⁸ I would note, in passing, how similar this last technique is to our own notwithstanding power.

How effective have these instruments been in controlling judicial excesses? Consider two very different verdicts. In summarizing his book length study of the subject, McDowell concluded : "The most striking feature of efforts to curb the courts is their marked lack of success."⁹

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4. See S. Nagel, "Court Curbing Periods in American History", (1965) 18 Vand. L. Rev. at p. 925.
 5. The 11th, 14th and 16th amendments directly reversed earlier Supreme Court rulings.
 6. See L. Fischer, *Constitutional Dialogues : Interpretation as a Political Process* (Princeton, N.J. : Princeton University Press, 1988); and W.F. Murphy, *Congress and the Court* (Chicago : University of Chicago Press, 1962).
 7. R. Scigliano, *The Supreme Court and the Presidency* (New York : The Free Press, 1971); L.H. Tribe, *God Save this Honourable Court : How the Choice of Supreme Court Justices Shapes Our History* (New York : Random House, 1985); H. Schwartz, *Packing the Courts : The Conservative Campaign to Rewrite the Constitution* (New York : Charles Scribner's Sons, 1988).
 8. See H.M. Hart Jr., "The Power of Congress to limit the Jurisdiction of the Federal Courts" (1953, June) 66 Harv. L. Rev. at pp. 1362-1402.
 9. G.L. McDowell, *Curbing the Courts : The Constitution and the Limits of Judicial Power* (Baton Rouge : Louisiana State University Press, 1988) at p. 165.

By contrast, McCloskey concludes that “At no time in its history had the Court been able to maintain a position squarely opposed to a strong popular majority.”¹⁰

These two assessments are not as contradictory as they appear. The President and Congress have been able to use the appointment power to reign in the Court when it has fallen too far behind or leaped too far ahead of strongly held public opinion. The Court ultimately failed in its attempts to protect property rights in slaves,¹¹ to stop the Roosevelt New Deal in the 1930s,¹² to integrate the public schools via court ordered-busing,¹³ or abolish capital punishment.¹⁴

But sustained, strongly held majority opinion is the exception, not the rule in US politics. When public opinion is indifferent or fractured, the opportunity for lasting judicial influence on public policy is enhanced. This is even more so when the issue cuts across normal lines of partisan cleavage, *i.e.* when an issue divides Democrats from Democrats and Republicans from Republicans.¹⁵ Because this is so often the case, McDowell is correct : on policy-specific attempts at court-curbing, there have been many more failures than successes. In recent decades, the US Court has decisively influenced public policy on issues as diverse as abortion, electoral distribution, censorship of the press, and state-aid to religious schools.

The old saw that the US Court “follows the election returns” is true. The presidential appointment power ensures this. Indeed, it is this political renewal that sustains the legitimacy of the Court. But the timing of appointments is sporadic. Presidents never really know how their appointees will vote, and

10. R.G. McCloskey, *supra* note 3 at p. 132.

11. See D.E. Fehrenbacher, *The Dredd Scott Case : Its Significance in American Law and Politics* (New York : Oxford University Press, 1978).

12. See R.H. Jackson, *The Struggle for Judicial Supremacy, a Study of a Crisis in American Power Politics* (New York, Vintage Books, 1941).

13. See E.P. Wolf, *Trial and Error : The Detroit School Segregation Case* (Detroit, Mich. : Wayne State University Press, 1981).

14. M. Meltsner, *Cruel and Unusual Punishment : The Supreme Court and Capital Punishment* (New York : Random House, 1973).

15. See M. Silverstein, *Judicious Choices : The New Politics of Supreme Court Confirmations* (New York : W.W. Norton and Co., 1994). This condition also applies to Charter decisions in Canada. See F.L. Morton, “Dialogue or Monologue?” (1999, April) 20:3 in *Policy Options/Options politiques* (Montréal : Institute for Research on Public Policy / Institut de recherche en politiques publiques, 1999) at pp. 23-26.

certainly not on issues that have not yet even arisen. The Supreme Court thus remains a semi-independent policy-making body in the US political system — and thus the object of considerable partisan competition.¹⁶ The recent nomination battles over Robert Bork and Clarence Thomas are the most notable examples of this competition.¹⁷

II. EUROPE

Following World War II, the American model of constitutionalism *cum* judicial review was introduced in a number of European democracies : France (Fifth Republic), Germany and Italy all adopted some form of constitutionalism and judicial review. More recently, Spain and Portugal have done so. But in *adopting* American style-judicial review, each country also *adapted* it to fit their respective political and legal traditions. The European versions were all influenced by the work of Austrian jurist Hans Kelsen.¹⁸

These traditions are, in general, distrustful of a political role for judges. Most have strong traditions of legislative supremacy, especially those nations with strong social democratic or communist party traditions. In France, for example, the continuing influence of Rousseau's concept of "la volonté générale" was translated into a ritual distrust of "gouvernement des juges" that French intellectuals associate with the US system.¹⁹ This strong presumption in favour of the legislative power is reflected in and reinforced by the Civil Law systems that operate in the European democracies. Unlike what was the case in England, on the continent, judges were associated with the inequalities and corruption of the "ancien régime". Napoleon's Civil Law project of codification was intended to make laws "judge-proof". Comparatively speaking, the operation of the common law concept of judicial independence is weaker. Judges are treated more as a part of the civil service. For similar reasons, the position of judges in society is less prestigious than in Common Law countries.

16. See M. Silverstein, *supra* note 15.

17. *Ibid.*

18. See D. Rousseau, "La montée en puissance du juge dans le constitutionalisme contemporain : un phénomène à l'échelle mondiale", *supra* p. 1.

19. See F.L. Morton, "Judicial Review in France : A Comparative Perspective" (1988) 36:1 Am. J. Comp. L. at pp. 89-110 [hereinafter "Judicial Review in France"]; or F.L. Morton, "Pont de vue d'outre-Atlantique sur le Conseil constitutionnel" (1988) 46 Pouvoirs — Revue française d'études constitutionnelles et politiques at pp. 127-145.

Against this background, the European democracies have hedged their reception of judicial review with a variety of institutional checks that are intended to mitigate the problem of excessive judicial power by reducing the opportunities for invoking this power.

In both Germany and France, there is only one constitutional court — and thus one set of judges — authorized to exercise the power of constitutional control and veto. In France, there is no access to the Constitutional Council for individuals or interest groups. A case can be referred to the Constitutional Council only by designated public officials — the President, Prime Minister, or President of either the National Assembly or the Senate; or by petition signed by 60 members of either the National Assembly or the Senate. This reference can only concern legislation (not executive orders of police conduct) and must occur *prior* to the bill being proclaimed law. In Germany, aggrieved individuals or groups may raise a constitutional issue in a trial court, but then the issue is “certified” and sent up to Constitutional Court for resolution. The underlying logic in both systems is that it is unacceptable to distribute a veto power over government policy throughout the entire judicial system. The alternative is to concentrate this power in one special constitutional court.

Having concentrated the power of judicial review in a single judicial body, the rules governing appointment and tenure then bind these constitutional courts more closely to the changing partisan composition of the national governments. In France, there are nine judges who are appointed for nine year terms, but the terms are staggered so that there are three new judges appointed every three years. In Germany, appointments are for 12 years, while Italy and Spain use the nine-year term.

The appointment process itself involves the legislatures as well as the executive. In France, only three of the judges are appointed by the President of the Republic. The other six are appointed by the Presidents of the Senate and of the National Assembly. In Germany, the appointment of the sixteen constitutional judges is divided evenly between the two chambers of the legislature, who in turn make their respective appointments by a two-thirds vote.²⁰ Similarly, in Italy and Spain, the legislature appoints one-third and two-thirds of the constitutional judges, respectively.

Unlike in the US model, legislators participate in the recruiting, screening and selection of candidates, not just in the latter stages of confirmation

20. In the Bundestag, it is a two-thirds vote of a committee. In the Bundesrat, it is a two-thirds vote of the entire chamber.

and appointment. The party loyalty of judges is acknowledged and important in this process. As Professor Beatty has observed, this legislative involvement is a frank acknowledgment of the law-making — that is, the political — function of these constitutional courts, and is “intended to maximize the control of the public and its representatives over how the court’s powers will be exercised”.²¹

The result is a relatively strong system of institutional accountability. European constitutional courts cannot depart too far for too long from the political mainstream. Consider the example of the “French New Deal”. In the 1981 French elections, Francois Mitterand’s Socialist Party swept into power for the first time in the post-war era. In its first year in power, five of Mitterand’s ten major policy initiatives were struck down by a Constitutional Council still dominated by the appointees of the previous Gaullist government. However, by 1986, slightly amended versions of all vetoed legislation were approved by the Council, whose President was now Robert Badinter, Mitterand’s first Minister of Justice.²²

There are also more subtle aspects of institutional design that reduce the policy influence of these courts. Decision-making is more collegial than in Canadian or American Supreme Courts. Dissenting opinions are either forbidden (France) or rare (Germany). The obligation to find and define a common judgment forces bargaining and coalition building among the judges, a process that encourages more centrist, more moderate judgments.

With respect to remedies, the European constitutional courts have only a declaratory power. They have no power to issue injunctions, much less “read in” new meaning to amend contested legislation. When the German Constitutional Court finds a statute is unconstitutional, it does not necessarily declare it to be void. In other instances, it warns a legislature that it may declare the statute void if the Legislature does not make the indicated amendments.²³

To conclude, while there has been a dramatic growth in judicial power in the European democracies in recent decades, it is still modest relative to the political influence of the US Supreme Court and more recently that of the Supreme Court of Canada. The tendency in post-war European democracies has been to vest the power of constitutional control with special constitutional courts

21. D. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Law* (Toronto: Carswell, 1990) at pp. 261, 265.

22. “Judicial Review in France”, *supra* note 19.

23. H.G.P. Wallach, “Judicial Activism in Germany”, in K. Holland, ed., *Judicial Activism in Comparative Perspective* (New York: St. Martin’s Press, 1991) at p. 157.

that are more closely linked to the governing national coalition. Such courts are less likely to resist “majority tyranny”, but also less likely to block desired legislative reforms. If one finds less American-style “court curbing”, it is because there has been less judicial activism in need of curbing.

III. THE COMMONWEALTH

In the Commonwealth countries, experience with the judicial power of constitutional control is more limited. However, there are still some relevant comparative insights to be gleaned. In a 1988 national referendum, Australians rejected adding a Canadian-style bill of rights to their system of Parliamentary democracy. For the opponents, distrust of an unaccountable judicial veto over government policy was a decisive factor. Partisanship and fears of a centralizing effect on Australian federalism also contributed.²⁴

As an alternative, Australia has opted for a process of “parliamentary review”. Parliamentary review was already in place at the national level (since 1981), and has subsequently been adopted by the states of Victoria (1992) and Queensland (1995).²⁵ A special parliamentary committee scrutinizes proposed legislation for compatibility with rights and freedoms. Public hearings allow input from concerned groups and individuals. If the committee has concerns, it can request explanations and justifications from the Minister and/or the departments responsible. In the end, the committee can propose changes to a bill to accommodate rights concerns.

Professor Janet Hiebert (of Queens University) has argued persuasively that Canadian governments — federal and provincial — should adopt this practice, not as an alternative to the Charter but as a complement.²⁶ Note that individuals as politically diverse as Preston Manning and Peter Russell have

24. See B. Galligan, R. Knopff and J. Uhr, “Australian Federalism and the Debate over a Bill of Rights” (1990, Fall) 20:4 *Publius* at pp. 53-67.

25. See J. Hiebert, “A Hybrid Approach to Protect Rights : An Argument in Favour of Supplementing Canadian Judicial Review with Australia’s Model of Parliamentary Scrutiny” (1998) 26:1 *Federal L. Rev.* at pp. 115-138 [hereinafter “A Hybrid Approach to Protect Rights”].

26. J.L. Hiebert, “Wrestling with Rights : Judges, Parliament and the Making of Social Policy” (1999, July) 5:3 *Choices* (Montreal : Institute for Research on Public Policy/Institut de recherche en politiques publiques, 1999).

endorsed Hiebert's proposal.²⁷ Hiebert touts this form of constitutional "pre-view" by parliamentary committee as a way of reclaiming shared responsibility for rights issues from the courts.

*The task of scrutinizing legislation for rights violations is neither a uniquely legal one nor one for which judicial review is inherently superior [...] Parliamentary scrutiny of bills vests greater responsibility in parliament and emphasizes democratic debate as the method for determining the justification of legislation in rights-based terms.*²⁸

Under the Canadian Charter of Rights, parliamentary review could also contribute to the legitimacy of judicial review. Parliamentary hearings would presumably focus on section one issues such as the nature and importance of the legislation's objective; the seriousness of the rights limitation; and the availability of alternative, less restrictive means to the same end. Hiebert's point is that parliamentary review would produce legislation that is more carefully crafted not to violate Charter provisions and would thus create less need for judicial intervention. I would add that such hearings, properly conducted, would also create a paper record of section one materials that could be used to defend more successfully government policy in subsequent litigation — information that is currently lacking in both quantity and quality. Both these considerations, I suggest, could contribute to a less adversarial relationship between courts and legislatures in Canada.

Last but not least, we should take note of recent developments in Great Britain.²⁹ In 1998, Tony Blair's Labour government passed the *Human Rights Act* making the *European Convention on Human Rights* justiciable in British courts. For the first time, British subjects now have the same right as Americans and Canadians to go to court and to challenge government policy for alleged infractions of a rights instrument.

27. See P.H. Russell, "Reform's Judicial Agenda" (1999, April) 20:3 *Policy Options/Options politiques* (Montreal : Institute for Research on Public Policy/Institut de recherche en politiques publiques, 1999) at pp. 12-15; and P. Manning, "A 'B' for Professor Russell", *ibid.* at pp. 15-16.

28. "A Hybrid Approach to Protecting Rights", *supra* note 25 at pp. 117, 137.

29. For a recent and concise update on British developments, see K. Malleson, "A British Bill of Rights : Incorporating the European Convention on Human Rights", in "Judicial Power in Canada and Britain" (1999) 5:1 *Choices*. Also, C. Epp, *The Rights Revolution : Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago : University of Chicago Press, 1998), ch. 7 and 8.

Here, however, the similarity ends. Under the *Human Rights Act*, British judges are instructed to interpret laws so as to comply with the Convention on Human Rights. But if this proves impossible, the judges have no power to invalidate the offending statute. If “interpretive avoidance” is not possible, then all that remains for a judge to do is to make a “declaration of incompatibility” and to recommend that Parliament reconsider the statute in question. This declaration in no way affects the validity, continuing operation or enforcement of the law in question.

What value does the British experiment hold for Canada? For decades, Canadian defenders of parliamentary supremacy used the British example to reject the allure of an American-style bill of rights. Today, Charter enthusiasts proclaim that 1982 represents a decisive and irreversible break with the British model. This view, I would suggest, is more wishful prophecy than accurate statement. Nothing in politics is irreversible. For those Canadians who now have some doubts about the wisdom of the 1982 rupture, the British *Human Rights Act* holds out an interesting possibility : a inverse version of the Canadian notwithstanding clause.

In Canada, a declaration of statutory invalidity under the Charter automatically creates a new policy status quo (no law) and places the onus on government to invoke section 33 if it wishes to resurrect the old law. In the UK, a judicial declaration of incompatibility leaves the policy status quo intact. Of course, a government is expected to reconsider its now impugned policy, and either revise or repeal it. But, should it choose, it can leave the contested law intact and face the electoral consequences.

Amending the Charter to emulate the British *Human Rights Act* would be one way to rebalance the relationship between Canadian courts and legislatures in favour of the latter. Such an amendment would preserve the now much touted Charter “dialogue” between courts and legislatures.³⁰ Indeed, it would in one sense give judges more freedom than they currently have in writing their judgments, since they would no longer be responsible for adverse policy consequences.³¹ (Implementation of judicial rulings would be a legislative/

30. See P. Hogg and A. Thornton, “The Charter Dialogue between Courts and Legislatures : Or Perhaps the Charter isn’t such a Bad Thing After All” (1997) 35:1 Osgoode Hall L.J. at pp. 75-124.

31. Another option would be for the Supreme Court to separate hearings on the legal issues from hearings on remedies. This approach could mitigate the problem of unforeseen and regrettable policy consequences such as have occurred recently in the wake of the *Marshall* ruling on native fishing rights in Nova Scotia. Subsequent hearings on remedies would encourage governments to shoulder more of the responsibility for implementing judicial rulings, allow

government responsibility.) However, adopting the British model would remove the Supreme Court's current power of *ipse dixit*. It would require them to persuade rather than coerce — via the quality of their written judgments. The current section 33 could be repealed, since it would no longer be necessary. Charter rulings would in effect be advisory to, not binding on, elected governments. (For those who tremble at the prospects for “tyranny of the majority” under this system, an exception could be made for unanimous judicial rulings : they could be made mandatory and the impugned statute invalid and unenforceable.)

CONCLUSION

The conventional wisdom is that the entrenchment of the Charter of Rights has enhanced the importance of judicial independence. According to this view, the responsibilities of the courts as the guarantors of our newly entrenched rights make insulating the judiciary from politics more imperative than ever. In practice, however, just the opposite is the case. The comparative perspective presented above suggests that wherever courts have been given the power of constitutional control — especially national courts of appeal — political interests will seek to influence the exercise of that power.

This conforms to one of the few “iron rules” of political science : “Where power rests, there influence will be brought to bear.”³² It does not matter if the locus of that power is a regulatory agency; an advisor to the Chief Executive; a powerful committee chairman; or an appeal court judge with the power of judicial review. Interested parties will seek out that person or institution and try to influence how it wields power.

A nation may choose to take the constitution out of politics, but it cannot take the politics out of the constitution. Canada did the former when we entrenched the Charter in 1982 and effectively transferred primary responsibility for rights claims from our legislatures to the courts. But we cannot take the politics out of the constitution — or more precisely, out of the process of constitutional interpretation and application known as judicial review. In political science jargon, the Supreme Court now represents a new “veto point” in the

time for interim negotiations with interested parties, and facilitate greater dialogue between court and governments.

32. V.O. Key, *Politics, Parties and Pressure Groups* (New York : Thomas Y. Crowell, 1958) at p. 154.

policy process. Too much is at stake for interested parties to refrain from interfering.

In the US, this is most obvious at the Senate's confirmation hearings. In Canada, because of the absence of such a forum, the "battle for the judicial mind" takes a more subtle and interactive form.³³ Canadian feminists have described their campaign as the process of "influencing the influencers".³⁴ These efforts include trying to influence judicial appointments behind the scenes, but also such indirect methods as judicial education seminars, writing in law reviews, and presenting papers at conferences where judges are present (ahem!).³⁵

In my estimation, the Canadian judicial system is currently in transition, a transition from a traditional British model to one much more like the US one. I know that some do not like what the future seems to hold. However, to put it bluntly, we cannot have our cake and eat it too. We cannot have an American-style Supreme Court with British style protocol with respect to judicial appointments and public criticism of the Court's decisions. The more judges intervene in the political process, the more political interests (government and societal) will intervene in the judicial process. The demand for a public confirmation process for Supreme Court judges continues to grow.³⁶ Criticism of unpersuasive judicial decisions shows no sign of abating.

Canada, along with Britain, has long subscribed to the separation of powers principle so celebrated by Montesquieu. The British/Canadian version, however, has always been more orderly — perhaps because it is less separated — than the American version. (Federal-provincial relations is an obvious exception!) The American corollary of "checks and balances" is quite foreign to our political vocabulary. The key to effecting the separation of powers in the American system, James Madison emphasized in *Federalist Paper No. 51*, is that it does not rest on "parchment barriers" :

33. This phrasing comes from C. Epp, *supra* note 29 at p. 154. He uses it to describe the ascendancy of judicial power in Britain.

34. S. Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto : Second Story Press, 1991) at p. 37.

35. M.E. Atcheson, M. Eberts and B. Symes, *Women and Legal Action : Precedents, Resources and Strategies for the Future* (Ottawa : Canadian Advisory Council on the Status of Women, 1984) at p. 172.

36. See J. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court" (1999, June) 5:2 *Choices* (Montreal : Institute for Research on Public Policy/Institut de recherche en politiques publiques, 1999).

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place [...] [S]ecurity [...] consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.

Now I know that this kind of theorizing sounds positively un-Canadian. But then, two decades ago, so did the idea of a Charter of Rights — not to mention a politically active Supreme Court. In the life of a nation, two decades is not long. We are still working out the implications of the enhanced political power that we conferred on Canadian judges in 1982. I hope there is some solace in the knowledge that Canada is not alone in its quest to wed “the benefit of active judicial reasoning and scrutiny with final democratic oversight”.³⁷

Or to put the same point differently, those regarded as among America’s greatest presidents — Jefferson, Lincoln, both Theodore and Franklin Roosevelt, and perhaps Reagan — were also the greatest court-curbers in US history.³⁸ These examples alone should alert us to the fact that strong — even harsh — criticism of judicial decisions is not necessarily unhealthy in a constitutional democracy.

37. J. Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca, N.Y. : Cornell University Press, 1984) at p. 135.

38. R. Scigliano, *supra* note 7.