

# CANADA'S *ROE*: THE CANADIAN ABORTION DECISION AND ITS IMPLICATIONS FOR AMERICAN CONSTITUTIONAL LAW AND THEORY

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Like the United Kingdom, Canada traditionally has been committed to the doctrine of parliamentary supremacy, which leaves little room for judicial protection of individual rights. In 1982, however, the Canadian Constitution, originally a product of the United Kingdom, was "patriated" to Canada. It was also amended to include a judicially-enforceable Charter of Rights and Freedoms. This amendment gave the Supreme Court of Canada a power of judicial review analogous to that of the Supreme Court of the United States. Nonetheless, one might have expected the Canadian Supreme Court to move cautiously, narrowly interpreting the Charter and giving considerable deference to the policy judgments of the federal Parliament and the provincial legislatures.

Despite its institutional heritage of deference to the legislature, however, the Canadian Supreme Court has embraced an activist role in the protection of individual rights. It has ruled that it will not be bound by evidence of original intent, and it has invalidated numerous legislative and administrative actions found to violate Charter provisions. Perhaps most remarkably, the Court has endorsed a doctrine analogous to American substantive due process, breathing substantive content into the general language of Section 7 of the Charter, a provision that apparently was designed to provide purely procedural protection. Relying on Section 7, moreover, the Canadian Supreme Court has already decided the Canadian version of *Roe v. Wade*. In *Morgentaler v. The Queen*,<sup>1</sup> the Court invalidated a long-standing abortion statute and thereby granted constitutional protection to the abortion decisions of Canadian women.

*Morgentaler* may be the most prominent example of judicial

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1. [1988] 1 S.C.R. 30 (Can. 1988).

activism under the Charter. At the same time, however, the Court's decision contains significant elements of judicial restraint. The Court's rationale is limited, and it might permit a revised statute imposing substantial restrictions on abortion rights. The legitimacy of the Court's decision also is enhanced by two significant Charter provisions that have no analogues in the United States. On the one hand, the Charter explicitly authorizes judicial review and the resulting invalidation of legislation. On the other hand, it contains a "notwithstanding" clause that permits Parliament or a provincial legislature to enact legislation that is *not* subject to invalidation under specified provisions of the Charter, including Section 7. If Parliament were willing to invoke this provision, it could effectively "overrule" the *Morgentaler* decision with ordinary legislation.

In this article, I will first describe the Canadian Supreme Court's emerging constitutional jurisprudence, including its interpretation of Section 7. I will then discuss *Morgentaler* itself. Finally, I will offer some observations on the Canadian experience and its implications for constitutional law and theory in the United States.

## I

Even before 1982, Canada had a Constitution and an independent judiciary with the power of judicial review. Since 1867, Canada's pre-Charter Constitution has delineated the relative powers of the federal Parliament and the provincial legislatures. As a result, Canadian courts have exercised judicial review on questions of federalism for more than a century. With a few exceptions, however, the pre-Charter Constitution did not protect individual rights, leaving the doctrine of parliamentary supremacy essentially intact.

In 1960, the Canadian Parliament adopted a statutory bill of rights. This bill of rights, however, had significant limitations. First, as a statutory enactment it was subject to repeal at Parliament's discretion. Second, it applied only to federal laws, not to provincial legislation. Finally, when reviewing federal legislation, the Supreme Court of Canada exercised great caution in applying the bill of rights.<sup>2</sup> In 1975, for example, the Court summarily rejected a bill of rights challenge to the same abortion statute it later invalidated in *Morgentaler*.<sup>3</sup>

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2. See generally, P. HOGG, CONSTITUTIONAL LAW OF CANADA 639-47 (2d ed. 1985).

3. This 1975 decision bore the same name as the Court's 1988 decision invalidating the statute. See *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (Can. 1975). In this first *Morgentaler* case, the Court, without even hearing arguments in opposition, unanimously and summarily rejected the bill of rights arguments that had been advanced. See *id.* at 658.

The 1982 Charter of Rights and Freedoms has largely supplanted the 1960 Canadian Bill of Rights. Unlike the bill of rights, the Charter applies to legislative and administrative action at both the federal and the provincial levels, and it can be changed only by a difficult process of constitutional amendment. Patterned on American constitutional provisions, international covenants, and Canada's pre-existing statutory bill of rights, the Charter contains an extensive listing of protected individual rights. For example, the Charter protects freedom of conscience and religion, freedom of expression and association, freedom from unreasonable search or seizure, and the right not to be subjected to cruel and unusual treatment or punishment. It also protects a number of procedural rights for those accused of criminal violations, as well as the right to equal protection of the law. These rights are not protected absolutely. Instead, Section 1 of the Charter contains a "justification" provision, which states that Charter rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The Supreme Court of Canada could have interpreted Section 1 to mandate judicial deference to legislative enactments challenged under the Charter. Such deference would have permitted some continuity with the Canadian tradition of parliamentary supremacy, and could have been supported by judicial precedents under the Canadian Bill of Rights. But the Court has rejected that approach. Noting that Section 1 applies only to laws prescribing "limits" on Charter rights, the Court has held there can be no justification for laws in "direct conflict" with such rights.<sup>4</sup> In other cases involving Section 1, the Court has applied a two-step analysis. First, the Court must determine whether the challenged law infringes a right protected by the Charter. If it finds such an infringement, the Court then must decide whether the law is nonetheless justified under Section 1, with the government bearing the burden of justification.<sup>5</sup> The Court has read Section 1 to require a "stringent standard of justification"<sup>6</sup> and a burden of proof that "must be applied rigorously."<sup>7</sup> More generally, the Court has framed its inquiry in terms analogous to the United States Supreme Court's

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See also *id.* at 624 (Laskin, C.J., dissenting on other grounds). Chief Justice Laskin later explained why, in his view, these arguments were so obviously without merit. See *id.* at 628-37.

4. Attorney General of Quebec v. Quebec Ass'n of Protestant School Bds., [1984] 2 S.C.R. 66, 88 (Can. 1984).

5. See *The Queen v. Oakes*, [1986] 1 S.C.R. 103, 135-37 (Can. 1986).

6. *Id.* at 136.

7. *Id.* at 137.

“strict scrutiny,”<sup>8</sup> and it has suggested that “utilitarian” arguments will be met with considerable skepticism.<sup>9</sup>

The Court could also have limited the Charter’s reach by reference to the “legislative history” of its enactment. Whatever the theoretical appeal of such an approach in the United States, two circumstances surrounding the Charter’s adoption provide additional arguments in its favor. First, the history of the Charter is thorough and accessible,<sup>10</sup> as compared to the scant historical record concerning most of the individual rights provisions of the United States Constitution. Second, the Charter’s “history” is *recent*, so there is little room for a “changed circumstances” argument for departing from the original understanding of its provisions.

Here again, however, the Canadian Supreme Court has rejected a plausible limitation on its interpretive role, holding that the Charter’s “legislative history” should be given “minimal weight” in the Court’s interpretive process.<sup>11</sup> In support of this holding, the Court stated that it was “nearly impossible” to determine “the intention of the legislative bodies which adopted the Charter.”<sup>12</sup> And even if it could determine such an intention, the Court was unwilling to render “the rights, freedoms and values embodied in the Charter . . . frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs.”<sup>13</sup> The Court described the Charter as a “living tree” that must be permitted to grow through judicial interpretation: “If the newly planted ‘living tree’ which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials . . . do not stunt its growth.”<sup>14</sup>

So, too, in its consideration of other issues, the Canadian Supreme Court has given an expansive reading to the Charter’s protection of individual rights, a reading that assures the Court an activist, counter-majoritarian role in Canadian society. In construing Charter provisions patterned on the Canadian Bill of Rights, for

8. *See id.* at 138-40.

9. This was suggested by the opinion for three Justices in *Singh v. Minister of Employment & Immigration*, [1985] 1 S.C.R. 177, 218-20 (Can. 1985) (opinion of Wilson, J.). (The remaining three Justices participating in *Singh* based their decision on the Canadian Bill of Rights, without reaching any Charter issues.)

10. *See P. HOGG, supra* note 2, at 343-44.

11. *Re Section 94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 486, 507-09 (Can. 1985).

12. *Id.* at 508-09.

13. *Id.* at 509.

14. *Id.* *See generally*, *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 365-68 (Can. 1984).

example, the Court has refused to be bound by pre-Charter precedents that it now regards as insufficiently protective of the individual rights in question.<sup>15</sup> More generally, the Court has declared that the Charter calls for "the unremitting protection of individual rights and liberties," which the judiciary must ensure as "the guardian of the constitution."<sup>16</sup>

The Canadian Supreme Court's activist stance extends beyond its interpretation of Charter provisions that are relatively specific. In addition to these specific provisions, Section 7 of the Charter provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Even before *Morgentaler*, the Canadian Supreme Court had established that this section would be given a broad reading.

Like the due process clauses of the United States Constitution, Section 7 contains two elements: It first describes certain protected interests, and it then declares that these interests are not to be deprived unless stated conditions are satisfied. Because Section 7 is further subject to the "justification" provision of Section 1, the constitutional analysis of a Section 7 challenge entails three questions: (1) Has there been a deprivation of "life," "liberty," or "security of the person" within the meaning of Section 7? (2) If so, did the deprivation occur in violation of "the principles of fundamental justice"? (3) If so, can the government nonetheless justify the deprivation under the justification provision of Section 1?<sup>17</sup>

Despite their similarities, Section 7 differs in significant respects from the American due process clauses. In particular, its protected interests do not include "property," and the protection provided is stated in terms of "fundamental justice" rather than "due process of law." Those who framed and adopted the Canadian Charter were acting against the backdrop of American substantive due process, and they apparently did not like what they saw. They clearly wanted to avoid the possibility of a *Lochner*-like protection of economic rights. More generally, it appears that they wished to avoid substantive due process altogether.

As recently as 1975, the Chief Justice of the Canadian Supreme

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15. *E.g.*, *Re Section 94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 486, 509-11 (Can. 1985); *The Queen v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 341-44 (Can. 1985).

16. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 155 (Can. 1984). The Court's activist rhetoric and decisionmaking have been tempered to a degree in some of its more recent cases. See Petter & Monahan, *Developments in Constitutional Law: The 1986-87 Term*, 10 SUP. CT. L. REV. 61 (1988).

17. *See generally Re Section 94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 486 (Can. 1985).

Court described the notion of substantive due process as “foreign to our constitutional traditions, to our constitutional law and to our conceptions of judicial review.”<sup>18</sup> And at least according to important evidence from the legislative history of its adoption, Section 7 was designed to keep it that way. Testifying in 1981 before Parliament’s Special Joint Committee on the Constitution, several high-ranking officials of the Canadian Department of Justice suggested that Section 7 would “cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure . . . [but would] not cover the concept of what is called substantive due process, which would impose substantive requirements as to [the] policy of the law in question.”<sup>19</sup> These officials indicated that Section 7 therefore would not constrain the substantive judgments of Parliament on matters such as abortion and capital punishment, “the two main examples that we should keep in mind.”<sup>20</sup> Speaking without contradiction from other witnesses or from members of the committee,<sup>21</sup> they testified that “fundamental justice” was essentially synonymous with “natural justice” under pre-existing Canadian law.<sup>22</sup> Despite the potential breadth of each of these terms, “natural justice” in fact was a term of art with a well-defined meaning in Canadian law, one that was limited to purely procedural considerations. If “fundamental justice” had been read to mean “natural justice,” Section 7’s protection would have been limited to the equivalent of procedural due process.

To date, the Supreme Court of Canada has rejected a *Lochner*-like role.<sup>23</sup> But the Court otherwise has embraced a broad reading of Section 7. In particular, it has rejected the historical evidence limiting “fundamental justice” to the procedural protections of “natural justice,”<sup>24</sup> noting that “[i]t was, after all, clearly open to

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18. *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, 632 (Can. 1975) (Laskin, C.J., dissenting). On the point in question, this was hardly a “dissenting” opinion. To the contrary, Chief Justice Laskin was explaining why the Court, in this first *Morgentaler* case, had unanimously and summarily rejected a Canadian Bill of Rights challenge to the same abortion statute that the Court would later invalidate in its 1988 *Morgentaler* ruling. See generally note 3 *supra* and accompanying text.

19. *Re Section 94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 486, 504 (Can. 1985) (quoting testimony of Mr. Strayer).

20. *Morgentaler v. The Queen*, [1988] 1 S.C.R. 30, 144 (Can. 1988) (McIntyre, J., dissenting) (quoting testimony of Mr. Chrétien).

21. See P. HOGG, *supra* note 2, at 747.

22. *See Re Section 94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 486, 504-05 (Can. 1985).

23. *See Attorney General of Quebec v. Irwin Toy Limited*, No. 20074, slip op. at 83-85 (Can. Apr. 27, 1989).

24. *See Re Section 94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. at 504-09.

the legislator to use the term natural justice, a known term of art, but such was not done."<sup>25</sup> Instead, in a ruling that seems to disregard "the unmistakable intentions of the framers,"<sup>26</sup> the Court has found that Section 7 limits the substance of legislative policy as well as the process by which that policy is enforced.

Prior to *Morgentaler*, then, the Canadian Supreme Court—in the face of a powerful argument to the contrary—had held that Section 7 imposes substantive restrictions analogous to American substantive due process. Moreover, the Court had decided cases in which it had assumed that Section 7, like American due process, might provide special protection for personal decisionmaking in the family setting and with respect to procreative choices.<sup>27</sup> The Canadian stage had quickly been set for a constitutional ruling on the question of abortion.

## II

*Morgentaler v. The Queen* presented a challenge to Section 251 of the Criminal Code of Canada. Under Section 251, abortion is a criminal offense at any stage of pregnancy, unless it falls within a "therapeutic abortion" exception. To fall within this exception, the abortion must be undertaken in an "accredited or approved hospital" and must be approved in advance by a "therapeutic abortion committee" acting in accordance with specified procedures and standards. Such a committee, composed of three or more physicians, is authorized to approve an abortion by another physician when "in its opinion the continuation of the pregnancy of [the woman] would or would be likely to endanger her life or health." Through Section 251 and its predecessor statutes, Canadian criminal law has contained a general prohibition on abortion for Canada's entire history as a Confederation, which dates from 1867; the "therapeutic abortion" defense that is now a part of Section 251 is the result of a liberalizing amendment enacted in 1969.<sup>28</sup>

Both the trial court and the lower appellate court in *Morgentaler* upheld Section 251. In a unanimous decision, the On-

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25. *Id.* at 503.

26. Monahan & Petter, *Developments in Constitutional Law: The 1985-86 Term*, 9 SUP. CT. L. REV. 69, 72 (1987). *See also id.* at 78-102.

27. *See Jones v. The Queen*, [1986] 2 S.C.R. 284, 302 (Can. 1986) (opinion of La Forest, J.) (assuming, without deciding, that Section 7 "liberty" includes "the right of parents to educate their children as they see fit"); *Eve v. Mrs. E.*, [1986] 2 S.C.R. 388, 436 (Can. 1986) (assuming, without deciding, that Section 7 "liberty" includes "a fundamental right to bear children [and] a fundamental right to choose not to have children and to implement that choice by means of contraception").

28. *See Morgentaler v. The Queen*, [1988] 1 S.C.R. 30, 136, 144-46 (Can. 1988) (McIntyre, J., dissenting). *See also id.* at 85-86 (opinion of Beetz, J.).

tario Court of Appeal found that the Charter-based attack on the statute feared no better than the bill of rights challenge the Canadian Supreme Court had rejected in 1975.<sup>29</sup> The Court of Appeal noted that the right to abortion was not “deeply rooted in our traditions and way of life.”<sup>30</sup> It stated that substantive review under Section 7 should be limited to “exceptional cases where there has been a marked departure” from norms of civil or criminal liability,<sup>31</sup> and that this was not such a case.

The Canadian Supreme Court reversed. Finding its earlier bill of rights precedent to be largely beside the point, the Court ruled that Section 251 violated Section 7 of the Charter and could not be justified under Section 1. The Court reached this result in a five-to-two decision, but with no majority rationale. Instead, the Justices produced three separate opinions supporting the Court’s invalidation of the statute, along with one opinion in dissent.<sup>32</sup>

Each of the three opinions supporting the Court’s judgment proceeded through the three-step analysis required in a Section 7 case. Speaking for himself and Justice Lamer, Chief Justice Dickson first determined that Section 251 deprived pregnant women of their Section 7 interest in “security of the person”; the statute interfered with women’s bodies and imposed physical risks and psychological harms, caused in part by the statutorily effected delay in securing even “therapeutic abortions” within the statutory defense.<sup>33</sup> Second, he concluded that this deprivation was not in accordance with “the principles of fundamental justice.” Based on an extensive examination of testimony and other evidence, he found that the procedures necessary to obtain lawful “therapeutic abortions” not only caused significant delays for women seeking such abortions, but operated inequitably and unfairly, making these abortions all but impossible for many women to obtain.<sup>34</sup> And it violated fundamental justice, he concluded, for Parliament to create a defense that is “illusory or so difficult to attain as to be practically illusory.”<sup>35</sup>

As for Section 1, Chief Justice Dickson wrote that Section 251 passed scrutiny at the “ends” level, being supported by the objective of protecting both fetal life and the competing interests of pregnant

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29. See generally *supra* note 3 and accompanying text.

30. *Regina v. Morgentaler*, 52 O.R.2d 353, 378 (Ont. Ct. App. 1985).

31. *Id.* at 385.

32. Taken together, the opinions are approximately 140 pages in length.

33. *Morgentaler*, [1988] 1 S.C.R. at 53-63 (opinion of Dickson, C.J.).

34. *Id.* at 57-61, 65-73. See also *id.* at 91-106 (opinion of Beetz, J.).

35. *Id.* at 70 (opinion of Dickson, C.J.). Although he affirmed that “fundamental justice” includes a substantive component, Chief Justice Dickson claimed that his “illusory defense” rationale was procedural in nature. *Id.* at 53, 63, 73.

women.<sup>36</sup> Focusing again on the "therapeutic abortion" defense, however, he concluded that the law failed at the "means" level because it called for procedures that were "often arbitrary and unfair" and because it held out "an illusory defence to many women who would prima facie qualify" for its protection.<sup>37</sup> He noted that in its actual operation, the statute was not well-suited to further one of the interests that it was designed to protect, namely, the life and health of pregnant women.<sup>38</sup>

Justice Beetz, joined by Justice Estey, agreed that Section 251 was unconstitutional. Like Chief Justice Dickson, Justice Beetz determined that the statute infringed the "security of the person" of pregnant women, that this infringement was not in accordance with "fundamental justice," and that it could not be justified under Section 1. He, too, focused on the defense provisions of the statute, finding certain of the mandated procedures "manifestly unfair" and "unnecessary."<sup>39</sup> But he went further. Although he recognized that Parliament has a "pressing and substantial" concern with the protection of fetal life,<sup>40</sup> he found this interest could not prevail over the life and health of pregnant women.<sup>41</sup> As a result, according to Justice Beetz, Parliament could not avoid the constitutional deficiencies in Section 251 by adopting an absolute prohibition on abortion. Instead, the Charter mandated *some* type of defense for abortions undertaken to protect the life or health of pregnant women.<sup>42</sup>

Justice Wilson also supported the Court's judgment, but for reasons considerably different from those of the other four Justices in the majority. She first determined that Section 251 deprived pregnant women of "liberty" as well as "security of the person," this because "liberty" under Section 7 includes "personal autonomy over important decisions intimately affecting [the women's] private lives,"<sup>43</sup> including decisions with respect to abortion.<sup>44</sup> Second, she

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36. *Id.* at 75.

37. *Id.*

38. *Id.* at 75-76.

39. *Id.* at 110 (opinion of Beetz, J.). *See also id.* at 114-22.

40. *Id.* at 124.

41. Interestingly enough, Justice Beetz reached this conclusion on the basis of Section 251 itself. He stated that the defense provisions of Section 251 recognized that the life or health of a pregnant woman must take precedence over the interest in protecting fetal life when "the continuation of the pregnancy of [the woman] would or would be likely to endanger her life or health," and that, with the adoption of the Charter, this became entrenched as at least a minimum standard for protecting the rights of a pregnant woman under Section 7. *Id.* at 85-89.

42. *Id.* at 125-28.

43. *Id.* at 171 (opinion of Wilson, J.).

44. *See id.* at 162-74.

found this deprivation inconsistent with “fundamental justice,” but primarily because it violated “freedom of conscience,” which is independently guaranteed by Section 2(a) of the Charter. According to Justice Wilson, if a statute infringes a right guaranteed elsewhere in the Charter, it cannot be in accordance with the principles of fundamental justice, and it therefore violates Section 7 as well as the more specific Charter provision.<sup>45</sup> Finally, Justice Wilson concluded that Section 251 could not be justified under Section 1 of the Charter. Although she conceded that the protection of fetal life might be permissible in the later stages of pregnancy, she noted that Section 251 “takes the [abortion] decision away from the woman at *all* stages of her pregnancy,”<sup>46</sup> and she concluded that this could not be defended on the basis of Section 1.<sup>47</sup>

Joined by Justice La Forest, Justice McIntyre dissented from what he viewed as the majority’s illegitimate judicial policymaking. He argued that in the exercise of judicial review under the Charter, Canadian courts “must confine themselves to such democratic values as are clearly found and expressed in the Charter and refrain from imposing or creating other values not so based.”<sup>48</sup> “The proposition that women enjoy a constitutional right to have an abortion,” he wrote, “is devoid of support” in the language and history of the constitutional text.<sup>49</sup> Noting the long record of abortion prohibition in Canada, he also concluded that such a proposed right found no support in “the history, traditions and underlying philosophies of our society.”<sup>50</sup> Justice McIntyre rejected the majority’s conclusion that Section 7 protected such a right,<sup>51</sup> and he therefore saw no need to reach the question of justification under Section 1.

As Justice McIntyre’s dissenting opinion suggests, *Morgentaler* may be the most dramatic example thus far of judicial activism under the Charter. Relying on vague and ambiguous constitutional provisions and on reasoning not limited by the history of the Charter, the Canadian Supreme Court invalidated a prohibition on abortion that had been in effect for more than a century, and that Parliament had reaffirmed—albeit with a liberalizing amendment—less than two decades before the Court’s decision.

At the same time, however, the Court’s decision contains sig-

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45. *Id.* at 174-80.

46. *Id.* at 183 (emphasis in original).

47. *Id.* at 180-84.

48. *Id.* at 137-38 (McIntyre, J., dissenting).

49. *Id.* at 143-44.

50. *Id.* at 144. *See id.* at 144-46.

51. He also disputed the claim that Section 251 violated fundamental justice by holding out an “illusory” defense. *Id.* at 149-55.

nificant elements of judicial restraint. Although it invalidates Section 251, the decision does not preclude the adoption of a new abortion statute. Of the seven justices participating in *Morgentaler*, the two dissenters, Justices McIntyre and La Forest, obviously showed no hostility toward new legislation. Chief Justice Dickson and Justice Lamer voted to invalidate Section 251 on the basis of an extremely limited rationale, indeed, one that might permit a statute even more restrictive of abortion rights, as long as it does not hold out an "illusory" exception. The opinions of these four justices—a majority of those participating in *Morgentaler*—therefore do not foreclose the adoption of a new abortion statute that is quite restrictive of abortion rights, conceivably to the point of banning abortion altogether. In contrast, Justices Beetz and Estey specifically stated that they would not approve a total ban on abortion. But they did suggest that they might approve an abortion regulation protecting fetal life, as long as it also protected the life and health of pregnant women and avoided the unfairness that had resulted under Section 251.<sup>52</sup> Even Justice Wilson, who wrote the opinion most protective of abortion rights, suggested that Parliament could restrict abortion in the later part of pregnancy based on "the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines."<sup>53</sup>

Whether or not entirely by design, the Canadian Supreme Court, through its decision in *Morgentaler*, effectively has "remanded" the issue of abortion to Parliament. Indeed, the "remand" is one that leaves the issue open to a variety of possible resolutions, none of which is clearly required or precluded by the Court's ruling. These possible resolutions range all the way from an unlimited right to abortion, which presently exists as a result of the invalidation of Section 251, to a total ban on abortion, which might not be foreclosed by the Court's decision. The three opinions supporting the judgment in *Morgentaler* provide important information concerning how each Justice in the majority might assess the various sorts of abortion regulations that Parliament might now adopt, but none of them purports to give clear-cut guidance. Adding to the uncertainty, no more than two Justices joined any one of these three opinions, and two additional Justices were in dissent. Moreover, the membership of the Canadian Supreme Court has changed

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52. See *id.* at 106-12 (opinion of Beetz, J.). This suggestion was not unambiguous; these Justices also left open the possibility that in a future case, they might find that personal decisions concerning abortion implicate "liberty" as well as "security of the person," and that such a finding might require an unlimited right to abortion in the early stages of pregnancy. See *id.* at 112-14.

53. *Id.* at 183 (opinion of Wilson, J.).

significantly in the short time since it decided *Morgentaler*.<sup>54</sup> Thus, in future abortion cases, new Justices will be participating, and their views on the relevant constitutional issues have not yet been disclosed.

The Court's open-ended "remand," however, was accompanied by a thorough venting of the abortion issue. Although the Justices did not speak with one voice, they collectively presented Parliament with an eloquent and thoughtful account of the competing interests at stake. Each of the opinions in the majority, for example, gave serious weight to a woman's freedom from governmental interference on a matter that directly affects not only her body but also her future life. Justice Beetz emphasized a woman's interest in protecting her physical health and life. Chief Justice Dickson spoke more broadly, noting that a prohibition on abortion can force a woman to deny "her own priorities and aspirations."<sup>55</sup> Justice Wilson, speaking even more broadly, described a woman's abortion decision as a matter intimately tied to the woman's self-identity and sense of being: A woman's decision whether to have an abortion, wrote Justice Wilson, is "one that will have profound psychological, economic and social consequences" for her, "a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large."<sup>56</sup> To make her "the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life," Justice Wilson argued, would be to infringe the woman's most basic right to "human dignity and self-respect."<sup>57</sup>

The Justices' opinions expressed concern not only for protecting the interests of pregnant women, but also for protecting the lives of developing fetuses. Justice McIntyre's dissenting opinion recounted a long-standing Canadian commitment to the unborn and a correlative rejection of unlimited abortion rights: "There has always been clear recognition of a public interest in the protection of the unborn and there has been no evidence or indication of any gen-

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54. Although the Canadian Supreme Court has nine members, only seven participated in *Morgentaler*. Three of these seven—Justices Beetz, Estey, and McIntyre—since have retired and been replaced by new Justices. Justice Le Dain, who did not participate in *Morgentaler*, also has recently retired and been replaced. See Fraser, *New Justice Sopinka Warns Against Trying to Classify Him*, *Globe & Mail* (Toronto), June 24, 1988, at A5, col. 1; MacCharles, *Two Get Supreme Welcome: Protecting Rights Seen as Judges' Toughest Challenge*, *Ottawa Citizen*, Feb. 2, 1989, at A3, col. 1; MacCharles, *Top Court Appointment Caps Judge's Rapid Rise*, *Ottawa Citizen*, Mar. 31, 1989, at A1, col. 5.

55. *Morgentaler*, [1988] 1 S.C.R. at 56-57 (opinion of Dickson, C.J.).

56. *Id.* at 171 (opinion of Wilson, J.).

57. *Id.* at 173.

eral acceptance of the concept of abortion at will in our society.”<sup>58</sup> Each of the opinions in the majority agreed that the interest in protecting fetal life was extremely important. Justice Beetz, for example, described the interest as one of “pressing and substantial” concern,<sup>59</sup> and Justice Wilson conceded that protection of the fetus was “a perfectly valid” objective that might prevail over the right to abortion after a certain point in pregnancy.<sup>60</sup> Indeed, the Court even left open the possibility that fetal life itself might be entitled to some protection under Section 7 of the Charter.<sup>61</sup>

The decision in *Morgentaler*, then, was a blend of judicial activism and restraint. With little support from the text or history of the Charter, the Canadian Supreme Court entered the controversial field of abortion and promptly upset the legal status quo. But the Court’s decision, in effect, was a “provisional” ruling, a ruling that invited Parliament to reconsider the question of abortion, perhaps with a more informed and thoughtful understanding of the relevant competing interests.

To date, Parliament’s response to the Court’s invitation has been halting, and the future of the abortion issue in Canada remains uncertain. In the aftermath of *Morgentaler*, Parliament vigorously debated the abortion question and examined a variety of policy options, but it was unable to muster majority support for any of the alternatives it considered.<sup>62</sup> Later, the Government postponed further legislative initiatives pending the Canadian Supreme Court’s resolution of another abortion case, *Borowski v. Attorney General of Canada*.<sup>63</sup>

Addressing an issue left open in *Morgentaler*, the challenger in *Borowski* had argued that a fetus is within Section 7’s protection of “everyone” and therefore is entitled to constitutional protection of its own.<sup>64</sup> On this reasoning, the challenger had contended that Section 251, with its “therapeutic abortion” defense, was unduly

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58. *Id.* at 146 (McIntyre, J., dissenting).

59. *Id.* at 124 (opinion of Beetz, J.).

60. *Id.* at 181-83 (opinion of Wilson, J.).

61. *See id.* at 74 (opinion of Dickson, C.J.); *id.* at 128 (opinion of Beetz, J.); *id.* at 184 (opinion of Wilson, J.).

62. *See Burns, Canadian Legislators at Impasse on Abortion*, N.Y. Times, July 29, 1988, at 3, col. 2; Fraser, *MPs Vote Down Abortion Resolution*, Globe & Mail (Toronto), July 29, 1988, at A1, col. 1.

63. No. 20411 (Can. Mar. 9, 1989). Earlier, the Government had asked the Canadian Supreme Court to delay its consideration of *Borowski* until after Parliament had adopted new abortion legislation, but this request had been denied. *See Borowski*, slip op. at 6; Fraser, *Top Court Refuses to Delay Hearing on Rights of Fetus*, Globe & Mail (Toronto), July 20, 1988, at A1, col. 1.

64. The challenger also had argued that fetal rights should be protected under the equality provisions of Section 15 of the Charter.

*permissive* in the regulation of abortion. The Government awaited the Court's decision in *Borowski* based on an apparent belief that the Court might provide a more definitive constitutional ruling to guide and constrain Parliament's legislative decisionmaking.<sup>65</sup> To the contrary, however, the Court found the *Borowski* case moot in light of *Morgentaler's* invalidation of Section 251 and Parliament's failure to adopt new legislation. In effect, the Court chose to leave intact its inconclusive and "provisional" ruling in *Morgentaler*, thereby renewing its invitation for Parliament to take the next step in resolving the abortion question.<sup>66</sup>

In the wake of *Borowski*, the Government has indicated that it will proceed deliberately and with caution as it gives renewed consideration to the issue of abortion.<sup>67</sup> An influential commission has suggested compromise legislation that would be relatively permissive early in pregnancy, but substantially more restrictive for abortions after twenty-two weeks.<sup>68</sup> The Government, however, has yet to endorse this or any other legislative proposal, and it might even choose not to propose new legislation at all, leaving the right to abortion unregulated by the criminal law.<sup>69</sup>

For present purposes, the actual response of Parliament is less important than its power to respond. Indeed, even if Parliament takes no legislative action, its inaction will be a product of democratic choice, not judicial compulsion. The Supreme Court of Can-

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65. See Delacourt & Howard, "Gutless" PM Under Fire for Decision to Wait for Ruling on Unborn's Rights, *Globe & Mail* (Toronto), Aug. 30, 1988, at A1, col. 4. The Government's decision to delay might also have been influenced by political considerations, in that it permitted Parliament to avoid the abortion issue until after an upcoming federal election. See Howard & Delacourt, *All Parties "Off the Hook" for Now as Tories Defer Abortion Decision*, *Globe & Mail* (Toronto), Sept. 2, 1988, at A1, col. 2.

66. Canadian mootness doctrine includes a discretionary component that permits a court to decide the merits of a case despite the absence of a live controversy. The Court declined to exercise such discretion in *Borowski*, noting that to do so might "pre-empt a possible decision of Parliament by dictating the form of legislation it should enact." *Borowski v. Attorney General of Canada*, No. 20411, slip op. at 22 (Can. Mar. 9, 1989).

67. See Kennedy & MacCharles, *Court Dodges Fetal Rights*, *Ottawa Citizen*, Mar. 10, 1989, at A1, col. 5.

68. Under a proposal of the Law Reform Commission of Canada, a woman could have an abortion up to the twenty-second week of pregnancy if her doctor agreed that the abortion was necessary to protect the woman's "physical or psychological health." "[A]nnoyance or inconvenience" would not be sufficient reason. After twenty-two weeks, an abortion would require the approval of two doctors and could be performed only to save the woman's life or to protect her against "serious physical injury." The proposal also would permit, at any stage of pregnancy, the abortion of a fetus suffering from a "lethal defect" that would result in death soon after birth. See Kennedy, *Abortion Limits Sought: Commission Urges Govt. to Replace Rejected Law*, *Ottawa Citizen*, Feb. 23, 1989, at A1, col. 1.

69. See Kennedy & MacCharles, *supra* note 67; Bindman, *Government Still Wavers on Abortion*, *Ottawa Citizen*, May 24, 1989, at A4, col. 1; Kennedy, *PM Brushes Off Queries on Abortion Law*, *Ottawa Citizen*, June 8, 1989, at A3, col. 1.

ada has made abortion a matter of judicial concern, but it also has left the door open for a continuing parliamentary role.

### III

In any democratic society, judicial review in the protection of individual rights raises a profound question of legitimacy, because such review stands in obvious tension with majoritarian self-government. The legitimacy question is serious even when the judiciary relies on specific constitutional language or clear historical evidence. The problem is dramatically compounded, however, when courts use vague and ambiguous constitutional language to formulate constitutional rights that are largely of the judiciary's own making. The most prominent example of this type of creative decisionmaking in the United States is the doctrine of substantive due process; in Canada, it is the interpretation of Section 7 of the Charter. And in their most controversial uses of this type of creative decisionmaking, the highest courts of both countries have granted constitutional protection to the right to abortion.

Given these parallels, one might argue that the Canadian experience supports the American experience in this area, in that it confirms the legitimacy of creative judicial decisionmaking and the use of such decisionmaking to protect abortion rights. But such a conclusion would be overdrawn, for the Canadian experience in this area is not the same as the American, and the differences have significant implications for the legitimacy question.

The foundation of American judicial review is *Marbury v. Madison*, in which the Supreme Court concluded that the makers of the Constitution had implicitly authorized this power when they adopted the Constitution some two hundred years ago. Canadian judicial review to enforce Charter rights, by contrast, was expressly authorized by constitutional amendments enacted in 1982.<sup>70</sup> Unlike those who framed and ratified the United States Constitution, moreover, the makers of the Charter acted against the backdrop of American judicial review. Although they may not have anticipated the Canadian Supreme Court's expansive reading of Section 7, they could not have been blind to what the power of judicial review might mean.

As the Canadian Supreme Court itself has observed, "the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of

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70. See Constitution Act, 1982, § 52(1) (declaring that laws inconsistent with the Charter are "of no force or effect"); *id.* § 24(1) (authorizing judicial remedies for Charter violations).

Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility."<sup>71</sup> The adoption of the Charter reflects a majoritarian consent to judicial review that is far more explicit, far more deliberate, and far more contemporary than any such consent that might be posited for judicial review in the United States.<sup>72</sup> This Canadian consent does much to resolve the question of legitimacy in Canada, but it has no relevance in the United States.

In their authorization of judicial review, those who adopted the Canadian Charter fully understood that they were sanctioning a counter-majoritarian practice that was fundamentally inconsistent with the Canadian tradition of parliamentary supremacy. But they were unwilling to sever all ties with that tradition, and, accordingly, they adopted the "notwithstanding" provisions of Section 33 of the Charter. Under Section 33, most of the basic rights protected by the Charter, including those protected by Section 7, are subject to legislative override by Parliament or a provincial legislature. Under Section 33, a legislative body may "expressly declare" that its enactment "shall operate notwithstanding" a right contained in the Charter.<sup>73</sup> Section 33 effectively permits Parliament to "overrule" judicial decisions with which it disagrees. Thus, for example, Parliament could "overrule" *Morgentaler* by reenacting, with a Section 33 declaration, the very same abortion statute that the Court invalidated.

Perhaps paradoxically, Section 33 further enhances the legitimacy of Canadian judicial review. Section 33 supplements the Charter's general authorization of judicial review by providing a continuing basis for majoritarian control over most constitutional rulings. Although the use of Section 33 may be politically treacherous,<sup>74</sup> it gives Parliament and the provincial legislatures an impor-

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71. Re Section 94(2) of Motor Vehicle Act, [1985] 2 S.C.R. 486, 497 (Can. 1985).

72. Elsewhere I have argued that Congress's consistent failure to exercise its power to restrict the Supreme Court's appellate jurisdiction reflects some measure of popular consent to judicial review in the United States. See Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 638-58 (1985). But that argument does nothing to negate the comparative point that I am making here.

73. Under Section 33, such a declaration ordinarily expires at the end of a five-year period, although it may be extended by re-enactment.

74. Except, apparently, for the Legislature of Quebec, which has invoked Section 33 on numerous occasions. See Bayefsky, *The Judicial Function under the Canadian Charter of Rights and Freedoms*, 32 MCGILL L.J. 791, 823-25 (1987); Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REF. 51, 89-91 (1984). Most recently, it invoked Section 33 in the aftermath of Canadian Supreme Court decisions invalidating Quebec restrictions on the use of languages other than French on public signs. See *Attorney General of Quebec v. La Chaussure Brown's Inc.*, [1988] 2 S.C.R. 712 (Can. 1988); *Allan Singer Ltd. v. Attorney General of Quebec*, [1988] 2 S.C.R. 790 (Can. 1988). In re-

tant power that legislative bodies in the United States do not possess—the power to “overrule” particular constitutional decisions without the need for constitutional amendment. This renders the Canadian Supreme Court’s decisions less inconsistent with majoritarian self-government, and it thereby provides another source of legitimacy that has no American analogue.

If there is a lesson in *Morgentaler* for the United States, then, it is not a lesson in judicial activism. Although the Court gave a broad reading to Section 7, its creative constitutional decisionmaking is protected by general legitimating factors that are not present in the American constitutional system, and that therefore cannot be expected to support the judicial protection of abortion rights in the United States. To the contrary, *Morgentaler* may provide a lesson in judicial restraint. Perhaps because of the legitimacy that it derives from the Charter’s authorization of judicial review, as well as from Section 33, the Canadian Supreme Court quickly has become quite activist. In addressing the question of abortion, however, this activist court has proceeded with far more caution than its American counterpart.

In *Roe v. Wade*, the United States Supreme Court, in its first major encounter with the abortion question, attempted to provide a “final” constitutional answer. It announced a definitive constitutional framework that was broadly protective of abortion rights. The Court thereby inhibited what had been a developing political debate concerning abortion by moving legislative bodies away from a direct consideration of the basic political-moral issues and toward an (often duplicitous) consideration of abortion regulations crafted to avoid judicial invalidation under *Roe*.<sup>75</sup> Further, the Court’s decision polarized debate on the abortion question, contributing to a political and judicial climate in which the Court’s decision itself may soon be overruled.<sup>76</sup>

In *Morgentaler*, by contrast, the Canadian Supreme Court avoided a final constitutional ruling on the abortion question, rendering a decision that was distinctly “provisional” in nature. Although the Court invalidated the abortion statute under review, its several opinions did little more than open a dialogue with Parlia-

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response, the Legislature of Quebec promptly adopted new restrictions in legislation that included a Section 33 declaration. See Burns, *Quebec’s French-Only Sign Law Voided*, N.Y. Times, Dec. 16, 1988, at 3, col. 4; Burns, *Quebec Offers “Poster War” Compromise*, N.Y. Times, Dec. 19, 1988, at 3, col. 4; *Quebec Approves Ban on English Signs*, Ottawa Citizen, Dec. 22, 1988, at A3, col. 1.

75. See Maltz, *Murder in the Cathedral—The Supreme Court as Moral Prophet*, 8 U. DAYTON L. REV. 623, 630-31 (1983).

76. See generally Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 237-41 (1987).

ment concerning the ultimate resolution of the abortion question in Canada. The Court's opinions suggested that Parliament should be more sensitive to the interests of pregnant women, but also did not discount the importance of protecting fetal life. The Justices provided insightful and eloquent arguments concerning the interests on both sides of this issue, but, at least for the time being, they left it largely for Parliament to decide how those arguments should be resolved in the adoption of any new abortion statute.

Given the inherent intractability of the abortion issue,<sup>77</sup> perhaps the best we can hope for is a resolution that honors the contemporary values of the society in question, regardless of whether those values are sound in the ultimate sense of political-moral truth. If so, then the role of judges in resolving this issue should be limited, because they have only a limited ability to tap the contemporary values of the society. On the other hand, there may be reasons for judges to upset the legal status quo in this area, thereby forcing the political process to do its work afresh.

Historically, women have been undervalued by society and have been under-represented in the political process. In recent years, however, conceptions of women and of their proper role in the modern world have changed dramatically, and they have begun to participate more actively in politics. With these changes have come an enhanced understanding of women's interests, including their interest in matters of reproduction. For these reasons, dated legislation on the question of abortion is not adequate. To ensure a proper measurement of contemporary societal values, any legislative determination of these values must itself be contemporary. Further, it must be as thoughtful and considered as possible. Under this view, the judiciary has an important, but limited, role: It properly may invalidate legislation, but only to facilitate a better legislative judgment on abortion rights, one that reflects a thoughtful consideration of the contemporary values of society.

Unlike *Roe*, *Morgentaler* reflects this more cautious, limited judicial role with respect to abortion. Although Parliament had addressed the abortion issue as recently as 1969, its decision may not have fairly considered the interests of women,<sup>78</sup> and, in any event,

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77. Cf. M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 1 (1987) (suggesting that this question is one that is "not only unresolved but perhaps not susceptible of resolution in any definitive sense"). See generally *id.* at 10-62 (describing the abortion policies of a variety of western countries and concluding that the policy of the United States is extreme in its protection of abortion rights); *ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE* (S. Frankowski & G. Cole ed. 1987) (discussing the divergent abortion policies of various countries).

78. According to one critical commentator, Parliament's 1969 liberalization of Canada's abortion law went no further than it did because it was premised on a virtually all-male

the last twenty years may well have brought changes in Canadian societal values making Parliament's 1969 decision dated and obsolete. And the various opinions in *Morgentaler* provide important arguments for Parliament to consider. If Parliament takes these arguments seriously, "not as the words of an infallible oracle but as a prod to [its] own conscientious review of the issues,"<sup>79</sup> it will help ensure a thoughtful legislative judgment on this extremely difficult question. In any event, *Morgentaler* invites Parliament's participation in resolving the abortion question in Canada. And this continuing involvement of Parliament ultimately may produce a resolution of the abortion question that is both more reflective of contemporary societal values and more politically acceptable than a purely judicial resolution could ever be.

In his dissenting opinion in *Morgentaler*, Justice McIntyre complained that the majority had ignored the primacy of Parliament in this area: "The solution to this question in this country must be left to Parliament. . . . This is not because Parliament can claim all wisdom and knowledge but simply because Parliament is elected for that purpose in a free democracy and, in addition, has the facilities—the exposure to public opinion and information—as well as the political power to make effective its decisions."<sup>80</sup> To be sure, the majority did not defer entirely to Parliament. Nonetheless, it left far more room for legislative decisionmaking than did the United States Supreme Court in *Roe v. Wade*.

#### IV

No country has had a longer experience with judicial review than the United States. Many countries, however, learning from the American experience, now have adopted this institution. And it would be a mistake to conclude that we have nothing to learn in return.

When we look to Canada, we can see that the theoretical legitimacy of judicial review need not be the problem that it is in the United States. Indeed, Canada has gone a long way toward resolving this problem through the adoption of constitutional provisions that expressly authorize the practice, but that also retain for the political process an important means of majoritarian control. And we can see that in such a regime, even a judiciary schooled in the

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debate that was infused with an anti-woman bias. See E. PEIRINE, ABORTION IN CANADA 33-35 (1971).

79. Russell, *The Paradox of Judicial Review*, 12 QUEEN'S L.J. 421, 436 (1987).

80. *Morgentaler*, [1988] 1 S.C.R. at 159 (McIntyre, J., dissenting).

tradition of parliamentary supremacy can quickly take on an activist judicial role.

When we look at *Morgentaler* in particular, however, we see an activist court hesitating, and proceeding with caution, in addressing the issue of abortion. Given the continuing tumult that has followed *Roe v. Wade*, it is appropriate to ask whether a more cautious, "Canadian" approach might have been advisable in the United States.<sup>81</sup> More generally, and looking to the future, it is worth considering whether the use of "provisional" rulings, such as that in *Morgentaler*, might be advisable in other controversial areas, especially when the challenged legislation is dated or otherwise appears to conflict with the contemporary values of the society.<sup>82</sup>

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81. It is too late in the day for a "Canadian" approach to the abortion question in the United States. On the other hand, the Canadian experience might have some continuing relevance, for it suggests that there should be both legislative *and* judicial involvement in achieving an appropriate resolution of this question. This experience might suggest, therefore, that the United States Supreme Court should not abandon *Roe* by giving the legislatures carte blanche in this area, but instead should attempt to preserve some type of continuing judicial role, a role designed to promote a thoughtful legislative assessment of contemporary societal values.

82. For examinations of how and when "provisional judicial review" might appropriately be used in the United States, see P. DIMOND, *THE SUPREME COURT AND JUDICIAL CHOICE: THE ROLE OF PROVISIONAL REVIEW IN A DEMOCRACY* (1989); Conkle, *Non-originalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9 (1985).

As this Article went to press, abortion was returning to center stage in Canada. On August 8, 1989, ruling from the bench in an emergency appeal, the Canadian Supreme Court reversed a lower court's order, based on provincial law, that had enjoined a woman from obtaining an abortion to which her ex-lover had objected. The Court may not issue the reasons for its reversal for several months, but speculation centers on the argument of the federal Government, as intervenor, that it alone, and not the provinces, has the authority to prohibit abortions and to define exceptions to that prohibition. In any event, it now appears that federal abortion legislation will be introduced this fall. See Barron, *Canada's Supreme Court Rejects Ex-Lover's Effort to Halt Abortion*, N.Y. Times, Aug. 9, 1989, at 1, col. 5; Weston, *Govt. Quietly Drafts Abortion Legislation*, Ottawa Citizen, Aug. 10, 1989, at A1, col. 1.