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Strange Expectations: A Review of Two Theories of Judicial Review*

Joel. C. Bakan**

The author examines two theories of judicial review under the *Charter*, one proposed by D.M. Beatty in *Putting the Charter to Work: Designing a Constitutional Labour Code*, and the other by P. Monahan in *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*. He demonstrates how each of these theories attempts to reconcile judicial review under the *Charter* with the principles of democracy by portraying it (judicial review) as a means for realizing these principles. He then argues that both efforts are ultimately unsuccessful and, indeed, only compound the problems they identify and set out to redress.

L'auteur étudie deux théories de contrôle judiciaire sous la *Charte*, l'une proposée par D.M. Beatty dans *Putting the Charter to Work: Designing a Constitutional Labour Code*, et l'autre par P. Monahan dans *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*. Il démontre comment chacune de ces théories cherche à réconcilier le contrôle judiciaire sous la *Charte* avec les principes de la démocratie en caractérisant le dit contrôle comme étant le moyen par lequel on puisse concrétiser ces principes. Il affirme ensuite qu'il faut constater l'échec de ces deux théories, qui, en fin de compte, ne font qu'aggraver les problèmes qu'elles tentent d'identifier et résoudre.

* * *

*A note on D.M. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston and Montreal: McGill-Queen's University Press, 1987) and P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1987).

**Assistant Professor, Osgoode Hall Law School, Visiting Assistant Professor, Faculty of Law, University of British Columbia (1989-90). I would like to thank the following people for their substantial comments and assistance on earlier drafts of this paper: Didi Herman, Marlee Kline, Patrick Macklem, Andrew Petter and Paula Rochman.

There is an old Yiddish aphorism that translates like this: "If my grandmother had wheels, she would have been a trolley car." It serves as a wistful rejoinder to proposed actions, and regretted inactions, that are plausible in the abstract, but lack attachment to reality. Patrick Monahan and David Beatty, in their respective 'theories of judicial review', have constructed trolley cars out of grandmothers with wheels. Each has sought a cure for the ills of democracy in late capitalist society in the demonstrably undemocratic and elitist institution of judicial review. They have presumed a potential in the judiciary, and the rest of the legal elite who participate in constitutional argument, to direct their efforts and powers against the increasingly anti-democratic impulses of our society and to foster more participation, better community and truer self-government. In this note I will attempt to demonstrate the incoherence of this presumption and the theories based upon it. I will argue that, while Beatty and Monahan's concern about the malaise of democracy is well founded, their theories of judicial review only compound the problems they identify.

Beatty and Monahan are concerned that democratic values are not well reflected in the outcomes and procedures of democratic institutions. For Beatty, the formal democratic trappings of Canadian governmental institutions obscure the undemocratic operation of these institutions. Participation in self-government, the central idea in democratic theory, is impoverished and unequal. "The larger lesson of history is surely a confirmation of how susceptible the legislative and executive branches of government are to the influence of what today we call pressure group politics."¹ Those who are weak cannot exert the pressure necessary to have their interests taken into account and, accordingly, "receive the least concern and respect from the state."² More powerful and organized groups, on the other hand, are able to exert considerable influence over the legislature and secure benefits for themselves at the expense of the disempowered groups. Altogether, according to Beatty, "political procedures [are] arrayed against [the disempowered]."³ His argument concentrates on the plight of working people in this regard, particularly those working people, like domestics and agricultural workers, who have been treated less favourably than others: "The pragmatic and often unprincipled method of our legislative and executive branches of government has frequently meant that the vital concerns of those workers did not always receive the concern and respect they deserved."⁴

Monahan paints a similarly skeptical picture of contemporary democratic practice. According to him, "[t]he current practice of democracy gives rather

¹D.M. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill-Queen's University Press, 1987) at 50.

²*Ibid.* at 51.

³*Ibid.* at 53.

⁴*Ibid.* at 8.

limited expression to ...[the] participatory ideal.”⁵ The goal of social revision and reform is “to enhance the opportunities for popular debate, argument and accountability.”⁶ Like Beatty, Monahan is aware of the intersection between levels of participation, social and economic power, and legislative sensitivity to the needs and interests of particular groups. He cites evidence indicating that “levels of political participation decline with social and economic status”⁷ and notes that “rates of political participation vary considerably based on factors such as ethnicity, social status, age and gender”.⁸ According to Monahan, “Despite guarantees of formal access, certain groups may nevertheless come to enjoy a *de facto* monopoly over state power, leading to the exclusion of certain minorities from effective participation in the system”.⁹ Moreover, these “differential rates of participation constitute a systemic bias in the process, making it politically irrational for elected representatives to weigh competing interests in an even-handed matter.”¹⁰

The shared concern of Beatty and Monahan about the current state of Canadian democracy is, perhaps, best reflected in both authors’ adoption of J.S. Mill’s hypothesis that “in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and when looked at, is seen with very different eyes from those of the person who it directly concerns.”¹¹ Indeed, both authors advance, in support of the veracity of this statement, the legislative gains working people have been able to secure as a result of participation in the political process, and the losses suffered when excluded from that process.¹² For Monahan, political participation is valuable not only as a way to secure protection of the social and economic interests of the citizenry, but also “for its role in producing better informed and tolerant citizens.”¹³

Monahan and Beatty’s concerns about the impoverished state of democracy in Canada are well founded. As they point out, participation in self-government is an ideal only partially realised in practice.¹⁴ Commitment to ideals of social and economic equality, an essential condition for genuine

⁵P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 120.

⁶*Ibid.* at 123.

⁷*Ibid.* at 126.

⁸*Ibid.* at 129.

⁹*Ibid.*

¹⁰*Ibid.* at 130-31.

¹¹Beatty, *supra*, note 1 at 5, 7, 30, 45, 50; Monahan, *supra*, note 5 at 130.

¹²Beatty, *ibid.* at 7; Monahan, *ibid.* at 130. Both authors emphasize that, historically, protection of workers’ interests has been put in place through the legislative process. They appear to have in mind the legislative creation of collective bargaining rights, occupational health and safety regimes, unemployment insurance and social legislation in general.

¹³Monahan, *ibid.* at 123.

¹⁴See: C.B. MacPherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977); P. Resnick, *Parliament vs. People* (Vancouver: New Star, 1984).

participation, as pointed out by both authors, is increasingly on the wane, and attacks on existing progressive legislation by governments, industry leaders and academics are more and more commonplace.¹⁵ Indeed, the ideal of participation itself has been the target of recent writing on politics and public policy, with respected scholars arguing that political participation should be curbed to allow for more efficient governability.¹⁶ The political processes leading to the Meech Lake Accord and the Mulroney Trade Deal, along with the potential constitutional entrenchment of executive federalism, further exemplify the gap between democratic ideals and the functioning of "democratic" political institutions.¹⁷ Add to this the substantial influence business enjoys over political institutions, the selective coverage of important events and decisions by a press establishment operating primarily for profit, and the impossibility of genuine participation without access to major financial resources, and one cannot help but conclude that these are depressing times for those committed to democratic ideals.¹⁸

Despair and delusion are often the symptoms of depression. We feel powerless and lose hope in the face of what appear to be overwhelming obstacles to the achievement of cherished goals. To avoid the widening and deepening gulf of this despair, we often delude ourselves into believing there is an easy way out of the difficulties that are the subject of despair. The result is a solution the plausibility of which depends upon a disregard of the institutional constraints affecting our endeavours. This psychodynamic may provide some explanation of why many progressive scholars and lawyers have embraced judicial review under the *Charter*. Writers like Monahan and Beatty, who evidence a commitment to progressive social change and equal participation in self-government, end up in the ironic position of defending and legitimating either explicitly (Beatty) or implicitly (Monahan) the power and authority of undemocratic institutions — the judicial and legal elites — which have, throughout his-

¹⁵Privatization, cut-backs in social spending and emphasis on deficit reduction are examples in Canada. See: G. Riches, *Food Banks and the Welfare Crisis* (Ottawa: Canadian Council on Social Development, 1986); J. Patterson, "Winding Down Social Spending: Social Spending Restraint in Ontario in the 1970s" in A. Moscovitch & J. Albert, eds, *The "Benevolent" State: the Growth of Welfare in Canada* (Toronto: Garamond Press, 1987).

¹⁶See, for example: M. Crozier, S. Huntington & J. Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York: New York University Press, 1975); H. Sklar, ed., *Trilateralism: the Trilateral Commission and Elite Planning for World Management* (Montreal: Black Rose Books, 1980); G. Kateb, "On the 'Legitimation Crisis'" in W. Connolly, ed., *Legitimacy and the State* (New York: New York University Press, 1984).

¹⁷See J. Bakan, "The Crisis in Canadian Democracy", *The Globe and Mail* (19 August 1988) A7; and J. Bakan and D. Pinard, "Getting to the Bottom of Meech Lake" (forthcoming, Ottawa L.R.).

¹⁸See J. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 *Osgoode L.J.* 123 at 184-85. For discussion of the relationship between democracy and the media, see N. Chomsky, *Necessary Illusions: Thought Control in Democratic Societies* (Toronto: CBC Enterprises, 1989) at 1-21.

tory, expressed little sensitivity or responsiveness to the needs of disempowered people and their demands for social power and participation in genuine self-government.

In the following sections I will outline and criticize the arguments made by Beatty and Monahan about the function of judicial review under the *Charter* in promoting democracy. My analysis will focus on drawing out the contradiction in each argument between the theory of judicial review prescribed by the author, and the institutional realities of judicial review he acknowledges. Beatty's argument that, with the *Charter* in place, the courts will provide a forum for disempowered groups and individuals, like working people, to pursue their claims and interests on equal terms with their adversaries, will be contrasted with the historical antipathy of the courts towards employees' interests and concerns (which Beatty acknowledges). Monahan's argument that the judiciary can be mobilized to democratize existing political institutions will be analyzed in light of the undemocratic and elitist nature of the judiciary (which Monahan acknowledges). By analyzing Beatty and Monahan's theories in these ways I hope to make some general claims about the relationship between judicial review and democracy.

A useful starting point is to ask why people bother to construct theories of judicial review. The practice of constitutional theory is one of the mainstays of American legal scholarship and is a growing industry in Canada.¹⁹ As an intellectual exercise it may be enjoyable and stimulating. However, it is important to understand that these theories function in a particular way. Constitutional theories, like those constructed by Beatty, Monahan and many others, are aimed at uncovering the principles that supposedly underlie a particular constitutional document. The purpose of the exercise is to place limits on the potentially infinite range of meanings that might be attributed to provisions expressed in vague and indeterminate language. In the absence of such limits, judges would have no criteria for choosing between competing plausible interpretations of constitutional provisions. They would, in other words, have to make choices and, in the absence of constraints, these choices would inevitably reflect their personal and collectively held world views. Thus, constitutional theories attempt to compensate for the open-textured nature of the legal materials by establishing principles and standards that judges can rely upon in interpreting and applying the constitution. In this way, they define the boundaries of *legitimate* judicial action (and inaction) under the constitution and are, accordingly, theories about the

¹⁹For general discussions of constitutional theory in Canada and the U.S., see Bakan, *ibid.*; M. Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Cambridge, Mass.: Harvard University Press, 1988); S.M. Griffin, "What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition" (1989) 62 S. Cal. L. Rev. 493.

legitimacy of judicial review.²⁰ They assume legitimacy is possible and provide the means for realizing that possibility.

Beatty and Monahan's theories follow quite closely the usual dimensions of constitutional theory. Each is an interpretation of the *Charter* — an analysis of what principles constitute the structure of the *Charter* and inform particular provisions. By articulating these principles, the authors hope to provide meaningful guidelines for judicial interpretation of the otherwise open-ended provisions of the text. It should be noted, however, that both Monahan and Beatty endeavour to construct a particular kind of constitutional theory, one that harnesses judicial power to the requirements of democracy itself. Their theories do not merely establish constraints on judicial power, thereby meeting the problem of judicial discretion and choice. Rather, they establish the principles of democracy as *the* constraints on judicial power. Thus, at least in theory, they portray judicial review as facilitating democracy, not just being consistent with it.²¹

For Beatty, realization of the democratic ideal of participation can be achieved through *Charter* review if judges adopt as their guide to decision-making under the *Charter* the general principle of equal participation in self-government,²² and the more specific principles derived from it: first, that legislation will be constitutionally valid only if its purpose is to promote the equal freedom of those who are least advantaged in the community;²³ and second, that the legislative means chosen to achieve that purpose are the least restrictive possible of individual rights and freedoms.²⁴ According to Beatty, judicial review which follows these principles is more likely to promote equal participation than legislative politics because it provides a "forum of principle" (the Courts) where disputes will be decided "in much more as a matter of reason and right than on the possession of material and political influence".²⁵ Accordingly, those who have been disadvantaged in the political process by their lack of political and economic power will be offered under the *Charter* "...[a] new opportunity to participate in the processes of government"²⁶ in a "much fairer and more neutral forum for citizen participation"²⁷ than the legislature. In the courts one can expect impartial and principled deliberation, as compared to the "pleas of passion and panderings to prejudice by those [i.e. legislators] whose understand-

²⁰*Ibid.*

²¹Neither author suggests there is a necessary antipathy between individual rights and democracy. Implicit in each theory is an understanding of individual rights as serving the aspirations encoded in democratic ideals.

²²Beatty, *supra*, note 1 at 53, 59.

²³*Ibid.* at 63-64.

²⁴*Ibid.* at 63-65.

²⁵*Ibid.* at 53.

²⁶*Ibid.*

²⁷*Ibid.* at 181.

ings of the issues may be marginal at best."²⁸ Throughout his book Beatty suggests that, if judges adopt his principles of judicial review, they will be directed to conclusions advantageous to workers, especially those workers most disadvantaged by the labour relations scheme.

Beatty provides several examples of the consequences of applying the *Charter*, mediated by his principles of judicial review, to labour relations law. He argues that minimum wage and other employment standards laws interfere with freedom of association (s. 2(d) of the *Charter*) because they constrict freedom of contract, but are protected by section 1.²⁹ The exclusion of farm workers and domestic workers from collective bargaining regimes is also a violation of freedom of association, (as well as section 15 of the *Charter*), but is not justified by section 1.³⁰ Similarly, union security rules — like compulsory union membership, compulsory union dues and exclusive bargaining units — all violate freedom of association and are not saved by section 1³¹ (except where compulsory union dues are used only to support collective bargaining).³² In the area of equality rights, Beatty argues that anti-discrimination laws are constitutionally permissible;³³ mandatory retirement is unconstitutional;³⁴ differential employment standards for men and women concerning exposure to toxins in the work-

²⁸*Ibid.*

²⁹This type of legislation is saved by section 1 in Beatty's view because it impairs freedom of association as little as possible by not requiring or compelling association; it merely sets bottom-line conditions governing an already existing relationship. Such measures are essential, in Beatty's view, to create the conditions whereby workers can exercise their participatory rights in the contractual process of labour regulation. *Ibid.* at 81-83.

³⁰According to Beatty, these exclusions constitute "discrimination of the most blatant and explicit kind". *Ibid.* at 90. However, he does suggest that the exclusion of agricultural workers may be justified when the relationship involves "a unique social institution like the family farm". *Ibid.* at 91. His reliance here on the special, private nature of personal family relationships seems at odds with his blanket inclusion of domestic workers in the legislative schemes. *Ibid.* at 92-93.

³¹According to Beatty, freedom not to associate is a fundamental value in a liberal democratic state that must be impaired as little as possible. With respect to section 1 he argues that while the *purpose* of these measures is valid, the means chosen are not proportional to the ends. They violate his second principle of judicial review. *Ibid.* at 121-24.

³²This approach was endorsed by the Ontario High Court but rejected by the Court of Appeal. See *Re Lavigne and Ontario Public Service Employees Union* (1989), 67 O.R. (2d) 536, 56 D.L.R. (4th) 474 (C.A.).

³³According to Beatty, anti-discrimination laws interfere with an individual's freedom to not associate with people but this limit on s. 2(d) is reasonable under s. 1 because it is as unobtrusive as possible and the objective of such laws is one "which no one who claims his freedom is limited can consistently deny." Beatty, *supra*, note 1 at 78.

³⁴Beatty suggests that in order for a mandatory retirement scheme to meet the requirements of his principles of judicial review it would have to be based on years of work rather than life. This would ensure that decisions to re-allocate work opportunities were not made on arbitrary grounds like age. Further, the state would have to ensure that the employment opportunities created through such schemes did not disappear but were in fact given to others. *Ibid.* at 103-04.

place are likely unconstitutional;³⁵ and affirmative action programs are likely justifiable when they provide a "reasonable" means for assisting historically disadvantaged individuals.³⁶

Monahan, like Beatty, sees a potential role for judicial review in promoting democratic participation. He proposes a theory of judicial review which, like Beatty's, portrays judges as responsible for implementing democratic values and promoting political participation. According to Monahan, "the best interpretation of the *Charter* — the interpretation which makes sense of the document as a whole — is an interpretation which gives primacy to values of democracy and community."³⁷ These are the "values that should guide Canadian judges as they give meaning to its [the *Charter's*] open-ended provisions";³⁸ "judicial review should be conducted in the name of democracy".³⁹ More specifically two principles of judicial review should be adopted. First, the judiciary should be guided by the "right of equal access to and participation in the political process" and the knowledge that "formal access does not guarantee equal access".⁴⁰ And, second, "judicial review should always attempt to maximize openness and the possibility of revision in social life": the judiciary should "ensure that all social arrangements are subject to meaningful debate and transformation through the political process".⁴¹ Thus, Monahan views judicial review under the *Charter* as a means for democratizing legislatures and other political institutions. Unlike Beatty, however, Monahan insists judges should not interfere with the substance of policies embodied in legislation.

How should judges interpret Monahan's principles of judicial review? According to him: "The starting point of the analysis would be the current practice and understanding of democracy, rather than some utopian, classical democratic community. Thus the analysis would accept the proposition that professional politicians and bureaucrats will continue to be responsible for the day to day management of public policy."⁴² In other words, the emphasis should be on conserving rather than challenging current structures of democracy, though widespread citizen apathy would be "lamented rather than praised", and the "overriding goal would be to enhance the opportunities for popular debate,

³⁵Beatty argues that differential standards deny women equality in the workplace. With respect to section 1 he argues that protecting the life of the fetus is a reasonable legislative objective but that setting more stringent standards for female employees concerning exposure to toxins in the workplace is not the least drastic means for achieving this objective. *Ibid.* at 107-09.

³⁶*Ibid.* at 115. There is no elaboration of what is or is not "reasonable".

³⁷Monahan, *supra*, note 5 at 102.

³⁸*Ibid.* at 97.

³⁹*Ibid.* at 99.

⁴⁰*Ibid.* at 124-25.

⁴¹*Ibid.*

⁴²*Ibid.* at 123.

argument and accountability.”⁴³ Monahan illustrates the “practical ‘bite’” of his principles by providing examples of the conclusions he would draw from their application to particular issues: welfare rights would not be protected under the *Charter*;⁴⁴ only the “manner in which political outcomes are produced” and not “the substantive equality of the outcomes themselves” would be scrutinized under sections 7 and 15;⁴⁵ legislative campaign financing restrictions would be upheld despite the *Charter*’s guarantee of freedom of expression;⁴⁶ and, under section 1, a “proportionality test”, like that established in *Oakes*,⁴⁷ would have “compelling attractions” for applying section 1.⁴⁸

As can be seen from this brief summary of Monahan and Beatty’s theories, the authors employ a similar structure in putting their schemes together. First, a general political principle is posited as rationalizing and underlying the menu of rights and freedoms explicated in the *Charter*. Monahan identifies the principles of democracy and community; Beatty that of equal participation in self-government. Next, more particular principles are portrayed as following from the general principles. And, finally, these latter principles are applied to interpret provisions of the *Charter* and yield particular results. Thus, an interpretive chain is established in moving from the *Charter* to judicial outcomes:

Charter → general political principle(s) → principles of judicial review → interpretation of particular provision → result

Prima facie this scheme suggests the end result is *determined* by the *Charter*. This is not, however, the position either Beatty or Monahan wants to defend.

⁴³*Ibid.*

⁴⁴Monahan argues that it is undemocratic for judges to read welfare rights into the Constitution: “Constitutionalizing such rights would vastly limit the scope for democratic debate and dialogue rather than expand it.” This is because 1) the judiciary would have to determine welfare entitlements, and 2) “It has always been legislatures rather than courts which have taken the initiative in improving equal political access.” Legislatures have put in place “the basic elements of the modern welfare state.” *Ibid.* at 126. It is difficult to reconcile this latter point with Monahan’s prescription that judges use the *Charter* to enhance democracy. See Bakan, *supra*, note 18 at 185 and see *infra*, at 451-52.

⁴⁵Monahan, *supra*, note 5 at 127.

⁴⁶According to Monahan, such restrictions enhance overall freedom by ensuring that “no one political perspective is permitted to drown out the competing messages in the electoral marketplace”. *Ibid.* at 134.

⁴⁷*R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1.

⁴⁸He contends that the proportionality approach is empirical, pragmatic, and flexible. Further, in attempting to pass this test the legislature is forced to be “self-critical”. *Ibid.* at 135-36. This endorsement is rather curious given Monahan’s earlier condemnation of the “rationality” test, the first stage of the proportionality test established in *Oakes*, *supra*, note 5 at 62-71. It is difficult to see how any form of proportionality test would escape Monahan’s critique. Monahan recognizes the tension and then moves on. *Ibid.* at 135. I would have liked to see at least an attempted explanation of the inconsistency.

The authors each acknowledge two important facts about their constitutional theories: first, that the political principles and principles of judicial review they prescribe are not “determined” by the constitution — they are only interpretations of it; and, second, that their theories are open-textured and cannot determine uniquely correct outcomes to particular disputes.⁴⁹ Thus, they concede that normative and political considerations must enter into the process of constitutional interpretation at the point of defining the principles and standards supposedly embodied in the constitution and at the point of applying the standards and principles so defined to solve concrete disputes. To put it another way, each theory is controversial, in that it is only one of several or many plausible readings of the constitution; and neither theory yields uncontroversial conclusions because each is capable of a multiplicity of plausible meanings when applied in particular contexts. The former point raises the question of why either theory should be considered authoritative, while the latter challenges the view that either theory can significantly constrain judicial power.

For the moment, I will concentrate on the latter problem: the open-textured nature of each theory and, correspondingly, the inability of the theories to constrain significantly judicial choice. (The former problem will be discussed towards the end of the paper). A curious difficulty with both authors’ arguments is the contradiction between each author’s stated purpose of designing a theory that will constrain judicial power, and his explicit acknowledgement that his theory is open-textured and thus unable to constrain, in any substantial way, judicial choice. Beatty, for example, points out that constitutional interpretation necessarily “has some creative aspect to it”.⁵⁰ It involves “interpreting and better understanding the political theory and ethical principles that underlie our new constitutional order.”⁵¹ He acknowledges that his own prescribed principle of “equality of liberty” cannot, “by itself...provide a blueprint of how courts should rule” in constitutional cases concerning labour.⁵² As well, he notes that application of section 1 of the *Charter* necessarily involves judges in an “avowedly creative function” and requires them “to develop general principles of judicial review consistent with the particular political theory which, in their view, best explains our constitutional order of government.”⁵³

Monahan also understands constitutional interpretation as a necessarily normative process, one that involves choices between competing values. It is,

⁴⁹Though in a subsequent article, Beatty develops an approach to constitutional interpretation that presumes and defends the possibility of determinate “right answers”; see Beatty and S. Kennett, “Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies” (1988) 67 *Can. Bar Rev.* 573.

⁵⁰Beatty, *supra*, note 1 at 54-55.

⁵¹*Ibid.* at 4.

⁵²*Ibid.* at 63-64.

⁵³*Ibid.* at 65.

for him, "inherently and thoroughly political."⁵⁴ He emphasizes that, in deciding constitutional cases, the courts act politically, and "can never escape the task of evaluating the policies chosen by the legislature."⁵⁵ This is because the provisions of the *Charter* are indeterminate: they "resemble blank slates on which the judiciary can scrawl the imagery of their choice."⁵⁶ Accordingly, the courts must make political decisions under the *Charter*, especially when applying section 1, which necessarily involves judicial "interest balancing."⁵⁷ And, because the words of section 1 "are themselves indeterminate and fundamentally contested ...they merely invite the court to devise its own theory of freedom and of democracy."⁵⁸ Like Beatty, Monahan emphasizes that constitutional interpretation "is a normative exercise, as well as a descriptive one."⁵⁹ Moreover, like Beatty, Monahan applies these insights to his own prescribed principles of judicial review. He acknowledges that "the idea of democracy seems so vague and indeterminate that it appears rather unhelpful as a basis for judicial review";⁶⁰ it describes a constellation of principles that "may seem overly abstract to be of any value in adjudication."⁶¹ After these acknowledgements, however, he asserts his earlier claim that determinacy is not a necessary requirement of a theory of judicial review:

The theory of judicial review which I am defending is not intended to serve as some comprehensive hornbook which will enable lawyers to 'look up' the answers to *Charter* problems. This is not the purpose or function of general theory. The more modest ambition is to provide a larger backdrop which will lend structure and intelligibility to legal analysis under the *Charter*. ...[The theory] offers a measuring rod for choosing between various competing and plausible definitions of a right protected by the *Charter*. It offers weights and measures to assist in 'balancing' rights against larger considerations of social utility.⁶²

Thus, Monahan acknowledges that, while his theory provides a structure for constitutional argument, it does not ameliorate the political nature of judicial review: judges will still be required to make choices, normative judgements and exercise discretion in deciding cases under the *Charter*.

The acknowledged indeterminacy of Monahan and Beatty's principles of judicial review comes into conflict with the ideal of democracy central to both theories once the actual context in which the principles are to operate is considered. In practice, the principles of judicial review are intended to be relied upon to

⁵⁴*Ibid.* at 102-03.

⁵⁵Monahan, *supra*, note 5 at 68.

⁵⁶*Ibid.* at 53.

⁵⁷*Ibid.*

⁵⁸*Ibid.* at 56.

⁵⁹*Ibid.* at 12.

⁶⁰*Ibid.* at 120.

⁶¹*Ibid.* at 125.

⁶²*Ibid.* at 125-26.

justify applications of judicial power in constitutional cases. Yet, as we have seen, they are too generally expressed to compel any particular set of results. In a word, they must be interpreted; and each interpreter will necessarily import into the principles the perspectives, beliefs, and ideologies of her or his "interpretive community".⁶³ As noted, Monahan and Beatty are aware of this. Neither author acknowledges, however, the severe difficulties this insight poses for his project. In short, the open-endedness of the principles of judicial review prescribed by each author ensures that the judicial world-view will be imprinted on interpretations of these principles. For Beatty this is problematic because of the historic "tilt" of judge-made law against labour and in favour of owners of productive property,⁶⁴ a tilt he is well aware of and acknowledges.⁶⁵ For Monahan, there is a strange contradiction in providing principles that will function to legitimate the value judgements of the judicial elite while, at the same time emphasizing the anti-democratic nature of judicial power. As we shall see, in both works there is a real tension between the aspirations of the theory developed and the nature of the institutional context — the courts — in which the theory is meant to operate. I will draw out this tension in each theory in turn.

Beatty is aware of and acknowledges some important facts about the values and predilections of the judiciary. In particular, he points to the historical "tilt" of judge made law against the interests and concerns of workers.⁶⁶ He notes that "trusting to the processes of law and the institution of the court will not, given the treatment workers and unions have received from the judiciary in the past, be something that will come easily or naturally to the working class and its representatives."⁶⁷ Beatty provides compelling reasons for distrust of the judiciary by workers in a recent paper:

The historical record of the courts' performance in developing all the traditional torts, such as criminal and civil conspiracy, inducing breach of contract, intimidation, secondary picketing, nuisance, trespass, etc., unambiguously reveals a persistent pattern of favouring the interests of business and commerce...[i]n the past quarter century the great majority of the court's decisions regulating industrial conflict have come out just like *Dolphin Delivery*. ...[T]his succession of cases in which the court judged that the commercial interests of making profits should take precedence over the workers' freedom to associate and express themselves in

⁶³Bakan, *supra*, note 18 at 173-75, 188-91.

⁶⁴See W. Holt, "Tilt" (1984) 52 Geo. Wash. L. Rev. 280; J.A.G. Griffith, *The Politics of the Judiciary* (London: Fontana Press, 1981); J. Fudge, "Labour, The New Constitution and Old Style Liberalism" in *Labour Law Under the Charter* (Kingston: Queen's Law Journal and Industrial Relations Centre, 1988) at 61.

⁶⁵Beatty, *supra*, note 1 at 11-12; Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37 U.T.L.J. 183 at 191, n. 7.

⁶⁶See Monahan, *supra*, note 5 at 126-27, for a similar acknowledgement of the historical tendencies of the courts against the claims of disempowered groups.

⁶⁷Beatty, *supra*, note 1 at 11.

ways they felt were necessary to protect their interests clearly illustrates the predominant value system of the court.⁶⁸

At the same time, Beatty notes that working people have achieved some success through *legislative* politics:

Over time, the focus of labour law has gradually expanded, both in terms of the persons that are caught within its field of vision and in the interests it is intended to protect. As members of the working class have been able to participate more effectively in the legislative and executive branches of government, the law has, haltingly and sporadically, come to recognize principles and rules to reconcile relations at work which promote the autonomy of those they govern.⁶⁹

There is, then, a rather ill fit between the respective histories of judicial and legislative activity with respect to working people and Beatty's prescriptions for the judiciary. He "resolves" the apparent conflict by being ahistorical: he prescribes that judges, when applying the *Charter* should, in effect, abandon the principles and rules they have developed over the years and, rely instead on principles found in the "*legislative past*".⁷⁰ In short, they must ignore their own history and develop and expand the principles underlying initiatives taken by legislatures. This sounds fine in the abstract, but it is not at all clear that judges would or could do this.

Nonetheless, Beatty offers three reasons why workers should "overcome a longstanding antipathy to judicial law-making" and "be optimistic",⁷¹ each of which is ultimately unconvincing. First, there is "the nature of the interpretative process through which courts develop the law."⁷² In particular, unlike the legislature, where the "power of one's resources" determines the ability to participate, in the courts "[workers'] relative lack of resources should not count as heavily against them."⁷³ The difficulty with this first reason is that it is simply not clear that the "power of one's resources" in *Charter* litigation is any less important a factor than it is in legislative politics. *Charter* litigation is very expensive, as unions have discovered in recent cases they have fought (and lost). It often involves elaborate submissions to assist the court with its "balancing" under section 1, as well as multiple appeals. It allows a considerable advantage to those who have legal resources at their disposal (the state and big business) over those with more limited resources (labour, especially when not organized).⁷⁴ In many cases, workers will feel they have little choice but to engage in *Charter* litigation as

⁶⁸Beatty, "Constitutional Conceits, The Coercive Authority of Courts", *supra*, note 65 at 191, n. 7.

⁶⁹Beatty, *supra*, note 1 at 7.

⁷⁰*Ibid.* at 10.

⁷¹*Ibid.* at 11.

⁷²*Ibid.*

⁷³*Ibid.* at 11-12.

⁷⁴See A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct. L. Rev. 473, for discussion of the costs of *Charter* litigation.

they will be defending attempts by business interests to avoid, or have declared invalid, pro-labour legislation.⁷⁵ Some bonus! In any event, even if *Charter* litigation was less expensive than other forms of political action, it would still be a lousy deal for labour if the odds of winning were not at least even. And this brings us back to the question of why workers should be optimistic about an institution that is historically tilted against their interests.

In his second argument for worker optimism about the *Charter*, Beatty attempts to meet this concern more directly. He acknowledges that “the rulings courts have handed down in the past have been hostile to the interests of workers as a group”, but points out that “[t]here have also been important instances in which courts have developed common law principles which have protected and benefited the interests of the working class.”⁷⁶ The difficulty with this response is that, while it may be true there are examples of judicial protection of workers’ interests, these are exceptions to the tendency of labour decisions to reflect the “predominant value system of the court” which, as Beatty has told us, is stacked against labour. It seems odd to rely on such exceptions as a basis for general optimism.

Beatty’s third reason is even less convincing. He says of the courts that “the method and criteria of their constitutional adjudication will conform closely to the traditional roles they have performed in the past”.⁷⁷

On the theory of the *Charter* I will work with, our courts would endeavour to effect a balance between the competing interests in the workplace and a set of values which is similar to those they have conventionally turned to when they developed and applied the common law.⁷⁸

Working people and their representatives would likely find little solace in this last reason for “optimism for judicial review”.⁷⁹ Traditional methods and criteria, and the conventional values of the common law constitute, after all, the same predominately anti-worker approach that reflects the “predominant value system of the court”. Indeed, the foundational values of the common law — property and contract, are exactly the values in whose names most anti-labour judicial initiatives have been taken. They are, as well, the values which may help explain the consistent losses sustained by labour under the *Charter*.⁸⁰ In the end Beatty’s arguments for optimism by labour about judicial review under the *Charter* are unconvincing. As the cases have demonstrated to this point, when

⁷⁵See, for example, *Re Lavigne*, *supra*, note 31; *Re Arlington Crane Service Ltd* (1988), 56 D.L.R. (4th) 209.

⁷⁶Beatty, *supra*, note 1 at 12.

⁷⁷*Ibid.*

⁷⁸*Ibid.*

⁷⁹*Ibid.*

⁸⁰Fudge, *supra*, note 64.

workers attempt to use the *Charter* to advance their interests, they end up windmilling at tilt.⁸¹

Monahan accepts along with Beatty that the courts have not, as a general rule, been sympathetic to the interests of people without power. While Beatty manages to feel optimistic about the *Charter* despite this fact, Monahan's attitude to judicial review and the *Charter* is skeptical. He believes empowering the judiciary to challenge the substantive decisions of elected representatives is undemocratic and detrimental to the interests of disempowered groups. His theory is based on a distrust of judges.⁸² It is designed to limit judicial power under the *Charter* to perfecting and protecting the democratic process, while leaving the outcomes of that process in place. Monahan agrees with Ely that, accepting "indeterminacy in moral theory, the invitation to judges to act as moral philosophers is a covert invitation for them to impose their own values on the democracy," and that this is "flagrantly elitist and undemocratic".⁸³

Monahan purports to avoid this problem by confining judicial activity to advancing democratic and communitarian values through scrutiny of the political process. This move does not, however, enable him to escape his own argument that asking judges to interpret and apply indeterminate moral theory is undemocratic and flagrantly elitist. Monahan's theory provides judges with the concepts of "democracy" and "community", as well as the distinction between "process" and "substance". "Democracy" and "community" are hardly determinate concepts. Surely, the provision of such vagaries to guide judicial behaviour is "a covert invitation for [judges] to impose their own values on the democracy". In the hands of judges, interpretations of the central concepts of his theory would engender reflections of *judges'* values. And the problem is not avoided by confining judicial review to matters concerning the democratic "process" and placing the "substance" of government policy out of bounds. As Monahan himself notes, any question about access to the political process "still requires the judiciary to make substantive judgements of political morality."⁸⁴

In a more general sense, the distinction between process and substance is challenged by the inseparability of political and social/economic equality.⁸⁵

⁸¹I am paraphrasing Holt, *supra*, note 64 at 286. See Fudge, *ibid.*, for a discussion of case law.

⁸²Monahan, *supra*, note 5 at 53, 54, 87.

⁸³*Ibid.* at 87.

⁸⁴*Ibid.* at 131.

⁸⁵It is a common theme in liberal political theory that the "public" world of politics can be separated from the "private" world of social and economic relations. Liberal democracy is based on the notion that all individuals are political equals, because they each have a vote, despite the very unequal distribution of social and economic power. Monahan appears to be accepting this assumption. For critiques of the public/private distinction in general, see: A. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278; J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485.

Policies on and affecting education, health, welfare, labour, etc. are all very much related to the ability of individuals and groups to participate effectively in the democratic process. Indeed, Monahan cites statistics which demonstrate a correlation between social/economic status and levels of political participation.⁸⁶ He argues nonetheless that review of substance “would vastly limit the scope for democratic debate and dialogue rather than expand it” even if such review had the effect of promoting social and economic equality.⁸⁷ This response presumes the scope of “democratic debate and dialogue” is independent of social and economic status, and is thus difficult to reconcile with those parts of Monahan’s argument where he suggests a strong relationship between the two. Nonetheless, Monahan must maintain this separation, for without it, the process/substance distinction — a crucial constraint on judicial choice in his theory — would be unintelligible. He cannot acknowledge the dependence of political participation on social and economic status without accepting that arguments for more participation in the political process could just as plausibly be cast in terms of the need for particular “substantive” (social/economic) policies. And to accept this would deny the process/substance distinction any bite. In short, the process/substance distinction cannot be relied on to constrain judicial choice without accepting the presumption, which Monahan appears to want to reject, that questions about democratic process (participation) can be severed from ones about social and economic equality.

In parts of his book, Monahan attempts to deal with the problem of “judicial elitism” by portraying it more as a problem with judges than with elitism. For example, he argues that while the indeterminacy of the *Charter* renders hollow the pretensions of the judiciary to be engaged in “value free” adjudication under the *Charter*, this does not mean constitutional interpretation is an inappropriate or undesirable form of politics *per se*: “... the mere fact that an issue cannot be resolved in some neutral or mechanical fashion does not mean that it must be relegated to the category of mere whim or caprice. It is possible to acknowledge the contingent and value laden character of an enterprise and yet make rational and meaningful arguments about that enterprise.”⁸⁸ Indeed, Monahan notes, this is exactly what *he* is doing in his construction of a theory of judicial review. This comes through in his discussion of section 1. That concepts like “freedom” and “democracy” are “contested” — that there is “a rich and sophisticated debate continuing within political theory over their content and application”⁸⁹ — does not appear to bother Monahan. What bothers him is that *judges* are engaged in interpreting these concepts. They are, in Monahan’s

⁸⁶Monahan, *supra*, note 5 at 122.

⁸⁷*Ibid.* at 126. I am not suggesting the courts are likely to read “welfare rights” into the *Charter*. Indeed, as a predictive matter I do not think they will do so in any significant way.

⁸⁸*Ibid.* at 59.

⁸⁹*Ibid.* at 54.

view, inept at political theory and not up to the challenges presented by the *Charter*.

The thesis Monahan appears to advance here is that only those who are sophisticated and expert political theorists are appropriate candidates for the calling of constitutional interpretation, and judges do not make the grade. This explains how he can criticize the courts' efforts at constitutional interpretation on the ground they are political and value-laden and, at the same time, offer his own admittedly political and value-laden interpretation of the *Charter*. That constitutional interpretation is a political exercise is not the problem. Indeed, Monahan's prescription is for broader, more openly political and normative interpretation of the *Charter*. He criticizes the courts and traditional scholars for being too technical and legalistic and celebrates his own intention to embrace the "larger jurisprudential considerations which have so preoccupied American courtwatchers", to "step back from the trees...[and] sketch the shape and structure of the forest."⁹⁰ The incompetence of judges and the inappropriateness of granting them a monopoly on constitutional meaning do not, for Monahan, lead to a rejection of constitutional interpretation as a political practice. Rather, these factors appear to lead to the conclusion that the appropriate group for interpreting the constitution is the elite of constitutional "experts" — an elite which includes academics and, potentially, government bureaucrats — people like Monahan himself.⁹¹

The difficulty with this conclusion is that it merely shifts the monopoly on constitutional meaning from one elite group, judges, to another, constitutional theorists and philosophers. There is little in democratic theory that suggests a preference for academic oligarchies over judicial oligarchies. Indeed, the ideal of democracy as articulated by Monahan is radically inconsistent with government by an elite *cadré* of judges *or* legal and political philosophers. Monahan points out that democracy represents:

A choice ... for politics and pluralism over universal truth. The particularity of a community's experiences 'are valued by the people over the philosophers' gifts because they belong to the people and the gifts do not...'⁹²

The prescriptions of constitutional theorists and philosophers about what are the correct interpretations of the admittedly open-textured provisions of the constitution are the epitome of "philosophers' gifts". It is perplexing that Monahan so readily endorses the practice of constitutional interpretation by an

⁹⁰*Ibid.* at 4.

⁹¹This point is made as well in B. Slattery, "Are Constitutional Cases Political?" (forthcoming in 11 *Sup. Ct. L. Rev.* 34)

⁹²*Ibid.* at 106.

elite group of “experts”, after acknowledging that constitutional interpretation is political and condemning elitism in the name of democracy.⁹³

Monahan cannot, of course, avoid the difficulty that constitutional interpretation is an inherently elitist form of politics: some group must be identified as having the final say on what a particular provision means. And that group will thus be licensed to impose its vision and perspective on everybody else.⁹⁴ This is apparent when we look at judicial decisions and ask why an elite group of lawyers should be able to establish the terms for allocating political, social and economic power on the basis of their understanding of “equality”, “liberty” or what is “reasonable” and “demonstrably justified in a free and democratic soci-

⁹³The elitism inherent in Monahan’s theory of judicial review has been noted by Slattery, *supra*, note 91: ...despite the populist language, and the appeal to the ideals of democracy and community, Monahan arguably espouses views with strong elitist overtones. But, while he distrusts the judicial elite, and has ambiguous feelings about members of legislatures, he seems to have a strong underlying faith in academia and the governmental bureaucracy. Not everyone who has experienced academic life or dealt with bureaucrats would share this faith. Slattery is, of course, correct in pointing out this contradiction in Monahan’s work. It is, however, important to note that Slattery avoids this tension in his own work only by accepting judicial elitism. He is less concerned with Monahan’s embracement of elitism than with his choice of academic and bureaucratic elites over judicial elites. In short, while Slattery defends judicial elitism, Monahan defends bureaucratic and academic elitism. Both accept elitism, and this similarity is more significant than any difference between them. Monahan and Slattery’s respective understandings of constitutional interpretation are not all that different. As we have seen, Monahan accepts that constitutional interpretation is neither “objective”, in the sense of deductive logic, nor “subjective”, in the sense of unconstrained whim or caprice. Similarly, Slattery rejects the view that judges must be able to deduce “specific propositions about concrete cases with a high degree of certainty, on a quasi-geometrical model” for their decisions to be legitimate. *Ibid.* at 16. We should, rather, understand constitutional decision-making as a “practical art” *Ibid.*. Good constitutional decisions are made “by tapping one’s tacit knowledge of the practical workings of the constitutional system and its implicit values and principles.” *Ibid.* at 18. And if an interpreter is working with the maxims of the practice, his decisions are not arbitrary nor unconstrained, despite the indeterminacy of the constitutional text. *Ibid.* The important difference between Monahan and Slattery, as noted above, is that Monahan believes academic experts — theorists and philosophers — are the appropriate cadres of constitutional interpretation and has little faith in judges, while Slattery sees it the other way around. Thus, a crucial part of Slattery’s argument is to portray judges as potentially appropriate constitutional authorities. According to him, good judges are “people with specialized skills, ... wisdom and good practical sense, grounded in broad experience.” *Ibid.* at 6. They are not mere technicians but, rather, decide cases by identifying “the general principles and values informing previous decisions.” *Ibid.* at 7. They do not engage in “high-flown social and political theory”, but nor do they simply balance competing interests in accordance with their will. *Ibid.* at 8. Those who are best at the art will be those who have been at it long enough to allow their understanding of its maxims to deepen: “it is the practice of the acknowledged master which ultimately exemplifies the meaning of the art’s basic maxims.” *Ibid.* at 17. And, ultimately, according to Slattery, judges are such masters.

⁹⁴Some authors argue for the democratization of constitutional interpretation. They see the constitution as establishing public values that should be applied through a process of public debate and discussion and/or by democratic bodies. See, e.g., S. Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988); P. Brest, “Constitutional Citizenship” (1985) 34 *Clev. S. L. Rev.* 175; B. Slattery, “A Theory of the Charter” (1987) 25 *Osgoode Hall L.J.* at 701.

ety". And it is no less apparent when we look at the role of academics in constructing and interpreting constitutional theory. Why should the political principles, principles of judicial review and particular outcomes that constitute some law professor's interpretation of the *Charter* — admittedly informed by his or her morals and politics — be accepted as authoritative? Why should the interpretation of a particular constitutional scholar be relied upon as a guide to the allocation of political power? The Herculean efforts Beatty and Monahan make to demonstrate the relationship between their respective theories and the text of the *Charter* demonstrate only that they are able to construct plausible interpretations of the *Charter*. No stronger basis of authority for the authors' views is offered.⁹⁵

Implied in Beatty and Monahan's theories and, indeed, in any constitutional theory, is the message that it is quite appropriate for law professors or other members of the intellectual elite to draw up blueprints for constructing the Canadian polity. We have already seen this position expressed in Monahan's book. Beatty makes the point as well. He celebrates the fact that, with the *Charter* in place, constitutional scholars can "bequeath a principled theory of the Canadian political/constitutional order which will organize our own and future societies for generations to come."⁹⁶ The idea of law professors bequeathing any such thing should be rather scary for those committed to the ideal of democracy. As noted earlier, academic elitism fits just as poorly with the ideals of democracy as does judicial elitism.

To summarize my arguments, the constitutional theories constructed by Beatty and Monahan each fall into the same trap, though in slightly different ways: the principles established in each are contradicted by the institutional and political character of the judiciary charged with interpreting and applying them. Beatty asks a judiciary historically committed to the interests of employers to be a forum for worker participation in self-government. Monahan asks an elitist and unrepresentative judiciary to protect and promote democratic principles in political institutions. The authors' attempts to avoid the trap are unconvincing. In each case, the principles prescribed are too vague and open-textured to compel judges to "do the right thing". In the final analysis, Beatty suggests we should be "optimistic" but provides no basis for such optimism. And Monahan moves from judicial elitism to academic/bureaucratic elitism, a move that makes little difference if the concern is to avoid elitism, as Monahan's appears to be in other parts of his argument.

⁹⁵Both Beatty and Monahan attempt to establish that their respective political principles and principles of judicial review are authoritative by showing how they form the basis for their particular provisions of the *Charter*'s text, as well as Canada's political culture. See Monahan, *supra*, note 5 at 100-26. Beatty, *supra*, note 1 at 56-72.

⁹⁶Beatty, *supra*, note 1 at 55.

The difficulties and contradictions encountered in Monahan and Beatty's theories of judicial review are, I believe, inherent in the project of constructing interpretations of the constitution with a view to promoting the interests and concerns of disempowered groups in society and furthering their participation in self-government. The indeterminacy and openness of constitutional law — the seeming potential for creative and innovative interpretation contrasts sharply with the closed and rigid institutional structure through which authoritative interpretations of the constitution are generated. Anybody can write to the Department of Justice, get a copy of the constitution, and develop a theory about its meaning from her or his particular perspective. The open-texture of the *Charter's* provisions would allow for a wide range of plausible renditions. But only one group in society has the institutional authority to have its interpretations implemented: the judiciary. Beatty tells us the judiciary has, historically, been unresponsive to the needs and demands of workers. Monahan has told us the judiciary is an elite and undemocratic institution. Both are right. So why do they, and many other constitutional theorists and interpreters, continue to envision a central role for the judiciary in helping the disempowered and advancing democracy? Maybe they are assuming a judiciary different from the one we actually have. Well, if my grandmother had wheels she would have been a trolley car.
