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UNENUMERATED RIGHTS AND THE DICTATES OF JUDICIAL RESTRAINT

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Your conference sponsors were most gracious to invite me to serve on this panel. It is an honor to meet with such distinguished professors and I am particularly gratified to meet so many of my Canadian colleagues. We share the commitment to a rule of law; and it is a great privilege for me to further my understanding of the constitutional process by sharing in these discussions.

I was asked to address the subject of unenumerated rights under the Constitution, but I chose the title "Unenumerated Rights and the Dictates of Judicial Restraint." The title mirrors the thesis: One cannot talk of unenumerated constitutional rights under the United States Constitution without addressing the question whether the judiciary has the authority to announce them.

If we are frustrated by the Constitution's game of hide and seek that has gone on for some two hundred years, and suddenly we shout, "Hidden rights, come out, come out wherever you are," the emergent ones can be classified and discussed in numerous ways. Without attempting a comprehensive survey, I shall discuss three particular rights or ideas recognized, and to some extent enforced, by the Supreme Court. This will serve to illustrate the boundaries of judicial power and the difficulties encountered in defining fundamental protection that do not have a readily discernible basis in the constitutional text. The three rights we

shall examine are: (1) the right to travel; (2) the right of privacy; and (3) the right to vote. Privacy has the potential to be the most comprehensive and its existence or not as a constitutional right causes the most controversy, but each of the rights raises interesting questions about the scope of judicial authority. Let me begin with some general remarks on the nature of the judicial power.

In discussions of unenumerated rights, there seems to be an undercurrent that judicial power to declare them is a necessary antidote to the potential excesses of a democratic majority. That formulation tends to distract us from the fact that there are other protections in the American system, and under the Canadian Charter. The Framers of the American Constitution well understood the threat from a tyranny of the majority. The most visible restraints they designed to contain it are internal to the political branches themselves. These are the checks of bicameralism, the executive veto, and the division of sovereignty between state and federal government.

At the outset, the Framers conceived of the Constitution primarily as a system for the structural allocation of powers. There is little evidence that the people intended to alter that structure by the addition of the Bill of Rights, though the question remains whether some alteration would be the inevitable result. The addition of the Thirteenth, Fourteenth, and Fifteenth Amendments presents the same question. But whether intended or not there has been some shift in the allocation of powers, reflecting perhaps the tension between a structure that reflects

Hamilton's ideas and a Bill of Rights traceable to Jeffersonian thought, a tension that runs throughout our constitutional history. All must concede, however, that the Bill of Rights, including the Ninth Amendment, and the amendments after the Civil War, spacious as are some of their phrases, were not intended to relieve the political branches from their responsibility to determine the attributes of a just society.

There are two principal limitations on judicial power. First are the rules of case and controversy and the rules of justiciability which prevent the court from acting unless a proper party is before it, or from declaring doctrine more sweeping than the case requires. Second, and of greater importance, is the overarching principle that the Constitution is a written text, itself a law. The courts are bound by it in announcing constitutional doctrine. What sources are legitimate for judges to consult in determining the meaning of the Constitution remains the enduring question in constitutional law. The question is debated in terms far more complex than the more familiar questions of statutory construction. By comparison with debates over statutory construction, debates over constitutional interpretation are deeply arcane and philosophically entangled. As a result, the restraints on judges who depart substantially from the constitutional text seem less compelling than restraints applicable to judges interpreting statutes. That is a great irony, given that statutory error is reversible by a routine legislative enactment and constitutional error is not.

The reality, though, is that courts make a brief, formal bow to the constitutional text and then reason from case precedents which contain verbal categories of vast normative dimension, much of it tied only in the most tangential way to the constitutional text. It is a paradox that judges are reluctant to explore the duality between textual limitation versus accreted sources. This may be explained in part from the philosophic complexity of the writings on the subject and in part because of a secret hope that we can reap the benefits of one position or the other depending on the exigencies of a particular case. In this respect, courts appear to follow the dictum of F. Scott Fitzgerald that "the test of a first rate intelligence is the ability to hold two opposite ideas in mind at the same time and still retain the ability to function."[1] Those words give false comfort, however. While it is unlikely that we will devise a conclusive formula for reasoning in constitutional cases, we have the obligation to confront the consequences of our interpretation, or the lack of it.

In the time we have to discuss the ideas of unenumerated rights, let me provoke further discussion in the meetings here at Stanford by certain suggestions that we can test further this afternoon and over the remainder of the conference. Even the process of naming three rights not fixed in the constitutional text, travel, privacy, and voting, implicates certain difficulties. Enumeration invites uncertainties of its own. The judicial method, as already remarked, is to decide specific cases,

[1] F. Scott Fitzgerald, The Crack-Up 1 (1936).

from which general propositions later evolve, and this approach is the surest safeguard of liberty. It forts constitutional dynamics, and it defies the presidential method to announce in a categorical way that there can be no unenumerated rights, but I submit it is imprudent as well to say that there are broadly defined categories of unenumerated rights, and to say so apart from the factual premises of decided cases. This follows from the dictates of judicial restraint.

The tentative position of the judiciary in declaring unenumerated rights is evident even in the decisions on the right of interstate travel, which, of the three rights I will discuss, has the longest history. The right took early form in the case of Crandall v. Nevada,[2] decided in 1868 when the State of Nevada had the poor taste to impose a tax on anyone who sought to leave it. The decision conceives of the right of travel as being even broader than that allowed by the Commerce Clause, an approach followed in later cases. To the extent that the right is enforced against the state, it seems to be implicit in the protections of the Commerce Clause or the Privileges and Immunities Clause of Article IV. But after its announcement in a case involving the states, the courts traveled further and found the right enforceable against the federal government as well.[3] The Court seems almost to delight in not disclosing the constitutional locus for the right, except to say it is not in the Due Process Clause.

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[2] 73 U.S. (6 Wall.) 35 (1868).

[3] Shapiro v. Thompson, 394 U.S. 618 (1969).

The right to travel is an inseparable part of the right of human personality only if there is a right to leave the country, as well as a right to travel interstate. The cases do not give definitive support for the right in this broader aspect, however.[4] So the most plausible defense of the right as an interpretative matter is that it is not announced as a fundamental right in the sense of a right that is essential for all free people, but rather that it is implicit in the federal system. The Canadian Charter, in Section 6, does grant all citizens the right to enter, remain in or leave the country; and it affirms the right of movement to any province to citizens and permanent residents. If I am correct that the right recognized by the American case law is more narrow, both in scope and rationale, the unenumerated right rests on a value of federalism and not a more fundamental conception of right and wrong; and this proposition in turn indicates that in finding the right the courts were guided by pragmatic constitutional necessities, rather than by some other, or abstract ideals.

Some principle other than the necessities of our own constitutional system does seem to underlie the second, substantive unexpressed right that the United States Supreme Court has considered, the right of privacy. Neither the right, nor the word, is mentioned in the text of the United States Constitution or the Canadian Charter.[5]

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[4] See Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

[5] In light of the contemporary debate surrounding the right of privacy in the United States Constitution, and the express provision of a right of privacy in the European Convention on Human Rights, the absence of such a right in the text of the

As many of you know, the European Convention on Human Rights does have a provision that uses a derivative of the word "privacy."[6] Under that provision the European Court of Human Rights decided a sexual preference case comparable on its facts to those considered late this term by the United States Supreme Court. The European case is the Dudgeon case.[7] The Supreme Court case is the sodomy case from Georgia, Bowers v. Hardwick.[8]

Dudgeon, a male adult active in the gay rights movement in Northern Ireland, challenged that country's criminal prohibition against homosexual acts. The threshold question in Dudgeon was whether the term "private" in Article 8 of the Convention on Human Rights sufficed to create a substantive right of autonomous choice, as distinct from a spacial zone of privacy that was free from government intrusion. Article 8(1) provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."[9] The European Court ruled, in a 15-4 decision, that Article 8 established the autonomous right of choice, a right that extends to the freedom to engage in homosexual acts with another consenting adult. It held

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Canadian Charter does indicate that its framers did not intend to create it.

[6] European Convention on Human Rights, art. 8.

[7] Eur. Court H. R., Dudgeon case, decision of 30 January 1981, Series A no. 45.

[8] 106 S. Ct. ___, 54 U.S.L.W. 4919 (decided June 30, 1986).

[9] Article 8(2) provides: "There shall be no interference ... with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

further that Northern Ireland had not shown sufficient or legitimate grounds to regulate that conduct in order to protect its public morals. The majority opinion followed the balancing apparently required by Article 8, balancing public morals against the right of personal choice. It is often an unsatisfactory inquiry to balance between two unlike quantities. The term "balancing" obscures the fact that the process is really one of choice. We tend to accept the idea that we can balance apples against oranges because the visual metaphors of a scale allows us to do so. Try, however, balancing apples on one side and three to the eleventh power on the other. This is not balancing but choice. Nevertheless, balancing, or choice as it should be called, is mandated by Article 8.

The dissenting opinion of Judge Walsh in the Dudgeon case challenged both the unstated assumptions and the explicit premises of the majority opinion. The dissenter asserted that mere invocation of the word "private" does not resolve the question whether there is a right of free choice. It simply restates the problem. He argued that assuming the privacy protection in Article 8 does have a substantive dimension, protecting autonomous choice, its purpose is to permit the private manifestation of a human personality. It is not clear that such manifestation extends to the autonomous choice to engage in any kind of sexual conduct with other persons. Resolution of that question, Judge Walsh thought, centered on the familiar debate between those who say the law may legislate morals and those who say it may not, a

question debated most prominently in our time by Lord Devlin[10] and Professor H.L.A. Hart.[11] Judge Walsh thought that debate was relevant in the interpretation of the European Convention and concluded it was for the legislators to determine whether morality was an appropriate subject for its concern. Indeed, he found in Article 8 explicit authority for the legislature to make that choice. He proceeded to note the historical condemnations of homosexual conduct that underlie religious convictions in contemporary Irish culture and argued the legislature could base its act on those cultural values.

We find, therefore, that even under a written constitution granting the explicit "right to respect for private and family life" the following issues were presented: Whether the word embraces a substantive right of autonomous choice; if so, whether that choice insures the manifestation of one's personality and if so, whether it extends to conduct with others; whether it was legitimate for the legislature to regulate on the question of morals; what the morals and religious values of the particular community were; and whether those concerns were in fact advanced by the law in question.

If those issues are presented in a case where privacy is the subject of an explicit constitutional provision, consider the position of a court faced with the question under a constitution which does not contain the word "private" or "privacy" at all. If the declaration of a privacy right simply introduces a set of

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[10] Lord Devlin, The Enforcement of Morals (1965).

[11] H.L.A. Hart, Law Liberty and Morality (1963).

subordinate issues, it does not necessarily resolve the case. If a court begins by announcing such a right, it seems to go, on the one hand, beyond the case before it by adopting a phrase more extensive than required for its resolution of the case; on the other hand it goes not far enough because there remain so many further issues to be resolved. And note that the debate then shifts to the word "privacy," rather than to a constitutional term, such as "liberty." The mystic attraction of the untested and undefined word catches all of us now and then. As Keats wrote: "Heard melodies are sweet, but those unheard are sweeter."[12] This is good inspiration for poets, but promises considerable understanding for judges charged with enforcing a written constitution.

As we all know, the United States Supreme Court in the recent Bowers v. Hardwick decision considered the constitutionality of Georgia's criminal regulation of homosexual conduct. The resulting judgment was the opposite of Dudgeon, for the Supreme Court upheld the Georgia law. The majority and the dissent in Bowers had enough analytic problems without trying to distinguish Dudgeon, or even bother to cite it. Let us ask that question and see if the cases can be reconciled. Are the decisions simply not comparable because the Convention on Human Rights has explicit protection for privacy and the United States Constitution, like the Canadian Charter, does not? This cannot be unless Bowers overruled Griswold v. Connecticut,[13] the source case announcing

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[12] J. Keats, Ode on a Grecian Urn (1820).

[13] 381 U.S. 479 (1965).

the right of privacy; and the opinion does not overrule that precedent. Are the decisions then in conflict over the substantive content of the privacy right? It seems to me the answer is yes, there is a conflict. In order to resolve which one is correct, we have to go back to all of the questions raised by Judge Walsh in his dissenting opinion for the Court of Human Rights. And this raises the question of the legitimate sources for interpreting the Constitution in order to resolve those troubling issues.

The logic, and some of the express language, in the majority's opinion in Bowers points to certain limitations on the idea of privacy. First, the Court majority said the right of privacy in previous cases extended to marriage, family and procreation, but not to the case before it. It noticed such precedents as Pierce v. Society of Sisters[14] and Meyer v. Nebraska,[15] discussing child raising and education, and found them inadequate to protect homosexual conduct. Second, the Court majority considered whether a more general substantive due process category protecting conduct implicit in a scheme of ordered liberty was applicable. It rejected that approach, noting a long history of laws forbidding the practice in question. Third the Court declined to find a new right under the Due Process Clause. Of as much interest as each of these three premises, however, was the reluctance of the Court to endorse the substantive due process methodology that is the predicate for each of the arguments. The

[14] 268 U.S. 510 (1925).

[15] 262 U.S. 390 (1923).

Court referred to the institutional and analytical vulnerabilities of constitutional law that goes beyond the language or design of the instrument. In other words, even such early cases as Meyer and Pierce were acknowledged, not endorsed. The Bowers discussion, while on the one hand distinguished Meyer as involving traditional family rights, on the other hand, seems to contradict its methodology.

Meyer involved a law forbidding the teaching of German as a foreign language in elementary schools. It stated this now well known formulation of liberty under the Fifth and Fourteenth Amendments:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[16]

Meyer was reaffirmed in Pierce. The result in Pierce, that students may attend parochial schools, and in Meyer, that teachers may teach the German language as a subject, seem correct and fully sustainable under the First Amendment. The broad formulation of fundamental rights announced in Meyer is one of the richest in all of our case law, yet the Bowers court cautions that such language is not necessarily the authorization for judicial creation of a whole new catalog of rights. Meyer and Pierce were decided by a court, and authored by a justice, committed to substantive due

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[16] Meyer, 262 U.S. at 399.

process holdings. In economic cases those holdings were repudiated in later Supreme Court cases. It has often been remarked that here are analytic difficulties in rejecting the substantive due process method in the economic cases while retaining it for cases like Meyers and Pierce, and though a later court could subdue any conflict between those early cases and Bowers by pointing to the lack of traditional approval for the homosexual conduct in Bowers, the tension in methodology remains.

Both by a contemporary and a constant historical standard it seems intuitive to say that our people accept the views set forth in Meyers; but that alone is not a conclusive reason for saying the court may hold that each and every right there mentioned is a substantive, judicially enforceable right under the Constitution.

At this point, we must be careful about rhetoric and semantic categories in talking about fundamental rights. A helpful distinction is whether we are talking about essential rights in a just system or essential rights in our own constitutional system. Let me propose that the two are not coextensive. One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.

Many argue that a just society grants a right to engage in homosexual conduct. If that view is accepted, the Bowers decision in effect says the State of Georgia has the right to make a wrong decision--wrong in the sense that it violates some people's views

of rights in a just society. We can extend that slightly to say that Georgia's right to be wrong in matters not specifically controlled by the Constitution is a necessary component of its own political processes. Its citizens have the political liberty to direct the governmental process to make decisions that might be wrong in the ideal sense, subject to correction in the ordinary political process.

Before leaving this subject one other point raised in Dudgeon should be noted: was the law invalid because it classified in an improper way, discriminating on the basis of sex? Article 14 of the European Convention, like Section 15 of the Canadian Charter, prohibits discrimination based on sex. The issue was not addressed by the majority in Dudgeon. Two judges dissented from the failure to consider the point and seemed to suggest the law did discriminate.[17] One other dissenter reasoned it did not.[18] Whether equal protection concepts under our Fourteenth Amendment would apply to a case on the precise facts of Bowers seems problematic, especially if the analytic framework simply repeats what already has been rejected under the Due Process Clause. A more elaborate discussion of equal protection concepts must be the subject of a different paper.

The last of the recognized but unenumerated rights I will mention briefly is voting. Voting is a right the Supreme Court has declared to be fundamental, but in a rather limited sense of that term. As I understand the precedents, it is not fundamental

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[17] Dissenting opinion of Judges Evrigenis and Garcia de Enterria.

[18] Dissenting opinion of Judge Matscher.

in the sense that, like the privacy right, it supports substantive relief on its own. It operates, instead, as a fundamental interest that triggers rigorous equal protection scrutiny. One reason given for the right's not being enforceable on its own is that it is mentioned in the Constitution so often, where, by contrast, privacy is not mentioned at all. This is a paradox.

A more practical reason for holding that voting is not enforceable on its own terms as a fundamental right is that the courts would be required to decide what issues and what public officers are directly controlled by the voters; and there is no constitutional guidance for the courts to make such determinations. The Canadian Charter is careful on this point. Citizens are guaranteed the right to vote in an election of members of the House of Commons or of a legislative assembly.[19]

In the American Constitution, of the sixteen amendments adopted after the Bill of Rights, fully seven addressed voting power. So the political process has responded to extending the franchise without judicial assistance. By amendment, the vote was extended to all without regard to race, or sex, or the payment of poll tax, and to all persons eighteen years of age or older.

It was, of course, the judiciary, and not the political process, which established the one person, one vote principle in the case of Baker v. Carr.[20] There is no demand for reexamination of that decision. As Dean Ely has pointed out, the one person,

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[19] Charter, § 3.

[20] 369 U.S. 186 (1962).

one vote standard is administratively workable.[21] The ultimate rationale for the decision remains obscure, though the practical significance of its holding cannot be denied. One plausible motivating principle for the decision is that it reinforces the state's political systems, so that, like the right to travel, the one person, one vote rule is required to make the system work. In this respect, the unenumerated travel and voting rights have a different justification than the right of privacy.

If there are persistent difficulties in method in announcing unenumerated rights, there will be intensified reliance on constitutional provisions other than the Due Process Clause to serve the same purposes. As I noted, the results in Pierce and Meyer, if not their broad statements, are sustainable under the First Amendment. This focus is legitimate, as the First Amendment even in its barest textual form has great substantive content. The Canadian Charter is interesting in this connection. Under the Charter the only rights called "fundamental" are those in the expansive statement in Section 2, a statement that makes explicit much of the speech, expression and conscience doctrine that exists in the United States only through case interpretation of the First Amendment.

The other clause in the United States Constitution that comes increasingly into play if the Due Process Clause does not give protection is the Fourteenth Amendment's Equal Protection Clause. This provision, like Section 15 of the Canadian Charter, will be the source for increasing demands to protect individual rights.

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[21] J. Ely, Democracy and Distrust 121 (1980).

To the extent that identification of a fundamental interest triggers strict equal protection scrutiny, problems in how that doctrine can be announced have been touched upon already. But some other aspects of equal protection litigation and its effects on the judicial role should be noted briefly. Just as there was a shift in the emphasis of legal thought from Locke's concern with the natural law rights of individuals to Bentham's concern with social utility and the rights of groups, so has equal protection litigation tended to become based on the claims of classes of persons. One result of this development has been the assertion of a whole category of unenumerated rights that the courts have not recognized but that deserves our brief attention. I refer to the demand that the courts enforce certain minimum entitlements from the state.

It was argued, for instance, in San Antonio Independent School District v. Rodriguez,[22] that there is a fundamental right to a minimum level of education. The Court rejected the claim but the suggestions in the dissenting opinion[23] and by some commentators[24] that certain necessities do become a constitutional entitlement have important consequences for the jurisprudence on this subject. The argument is that courts must enforce certain minimum entitlements--education, nutrition and housing--if the constitutional system is to work. The difficulty, however, is

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[22] 411 U.S. 1 (1973).

[23] See id. at 70-71 (Marshall, J., dissenting).

[24] See generally Michelman, Foreword: On Protecting The Poor Through The Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969).

that there are any number of social preconditions if the Constitution is to work but these are not contained in the constitutional text and are beyond the enforcement authority of the courts. We are back to the distinction between the rights in a just society and enforceable rights in a given constitutional system. One can argue, I think, that the political branch has a responsibility to furnish an entitlement that is necessary to make the constitutional system work, but this simply underscores the proposition that the legislature has the authority to initiate actions that the judiciary does not.

The theorist John Rawls argues that an ethical social order must recognize certain just wants of its citizens.[25] Building on this formulation, Ronald Dworkin has reached a synthesis between moral principles and the rights and values he finds implicit in the Constitution.[26] Again we encounter the natural tendency to equate a just regime with the constitutional regime. These exercises may be invaluable as critiques of our system; they are irrelevant to the judicial authority to reform it under the guise of announcing constitutional rights not justified by the text of the instrument.

Though it is an oversimplification, one way to understand the traditional judicial role in the federal system is that most rights in the United States Constitution are enforced as negatives or prohibitions, not affirmative grants. "Congress shall make no

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[25] See, e.g., Rawls, Constitutional Liberty and the Concept of Justice, in NOMOS VI: JUSTICE (C. Friedrich & J. Chapman eds. 1963).

[26] R. Dworkin, Taking Rights Seriously (1977).

law respecting an establishment of religion"; "no warrants shall issue but upon probable cause"; "no person shall be held to answer unless on a presentment or indictment"; "nor shall any State deprive any person of life, liberty, or property without due process of law." Even some of the clauses that appear to be affirmative, such as that the accused shall enjoy the right to a speedy and public trial, are best translated to negatives: no person shall be convicted except by a speedy and public trial. The constitutional case in its classic form presents a claim that the state has acted in an unlawful way to injure a specific claimant. In this context negatives are more readily enforced than affirmatives. This is usually the case. Compliance with the Ten Commandments is more easily determined than compliance with the Sermon on the Mount. Enforcement of the commandment "Thou Shalt Not Steal" is accomplished more easily than enforcement of the plea to "Love Thy Neighbor."

The preference for negatives is designed to confine the judicial power to declaring that particular action is either valid or not, rather than allowing for prospective relief which requires choices that may intrude upon the political branch. This is not to say that affirmative rights are never enforceable by the judiciary. Suppose a policeman stands idle while private persons beat a victim because of his race. Though the court is adjudicating a historical event, the underlying claim is an affirmative entitlement to equal protection. In most cases, however, the point remains that the judicial role is most concise when it determines whether the state's action has exceeded a

negative standard. Enforcement of a rule of affirmative entitlements tends to take the judiciary outside that sphere.

The Canadian Charter may not lend itself well to my suggestion that negatives are the classic form for judicial determination of constitutional cases. Like the European Convention, the Canadian Charter adopts an affirmative style for most of its substantive provisions. Whether this permits the Canadian judiciary more latitude in determining the scope of its judgments and grants the judiciary substantive power to require the government to implement the guarantees in an affirmative way, are fundamental questions under the Charter. Finally, I note that Section 36 of the Charter declares a commitment to equal opportunities and essential public services of reasonable quality, but, subject to correction from any of you; I do not understand this to be enforceable by the Canadian judiciary.

The difficulties I have noted in the judicial declaration of unenumerated rights brings us back to the place of beginning, the idea of judicial restraint.

The imperatives of judicial restraint spring from the Constitution itself, not from a particular judicial theory. The Constitution was written with care and deliberation, not by accident. Its draftsmen were men skilled in the art and science of constitution writing, for, after all, eleven or so constitutions had been written for the separate states before 1787. The constitutional text and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern the judges. Marbury v. Madison states the rule: "[I]t

is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."[27] Constitutional interpretation must, therefore, be more restrictive than an inquiry launched by a common law judge in determining, for instance, the liability of remote parties in a negligence case. If these principles do not provide fixed boundaries for judicial interpretation in constitutional cases, at least two systemic failures become manifest in the operation of checks and balances.

First, the political branches of the government will misperceive their own constitutional role, or neglect to exercise it. If the judiciary by its own initiative or by silent complicity with the political branches announces unenumerated rights without adequate authority, the political branches may deem themselves excused from addressing constitutional imperatives in the course of the legislative process. This would be a grave misallocation of power. If there are claims of basic rights or privilege not cognizable by the courts, claims that must be honored if the Constitution is to have its fullest meaning, the political parts of the government ought to address them, and announce aye or nay, so that as the branches most closely linked to the democratic process they are held accountable to it. The courts must never be an accomplice to a regime that erodes the initiative or the power of the political elements in the constitutional system.

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[27] 5 U.S. (1 Cranch) 137, 178 (1803).

The second injury to the constitutional order is done to the judiciary itself. If courts adjudicate claims by premises that are essentially political, they forfeit their right to independence, to the respect due a neutral arbiter, and to lifetime tenure. It is a great irony of contemporary history that those who argue most passionately for creative judicial intervention in effect advocate abolition of an independent, nonelected judiciary. The unrestrained exercise of judicial authority ought to be recognized for what it is: the raw exercise of political power. If in fact that is the basis of our decisions, then there is no principled justification for our insulation from the political process. The issue of judicial independence and its legitimacy is a necessary part of the equation when one debates the legitimacy of a source or method of constitutional interpretation. If we overreach, it is fair to call our commissions in question.

Finally, I am unconcerned that there is a zone of ambiguity, even one of tension, between the courts and the political branches over the appropriate bounds of governmental power. Uncertainty is itself a restraint on the political branch, causing it to act with deliberation and with conscious reference to constitutional principles. I recognize, too, that saying the constitutional text must be our principal reference is in a sense simply to restate the question what that text means. But uncertainty over precise standards of interpretation does not justify failing in the attempt to construct them, and still less does it justify flagrant departures.