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CANADA'S *CHARTER OF RIGHTS*: PARADIGM LOST?

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The author sets out the judicial role that is appropriate in the analysis of rights claims under the Canadian Charter of Rights and Freedoms. *This judicial role is appropriate, she argues, because it fulfills the specific remedial purposes of the* Charter, *offers the best reading of the* Charter*'s text against the background of its drafting history, and reflects the particular model of rights-protection that the* Charter *was designed to incorporate, i.e., the model embedded in post-Second World War constitutions and international rights-protecting instruments. While the Supreme Court of Canada initially adopted this judicial role (by applying purposive interpretation of the rights guarantees and only principled and normative application of the limitation clause), some judges later departed from it, preferring a more deferential approach for rights claims embedded in a socio-economic context. The author argues that this deferential approach is inappropriate for the* Charter *for a number of reasons. As a matter of constitutional interpretation, it lacks any foundation in the* Charter*'s political history, text or chosen model of rights-protection. As a matter of constitutional history and theory, it imports as generic an outdated, misconceived, and parochial American constitutional paradigm.*

L'auteur donne les grandes lignes du rôle judiciaire qui convient à l'analyse des revendications de droits en vertu de la Charte canadienne des droits et libertés. *Elle estime que ce rôle judiciaire est indiqué parce qu'il répond au besoin de recours spécifique de la* Charte, *qu'il constitue la meilleure lecture du texte de la* Charte *par rapport au contexte de sa préparation et qu'il traduit un modèle particulier de protection des droits que la* Charte, *de par sa conception, doit incorporer, c'est-à-dire le modèle ancré dans les constitutions et les instruments internationaux de protection des droits de l'après-guerre. Bien que la Cour suprême du Canada ait d'abord adopté ce modèle judiciaire (en appliquant une interprétation fonctionnelle aux garanties des droits et en adoptant uniquement une application de principe et normative de la clause limitative), certains juges s'en sont écartés, préférant une démarche plus déférentielle pour les revendications de droits ancrés dans le contexte socio-économique. L'auteur estime que cette démarche déférentielle ne convient pas à la* Charte *et ce, pour un nombre de raisons. En tant qu'interprétation constitutionnelle, il lui manque les fondements de l'histoire politique de la* Charte, *qu'il s'agisse du texte ou du modèle choisi de protection des droits. En tant qu'histoire ou théorie constitutionnelle, elle est importante en tant que paradigme constitutionnel générique du genre paroissien américain, démodé et peu judicieux.*

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> The intention of a *Charter* is to limit the scope of the legislature and Parliament in relation to the fundamental rights of Canadian citizens.[1]
>
> …the very denomination of certain interests as … rights means that any interference should be kept to a minimum. In this sense proportionality is a natural and necessary adjunct to the recognition of such rights.[2]

I. INTRODUCTION

With the adoption of the *Canadian Charter of Rights and Freedoms*,[3] Canada joined the family of nations operating under a post-Second World War regime of rights-protection. This step marked the culmination of decades of discussion about the nature of rights and, as the debate matured, the institutional structure necessary to protect rights effectively in Canada. The challenge was to transform Canada's federal, parliamentary democracy into a modern, rights-protecting polity. Unlike other states making this transition, Canada did not create a special constitutional court or reconstruct its political institutions. It vested the new judicial review function in the existing courts and, in addition, marked out an innovative constitutional role for the established legislatures. This institutional continuity reflected two factors. First, the adoption of Canada's *Charter of Rights and Freedoms* occurred without the precipitating events that have pushed other nations to this step, such as revolution, defeat in war, or reconstruction of government at the end of a regime, for example apartheid or communism. Second, the new arrangements were negotiated by those who held power under the old arrangements. Nonetheless, the *Charter* effected a revolutionary transformation of the Canadian polity involving every public institution. The Supreme Court became the subject as well as the major agent of this transformation, mandated to bring the entire legal system into conformity with a complex new structure of rights-protection.

The centrepiece of the new arrangements lies in the *Charter*'s first section:[4]

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1 Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada 1980–81, 38 *Proceedings* (Justice Minister Jean Chrétien) [hereinafter *Proceedings*].

2 P. Craig & G. de Búrca, *EU law: text, cases, and materials* (New York: Oxford University Press, 1998) at 351.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

4 *Ibid*. at s. 1.

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This guarantee-and-limitation clause, despite its distinctive features, brings the Canadian *Charter* within the pattern of rights-protecting instruments adopted since the Second World War. The prototype for these instruments, the two century old United States *Bill of Rights*, has no parallel provision. It set down a list of constitutional guarantees primarily as negations of legislative authority, and made no specific provision for judicial review. The modern documents, in contrast, envisage the positive role of the state assuring the rule of law, the essentials of liberal democracy, and the foundations for general welfare in a multicultural, pluralist society. This extended dimension is given effect in part by a wider range of rights and freedoms guaranteed against the legislature and the executive. It is further secured by specification of the exclusive grounds on which the state is permitted to limit the operation of those guarantees. Judicial review is an integral and indispensable part of this model having as its purpose the imposition of the new rights-based values on every exercise of public power.

Constitutional rights embody the bedrock principles of post-Second World War liberal democracy. Experience in the operation of rights-protecting instruments has demonstrated that it is these principles, not their crystallization as rights, which must be regarded as absolute. To this end, the constitutional arrangements do not permit the state to abrogate these rights altogether but allow limits on restricted grounds. Limitation differs from abrogation in the way that an exception to a rule differs from the absence of the rule. A limitation attests to the primacy of that which it limits and maintains some conceptual continuity with it, coming into play only upon demonstration of stringent justifying conditions. In contrast, abrogation nullifies that which it abrogates. It is the traditional role of courts to sustain this distinction wherever it arises in our legal system.

Limitation provisions in rights-protecting instruments thus give legal expression to the common body of principles underlying the guarantees and the permitted basis for their limitation. They do not mark a boundary beyond which the exercise of plenary legislative authority reasserts itself, excluding the normative force of these principles. In operation, limitation provisions require demonstration by the state that any measure diminishing the enjoyment of the rights conforms to the principles, encapsulated in the formula for permitted

limitation, that underlie the rights themselves. On this basis, the normative force of the guarantee of the rights continues into the limitation analysis because:[5]

> ... the ultimate objective of the limitation clauses is not to increase the power of a state or government but to ensure the effective enforcement of the rights and freedoms of its inhabitants.

The express statement of the exclusive grounds of limitation in modern instruments creates the opportunity for a reasoned and coherent judicial elaboration of the terms of limitation consistent with the principles informing the document as a whole. The judges' responsibility is to interpret and apply these terms, not to defer to the legitimacy of the policy-making function of the representative, accountable legislature or to roam at large among considerations of their own choosing. When a bill of rights is silent as to the permissibility or basis of limitation on rights, it leaves the scope and limitation of rights to judicial development. Proponents of plenary legislative power can allege that the judges, even when asserting the core values of liberal democracy, usurp the political role or impose their own personal values. Lacking a sufficient response to this charge, judges may find themselves strongly tempted to treat the rights guarantees as encroachments on the working of democratic institutions, and to defer. These patterns are evident in many rights-protecting systems from time to time and, some might say, sharply demonstrated by trends under the United States *Bill of Rights* in the aftermath of the Warren Court's attempts to bring that instrument into conformity with the postwar model of rights protection.

In its initial judgments under the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada respected the postwar structure of rights protection embedded in its first provision and began to work out the requisite rules of interpretation, legal presumptions, and conceptions of institutional roles. Central to this legal analysis was the Court's understanding that its responsibility was to secure the rights guarantees as supreme law and to ensure that the limitation function enjoyed normative continuity with the rights. It began to apply tests that derive from the postwar systems of rights protection, most notably those that

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[5] A.C. Kiss, "Permissible Limitations on Rights" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 290 at 310. The Supreme Court has endorsed the idea that a complex web of inter-related, fundamental principles, including those embodied in the *Charter*, stand as the strongest norms of the Canadian Constitution. These principles operate as interpretive and supplementary, normative standards, enforced by the judiciary as is necessary: *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217; *Provincial Court Judges*, [1997] 3 S.C.R. 3; *Re Provincial Court Judges (No.2)*, [1998] 1 S.C.R. 3.

come under the rubric of "legality" and "proportionality." These tests require the state to justify any encroachment on guaranteed rights as prescribed by law, suitable, necessary and lacking excess. Some members of the Court, however, opposed these developments. They saw in the postwar model an unwarranted expansion of judicial power at the expense of legislatures and the executive, and introduced a more relaxed and deferential mode of *Charter* review. The *Charter* was not to fetter the legislature when it worked as mediator, resolving competing claims asserted primarily by groups, often including the claims of vulnerable people, for limited resources in a complex and ultimately unknowable world. Rigorous constitutional scrutiny to preserve traditional ideas of justice was acceptable only in those instances where an individual asserted rights against the state, the paradigm situation being the criminal process. But even in this context, deference often seemed appropriate. This deferential approach, in which rights enjoy no distinctive, protected status, now vies for dominance with the Court's original, postwar approach.

In this paper, I develop a critique of the deferential approach to judicial review under the *Charter*. First, it disregards the prolonged, well-informed and remarkably participatory debate that led to the *Charter*'s adoption. Particularly it disregards its fully and publicly articulated remedial purpose: to withdraw certain interests, denominated as constitutional rights and freedoms, from the give and take of the ordinary political process. Second, it fails to take seriously the written product of that debate. The deferential approach in effect creates a hierarchy of rights lacking any discernible basis in the text and ignores the differentiation between rights that the text does make. It also disregards the carefully chosen terms of the limitation formulation, drafted in publicly televised, parliamentary proceedings. That text was expressly designed to include the technical legal language of the postwar instruments in order to deliver the effective regime of rights-protection desired by Canadians generally and, in particular, sought by those to whom the previous lack of rights-protection mattered most.

Disregard of remedial purposes and text leads to the third failing: insensitivity to the *Charter*'s reconstruction of institutional roles. The advocates of deference cede the primacy of guaranteed rights and freedoms to ordinary politics on the ground that the representative, accountable legislatures must take responsibility for the political choices required. In effect, the polity reverts to the legislative policy-making role that the *Charter* was designed to redesign. This response to the standard critiques against judicial review ignores the fact that the distinctive features of the *Charter*, notably the postwar limitation clause and the made-in-Canada legislative override or notwithstanding clause, restructure

institutional responsibilities. Judicial deference to the legislature may be the conclusion of analysis of a *Charter* claim. It is not a pre-emptive strike.

The most interesting features of the *Charter* are the roles cast for the existing Canadian courts, executive and legislatures. These new roles do not merely continue the pre-*Charter* functions of Canadian legislatures. Nor do they recapitulate the institutional features of older rights-protecting instruments, which attracted the charge of undermining and debilitating the democratic function. The *Charter*'s institutional structure is designed to respond to that critique. First, the *Charter* provides a much clearer normative foundation to the rights, including the statement that Canada is to be a "free and democratic society," as well as interpretive directives on gender equality and the preservation and promotion of multiculturalism. Second, it withdraws those rights from the reach of ordinary politics. Third, the *Charter* does not merely contract state power or denigrate the political process. It expands and enhances political power by establishing a new form of extraordinary constitutional politics, situated in between court determinations of rights violations and constitutional amendment: the temporary, legislative suppression of named guarantees by ordinary legislative majority. The *Charter* thus does not precipitate a simplistic confrontation between judicially enforced rights guarantees and legislative supremacy. Fourth, in place of that confrontation the *Charter* establishes a complex, normative partnership model, in which courts, the executive and legislatures, each working to its institutional strengths, carry interlocking constitutional mandates to sustain and develop the basic elements of a modern, liberal democracy.

The desire to refashion the most basic structure and traditional working of our inherited constitutional arrangements is not unique to Canada. It is part of a postwar global phenomenon that is reworking our received ideas of national and legislative sovereignty. Commenting on developments in public law in England, in the absence of a bill of rights, Sedley J. has described judicial transformation of the organic British constitution in similar terms:[6]

[6] Hon. Sir S. Sedley, "Human Rights: a Twenty-First Century Agenda" [1995] Public Law 387 at 389. See also *X Ltd.* v. *Morgan Grampian Ltd.*, [1991] A.C. 1 at 48, per Lord Bridge of Harwich: "In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament and the sovereignty of the Queen's courts in interpreting and applying the law." For similar approaches see T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993); and M. Loughlin, *Sword & Scales: An Examination of the Relationship Between Law & Politics* (Oxford: Hart Publishing, 2000).

> ... we have today both in this country and in those with which it shares aspects of its political and judicial culture a new and still emerging constitutional paradigm, no longer of Dicey's supreme parliament to whose will the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable — politically to Parliament, legally to the courts. That the government of the day has no separate sovereignty in this paradigm is both axiomatic and a reminder of the sharpest of all the lessons of eastern Europe: that it is when state is collapsed into party that democracy founders.

This essay argues that the calls for pre-emptive judicial deference to the ordinary political process severs the *Charter* from its political genesis, its text, its chosen models, its institutional structure, and its early interpretation in fidelity to a fixed constitutional theory that no longer animates the Canadian constitutional order. Part II of the essay outlines the features of the postwar model and notes the congruence of section 1, the *Charter*'s guarantee-and-limitation clause, with those features. Part III examines the development of the limitation formulation in the proceedings of the 1980–81 Joint Committee of Parliament, following the model of postwar rights-protecting instruments, and the subsequent creation of the legislative override or notwithstanding clause.[7] In Part IV, the paper contrasts the full integration of the postwar model for limitation, in the Court's early interpretation of its role under the *Charter*, with the deferential counter-revolution. In conclusion, in Part V, I suggest that the Court could best fulfil the values of democracy championed in the revisionist approach by retracing its steps and returning to the *Charter*'s text, remedial purposes and adopted model of rights-protection.

II. THE POSTWAR MODEL

The postwar model of rights-protection, expressly incorporated into Canada's *Charter*, developed in the aftermath of the Holocaust, as a reaction against a fascist legal system that imposed law without rights.[8] Designed to protect the most basic elements of human freedom and dignity against state encroachment, in the shadow of their utter denial, the postwar rights-protecting instruments,

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7 *Supra* note 3 at s. 33.

8 L. Henkin, "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" (1993) 14 Cardozo L. Rev. 533 at 537; U. Reifner, "The Bar in the Third Reich, Anti-Semitism and the Decline of Liberal Advocacy" in F.C. Decoste & B. Schwartz, eds., *The Holocaust's Ghost: Writings on Art, Politics, Law and Education* (Edmonton: University of Alberta Press, 1999) 262.

both national and international, constrain governments to respect equal citizenship in the pluralist and multicultural nation state.[9]

The central feature of the postwar system is the guarantee of named rights and freedoms against the state, interests deemed essential to equal human dignity in modern society.[10] The guarantees take effect as higher law, either as constitutional protections or as international norms to which nation states subscribe. The postwar, rights-protecting instruments do not regard the individual as disembodied or abstracted from human community, nor do they regard the state as intrinsically hostile to human flourishing. These instruments regard the right-holder as a unique individual whose personal identity is embedded in a given or chosen community, including the family, within a democratic and rights-respecting society. This system of rights protection works to maximize the conditions under which human beings flourish by both commanding and restricting the exercise of state power.[11]

These higher law guarantees, whether national or international, are not absolute. To accommodate the functioning of the modern active state that provides the context in which we live our lives, and to afford the fullest realization of the principles of liberal democracy, the postwar system makes room for permitted limits upon, but not abrogation of, the rights and freedoms.[12] These limits on rights stand as exceptions to the most basic and fundamental entitlements enjoyed by members of a liberal democracy. To legitimate such exceptions, the postwar model requires the state to bear a strict burden. It must utilize its deliberative, accountable and representative machinery. It must engage in an exercise of justification, adjudicated by independent judges on a case-by-case basis. Judicial independence means that the government cannot decide in its own cause, as would follow in a system of legislative supremacy. Adjudication means that the government must be prepared to justify, not simply

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9 R. Marcic, "Duties and Limitations Upon Rights" (1968) 9 J. Int. Comm. Jurists 59 at 61, with reference to both the German Constitution and the *Universal Declaration of Human Rights.*

10 The question of application of rights protection to private law, with full comparative references, is illuminated in Justice A. Barak, "Constitutional Human Rights and Private Law" (1996) 3 Rev. Const. Stud. 218. For a discussion of indirect application of the *Charter* to private law, see L.E. Weinrib & E.J. Weinrib, "Constitutional Values and Private Law in Canada" in D. Barak-Erez & D. Friedmann, eds., *Human Rights in Private Law* (Oxford: Hart Publishing, 2001).

11 Marcic, *supra,* note 9 at 61ff.

12 Marcic, *supra* note 9 at 64–65; P. Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983) at 88, 91.

explain or offer excuses for, any infringement of rights, in a court of law, on the basis of evidence and argument.[13] Adjudication by an independent judiciary allows for limitation in a way that preserves the normative primacy of the right.

Limitation analysis precipitates two sequenced inquiries.[14] First, the principle of legality, as a formal matter, requires the state to embody any limitation on the guaranteed rights in general laws, the product of the recognized law-making institutions. In most instances this requirement offers the subject the protection derived from the working of the public, published, representative, accountable legislative process and from the general application of the laws produced. In common law jurisdictions, it also provides the possibility of judge-made rules predicated upon the principled evolution of the common law. Unconstrained executive discretion or undisclosed rulemaking fail to meet the standard. The basic idea emanates from the rule of law: the authority, accessibility, intelligibility and predictability of a system of legal rules as they impact on the individual.[15]

Second, the principle of legitimacy takes the analysis beyond the more formal aspirations of law creation to include principles of justice.[16] Rights are not absolute. Encroachments are permitted, but only as justified exceptions, that is as encroachments on the right but not on the underlying value-structure of the rights-protecting polity.[17] This result follows from the understanding that limits

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13 N. Strossen, "Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis" (1990) 41 Hastings L.J. 805 at 857.

14 E.-I.A. Daes, "Restrictions and Limitations on Human Rights" (1971) 3 René Cassin Amicorum Discipulorumque Liber 79 at 84–85.

15 F.G. Jacobs & R.C.A. White, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1996) 302–304. Sieghart, *supra* note 12 at 91–92. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4 Annex, nos. 15–18, reprinted in (1985) 7 Hum. Rts. Q. 3.

16 "The criterion which determines the boundaries of human rights is not law (especially written law) but justice." O.M. Garibaldi, "General Limitations on Human Rights: The Principle of Legality" (1976) 17 Harv. Int'l L.J. 503 at 517.

17 "...[T]he basic liberties constitute a family, the members of which have to be adjusted to one another to guarantee the central range of these liberties ... [T]he mutual adjustment of the basic liberties is justified on grounds allowed by the priority of these liberties as a family, no one of which is in itself absolute. This kind of adjustment is markedly different from a general balancing of interests which permits considerations of all kinds — political, economic, and social — to restrict these liberties, even

share the same normative foundation as the rights themselves. Limits operate to "provide equivalent protection to the rights and freedoms of others, or for the protection of other legal interests which are essential if man is to continue to enjoy his rights and freedoms."[18] Because they constitute the foundation of the liberal democratic state, the rights and their justified limits do not undermine the legislative prerogative of governments holding a temporary electoral mandate.

Limitation clauses express these features of the postwar model in a variety of ways. Reference may be made to specific, permitted grounds of limitation, such as morality, public order, the general welfare or democracy — the traditional "police powers" of the sovereign state — or to more general or abstract formulations. Some limitation clauses apply to all the guarantees in the instrument; others attach to specific guarantees. The common thread is the stipulation of an exclusive, objective basis for limiting rights.[19] These variations offer different expressions of the basic commitment to a legal system in which laws operate within the "framework of individual rights" — and not the other way around.[20]

Limitations, as normative exceptions to the rights, present questions separate from the scope of the right itself. Inasmuch as they are exceptions, the independent courts deal with each assertion of limitation individually, reading the exclusive grounds of limitation narrowly and restrictively, against the state.[21] To successfully justify limitations on the rights guaranteed, the state carries the burden of demonstrating that the impugned measure forwards the purposes of a society committed to equal human dignity. It is not enough to demonstrate that the impugned measure enjoys the support of the majority or confers the blessings of utility.

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regarding their content, when the advantages gained or injuries avoided are thought to be great enough." J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 358–59.

18 Marcic, *supra* note 9 at 67, with reference to both the German Constitution and the *Universal Declaration of Human Rights*. Kiss, *supra* note 5 at 290.

19 Jacobs & White, *supra* note 15 at 301–302.

20 "At the beginning, individual rights were applied only within the framework of law. In our time laws are only applied within the framework of individual rights." Daes, *supra* note 14 at 84.

21 Kiss, *supra* note 5 at 290; Jacobs & White, *supra* note 15 at 302; Marcic, *supra* note 9 at 65.

The postwar instruments stipulate that the limitation must be "necessary in a democratic society," the standard that provided the model for the *Charter*'s requirement that the state demonstrably justify limits on rights "in a free and democratic society." The key point here is that the reference to "democracy" in this context does not denote the expansiveness of unrestrained majority rule. It has normative, substantive, rather than procedural content, connoting a polity that constrains every exercise of power to the rule of law, to the principles of liberal democracy, and to the idea of equal human dignity.[22] Express provision for limited limitations on rights does not therefore subordinate the guarantee of rights to simple majority rule or to the satisfaction of the most preferences, or the most intense preferences, of the elected members of the legislature or the electorate. Instead, the "democratic society" standard refers back to the principles of rights-protection.

In the international system, "democratic society" clauses have a standard interpretation. As John Humphrey observed, the addition of such a clause to the *Universal Declaration of Human Rights*[23] reflected the desire to put "some real limits on limitations of the exercise of freedom."[24] These real limits are understood to incorporate the principles of the *Charter of the United Nations*,[25] the *Universal Declaration of Human Rights*, and the *Covenants on Human Rights*.[26] Under the *European Convention on Human Rights*,[27] for example, "democracy," as a ground of limitation, connotes the common heritage of European countries in respect to the rule of law, the values of pluralism, tolerance and broad-mindedness, equality, and liberty. This concept promotes self-fulfilment and the commitment to political freedom and individual rights as a moderating force on the state.[28] Noting that it may appear circular to protect rights in a democracy subject to a standard of democracy, Professor Humphrey describes the "vicious circle" as "more apparent than real."[29] The product of the

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22 Marcic, *supra* note 9 at 70: "the words 'in a democratic society' ... introduce a further normative element."

23 GA. Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc A/810 (1948) 71.

24 J.P. Humphrey, "The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society" in R.St.J. Macdonald & J.P. Humphrey, *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworths, 1979) 137 at 147.

25 26 June 1945, Can T.S. 1945 no. 7.

26 6 I.L.M. 360. Kiss, *supra* note 5 at 306–7, Strossen, *supra* note 13 at 850.

27 (1994) 33 Y.B. Eur. Conv. H.R. 274–83.

28 Kiss, *supra* note 5 at 306, Sieghart, *supra* note 12 at 93.

29 Humphrey, *supra* note 24 at 147.

democratic process is checked in order to realize a substantive understanding of democracy.[30]

The "necessary" qualification of the democracy standard is clarified by distinguishing it from both a more rigid and a less demanding standard. It does not require the state to prove that its policy is "indispensable" or "absolutely necessary," but it does require something more than merely showing that the measure is "reasonable," "desirable," "ordinary" or "useful."[31] Language found helpful to convey the requisite standard stipulates the need for "pressing social need" in the circumstances and "justification."[32] Further elaboration emphasizes the objective quality of the analysis, the burden of justification on the state, the proportionality of the impugned measure to its legitimate objective and its minimal restriction on the right in servicing that objective.[33] The central point is that the ordinary political process, and the values of tradition, expediency, efficiency and cost containment will not satisfy the test. Nor will a result prevail if some members of society are treated as having less than equal human dignity. It is not permissible to treat some individuals as less worthy by sacrificing their rights in order to benefit others.

The international postwar instruments also employ a margin of appreciation, which broadens the basis for encroachments on rights guarantees. This consideration marks respect for the separate national sovereignties of the participating states as well as their different cultures and traditions, while stipulating development towards the values that inform the rights guarantees.[34]

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30 G.H. Fox & G. Nolte, "Intolerant Democracies" (1995) 36 Harv. Int'l L.J. 1.

31 Kiss, *supra* note 5 at 308; Sieghart, *supra* note 12 at 93, Jacobs & White, *supra* note 15 at 307.

32 Sieghart, *supra* note 12 at 93. B.B. Lockwood *et al.*, "Working Paper for the Committee of Experts on Limitation Provisions" (1985) 7 Hum. Rts. Q. 35 at 52; Jacobs & White, *supra* note 15 at 306–308.

33 See Craig & de Búrca, *supra* note 2; *Siracusa Principles*, *supra* note 15, nos. 10–14. There is a burgeoning literature on proportionality. See *e.g.* E. Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999), N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London: Kluwer Law International, 1996); G. de Búrca, "Proportionality and *Wednesbury* Unreasonableness: The Influence of European Legal Concepts on U.K. Law" (1997) 3 Eur. Public L. 561; J. Schwarze, *European Administrative Law* (London: Sweet & Maxwell, 1992) c. 5.

34 Strossen, *supra* note 13 at 857, n. 252: "Courts within a single country should not feel it necessary to exercise self-restraint ... since rulings by domestic courts do not entail any threat to national sovereignty."

The doctrine provides flexibility in situations of emergency best appreciated by persons most familiar with and close to the particular circumstances, for questions deeply rooted in the particular national life of a nation state, and for special situations where an issue has prompted a wide range of different national approaches. Its purpose is pragmatic. A uniform, pan-European system of human rights must develop incrementally, upon "the fragile foundations of the consent of the Contracting Parties."[35] Commitment to the guarantees has to be secured without abandoning the principles of narrowly construing limitations or perpetuating the "ideas and conditions prevailing at the time when the [rights-protecting] treaties were drafted."[36]

The postwar model does not simply negate state power. It delineates the institutional mechanisms that transform a system of legislative sovereignty into a system of constitutional supremacy. Once this transformation is effected, the fact that a measure is the duly enacted product of the legislative process satisfies at most only the initial inquiry as to legality. The mere exercise of legislative authority, therefore, only moves the limitation inquiry to the next stage, where the courts engage in substantive examination of constitutional legitimacy. At that point the state must prove its preferred policy to be a justified exception to the guaranteed right, by demonstrating its compatibility with the basic requirements of rights-protection. These requirements encompass both the equal human dignity of all members of society as holders of rights and the wider exigencies of an effective rights-protecting system. Although the inquiry goes beyond questions of procedure, fairness, or jurisdiction, it does not enter into the actual merits of the impugned measure.

The text of section 1 of the *Canadian Charter of Rights and Freedoms* fully exemplifies these features of the postwar model. The initial prerequisite for valid limitation requires that the state prove "prescription by law." If this stipulation is met, the second, substantive requirement arises: proving that the impugned measure is "reasonable" and "demonstrably justified in a free and democratic society." The exceptional nature of a measure limiting rights is reflected in the stringent requirement of justification, *i.e.*, reasonable limits and demonstrable justification. The forum for justification, as other sections of the *Charter* make clear, is a court, which adjudicates infringements on a case-by-case basis, invalidating measures that do not conform to the requirements of section 1. The

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[35] R.St.J. Macdonald, "The Margin of Appreciation" in R.St.J. Macdonald *et al.*, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) 83 at 123.

[36] Jacobs & White, *supra* note 15 at 38.

ultimate standard is that of a "free and democratic society," a phrase that refers not to the majoritarian institutions of the state, but to the polity as the repository of the entire ensemble of rights and the preconditions for their effective exercise.

The congruence of the limitation formula in section 1 of the *Charter* and the postwar model is not mere coincidence. At the final stage of the drafting of the section, the postwar model was deemed essential to the achievement of the new *Charter*'s remedial purposes — to create an effective and legitimate system for judicial review of rights violations in lieu of legislative supremacy. The limitation formula was recast to conform to the postwar model, replacing a weaker version that would have ceded rights guarantees to majoritarian preferences of any kind. These developments are the subject of the next section of this essay.

III. THE EVOLUTION OF CANADA'S LIMITATION CLAUSE: FROM POLITICS TO LAW

Canada's *Charter* grafted a constitutional rights-protecting system onto a constitutional framework that was partly unwritten, in the tradition of British constitutionalism, and partly written, to establish the institutional structure of a new parliamentary, federal system of government in 1867. While the *Charter* project had a number of stimuli, the widely perceived inability of the existing legal system to protect the fundamental values of liberal democracy provided significant momentum.[37] The public debate that preceded the adoption of the *Charter* revealed widespread dissatisfaction with a constitution largely silent as to these values. Other parts of the legal system — the common law, statutory rights codes (provincial and federal), administrative law as well as the federal-provincial division of powers — had showed promise from time to time but ultimately proved inadequate. Proposals to add a system of rights protection, to stand supreme over the routine exercise of public authority, precipitated discussions as to the comparative competence of courts and legislatures to serve the desired end with extensive reference to the experience of other countries as well as to Canada's international obligations.

[37] L.E. Weinrib, "Trudeau and the Canadian *Charter of Rights and Freedoms*: A Question of Constitutional Maturation" in A. Cohen & J.L. Granatstein, eds., *Trudeau's Shadow: The Life and Legacy of Pierre Elliot Trudeau* (Toronto: Random House Canada, 1998) 257; L.E. Weinrib, "The Notwithstanding Clause: the loophole cementing the *Charter*" (1998) 26 Cité Libre 47.

In the final stages of the debate, the draft text delineating these functions attracted a remarkable degree of attention precipitating what was, in effect, an intensive national seminar on the substantive content and institutional structure of the modern constitutional state. Politicians wary of any reduction in their powers found themselves pitted against individuals and groups intent on securing precisely such restrictions. The question of institutional legitimacy figured so prominently that the final text of the *Charter* includes a complex array of institutional directives. These directives mark one of the distinctive features of the *Charter.* They set it apart from older texts such as the United States *Bill of Rights*, which does not refer to judicial review, as well as from modern rights-protecting instruments, which do formally establish judicial review but set down less institutional detail. Other countries, deliberating later on the same questions in their own national contexts, have considered the Canadian *Charter* as a distinctive model. Some have followed Canada's example, notably Israel and South Africa, where the combination of novel and traditional elements in the Canadian *Charter* have found new homes.

Since the *Charter* created no new institutions, such as a constitutional court or new legislatures, these directives take on particular importance. They indicate that the *Charter* project, as finally conceived and captured in text, contemplated both the expansion and restriction of the functions of existing institutions. To understand these changes one must keep several facts in mind. The Canadian courts, since 1867, had exercised the authority to strike down laws that transgressed the federal-provincial division of powers, which had the status of higher law. Canada was thus no stranger to judicial review. In addition, the discussions were well informed, not merely on the particular challenges that Canadian society posed for the design of a bill of rights. There were also many references, both approving and disapproving, to the operation of well-established, rights-protecting systems. Moreover, the recent disappointment at the limited reach of the statutory *Canadian Bill of Rights*,[38] on the one hand, and the overarching directives of the international rights-protecting obligations under the auspices of the United Nations, on the other, provided a framework that brought the discussions into sharp focus. Canada's debate, therefore, stands apart from that which preceded the adoption of the United States *Bill of Rights* in the late eighteenth century or the formulation of rights-protecting systems in the immediate aftermath of the Second World War. Canadians had the opportunity to address the institutional questions in great detail in the context of the mature, stable, democracy of a modern welfare state. Indeed, it was the understanding of

[38] S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

the full ramifications of the institutional transformation proposed that fueled the strong opposition mounted by eight provincial premiers to the project.[39]

The decades-long debate produced a fascinating series of proposals as to institutional role, some expansive and others restrictive. These rejected alternatives shed light on the final design. They demonstrate that in following a postwar trend, the *Charter* project did not ignore or dismiss concerns raised as to the legitimacy of judicial review of legislation in a democracy.[40] On the contrary, those involved in the *Charter*'s genesis took that controversy very seriously and responded to it. First, the *Charter* delineates a narrow judicial role that does not go beyond established legal modes of analysis. Second, it imposes restrictions on policy choices according to foundational constitutional values, the same values that legitimate democratic government and federalism. Third, it gives governments the permission to depart from these restrictions upon demonstration in a court of law that the breach has the form of law and is justified according to constitutional principles. Fourth, it creates an override power that permits a legislative majority to suppress selected guarantees expressly, for the term of its electoral mandate, without establishing justification. The procedural requirements imposed are more demanding than mere prescription by law, in respect for the fundamental nature of the guarantees suppressed, but less demanding than the extraordinary degree of political consensus required for permanent constitutional amendment. These features do not usurp the legislative role or debilitate political institutions. Each moves responsibility to the elected branch of government and ties the democratic function to the values and principles that give it legitimacy. At a minimum, the standard critiques against judicial review must be reformulated in light of these features.

The *Charter*'s elaborate institutional structure builds on the core idea that the Constitution, including the rights guarantees, is supreme law. The *Charter* makes explicit many of the institutional implications of this higher law status, clarifying elements that have attracted controversy in other systems of rights protection. Section 52 of the *Constitution Act, 1982* expressly stipulates that laws inconsistent with the Constitution are "of no force or effect." Other provisions apply the supremacy directive to the legislatures and to the executive, as well as

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[39] W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McClelland & Stewart, 1975).

[40] C.R. Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998); C.N. Tate & T. Vallinder, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

to the courts, whose task it is to determine the conformity of those laws to the *Charter*'s guarantees. Section 32 imposes the obligation to comply with the *Charter*'s guarantees on governments and legislatures. Section 24 provides for judicial review of rights claims, including a grant of wide remedial power. Sections 25 to 29 supply interpretive directives, both preserving pre-*Charter* entitlements and specifying the supervening values of multiculturalism and gender equality.[41]

The most important elements of the institutional structure are to be found in two companion clauses: section 1, the guarantee-and-limitation clause, and section 33, the notwithstanding or override clause. To fully appreciate the judicial role, one must understand both the relationship between these two clauses and the considerations that informed the drafting of the limitation formula within section 1, for which we have a rich parliamentary record.

The historical material illuminates the ideas and models that informed the *Charter*'s distinctive institutional features. First, the limitation formula, following the postwar model's legality stricture, requires the state to formulate, as law, any exercise of power that limits guaranteed rights. The second is that the remedial aspirations for Canada's *Charter* adopt the postwar model of rights-protection, in which the normativity of the guaranteed rights offers only one level of constitutional guarantee. The other level is provided by the strict terms of the limitation formula, which carry the normative content of the guarantees into the strictures for permissible limitation. The third is that the legislative override or notwithstanding clause, which applies only to certain rights, precludes the need for judicial deference, or any margin of appreciation, in applying the limitation formula. For rights not subject to that clause, the *Charter*, by implication, gives courts the last word unless the constitutional context is transformed or the extraordinary consensus necessary for constitutional amendment is satisfied. For the remaining rights, judges should not defer to the legislature because that body itself has the power, by simple majority, to in effect opt out of the guarantee for the term of its electoral mandate.

The limitation and notwithstanding clauses are the products of a political debate that informs their nature and design. The *Charter* marks the culmination of contentious federal-provincial negotiations seeking agreement on a constitutional text for inclusion by amendment into Canada's written constitution. The *Charter* project reflected Prime Minister Trudeau's dual commitment to liberal democracy under the rule of law and a national citizenship

[41] *Supra* note 3.

based on rights, including minority language rights designed to counter Quebec nationalism.[42] Only New Brunswick and Ontario supported this initiative. Combined in opposition, but not in motivation, were the remaining eight provinces, including Quebec. The so-called "gang of 8" joined forces to resist Trudeau's *Charter*, melding a provincial rights agenda, including the Quebec nationalist movement, to the desire to preserve legislative supremacy on the British model.[43] Hoping that a consensus would emerge, Trudeau set in motion a deliberative process in which committees of federal and provincial officials worked toward a "best efforts" draft, pending agreement on the project itself. The eight provincial premiers remained recalcitrant, although opinion polls indicated strong popular support for the *Charter* across the country, including Quebec.[44]

The drafting process became a natural battleground between the pro-*Charter* and anti-*Charter* camps. When objection to the project gained strength, opponents of the *Charter* secured agreement to remove rights, to diminish the force of their guarantee, and to negate their content through wide limitation clauses and provincial opt-out and/or opt-in clauses. When the political balance shifted to those supporting rights protection, the rights proliferated and

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42 Weinrib, *supra* note 37. Hon. P.E. Trudeau, "A Canadian *Charter* of Human Rights" (January 1968) in A.F. Bayefsky, *Canada's Constitution Act, 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) at 51.

43 For narrative accounts see S. Clarkson & C. McCall, *Trudeau and our Times*, vol. 1, *The Magnificent Obsession* (Toronto: McCelland & Stewart, 1990); R. Sheppard & M. Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982); R. Romanow *et al.*, *Canada ... Nowithstanding: The Making of the Constitution 1976–1982* (Agincourt: Carswell/Methuen, 1984).

44 Sheppard & Valpy, *ibid*. at 52, 56, 68, 75, 99, 102, 108, 184. P.M. Sniderman *et al.*, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1996) at 169, 171, 173, 190, 274, n. 13. "As a recent poll says" *The Globe and Mail* (22 May 1981) A6; "Seek more support, public tells Ottawa" *The Globe and Mail* (13 December 1980) A1; "Civil liberties backed for women, natives" *The Globe and Mail* (19 December 1981) A4; "72% favour *Charter* of rights" *Winnipeg Free Press* (10 November 1981) A4. This support has continued, see J.F. Fletcher & P. Howe, "Canadian Attitudes toward the *Charter* and the Courts in Comparative Perspective" (2000) 6 Choices 4; J.F. Fletcher & P. Howe, "Supreme Court Cases and Court Support: The State of Canadian Public Opinion" (2000) 6 Choices 30.

broadened, limitation clauses narrowed and the opt-in and opt-out conditions disappeared.[45]

One element remained constant however. Every draft of the *Charter* included express limitation formulations, reflecting the fact that the legitimacy of the judicial role remained a strong concern. Sustained provincial opposition to the *Charter* initiative eventually produced a compromise draft that subordinated a range of rights to a single, expansive limitation clause:[46]

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

This version afforded marginal force to the rights guarantees. It did not even require that limits on rights have the form of law, which would have offered assurance that a measure restricting rights had passed through the legislative process or worked through the principled reasoning of the common law. Its vague language did not indicate any specific degree of "acceptance" beyond the vague word "general." What would this mean: passage by a legislature? long-standing application? presence in many of Canada's legal systems? presence in other legal systems? presence in systems that honoured rights? On any reading, this formulation failed to remedy the defects in the existing arrangements. Canadian experience offered numerous examples of the general acceptance of egregious rights infringements in their time and place. Indeed, it was precisely the past acceptance of these now wholly discredited policies — based on ignorance, prejudice, and tradition — that prompted widespread support for an entrenched *Charter*. In the Joint Committee hearings on the *Charter* described below, presenters dubbed this attempt at compromise the "Mack Truck clause," connoting the expansiveness of permissible limitation on rights with the image of a huge truck that could be driven at will through the *Charter*'s guarantees.[47]

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[45] L.E. Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution" (1992) 42 U.T.L.J. 207 at 218ff.

[46] Bayefsky, *supra* note 42 at 766.

[47] *Proceedings*, *supra* note 1, (12 December 1980) at 22:53. The image was struck by Ms. Monique Charlebois, who appeared before the Committee on behalf of the National Association of Women and the Law, and was picked up by other presenters. The clause was also condemned as a "bathtub section," enabling politicians to pull the plug on citizens' rights. *Ibid.*, (9 December 1980) at 22:32.

This draft text reflected the extent to which the governments supporting the *Charter* were willing to compromise in order to achieve wider support. But the opposing eight provinces sought more than a drafting victory; their objective was to defeat the *Charter* project altogether.[48]

The Conservative Party, the official opposition in the national Parliament, hoping to give time for provincial efforts against the *Charter* project to consolidate, secured the Liberal government's reluctant agreement to put the *Charter* into a parliamentary committee for public hearings. This move, animated by coldness to the *Charter* project, proved to be the major turning point in its favour. For the first time, the "ordinary Canadians" most affected by the presence or absence of effective rights protection in the Constitution had the opportunity to do more than simply register their strong support for the *Charter* to the pollsters. They had the opportunity to delineate, en masse and in significant detail, the *Charter* they wanted.

This was not the first public forum on the Constitution. The Molgat-MacGuigan Committee, a Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, which reported in 1972 just after the failure of the *Victoria Charter*[49] proposal, had engaged a very interested public in the issue of constitutional reform, including rights protection.[50] This and other public airings of the issues had constituted a prolonged national seminar on constitutional reform. The numerous initiatives created momentum for constitutional change as the circle of those involved widened beyond the usual cast of federal and provincial politicians and their bureaucrats.

The Joint Committee of the Senate and House of Commons of 1980–81 created the opportunity for experts, representative groups and public interest associations to voice the strong public support for the *Charter* project that

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[48] The "gang of 8" did support an amending formula for Canada's constitution but not a *Charter*. For the terms of their amending formula, see Bayefsky, *supra* note 42 at 806. It is interesting to note that Premier René Lévesque, the leader of the separatist party in Quebec, agreed to this formula even though it did not give Quebec a veto over constitutional change as did Trudeau's version.

[49] Canada. *Constitutional Conference Proceedings*, Victoria, British Columbia (14 June 1971) (Ottawa: Information Canada, 1971) 51–72.

[50] Bayefsky, *supra* note 42 at 224–308. In just over two years the committee held 145 public meetings, 72 of which took place in 47 cities and towns and produced eight thousand pages of transcript. While the public engagement was exceptional at that stage of the constitutional wars, the committee regretted that it had not been able to tap the views of disadvantaged Canadians.

Trudeau's Liberals had been nurturing through intensive promotion of their "people's package" of reforms. The nationally televised sessions went on for months, galvanizing further support for a government withstanding the friendly fire of *Charter* supporters. Local, regional, national and umbrella groups, organized on the common bonds of race, religion, national origin, ethnicity, gender, aboriginal status and disability, voiced their desire for effective rights-protection. Their message was that the *Charter* should preclude repetition of the many past failings of Canadian legislatures and courts to offer equal concern and respect to all members of Canadian society.[51] Experts as well as public interest associations dedicated to promoting equality and civil liberties submitted detailed critiques of the draft text. They proposed amendments, citing other rights-protecting systems as positive models and past failures to protect rights in the Canadian system as tests for the new *Charter* to meet.[52]

This process resulted in dramatic changes to the guarantee-and-limitation clause. There was strong consensus among presenters that the "Mack Truck" formula would offer no effective protection of rights. As drafted, it would preserve legislative sovereignty at judicial prerogative. The record of the courts on the basic liberties and equality did not instill any more confidence than that of the legislatures. Revision of the limitation formula thus became a high priority, given that there would be no constitutional court to administer the *Charter* and no alteration of the existing political institutions. The limitation

[51] Presenters included the Canadian Advisory Council on the Status of Women, the National Action Committee on the Status of Women, the Canadian Association for the Mentally Retarded, The Association of Franco-Manitobans, the Coalition of Provincial Organizations for the Handicapped, the National Association of Japanese Canadians, the Ukrainian Canadian Committee, the Inuit Committee on National Issues, the Native Women's Association of Canada, the Native Council of Canada, the Canadian Federation of Civil Liberties and Human Rights Associations, the National Association of Women and the Law, the Council of National Ethnocultural Organizations of Canada, the B.C. Civil Liberties Association, the Canadian Association for Prevention of Crime, the Canadian National Council for the Blind, the Nishga Tribal Council, the Nuu-Chah-Nulth Tribal Council, the Indian Association of Alberta, the Vancouver People's Law School Society, the Union of N.B. Indians, the Anglican Church of Canada, and the Canadian Jewish Congress.

[52] The presenters made reference to the widely perceived failures of the legal system to adequately protect liberty, autonomy and equality through the common law, the division of powers between the federal and provincial governments, the "implied bill of rights" (based on the preamble to the *British North America Act, 1867*, which stated that the Canadian constitution was to be similar in principle to the British Constitution) and the statutory, federal *Bill of Rights*.

formula would therefore have to carry the burden of the transformation by providing a clear statement of the mode of institutional protection that the *Charter* would afford. The stakes were high. Creating an inadequate institutional framework for the new constitutional guarantees would not merely perpetuate the *status quo*. Given the difficulty of securing constitutional rights guarantees against governments that controlled the amendment process, it might well leave the country without further viable reform options.

Experts in the comparison of human and civil rights systems agreed and offered constructive suggestions. Of particular importance were the contributions of R. Gordon L. Fairweather, Chief Commissioner of the Canadian Human Rights Commission, and Professor Walter Tarnopolsky, a distinguished scholar of human rights appearing as President of the Canadian Civil Liberties Association. Justice Minister Chrétien later acknowledged that he had relied upon these submissions in making the final revisions to the limitation formula in section 1 of the *Charter*. Both Mr. Fairweather and Mr. Tarnopolsky proposed drafting the limitation formula on the postwar model of rights protection, giving institutional structure and drafting suggestions that reflected the content of the submissions that had preceded them.

Gordon Fairweather opened his submissions to the Joint Committee by situating the process in its postwar agenda. The formulation of Canada's *Charter* was not "an isolated act of domestic draftmanship." It was an exercise originating in Canada's international undertakings and commitments under the U.N. "Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights that flowed from the Universal Declaration and [that has] now become the International Bill of Rights."[53] In reference to the provincial opposition to the *Charter* project, he pointed out that all the provinces had supported Canadian ratification of the Covenants in 1976. Moreover, he noted that the opposing premiers' allegiance to the British heritage of parliamentary supremacy should be considered in the light of the fact that the United Kingdom had been a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms since 1951.

[53] *Proceedings*, *supra* note 1 (11 November 1980) at 5:7. Later, in response to a question, Mr. Fairweather expressed the view that the "Mack Truck" limitation formula would put Canada in violation of her international obligations. See *ibid*., (14 November 1980) at 5:14.

With Canada's international commitments in mind, he rejected the "Mack Truck" clause as "seriously flawed," "dangerously broad" and "unacceptable."[54] In departing from the formula used in modern state constitutions as well as international rights-protecting instruments, the draft suggested a reluctance to depend upon language that had stood the test of adjudication in its service to rights protection.[55] In his view, the compromise limitation clause stood at "the heart of a very regressive document,"[56] which would permit discrimination on the basis of age, racial restrictions on political and economic rights, and gender discrimination.[57] He suggested that the *Charter* should be as "comprehensive as, and close to the language and spirit of, the International Covenants." On this basis, he recommended the following text for the guarantee-and-limitation clause:[58]

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such limits prescribed by law as are reasonably justifiable in a free and democratic society.

Professor Tarnopolsky's presentation to the Joint Committee on behalf of the Canadian Civil Liberties Association went further and carried exceptional weight. He represented Canada's leading civil rights association and was, in his own right, an acknowledged expert in international and national systems of rights protection. In addition, he spoke as Canada's leading expert on the *Canadian Bill of Rights* of 1960, a statutory instrument so ineffective as to have become the negative benchmark for those seeking effective rights-protection.[59] Since his academic work had meticulously exposed the inadequacies of the statutory *Bill of Rights*, Professor Tarnopolsky's declared preference for that

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54 *Ibid*. at 5:8 and 5A:2.

55 *Ibid*. at 5:12. Earlier drafts had followed this model more closely. But the political goal of bridging the gap between those who supported and those who opposed the project had moved the wording away.

56 *Ibid*. at 5:18.

57 *Ibid*. at 5:12,14–16.

58 *Ibid*. at 5A:3. This was the second of two proposals he put forward for section 1. It differs from the final version in only two respects: (i) the final version contains the adjective "reasonable" modifying the word "limits," and the phrase "as can be demonstrably justified" replaces the phrase "as are reasonably justifiable." His first proposal contained two additional subsections, one precluding limitation on legal and non-discrimination rights and the other guaranteeing *Charter* rights and freedoms equally to men and women. The gender rights provision later found its way into section 28 of the *Charter* but the limitation clause was made applicable to all rights and freedoms.

59 Tarnopolsky, *supra* note 39.

discredited instrument over the proposed *Charter* draft was striking. This preference took on added significance when he widened the basis of comparison to include the postwar model:[60]

> [The "Mack Truck" limitation formulation] permits Parliament to take away everything that Parliament gives by the rest of the charter ... Limitations clauses have come to be inserted in international instruments and in Commonwealth bills of right by United Kingdom lawyers since 1950 with the signing of the European Convention on Human Rights. However, none of the limitations clauses, in the international arena, nor, of course in Europe, nor in the Commonwealth, has a limitation clause as wide as this one ...

Professor Tarnopolsky went on to describe the main features of the postwar model — the requirements of both legality and legitimacy for permissible limitation on rights. The established pattern was to save laws that infringed rights if both "prescribed by law" and "necessary for the purposes of a free and democratic (and, in our case, plural and democratic) society."[61] In operation such stipulations shifted the onus to the party supporting the infringement to prove that it had been specified as law and was justified on a standard of necessity.

The "Mack Truck" text preserved parliamentary supremacy rather than instituting an effective measure of rights protection on the postwar model. The phrase "democratic society with a parliamentary system of government" implied parliamentary supremacy and was therefore incompatible with an entrenched bill of rights.[62] The words "generally accepted" shared the same flaw because it was "very difficult to argue that whatever Parliament enacts is not generally acceptable in that society."[63] How could one argue in a court of law that members of Parliament do not "represent what is generally accepted in

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60 *Proceedings*, *supra* note 1 (18 November 1980) at 7:9. Professor Tarnopolsky took the view that the limitation clause, as drafted could be "more dangerous from a civil libertarian point of view" in that there would be less opportunity "to argue [against] the limitations" under the *Charter* as proposed than under the *Canadian Bill of Rights*. *Proceedings* at 7:16.

61 *Proceedings*, *supra* note 1 (18 November 1980) at 7:10.

62 *Ibid*. at 7:16

63 Alan Borovoy, then General Counsel of the Canadian Civil Liberties Association (and now President), was also critical of the "generally accepted" formula. In his opinion:

> If you are talking about that which is generally accepted in a free and democratic society with a parliamentary form of government, you may well be talking about everything that Parliament or the legislatures have said is acceptable and to the extent that you are doing that, then it renders the entire *Charter* a verbal illusion.

Proceedings, *supra* note 1, (18 November 1980) 7:26.

society?"[64] Professor Tarnopolsky was asked whether the word "reasonable" describing "limits" would constrain governments to respect rights. His opinion was that these words, if standing alone, might require objective assessment and some onus on the government to prove the necessity of the limitation, in the postwar model. However, the draft's further stipulation of "generally accepted" limits undermined this reading.[65]

In effect, the "Mack Truck" formula would impose no limit on the exercise of power. Professor Tarnopolsky illustrated the dangers posed by the absence of such restraint, citing notorious examples of past failures to protect rights in Canada. These were the same examples that many other presenters had noted as test-cases for the effectiveness of a new constitutional bill of rights. The judiciary had upheld the internment of Canadian Japanese during the Second World War, discrimination against aboriginal women under federal legislative authority, and incursions on the freedom of religion and expression of Jehovah's Witnesses in Quebec in the 1940s and 1950s.[66]

These two submissions, by Professor Tarnopolsky and Mr. Fairweather, clarified what was at stake in the formulation of the limitation formula and resulted in decisive changes to the *Charter* text. Canada's international obligations combined with the remedial purposes of the *Charter* required the postwar model. Professor Tarnopolsky proposed new wording to bring the limitation formula within this model: section 1 should require governments to bear an onus to establish that limits on rights were "prescribed by law and ... necessary for the purposes of a free and democratic ... society" and "demonstrably justifiable ... or demonstrably necessary."[67]

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64 *Ibid*. at 7:9.

65 *Ibid*. at 7:20. For further commentary, see W.S. Tarnopolsky, "A Comparison Between the *Canadian Charter of Rights and Freedoms* and the *International Covenant on Civil and Political Rights*" (1982–83) 8–9 Queen's L.J. 211. In this article, Justice Tarnopolsky notes that the *Charter*, in contrast to the *International Covenant on Civil and Political Rights*, does not provide expressly against limitation of the legal rights under normal circumstances or against certain other rights even in times of emergency. But, he notes, the *Charter* did not preclude arguments to this effect.

66 See *Co-operative Committee on Japanese Canadians* v. *Canada (A.-G.)*, [1946] S.C.R. 248; *Canada (A.-G.)* v. *Lavell*, [1974] S.C.R. 1349; W. Kaplin, *State and Salvation: The Jehovah's Witnesses and Their Fight For Civil Rights* (Toronto: University of Toronto Press, 1989).

67 *Supra* note 1 (18 November 1980) 7:10.

The final changes to section 1 marked acceptance of these submissions. Justice Minister Chrétien quickly conceded the weaknesses of the "Mack Truck" limitation clause:

> ... many witnesses and most members of the Committee have expressed concerns about Section 1 of the Charter of Rights and Freedoms. These concerns basically have to do with the argument that the clause as drafted leaves open the possibility that a great number of limits could be placed upon rights and freedoms in the Charter by the actions of Parliament or a legislature.
>
> ... I am prepared on behalf of the government to accept an amendment similar to that suggested by Mr. Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission and by Professor Walter Tarnopolsky, President of the Canadian Civil Liberties Association. The wording I am proposing is designed to make the limitation clause even *more stringent* than that recommended by Mr. Fairweather and Professor Tarnopolsky. I am proposing that Section 1 read as follows:
>
> > The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> This will ensure that any limit on a right must be *not only* reasonable and prescribed by law, but must *also* be shown to be demonstrably justified.

Chrétien defended this wording against the allegation that nothing much had changed:[68]

> I think we have moved quite far; and, in the case of those who were the main proponents of the change, Professor Tarnopolsky and Mr. Fairweather, it is the text which they have more or less suggested, and they have approved it and commended me on it. ...
>
> *So this limited clause narrows the limits of the courts*. The first one — and you heard the testimony given here, where there was argument to the effect that it was so limiting in scope as to be almost useless, and we would be caught in the same position as we were in the case of the Bill of Rights of Mr. Diefenbaker ...
>
> The intention of a *Charter* is to limit the scope of the legislature and Parliament in relation to the fundamental rights of Canadian citizens.

Asked to comment on the extent of the judicial review power, Mr. Chrétien indicated that it is the role of the courts to interpret the law when citizens raise

[68] *Proceedings*, *supra* note 1 (15 December 1981) at 38:42 [emphasis added].

rights claims, as a check on what is otherwise the absolute and arbitrary power of legislatures.[69]

Mr. Chrétien's comments make clear that the final draft of section 1 was designed to bring the *Charter* into the postwar model of rights protection. The *Charter* would secure its guarantees against the ordinary political process by setting down the exclusive ("only") basis on which encroachments on rights were to be justified by the state. This justification burden was to be stringent, so that the enjoyment of fundamental rights would be the norm, and the limitation the exception. In result, the legislatures' prerogatives would be restricted. Canadian society would not only be democratic, but free and democratic. This transformation did not effect the transfer of the political power previously enjoyed by the political arms of the state to the courts. On the contrary, the judicial review function would itself be restricted by the terms of the limitation formula. These features would provide protection for rights unavailable under the statutory *Canadian Bill of Rights*. This unprecedented degree of protection was achieved by incorporating the features of the postwar model of rights-protection, that is, prescription by law, reasonableness and demonstrable justification in a free and democratic society.

Those who guided the final drafting of the *Charter*'s limitation formulation had as their goal the creation of an effective rights-protecting system on the postwar model, one that would elevate the most fundamental interests of members of a postwar democracy above the ordinary workings of elected governments. The pre-*Charter* legal system had failed to offer this protection. Federal-provincial negotiations had produced a draft text for constitutional amendment that augured no better. The desire to provide effective, but not absolute, protection for rights had necessitated going beyond the existing framework. The process had ultimately adapted the language and institutional framework of the postwar model for rights protection to the Canadian context.

The difference between the "Mack Truck" version and the postwar model incorporated into the final text of section 1 is striking. Recall that the limitation provisions in postwar instruments impose the burden on the state in respect to two inquiries, an initial consideration of legality, which, if satisfied, leads to a

[69] *Proceedings*, *supra* note 1 (1 December 1981) at 49:29 [emphasis added]. Mr. Chrétien's description of the changes as imposing limits on the permissible limits echoes the statement by John Humphrey that the parallel clause in the International Declaration of Human Rights "put some real limits on limitations of the exercise of freedom," *supra* note 24 at 147.

second inquiry into legitimacy. A measure could pass the "Mack Truck" version of limitation but fail *both* of these tests. It would fail the first test to the extent that it lacked the required form of law or the qualities of accessibility, intelligibility and predictability encompassed in the rule of law. And it would fail the substantive test to the extent that the state demonstrated nothing beyond the fact that members of a legislature, executive or the general public at some time and place had signaled, perhaps by inaction, their acceptance. The remedial objective of the final drafting of the *Charter* was to preclude the repetition of past rights infringements on this basis. To this end, the final drafting of the *Charter*'s limitation clause incorporated the features of the postwar model to replace the "Mack Truck" version's subordination of rights to "reasonable limits," "generally acceptable" in a parliamentary democracy, that is, the ordinary majoritarian function of elected legislatures. As the drafting history demonstrated, "generally acceptable" limits on rights were the problem, not the solution.

The penultimate and final texts of the limitation formula thus posed starkly contrasting alternatives for Canada's constitutional future. The "Mack Truck" clause offered the continuation of legislative supremacy, with the fundamental interests of Canadians resting on the good judgment and self-restraint of elected politicians and political parties. The alternative materialized in the final formulation for section 1, based on the reasoning and draft text offered by Professor Tarnopolsky and Mr. Fairweather: the adoption of the features of the postwar framework of rights and their legally prescribed, justified limits. The alternatives were clear and the choice made between them was decisive. The judicial role dictated by the final text embodied what experts considered the best framework for effective rights-protection, one which enjoyed widespread public support across the country and formed the basis of Canada's international obligations. The battle for and against the *Charter* produced a limitation formula that made rights stand prior to all but justified limitation (i) having the form and quality of law and (ii) demonstrated as justified in a rights-protecting polity.

As we shall see, however, victory in the battle for the text proved insufficient to effect the desired transformation. The aspiration was to replace a system in which rights fit into a framework of law with a system in which law functions within the framework of rights-protection.[70] Remarkably, the "Mack Truck" approach, which is an example of the former rather than the latter, has its champions in the Supreme Court of Canada. Before turning to that development,

[70] Daes, *supra* note 14.

it is necessary to consider the final adjustments to the *Charter* made in response to the final version of the limitation clause.

The *Charter,* momentarily removed from the crucible of federal-provincial politics by the public deliberations in the Joint Committee, reverted to negotiation among the first ministers. The politicians who opposed the *Charter* did not take up their old game of scaling down the rights and expanding the limitation formula. Instead, they left in place the guarantee-and-limitation clause as transformed in the Joint Committee. Perhaps they recognized that the revised text enjoyed profound legitimation by virtue of the unprecedented public participation in drafting its terms, its popular support, and the national television coverage of the Joint Committee proceedings.[71] As the price for acceptance of the *Charter* as redrafted in the Joint Committee, seven premiers exacted agreement to a fall-back mechanism in respect to the rights they considered most controversial, just in case the courts ventured too far beyond the politicians' tolerance for rights-protection.[72] The first ministers created the legislative override or "notwithstanding" mechanism and made it applicable to the rights

[71] The work of the Joint Committee transformed more than the guarantee-and-limitation clause. It also strengthened the protection against search and seizure and against discrimination on the basis of mental or physical disability, increased entitlements to minority language education, and strengthened the enforcement clause. See Romanow et al., *supra* note 43 at 250–57.

[72] Quebec, which had mounted the strongest battle against the *Charter*, found itself isolated. Its partners in the "gang of 8" group had ultimately found a palatable deal, which included the notwithstanding clause as well as their preferred amending formula (without Quebec's desired opt-out with compensation). This trade-off was totally unacceptable to the Quebec government. For commentary on Quebec's exclusion, see C. Morin, *Lendemains Piégés: du référendum à la "nuit des longs couteaux"* (Montréal: Boréal, 1988) and S. Clarkson & C. McCall, *Trudeau & Our Times* (Toronto: McClelland & Stewart, 1990) at 368ff. Quebec's opposition to the *Charter* did not reflect opposition to rights protection, to a formal bill of rights or to the type of institutional arrangements created. Quebec's *Charter of Human Rights and Freedoms* (Charte des droits et libertés de la personne), R.S.Q., c. C–12 (originally enacted in 1975 and amended in 1982 after the entrenchment by constitutional amendment of the *Canadian Charter of Rights and Freedoms*) has features and institutional arrangements similar to the Canadian *Charter*, although, as a provincial statute, it has different subject matter and application. Its array of protected rights is broader, including, for example, a right to rescue, rights to property, privacy, cultural rights, and economic and social rights. Its limitation clause, section 9.1, applicable to the fundamental freedoms and rights, added in 1982, is similar to section 1 of the Canadian *Charter* and shares the international human rights instruments as its model. Section 52 enables the National Assembly to expressly state that a later enacted law applies "despite the *Charter*."

they believed should not rest for final determination in the courts: fundamental freedoms, legal rights, and equality rights. This mechanism enabled a legislature, within its legislative jurisdiction, to suppress guarantees it specified for up to five years, the maximum length of electoral office, by explicit enactment.[73] Re-enactment of a lapsed overriding provision was permitted. Left to final judicial determination under the limitation provision, without recourse to the notwithstanding clause, were the democratic rights, the mobility rights, and the language rights. The politicians left these interests to the expertise of the independent judiciary, marking continuity with long established constitutional commitments to parliamentary democracy and federalism.

This new clause offered, in general form, the type of political flexibility that the opposing premiers had inserted in earlier drafts of the *Charter* as opt-in and opt-out mechanisms for specific rights. The model for these clauses resided in various statutory rights-protecting instruments. They were considered safety valves for exceptional circumstances. And in fact the prototypes had all but never been used.

The "notwithstanding clause" materialized as a response to the *Charter* text that emerged from the Special Joint Committee proceedings. The new limitation provision made limits on rights the exception, rather than the rule. Without the "notwithstanding clause," the *Charter* created three possible outcomes to a successful *Charter* challenge: (i) the enjoyment of the rights as guaranteed, (ii) legally prescribed limits upon those rights as justified by governments in courts of law according to the postwar model or (iii) constitutional amendment. The notwithstanding clause added a fourth possibility: Parliament or a legislature could re-assert its primacy over specified *Charter* rights, for the duration of its electoral mandate, for whatever reason, by expressly indicating this desired result in legislation. Judicial affirmation of generally acceptable or merely reasonable limits on rights was not part of the final package.

In the *Charter*'s early days, Canadians seemed to regard the rights-limits-override arrangements in the *Charter* as somewhat unseemly — a compromise of justice, rather than a just compromise. But the notwithstanding clause is better understood as a political innovation that in its own way responds to the countermajoritarian difficulty posed by judicial review of rights guarantees in a

[73] The Supreme Court of Canada's major decision on the override clause is *Ford* v. *A.G. Québec*, [1988] 2 S.C.R. 712, (1989) 54 D.L.R. (4th) 577. For analysis of the decision and its implications for the structure of rights protection under the *Charter*, see L.E. Weinrib, "Learning to Live with the Override" (1990) 35 McGill L.J. 541.

democracy. The legislature's capacity to have the last word, by invoking its political authority to expressly suppress rights for the duration of its mandate, shelters the courts from the political considerations or repercussions of the issue at hand. The courts need only attend to specification by law, objective reasonableness, and justification on a standard of necessity in a free and democratic society. If the government were to reject a ruling informed by such considerations, the legislature in question would be free to override the court's determination. But it would do so at the political cost of expressly legislating contrary to the *Charter*'s guarantees. In addition, the political cost secures only a temporary reprieve because of the sunset provision, which re-instates the *Charter*'s primacy after five years.[74]

What is the place of ordinary majoritarian politics in this framework? In terms of judicial determination of justified limitation, the product of the legislative process *per se* might not even meet the "prescribed by law" standard. A measure that would meet the promulgation standard, for example, would not necessarily meet the standards of intelligibility and prediction as to impact on the subject, key components of the rule of law strictures in the postwar model. Moreover, something other than the often chaotic and unfocused political process is necessary to satisfy the justification standard. The legislative override also stands apart from the ordinary political process. The suppression of *Charter* guarantees made possible under this provision requires an enactment that invokes the override power and specifies the *Charter* rights superceded. There can be considerable political cost attached to these features, especially when one adds the need to contend with the political implications of the sunset provision. Thus the *Charter*'s limitation and override provisions put the guaranteed rights and freedoms beyond the operation of ordinary politics and onto the constitutional stage. This is the real force of the guarantee.

The notwithstanding clause, as outrageous as it may appear, has some merit. It legitimates the new judicial role under the *Charter.* To infringe guaranteed rights, governments must either establish sufficient justification in terms set down by the section 1 limitation formula or satisfy the strictures, and pay the political costs, set down in section 33. Courts need not, indeed they must not, subordinate rights to ordinary politics because that would undermine the roles that the *Charter* stipulates for both courts and legislatures. Institutional propriety

[74] The override mechanism does not require a court ruling as a precondition. It appears that a convention is developing to wait for a definitive ruling by the Supreme Court of Canada before serious consideration of using the override. This dynamic may have an effect on the Supreme Court's deliberation.

is preserved: courts adjudicate on the basis of legal reasoning, precedent and coherence, and legislatures legislate according to their representative and deliberative functions.

The *Charter* thus creates a new system of interlocking institutional roles under the Constitution, combining the postwar model of rights protection in the courts with a temporary, renewable legislative suppression of some guarantees. Both institutions have full roles as constitutional actors. Each role reflects institutional strengths and traditional functions. There is no need for one institution to encroach upon, anticipate, forestall or defer to the other institution's authority, interests or preferences.[75] By so affirming the separation of powers, the *Charter*'s institutional structure should dispel, and must at least transform, concerns as to the countermajoritarian quality of the judicial protection of rights in Canada.

IV. THE *CHARTER* IN THE SUPREME COURT OF CANADA: RIGHTS TRAPPED IN THE BALANCE

A. Early interpretation: the postwar model

The *Charter*'s legal purpose was to insulate certain extraordinarily important interests from the ordinary political process. History, theory and comparative study combined to demonstrate that these interests stood at risk if protected only by the self-restraint of legislatures and their executive officers. The *Charter* redesigned the institutional roles in respect to these interests by giving them special status as guaranteed rights and freedoms under the supreme law of Canada. It fell to the courts of law, as guardians of the Constitution, to extrapolate the full implications of the transformation. The *Charter* text left no doubt as to the judicial review function: the rights required the application of legal expertise and the exercise of political independence for their fulfilment. Judges, at all levels of the judicial system, would adjudicate claims of infringement of the guarantees in cases that came forward in no particular order as to importance, subject matter or institutional question. The challenge was to decide these cases, one by one, and, at the same time, to integrate the new arrangements into the Constitution so as to establish a revitalized, coherent legal order.

[75] Weinrib, *supra* note 73.

The early *Charter* judgments demonstrate that the Supreme Court of Canada approached this challenge methodically. It recognized that its role was to act as the guardian for guaranteed rights and freedoms that constituted fundamental features of a free and democratic society. Interpretation was therefore to be purposive, to realize the purposes of the instrument as a whole as well as each guarantee.[76] Rights were the norm and limitations the exception. It followed that justification for any encroachment on the rights stood as an isolated issue distinct from the scope of the right and the fact of its breach. For the same reason, any encroachment upon the guarantees demanded justification by the state on a stringent basis. Justification was not the mere rehearsal of the political calculus, on the merits; nor was it review for jurisdiction, or reasonableness, or fairness as in administrative law. The distinctiveness of justification rested on the idea of continuity between the limitation formula and the specification of the guaranteed rights. Justified limits were thus merely limits, not negations, of the rights and freedoms. The ultimate standard for justifying limits on rights was located in the final words of section 1, "free and democratic society" — words read as referring to a rights-protecting polity, not simply to majoritarian institutions, process or product.[77]

This approach emerged incrementally, as members of the Court worked out the many implications of the *Charter* text, the institutional structure it put in place, and the arrangements required for adjudication of rights claims. A number of early cases gave strong indication that the Court read the limitation clause restrictively and normatively, in the postwar mode, even before *Oakes*, the case that offered the fullest articulation of the legal framework for limitation on rights.[78]

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[76] *Hunter* v. *Southam*, [1984] 2 S.C.R. 145, (1985) 11 D.L.R. (4th) 641; *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to S.C.R.]; the Court took its approach from *Minister of Home Affairs* v. *Fisher*, [1980] A.C. 319 at 329 where Lord Wilberforce delineated a generous and purposive interpretive methodology.

[77] For a full analysis of this initial rights-forwarding approach to limitation on rights, see L.E. Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 Supreme Court L. R. 469.

[78] *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.].

The Court's treatment of the "prescribed by law" stipulation illustrated this pattern. These words had been added to section 1 at the behest of Gordon Fairweather and Professor Tarnopolsky during the Joint Committee hearings, described earlier, to bring the limitation analysis in line with the postwar model. The Court, drawing on the application of the parallel stipulation in the European Convention, determined that this proviso operated as a precondition to more substantive claims. This precondition precluded substantive state justification if the impugned measure lacked basic legal foundation. It was unacceptable for courts of law to consider the state's claim of substantive legitimacy of an encroachment on a right or freedom that lacked the legal form that only the state's law-making process could provide. Examples of prescription by law included statute or regulation, authority arising by necessary implication from statue or regulation, or the application of a common law rule. Lacking the political legitimacy emanating from such form, the state's reasons for encroachment were of no constitutional relevance.[79] The proviso supported the project of rights protection by, in effect, offering an implicit guarantee that the policy-making arm of the state would comply with the rule of law. In the *Charter* era, government policy affecting rights and freedoms would be the work of the accountable and representative legislative process, including more fully articulated executive action, or the product of the incremental growth and application of common law principles. The "free and democratic society" that the *Charter* promised was thus not freedom in tension with or at the expense of democracy. It was freedom increased by virtue of the added accountability, under the rule of law, of those who exercise power in the name of the state.

The Court's initial treatment of substantive justification also fell into these patterns. In *Quebec* v. *Quebec Association of Protestant School Boards*, for example, the Court distinguished justified limits on rights from measures that denied the guaranteed rights by directly conflicting with them.[80] Such denials would fail the test of section 1 justification in a court of law. They were not beyond the reach of political action altogether, just beyond the reach of ordinary political action. Temporary denial was available (with the possibility of renewal) by invoking the legislative override power under section 33 and permanent denial was available by constitutional amendment.[81] Accordingly, the state could not justify an ordinary law that stood diametrically opposed to a *Charter* guarantee. In *Singh*, the members of the Court who decided the case on the basis of the *Charter*, rejected arguments appealing to reasonableness, expense and

[79] *R.* v. *Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655.
[80] [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321.
[81] *Ibid*.

administrative convenience, suggesting that only a demonstration of prohibitive cost might supersede *Charter* guarantees.[82] To do otherwise would render the *Charter*'s guarantees "illusory."[83] Similarly, in *Big M*, the Court unanimously rejected arguments invoking administrative convenience, expediency and tradition as sufficient justification for limiting rights.[84] Such considerations were the basis on which statutory provisions or executive action breached rights; they could not also constitute the basis for justifying such breaches.[85] And in the *Motor Vehicle Reference*, the Court entertained the possibility that the state might justify limitation on "the principles of fundamental justice," but only in emergency circumstances.[86]

The thread tying these cases together was the understanding that the judicial duty under the *Charter* was to subordinate ordinary political considerations to *Charter* guarantees. When it elevated fundamental rights to constitutional status, the *Charter* restricted political priorities and imposed costs on the state for deviation. These results were the point of the exercise. The distinctions made in these cases reflect similar distinctions as between the characterization of permitted and non-permitted limitation in the postwar systems of rights-protection. The patterns are similar because the aspiration is the same: to put the denominated rights and freedoms beyond the reach of the ordinary political process and its routine calculations of majoritarian preferences, tradition, cost and benefit.

In *Oakes*, the Supreme Court presented the full conceptual and doctrinal framework for the justification of limits on *Charter* rights. Because limits constituted exceptions to *Charter* guarantees, the state would bear the burden of justification. The challenge was to narrow these exceptions to preclude full negations of the guarantees. The dual function of section 1, which combines both the guarantee and the exclusive basis for limitation of all *Charter* rights, provided the key concept. It signified the unity of values that informed both the rights and their permissible limitation. This unity of values mandated that the courts inquire into limits on rights "in light of a commitment to uphold the rights

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82 *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 [hereinafter *Singh* cited to S.C.R.].

83 *Ibid*. at 218–19. Alan Borovoy had used the same term to criticize the "Mack Truck" clause, *supra* note 63.

84 *Big M*, *supra* note 76.

85 *Ibid*. at 352.

86 *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289.

and freedoms set out in the other sections of the *Charter*."[87] The final words, "in a free and democratic society," provided the conceptual underpinning:[88]

> Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society....
>
> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[89]

Here we have the clearest statement by the Court of the *Charter*'s purpose and effect as well as the postwar structure of rights-protection. Where the principles "essential" to both freedom and democracy are implicated, ordinary political preferences are held in check. Rights *and* their justified limits enjoy higher constitutional status than these ordinary preferences. The limitation clause is the vehicle of restraint in precluding full denial of the guarantees and imposing on the state the burden of justification, *i.e.*, the burden of establishing that its impugned policy stood above these ordinary preferences.

The Court then went on to formulate the doctrinal components of the "*Oakes* test." Each component worked to put this conceptual framework into operation. As a precondition to making arguments as to justification, the state was required to satisfy the legality principle, by demonstrating the impugned measure was "prescribed by law." As noted previously, the Court read this term as a separate basis for assessing the permissibility of a limit on a *Charter* guarantee, precluding limits derived from the arbitrary, informal exercise of executive power and unintelligible or inaccessible exercises of legislative power. Next, the state had to justify the legitimacy of the infringement on the rights in a process of reasoning that included three sequenced stages.

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87 *Oakes*, *supra* note 78 at 135–36.

88 *Ibid.* at 136.

89 *Ibid.*

First, justification required scrutiny of the relationship between the impugned measure and its objective.[90] In terms of content, the objective had to have elevated importance, as indicated by the Court's stipulation that admissible objectives were to be "pressing and substantial in a free and democratic society,"[91] *i.e.*, "of sufficient importance to warrant overriding a constitutionally protected right or freedom." The state was precluded from justifying measures whose objectives were "trivial or discordant with the principles integral to a free and democratic society" as a rights-forwarding polity.[92]

Having examined the objective in terms of its policy genesis and consistency with core constitutional values, the next step scrutinized the correlation between the objective and the means chosen for its attainment. This step made clear that a constitutionally adequate purpose was in itself insufficient. This examination for "proportionality" had several components. It started with state demonstration of a "rational connection" between the objective and the means employed, thus eliminating "arbitrary, unfair or irrational" measures.[93] It then moved to a more demanding analysis. The state would have to demonstrate, given the objective and its rationally connected means, that the impugned measure encroached on the right as little as possible in the light of other possible measures that might meet the previous tests. Lastly, encroachments of a more severe nature had to serve correspondingly more important objectives.[94]

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90 *Ibid.* The characterization of the objective was not simply a matter of assertion or courtroom strategy. It was not to have a "shifting purpose," *i.e.*, a purpose lacking the political legitimacy deriving from demonstrable connection to the enacting purpose and the deliberative legislative process. *Big M*, *supra* note 76. This idea also operates in administrative review: "It is only possible to assess the soundness of agency decisions if we know the reasons for them at the time they were made. Bland statements set at a high level of generality, or justifications which were clearly rationalized *ex post facto*, do not ensure proper accountability…" P.P. Craig, *Administrative Law*, 4th ed., (London: Sweet & Maxwell, 1999) at 607. See *Baker* v. *Canada*, [1999] 2 S.C.R. 847, para. 37–44.

91 *Oakes*, *supra* note 78 at 138–39

92 *Ibid.* at 105; and *Big M*, *supra* note 76 at 352.

93 *Oakes*, *supra* note 78 at 139.

94 *Ibid.* at 139–40. In applying the newly formulated *Oakes* test to the claim asserted, the Court ruled that a *Criminal Code* provision failed the "rational connection" component of the test in imposing a reverse onus on those proved to be in possession of a small quantity of narcotics to disprove trafficking. The Court reasoned that it was rational to presume that these people were *not* engaged in trafficking, *i.e.*, that they possessed the prohibited substance for personal use. The proportionality analysis was modified in *Dagenais* v. *C.B.C.*, [1994] 3 S.C.R. 835 at 889, to include consideration that the

The Court set down the doctrinal tests for judicial review under the *Charter* methodically, articulating its understanding of the new constitutional structure, describing the institutional roles dictated, including its own, and extrapolating the appropriate doctrinal formula. Despite the detail and clarity of this exposition, the analysis remained incomplete. The Court did not set out the full range of considerations that supported its analysis. The Court made no reference to the prolonged deliberations that had ultimately turned to the postwar model to immunize rights from the routine activity of temporarily elected governments. By reaching back to the Joint Committee proceedings in 1980–81, the Court could have demonstrated the close link between the remedial objectives of the *Charter*, its text, and the interpretive approach adopted.[95] Having made reference to the *Charter*'s genesis, the Court might then have made more extensive reference to the models for the institutional roles under the *Charter* as well as to the extensive literature on limits on rights within the postwar systems of rights protection. It had turned to this material when it set down the purposive

deleterious effects not outweigh the salutory effects.

95 One might object that reference back to the *Charter*'s political genesis would lead the Court into considerations akin to the discredited original intent doctrine in the United States. The parallel is not as strong as it might seem. First, the weakness of the historical intent approach in the United States does not taint all historical foundation for legal analysis, only that which is not guided by history so much as by the instrumental search for conservative social values that a sufficiently distanced history can provide. Given this ideological foundation, the history that is done is often defective as well as selective. Second, the subject matter here is the conceptual structure of a Constitution, the institutional roles dictated by that structure and the doctrinal tests that serve to put remedial objectives, concept and institutions into operation. It is not these elements that make the security of historical material attractive to those who subscribe to the doctrine of original intent. Third, original intent in its more objectionable modes uses history to supplement or supply text. In the Canadian context, the text is more forthcoming, especially when read in light of the models that animated its drafting. Fourth, the Canadian example rests on recent history. The very full and well-informed documentary trail includes a long series of drafts and transcripts of proceedings produced by established institutions within a mature system of government. This is not a search through personal diaries, letters, and speeches to find the subjective understandings of certain people involved, in one way or another, in the formulation of a text two hundred years ago when the enterprise of protecting constitutional rights was in its infancy, social ordering was based on religious precept, and political institutions were newly established in the aftermath of revolution. Fifth, the *Charter* benefitted by the fact that the idea of protecting rights was much more developed. There was a shared language and conceptual structure, as well as operative systems, available to inform the discussion of the alternative models of rights protection and institutional roles. There were also the examples of past Canadian failures on which to forge remedial initiatives.

approach to *Charter* interpretation and in its application of the "prescribed by law" stipulation but failed to do so for the justification analysis. Such reference material was not lacking. It could readily have made reference to the *Siracusa Principles on the Limitation Provisions in the International Covenant on Civil and Political Rights*. Here there is set out what Canadians would recognize as the precise terms of the Court's limitation analysis in *Oakes*, first in a list of general principles and then more specifically in respect to the terms "prescribed by law" and "in a democratic society."[96] Or it might have drawn explicitly from the case-law or academic commentary on the proportionality analysis in other rights-protecting systems. Lastly, the Court might have referred back to the reasoning of Canadian judges who had, before the *Charter*'s adoption, attempted to infuse judicial analysis with a commitment to a rights-protecting paradigm strikingly similar, *mutatis mutandis*, to the postwar model.[97]

Had the Court provided this broader basis for its initial interpretation of the *Charter*'s structure of rights-protection, institutional roles and doctrinal arrangements, the approach set out in *Oakes* might have proved more resilient. The similarity of the *Oakes* test, and the reasoning that supported its adoption, to the postwar model is so striking that one must acknowledge its strong influence on the Court. In failing to attribute the primary features of the *Charter* to this model, in terms of its political genesis as well as its conceptual underpinnings, the Court left its work unnecessarily vulnerable. The challenge materialized in the form of a competing vision of constitutional structure, institutional role and doctrinal strictures. This competing vision, far from enjoying roots in the *Charter*'s political genesis, its text or its chosen models, follows a different paradigm and resurrects the very possibilities that the final changes to the *Charter* text were put in place to supplant.

B. The Deferential Approach: Reassembling the Mack Truck

The Supreme Court of Canada's initial approach to the *Charter* was soon challenged by an alternative understanding of the structure of constitutional rights-protection, which included a decidedly deferential judicial role. This approach is informed by the idea that the constitutional order is secured by the

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96 *Siracusa Principles*, *supra* note 15.

97 As noted earlier, these judgments had attracted considerable criticism. They had come to stand for the undesirable state of the law for which entrenchment of rights-protection was the remedy. See L.E. Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 Can. Bar Rev. 699.

sovereignty of the legislature. The ordinary, political process reigns supreme. In elevating process in this way, this approach might appear to be lacking in substantive commitments. But that is not the case. The traditional values espoused need no special protection here because they enjoy adequate security in the workings of popularly elected, majoritarian institutions that control policy-making and thus the agenda for change. Constitutional amendment transforming the relative responsibilities of courts and legislatures is deeply unsettling to this world-view, all the more so if the changes involve substantive commitments, protected by judicial review, that are inconsistent with generally accepted mores. The role of the courts is restricted to interpretation and application, in service to the paramount, legislative, law-making function.

The fullest account of the primacy of majoritarian process is provided in Justice La Forest's dissenting reasons for judgment in *RJR-MacDonald Inc.* v. *Canada,* although there are many examples of its application in other cases. In this case, the Supreme Court, by a majority of five to four, struck down most of the federal prohibitions against tobacco advertising.[98] In this dissent, La Forest J., the architect of the deferential approach, sets out here the most explicit account of his views on the limitation clause, views that have had considerable influence on the Court's treatment of the limitation clause.

Justice La Forest begins by pointedly rejecting any prescribed *test* for limitation, preferring to see the *Oakes* paradigm as setting at most a "set of principles or guidelines" that should not act as a substitute for section 1 itself.[99] This reference is not, as one might expect, to the limitation formula expressly set down in section 1, but to the idea "implicit in its wording" that the courts must "strike a delicate balance between individual rights and community needs."[100]

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98 (1995), 127 D.L.R. (4th) 1 (S.C.C.) [hereinafter *RJR*]. La Forest J.'s discussion of limitation is to be found at pages 44–47. Notable applications of this approach include reasons for judgment by La Forest J. in *Edwards Books and Art Ltd.* v. *The Queen*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1; dissent by McIntyre J., La Forest J. concurring in *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385; reasons for judgment by Sopinka J. in *Rodriguez* v. *British Columbia*, [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342; reasons for judgment by La Forest J. and Sopinka J. in *Egan* v. *Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [hereinafter *Egan* cited to S.C.R.]; *Vriend* v. *Alberta* (1996), 132 D.L.R. (4th) 595 (Alta. C.A.) per McClung J.A. Generally, this approach has diluted the stringency of the doctrinal regime set out in *Oakes*.

99 *RJR, ibid.* at 46.

100 *RJR, ibid.* In an extra-judicial discussion of the *Charter*'s limitation clause, La Forest J. makes clear that he regards section 1, which makes no reference to balancing, as an "express provision for the balancing of interests." See "The Balancing of Interests under

This balancing exercise requires analysis that is non-abstract, non-formal, contextual and flexible. The exercise remains normative, nonetheless, it is claimed, because it includes consideration both of the nature of the right and the values invoked by the state to justify the limit. The dual function embodied in section 1 has the effect of "activating *Charter* rights and permitting such reasonable limits as a free and democratic society may have occasion to place upon them."[101] Quoting from one of his earlier judgements, La Forest J. described this balancing function in these words:[102]

> In the performance of the balancing task under s.1 ... [w]hile the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.

Justice La Forest's particular concern is with onus and burden of proof under the *Oakes* test as originally formulated. Legislated social policy initiatives might fail the stringent section 1 limitation requirements due to the difficulty, if not the impossibility, of producing "definitive social science evidence respecting the

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the *Charter"* (1992) 2 N.J.C.L. 133 at 134 [hereinafter "The Balancing of Interests"]. The distinction between what is express and what is implicit makes sense in terms of his reference, at the beginning of the article, to Roscoe Pound who understood law as a balancing of interests between competing groups in the political marketplace. La Forest J. writes, at 135:

> In balancing interests, whether on a constitutional or sub-constitutional level, one must put the interests on the same plane. Balancing individual interests against social interests is not really possible. One must translate one into the other, and in most cases, since we are engaged in social engineering, it is best to deal with them as social interests. But in the *Charter* we have adopted a rights approach, which clearly focuses our thinking on the individual's (or group's) interest.

Pound advocated "a pragmatic, … sociological legal science," *i.e.*, "adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument." (1908) Col. L. Rev. 605 at 609–10. Writing during the *Lochner* era, he stressed results rather than abstract legal content, law as an instrument of social reform, and legal precepts used as "guides to results that are socially just," rather than as "inflexible molds." N.E.H. Hull, "Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism" (1989) Duke L.J. 1302 at 1310.

101 *RJR, supra* note 98 at 47.

102 *Ibid.* at 47–48, quoting from *United States of America* v. *Cotroni* (1989), 48 C.C.C. (3d) 193 at 218–19, [1989] 1 S.C.R. 1469.

root causes of a pressing area of social concern."[103] Requiring governments to meet a standard of "scientific accuracy" would paralyze government policy-making in the socio-economic sphere, amounting to "an unjustifiable limit on legislative power" that was not "consonant with reality."[104] Rights guarantees, therefore, encroach on the legislature's authority to act in the real world where the relationship between cause and effect is murky or at least beyond demonstration.

Problems of proof pale beside the larger question of institutional role, however. The centrality of the legitimacy question is evident in a long passage that La Forest J. quotes from an early *Charter* commercial speech case. This extract describes the legislative process as primarily an exercise in mediation between vying political claimants and for that reason not amenable to judicial review based on the proportionality paradigm set out in *Oakes*:[105]

> ... in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how the balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. ... When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.
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> ...
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> In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the *Charter* [the legal rights], the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for

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[103] *Ibid.* at 50.

[104] *Ibid.*

[105] *Irwin Toy* v. *Quebec (A.G.)* (1989), 58 D.L.R. (4th) 577 at 625–26, as quoted in *RJR*, *supra* note 98 at 51. This passage occurs in the reasons for judgment of Dickson C.J.C., Lamer and Wilson JJ. La Forest J. did not sit on this case. It is difficult to account for the endorsement of this approach by the judges who did, given their (more or less) consistent adherence to the classic *Oakes* test.

> achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions.

This passage makes clear that stringent judicial review of legislation is appropriate (if at all) only in the criminal context, based on established judicial expertise in protecting liberty and in the interpretation of legislation in the context of a criminal prosecution. Such review power is acceptable because the legislature acts here on behalf of the whole community. Since everyone benefits from the protections of the criminal law and stands equally exposed to the interference with liberty authorized, "both the benefits and the burdens (the rights and duties flowing from the criminal law) are pervasive."[106] Courts can act for the common or shared good.

Beyond the criminal context, however, or at least where there are no "competing claims," La Forest J. rejects a strong judicial review function because the legislature confers benefits on some and burdens on others. The function of legislators in their representative capacity is to assess the social science evidence relevant to different policy choices and to mediate between competing social interests.[107] Here the legislature is not engaged in an analysis

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[106] The quoted passage, illuminates La Forest J.'s basic distinction. It is from his public lecture on section 1 of the *Charter*, delivered as the Goodman Lecture of 1992 at the University of Toronto Faculty of Law. See "The Balancing of Interests" *supra* note 100 at 138.

[107] La Forest J.'s resistance to judicial review of *Charter* rights in the socio-economic context may derive from reluctance to acknowledge the public interest model of litigation wherein adjudication legitimately enforces basic constitutional norms. Support for this conjecture lies in La Forest J.'s contrast between cases that are "polycentric" and for that reason candidates for deference (the word used to describe cases such as *Irwin Toy*, *supra* note 105 and *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545. See La Forest J., "Balancing of Interests," *supra* note 100 at 147 and the class of cases appropriate for strict review under the original *Oakes* framework, those in which the accused raises liberty issues as the "singular antagonist" against the state.) See D. Gibson & S. Gibson, "Enforcement of the *Canadian Charter of Rights and Freedoms* (Section 24)" in G.-A. Beaudoin & E. Ratushny, *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) at 783–94 for the contrast between the private and public models of adjudication and the reason for an expansion of rules of standing given in *Thorson* v. *Canada*, [1975] 1 S.C.R. 138 at 163, per Laskin C.J.C.: "It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament." For the classic American discussion, see A. Chayes, "The Role of the Judge in Public Law Litigation" (1975–6) 89 Harv. L. Rev. 1281; D. Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective" (1992) 55 M.L.R.

of the discernible and pervasive rights and wrongs of traditional criminal justice. It is balancing between and among a myriad of claims for action and inaction. The task is to award selective benefits out of scarce resources and to protect the less fortunate in a multitude of contexts. The legislature performs this function in its representative capacity, making policy without any clear guidelines in terms of social science data or expertise. When claims come to the courts challenging legislative policy forged in this socio-economic context, the problems are polycentric. The courts have no established expertise to resolve such disputes. Governments cannot meet the onus in terms of evidence, social science data or argument for the means-end or minimal impairment tests as set out in *Oakes*.[108]

Justice La Forest thus sees the *Charter* as a bad fit for the reality of Canadian society, in which many "groups" vie for government largesse, including those who are in special need. He does not offer a definition of vulnerability. Nor does he investigate whether claims emanate from rights-holders asserting *Charter* guarantees. In his description of the political activity of the vying "groups," *Charter* entitlements have no distinctive status. Similarly, the word "group" makes no allowance for the way in which some *Charter* guarantees protect interests of an organic community. For example, the entitlements to freedom of religion and non-discrimination based on religion have regard for people whose religious beliefs and practices bring them together to share a distinctive, shared way of life. The language rights protect individuals who also share a culture and tradition. In addition, the *Charter* offers protection to persons who possess particular characteristics, often unchosen and unchangeable, but who may or may not function in or depend upon an actual communal structure at all, or at least outside of the political arena. These protections work against the tendency of legislatures to ignore or impose disadvantage upon persons who are merely different from the mainstream or, worse still, undervalued by it for one reason

44 at 55, sheds light on the distinction: "interest group litigation in general is not synonymous with public interest litigation. Interest group litigation is typically a medium for arbitrating between competing claims in a pluralist system, a legal extension of the politics of faction. Public interest litigators, by contrast, try to give effect to an alleged common interest of the whole community. The emphasis is communitarian rather than pluralist. If the public interest were but an aggregation of individual interests, public interest litigation could be seen as a form of maxi-private-interest litigation. However, the range of interests which are encompassed ... may be very wide, including those of foreigners, future generations and fetuses..."

[108] La Forest J. considers the Court "unable to engage in assessing finicky details" or devising or approving the "single choice open to the Legislature." See "The Balancing of Interests," *supra* note 100 at 146.

or another. Where the *Charter* would give priority to particular claims, some individual and some shared, and to particular groups, La Forest J. sees fungible winners and losers in the political marketplace.

Justice La Forest wants to ensure that the *Charter* does not undermine legislative efforts to protect the disadvantaged. For this reason, he drains the rights claims of their constitutional distinctiveness. But concern to preserve efforts at social reform or economic redistribution does not compel this retreat from the *Charter*. It is possible to preserve the primacy of the *Charter* without imposing or exacerbating disadvantage. To this end, the adjudicator has to take the onus and burdens seriously. It would be necessary to inquire carefully into the record to ascertain the nature of the disadvantage implicated. The next step would be to consider the specific disadvantage claimed and the legislative intervention in its name. Then one would have to unwind the complex intersectionality between disadvantage and denial of constitutional rights. Sometimes they are mutually independent; at other times the long-term infringement of the interests that the *Charter* now protects has created or contributed to some degree, perhaps even to a pervasive degree, to disadvantage. In the rare case, protection of one *Charter* right may impact negatively on another. In that situation, the analysis would work to preserve to the extent possible the core entitlements engaged. Finally, the analysis of the right, the limit and the remedy should work together to preserve both the benefit of the legislative initiative and the *Charter* entitlement.[109] The *Charter* provides flexible remedial tools in section 24 to this end.[110] Justice La Forest seems to prefer wholesale, preemptive, judicial deference.

For La Forest J., *Charter* rights outside the criminal context possess no distinctive normative character. He affirms that "the rights guaranteed by the *Charter* must be given priority in the equation," a metaphor that does more to obscure than to clarify his ideas. Yet he can offer no such priority because the

[109] For an example of the approach that treats constitutional rights and rights-groups as fungible with the beneficiaries of legislative support and socio-economic interests, see *Edwards Books, supra* note 98. The dissent by Wilson J. retains the primacy of the rights even in limitation: respect for the communal aspect of rights guarantees, the distinctiveness of rights, and the need to preserve legislative protections for the economically disadvantaged.

[110] Section 24 provides for an expansive view of remedial authority, see *Schacter* v. *Canada*, [1992] 2 S.C.R. 679. For rulings based on this expansive reading, see the dissent by Lamer C.J.C. in *Rodriguez*, *supra* note 98, and *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493.

benefits and burdens that attend these rights, in his view, do not accrue to all, but advantage some and disadvantage others. Legislators must therefore simply decide which interests have a superior claim to the state's limited resources. Only the elected representatives of the people have the competence to consider the social science evidence supporting the competing claims and to mediate between the competing social interests. Thus, from the legislative standpoint, rights refer only to fungible interests that compete for the legislature's favour at the moment; and from the adjudicative standpoint, courts ought to recognize that the choice between interests properly belongs to the legislature. Rights enjoy no special normative status in this meshing of La Forest J.'s conception of politics with his conception of institutional competence.

Far from granting rights a priority in the equation, La Forest J.'s argument assimilates rights to other values in the legislative calculus and, having denied their distinctiveness, dismisses any special role for the courts in their protection. His scales accord no special weight to the guaranteed rights. The unsurprising consequence is that courts, in deciding whether to allow an infringement of a guaranteed right in the non-criminal context accord the legislation "a high degree of deference."[111]

Outside the criminal context, where there is a community of common interests, La Forest J.'s theory opts for the pre-*Charter* arrangements. As under the statutory *Canadian Bill of Rights*, the guaranteed rights stand subject to the vagaries of the political process. His approach abandons the primary purpose that animated the drafting of the *Charter*'s guarantee-and-limitation clause: to secure rights guaranteed under the *Charter* a place beyond the reach of ordinary politics.

Justice La Forest's approach rests neither on text nor on purposive interpretation. The rights and freedoms that section 1 expressly guarantees dissolve into the mix of competing interests from which the legislature sets priorities and preferences. The *Charter* text permits only those limits as are "prescribed by law" and can be "demonstrably justified in a free and democratic society." Justice La Forest characterizes the limits as those that "a free and democratic society may have occasion to place" on the rights. This dilution of the actual language of section 1 is based on an idea "implicit in the wording" which turns out to be as inconsistent with the section's text as with its remedial purpose. Justice La Forest's approach to the section 1 limitation coincides with the deferential "Mack Truck" version of section 1 (" limits ... acceptable in a free

[111] *RJR*, *supra* note 98 at 53.

and democratic society with a parliamentary system of government"), a formula decisively repudiated at the end of the process that created the *Charter* text. By equating the final words of section 1, "free and democratic society," with what legislatures promote in their routine function, he rejects — or ignores — the core idea of the postwar model that expressly triumphed during the drafting period. That idea is that both rights and their limits provide the foundation of the rights-protecting polity, supplanting the supremacy of the legislature as mediator between vying constituencies.

Nor does the deferential approach to section 1 make sense of other constitutional provisions. The application to the *Charter* of the supremacy clause, section 52 of the *Constitution Act, 1982*, presupposes at least the legal possibility that rights as guaranteed by the *Charter* have the status of higher law. Justice La Forest's insistence on deference to the legislature effectively undercuts this status. Nor does his insistence on deference illuminate the relationship between section 1 limitation and the legislative override in section 33. Why would Canadian legislatures have to satisfy the special conditions laid down in section 33 to override some *Charter* rights and freedoms for the length of their mandate, if the mere passing of a socio-economic measure through the legislative process suffices for courts to subordinate rights to legislative limits? Moreover, if the primary divide lies between criminal and non-criminal contexts, one would expect some suggestion of that distinction within the differentiation between the rights for which the override is available and those for which it is not. Here again the text contradicts La Forest J.'s allocation of institutional competencies. In his view, judicial expertise and experience justify assigning to courts the oversight of rights in the criminal context, but the text of section 33, by allowing the override to apply to the legal rights, leaves the last word on such questions to the Parliament.

Justice La Forest postulates a clean distinction between rights questions that require consideration of competing socio-economic interests and those that protect the individual against the state in the criminal process. This division is neither authorized by the *Charter* text nor feasible in practice. As the record of *Charter* litigation shows, cases implicating the liberty of the accused and the nature of criminal liability readily impinge on other *Charter* rights, for example, religious freedom, freedom of expression, security of the person, gender equality and disability equality.[112] And perhaps the most deferential reformulation of the

[112] Prominent cases include *R.* v. *Keegstra*, [1990] 3 S.C R. 697, 117 N.R. 1; *Big M*, *supra* note 76; *Morgentaler*, *supra* note 98; *Rodriguez*, *supra* note 98; *R.* v. *Seaboyer and Gayme* (1991), 7 C.R. (4th) 117, 66 C.C.C. (3d) 321 (S.C.C.); *R.* v. *Daviault*, [1994]

Oakes test occurred in the context of a garden variety criminal case.[113] It makes little sense to have the vigour of the judicial review of limits on such rights depend on the context in which they are litigated.[114]

The distinction also does not fit well with the *Charter*'s genesis. The *Charter* was supposed to remedy the inadequacies of the judicial role on rights questions that arose in the common law, as a federalism question, or under the statutory *Canadian Bill of Rights*. Justice La Forest's deferential model of *Charter*

3 S.C.R. 63, 33 C.R. (4th) 165; *Dagenais, supra* note 94 and *R.* v. *Hess and Nguyen*, [1990] 2 S.C.R. 906, 79 C.R. (3d) 332. Another indication of this phenomenon is the overlap, rare before the *Charter*, in Canadian law school courses and textbooks of constitutional law and criminal law.

113 *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303, (1991) 2 C.R. (4th) 1 at 31. (Supreme Court upholding *Criminal Code* presumption of sanity that imposed on accused the requirement of proving insanity on a balance of probabilities.) The minimal impairment test is reduced to this: "whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively." This test of the "reasonable legislature" marks a clear retreat to the "Mack Truck" formula for "generally acceptable" limits on rights. D. Stuart, in *Charter Justice in Canadian Criminal Law*, 2d ed. (Toronto: Carswell, 1996) at 10 and 18, describes the Court's s.1 limitation analysis in criminal cases as "bewilderingly inconsistent" and of "stunning inconsistency." He criticizes the *Chaulk* limitation analysis at 342–43.

114 The basic concern seems to be that *Charter* cases will not reach the correct resolution: strict judicial review will result in the invalidation of beneficial legislation, particularly legislation to protect the vulnerable, because social science that satisfied the legislature won't pass the *Oakes* test. La Forest J. has a number of concerns. He understands that section 1 demands demonstration of direct "causal" relationships, requiring the state to bring forward single, definitive empirical proofs that one phenomenon in society produces or prevents another or that its chosen policy presents the absolutely least intrusion on the guaranteed right or freedom. The proportionality analysis does not, however, impose such rigid standards. See J. Rawls, *Political Liberalism*, *supra* note 17 at 358: the minimal impairment test targets policies "when considerably less restrictive and equally effective alternatives are both known and available." The original *Oakes* test did not demand exact empirical demonstration. Indeed, it conceded that in some instances there would be no empirical demonstration but rather the work of common sense and logic. The majority in *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1 at 40, engages in social science and historical analysis with no great scientific exactitude within an analysis dominated by normative values. *Oakes, supra* note 78 at 138. See L. E. Weinrib, "Hate Promotion in a Free and Democratic Society: *R.* v. *Keegstra*" (1991) 36 McGill L.J. 1416. The concern of the normative approach was not to nail down empirical exactitude, but to assure state compliance with *Charter* strictures establishing either the primacy of the rights and freedoms or the more general norm of a "free and democratic society."

analysis reverts to the pattern of those discredited cases.[115] In any event, successive Liberal governments during the 1970s could have put a criminal law *Charter* into effect through the exclusive and paramount federal jurisdiction over the criminal law. If that was all that adoption of the *Charter* signifies, then Canada's eleven governments spent over a decade coming to an agreement on pervasive constitutional change when agreement was unnecessary. Provincial opposition to the *Charter*, and the final insistence upon the override clause, was misguided. Despite appearances and general understanding, the *Charter* had minimal impact on provincial jurisdiction.[116]

Justice La Forest's approach dispenses with the most salient aspects of the postwar model of rights protection. He does not recognize purposive interpretation, the special normative status of rights, the reference to democracy as a rights-protecting polity rather than to majoritarian mechanisms, and the idea that justification preserves the normative values of the rights within the limitation analysis. In his alternate *Charter* universe, there is no call to test government policy against substantive constitutional norms. Groups and individuals vie for state action or inaction free of the burden or advantage of *Charter* guarantees to their policy goals. Courts possess no expertise in respect to the value of individual dignity and equality that informs all rights. The allocation of resources is untied to constitutional priorities. The legislative process, not *Charter* conformity, vindicates state policy.[117]

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[115] The Supreme Court had determined, under the *Canadian Bill of Rights*, that the judiciary could legitimately review discrimination in the criminal law but not in the context of regulation or social benefits. Thus it ruled, in *R.* v. *Drybones*, [1970] S.C.R. 282, that criminal sanctions could not vary on the basis of racial characteristics. Accordingly, an Aboriginal person could not be made liable to a criminal sanction for conduct where a non-Aboriginal person would not. But when the state imposed racially-based disadvantage in the non-criminal regulatory context, the Court found no infringement of equality before the law: *Canada* v. *Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 and *Canada (A. G.)* v. *Canard*, [1976] 1 S.C.R. 170, 30 D.L.R. (3d) 9. Similarly, when the state withheld benefits based on pregnancy and childbirth, in *Bliss* v. *Canada*, [1979] 1 S.C.R. 183, the Court also rejected the claim to breach of equality as impermissibly egalitarian.

[116] This conclusion is inconsistent with the positions put forward by the "gang of 8" in the *Patriation Reference*, much of which the S.C.C. accepted. See *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753. See also *Re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793.

[117] La Forest J.'s understanding of s. 1 limitation inverts the *Charter*'s structure. Section 1 establishes the guarantees as the presumptive norm, subject only to the type of limits prescribed and justified. For La Forest J., the norm is plenary legislative authority over

One feature of the postwar instruments finds favour, however. While ignoring the features of the international rights-protecting arrangements that were specifically identified as models for the *Charter* in its final formulation, La Forest J. takes up a feature that played no part in those deliberations: the margin of appreciation.[118] As noted earlier, that doctrine operates within the international rights-protecting systems to preserve respect for member states having different histories and cultures. The doctrine, however, is not a *carte blanche*; it operates within the confines of judicial review and the primacy of the rights guarantees. Moreover, the flexibility introduced by the margin of appreciation does not go so far as to perpetuate resistance to the transition into the rights-protecting regime.[119]

The applicability of margin of appreciation analysis to Canada's *Charter* is somewhat strained. The doctrine is based on the political and cultural diversification of sovereign nation states that enter into an international rights-protecting system on a voluntary basis with full exit rights. Canada, in contrast,

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issues labelled socio-economic, a label that displaces the right claim by virtue of the context in which it arises. Accordingly, the Court's original approach, when carried through to its exacting empirical conclusions, imposes "unjustified limits on legislative power." He negates the whole project of creating a *Charter* for Canada in which rights would stand prior to ordinary legislative process: "Interpreted literally, mechanically, without nuance, the *Oakes* test and the burden of proof which it imposes on the state would most often negate its ability to legislate." (para. 67) To reach this conclusion he exaggerates the level of scientific accuracy demanded by the *Oakes* test, in effect reading it literally, mechanically and without nuance. For a similar inversion of the *Charter*'s structure of rights and limitation, see Sopinka J., in *Egan*, *supra* note 98, at 576: "I am not prepared to say that by its inaction to date the government has disentitled itself to rely on section 1 of the *Charter*." Here the idea seems to be that the government has an entitlement to judicial validation of its legislation, despite the proven infringement on the guaranteed right because it might act to remove that infringement in the future, in whole or in part. This approach has more common ground with pre-*Charter*, plenary legislative authority than constitutional rights-protection. It marks the nadir of s. 1 analysis.

118 In *RJR*, *supra* note 98 at 56–57, La Forest J. refers with approval to the margin of appreciation, citing *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927 at 990 for the proposition that the courts should not impose strict burdens on legislative policy-making when social science evidence is not determinative. See also *R.* v. *Lyons*, [1987] 2 S.C.R. 309 at 349.

119 Jacobs & White, *supra* note 15 at 37–38. For the view that the margin of appreciation can introduce an excessively subjective, reasonableness-based test that undermines protection of rights and freedoms, see O. Gross, "Once More unto the Breach" (1998) 23 Yale J. Int'l L. 437 at 496–98.

has always had a national criminal code, a widely shared system of common law with the exception of Quebec's *Civil Code*, and a unified court system with the Supreme Court of Canada at its apex for questions of provincial and federal law alike. In addition, as noted earlier, one objective of the *Charter* project was the creation of a pan-Canadian system of rights protection to inculcate an idea of shared citizenship. All these factors militate against adoption of a margin of appreciation into *Charter* adjudication. In any event, the function that the margin of appreciation doctrine plays in the international systems of rights-protection is provided for expressly in the *Charter* by the legislative override capacity under section 33. If the self-standing political units cannot subscribe to the rights guarantee and narrowly drawn limits, then the legislative capacity to suppress certain rights for the duration of an electoral mandate shifts the responsibility to the legislature to effect an express suppression of stipulated rights.[120]

Justice La Forest is of the view that it is permissible to limit rights in deference to the legislature because he regards representative government as the only way to mediate among competing social interests. This diminishing of *Charter* rights for the sake of legislative sovereignty is problematic for several reasons.

First, the *Charter* was designed to discipline the exercise of all state power to the framework of rights. As finally formulated and initially interpreted, it committed those who exercise public power in Canada to the values essential to liberal democracy in a pluralist, diverse, and often divided, state. The postwar model embodied in the text and its early interpretation translated that commitment into an institutional framework in which courts carry out a legal function, overseeing conformity to constitutional guarantees.

Second, La Forest J. fails to apply his own argument about the function of legislation to the creation of the *Charter*. That document was itself the product of a prolonged and intense political process, which manifested clear intention to commit the legal system to its terms. Even on La Forest J.'s own account, the *Charter* itself is a mediation between competing social interests in which the final result supports those who have been vulnerable to political neglect and prejudice in the past, and is therefore entitled to judicial deference. Justice La

[120] The override is also the correct mechanism for the "step by step" approach to limits on rights favoured by the Court in *McKinney*, *supra* note 107 and *Egan*, *supra* note 98. If the *Charter* strictures are deemed intolerable for a political community, then its recourse is not in the courts but to its legislature, where the political responsibility for divergence from those strictures is triggered by invocation of the override.

Forest's argument leads to the paradox that the product of ordinary politics is entitled to judicial deference but the product of decades of constitutional politics is not.

Third, his approach fails to recognize the remarkably participatory nature of the politics that produced the features of the *Charter* that he diminishes. By any standard of representational politics, the process of constitutional reform that produced the *Charter* was exemplary.[121] Repeated public debate by the first ministers and others on the respective merits of judicial review and legislative sovereignty was followed by televised parliamentary hearings in which those traditionally least valued by the political system had the opportunity to influence the terms of their constitutional entitlements. Ignoring the remarkably participatory genesis of the *Charter*, La Forest J. fails to acknowledge even the political merits of the exercise that crystallized the remedial purposes of Canada's constitutional revolution.

Fourth, his resistance to the *Charter* in the name of allegiance to the representative responsibility of ordinary politics ignores the fact that one of the purposes of a rights-protecting instrument is to reconfigure the political process to improve representation and accountability. Elected and representative law-makers must deliberate upon the priority of our common rights and freedoms — the guarantees prerequisite to a free and democratic society — when they exercise, or authorize the exercise of, the power we repose in them to regulate our lives. In other words, the *Charter* requires that elected officials take not only our votes, but also our rights, into their deliberations. Moreover, in the postwar model, departures from the guarantees require reasoned, normative justification by governments on a case-by-case basis in courts of law. Government lawyers must prepare to defend the exercise of state power when asked the following

[121] One might object on the grounds that the provincial government and National Assembly of Quebec objected to the entrenchment to the *Charter* and that this reflects a lack of participation or consent that should precipitate deference. The argument would not be very strong, even if it rested on the historical record. But it does not. The separatist government of Quebec fully participated in the *Charter* process up to the last minute, many participants believed with the purpose of undermining it. It secured most of the features of its preferred amending provisions, which did not contain a Quebec veto, in the trade-off for the *Charter*. Its political allies secured the override as well. The separatist government worked for rejection of a *Charter of Rights*, while committed to rights in its own governance. It played a dangerous game, which it lost. This background does not register a mark against the *Charter*. Moreover, the newly re-elected federal Liberals who had carried the *Charter* project for over a decade enjoyed an overwhelming mandate from Quebec voters.

questions: did the exercise of power have a foundation in law? was the legal rule intelligible, accessible and predictable to those to whom it applied? what was the actual purpose of the impugned exercise of power, *i.e.*, the purpose for which the impugned act or action passed through the law-making process? was that purpose of sufficient urgency and public importance to warrant an encroachment on constitutional rights? was it rational to pursue the purpose in the chosen way? was there a way to achieve the purpose without encroaching, or by encroaching less, on the right? The prospect that the government must offer evidence and reasoned argument on such questions before independent and impartial judges keeps the political process faithful to all its constituents. Whereas La Forest J. would see us all as winners or losers in the political game, the *Charter* would have us all sustain our rights or their justified limitation.

Justice La Forest thus resists the idea that rights guarantees impose duties and restrictions upon every exercise of state power, with judicial review to ensure state compliance. He objects to a *Charter* that would prevent our political representatives, acting within the dynamics of the ordinary political process, from inadvertently, ignorantly or intentionally sacrificing the rights and freedoms intrinsic to the modern liberal state to other preferences and priorities. He prefers judicial deference to the legislature, which leaves these rights and freedoms hostage to the ordinary political process. Preservation of pre-*Charter* judicial deference to ordinary politics cannot provide the conceptual foundation for the understanding of the *Charter*'s institutional roles. As former Justice Wilson has written,[122]

> The doubt about the legitimacy of judicial review persists and finds expression by different members of the Court in different ways — in terms of a distinction made between law and policy, law being for the courts and policy for governments, or in terms of courts not getting into the wisdom as opposed to the *vires* of the legislation (the pre-*Charter* Laskin concern), or perhaps the most straightforward rationale, namely the concept of the courts owing deference to the legislature as the elected representatives of the people. I must confess that to me judicial review and deference to the legislature are an incompatible pair and I fear that our attempt to combine them has simply resulted in a muddying of the jurisprudential waters!

[122] Hon. B. Wilson, "Constitutional Advocacy"(1992) Ottawa L. Rev. 265 at 270.

V. CONSTITUTIONAL MODELS[123]

Coinciding with the advent of the *Charter* was a confluence of factors that augured well for the fulfilment of its remedial objectives. The inadequacy of the previous arrangements was plain to view and widely acknowledged. The *Charter* project commanded popular acceptance and even enthusiasm across the country. The drafting process had left behind the compromises of the political actors, to produce an innovative scheme of interlocking responsibilities with the strengths and weaknesses of the continuing Canadian institutions in mind. Building on the postwar model, the *Charter* text envisaged a comparatively narrow and principled mode of judicial review. It bolstered the legitimacy of the judicial function by imposing constitutional roles on both the legislature and executive. This complex institutional structure was designed to put the *Charter* beyond the standard realist critiques. The rich and varied jurisprudence of the postwar model was available for interpretive guidance. And a strong Supreme Court was ready to elaborate the legal doctrines that would realize the *Charter*'s remedial purposes after numerous other attempts to protect rights had proved inadequate.

From the beginning it was obvious that the fate of the *Charter* depended on the interpretation of the express limitation formula common to modern constitutional bills of rights. Without a normatively directed limitation clause, *i.e.*, one that differentiated between normative, principled limitations and non-normative, power-based abrogation of rights, the *Charter* would betray the very rights and freedoms it was supposed to protect. This is why the government withdrew the "Mack Truck" version when public interest groups and experts in rights-protection pointed out that it would perpetuate the discredited *status quo*. The *Charter* text thus came to embody the postwar model, giving the courts the task of forwarding rights-based principles even when justifying limitation on guaranteed rights.

The revised deferential understanding of the limitation provision preferred by La Forest J. poses the danger of moving the *Charter* far from its text, original design and chosen models. In the face of established modes of legal interpretation, the "Mack Truck" version seems to have miraculously survived its public denunciation and excision from the *Charter* text. This erosion of the *Charter*'s limitation formula has not marked a stable stopping point. Interpretation that turns away from text, remedial purposes and stipulated

[123] See L.E. Weinrib, "Constitutional Models, Constitutional Comparativism" in M. Tushnet & V. Jackson, eds., Defining the Field of Comparative Constitutional Law (Westport, Conn.: Praeger, 2002).

institutional roles has no stopping point. Sankey L.C., in the *Edwards* case, suggested that we look on our written constitutional instrument as a "living tree capable of growth and expansion within its natural limits," not soft clay in which a judge may imprint and preserve his personal political philosophy.[124] As one might expect, the final legacy of La Forest J.'s theory of the *Charter* is not simply the expansion of the grounds of limiting rights to create a very deferential judicial role, but the parallel narrowing of the scope and content of the guaranteed rights as well.[125]

This deferential approach has little regard for the constitutional history that produced the *Charter*. Those who opposed entrenchment ultimately accepted a *Charter* with a rich array of rights and a narrow, principled limitation formula. In return, they secured a heavily qualified legislative override power, which by their design, made departure from *Charter* norms a potentially costly political option given the *Charter*'s popularity.[126] The resurrected deferential limitation formula would give the "gang of 8" provinces, which opposed the *Charter*, the victory they failed to secure either in public debate or in the federal-provincial battlefield. When it interprets the *Charter*'s guarantee-and-limitation formula as giving primacy to legislatures engaged in ordinary politics, the Court enables the state to abrogate rights without paying the cost of using the override.[127] And, as if that were not enough, it does so by resurrecting the rubber-stamp, limitation clause emphatically rejected by the people in Parliament. This stance amounts to an unexpected windfall to those who opposed the *Charter*.

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124 *Edwards* v. *Canada (A.-G.)*, [1930] A.C. 124 at 136, 1 D.L.R. 98 [hereinafter *Edwards* cited to A.C.].

125 See *Rodriguez*, *supra* note 98; *Egan*, *supra* note 98; and *Law* v. *Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1. Other cases, such as *Tétrault-Gadoury* v. *Canada*, [1991] 2 S.C.R. 22, *Eldridge* v. *B.C.*, [1997] 3 S.C.R. 607 might suggest otherwise. But these cases pivot on relief against disadvantage, not *Charter* rights at large. It does not follow from the fact that the claim succeeds that the Court has interpreted and applied the *Charter*'s strictures correctly. The wide discretion that the deference-minded judges accord to themselves opens the door to deference in cases where the legislature is preserving or forwarding the cultural majority's moral code, tradition values, and general consensus. *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 and *M.* v. *H.*, [1999] 2 S.C.R. 3 may suggest recommitment to the postwar model and its fundamental values, but *Law* v. *Canada*, [1999] 1 S.C.R. 497 and *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203 may indicate otherwise.

126 They also secured agreement to their preferred formula for constitutional amendment, with some modification.

127 Deference to ordinary politics has influenced the Court's interpretation of the override as well. See Weinrib, *supra* note 73.

Texts offer a range of interpretive flexibility; there is very rarely only one interpretive possibility. Over time, constitutional texts in some ways offer more flexibility than other legal instruments because of their abstract formulation, higher law norms and principled response to changed circumstances. But interpretation has its limits; it should stop short of undoing the clear historical compromises that informed the drafting of specific constitutional amendments to achieve focussed remedial ends. In other contexts, the Court has given such compromise great respect.

Seen in the light of our judicial history, the Court's treatment of the limitation formula is not without its ironies. Our great judges demonstrated in the past their ability to use whatever strands of legal reasoning came to hand to create what we would now recognize as rights-protection. Lord Chancellor Sankey presupposed gender equality in the interpretation of general language in a written constitution.[128] Justice Idington, in dissent in *Quong Wing*, invoked the status of British subject as an interpretive shield against statutory imposition of racial discrimination.[129] In *obiter dicta*, in *Reference Re Alberta Statutes,* Duff C.J. and Canon J., recognized freedom of speech and the press as inherent, democratic norms embedded in our federal arrangements.[130] Many judgments of Rand J. read a full array of original freedoms in the interstices of Canadian federalism.[131] These judges, lacking anything approaching the mandate of the *Charter*, did so much with the interplay of the written and unwritten components of our constitutional arrangements,[132] anticipating the Supreme Court's recent return to the idea of pre-eminent, deeply embedded constitutional principles.[133]

The postwar period has been called the age of rights. Those who translated the remedial purposes of the *Charter* into legal text and institutional design emulated the value structure and institutional design of the postwar model of rights-protection. It is a disappointment then that, on occasion, judges of the Supreme Court of Canada have failed to carry through this commitment.[134] It is

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128 *Edwards*, *supra* note 124.

129 *Quong Wing* v. *The King* (1914), 49 S.C.R. 440, 18 D.L.R. 121.

130 [1938] S.C.R. 100, 2 D.L.R. 81.

131 *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299, 4 D.L.R. 641, *Switzman* v. *Elbling*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337.

132 See Weinrib, *supra* note 97.

133 *Supra* note 5.

134 Although the Supreme Court has not been consistent in acknowledging the *Charter*'s international roots in its domestic operation, the *Charter* has nevertheless had a remarkably strong influence beyond Canada's borders. Many other systems of rights-

perplexing that these judges have turned away from the obvious foundations for *Charter* interpretation — the *Charter*'s political history, text and chosen model. It is even more perplexing to note that they have, in effect, moved toward another constitutional model, *i.e.*, the more conservative strands of the United States Supreme Court's approach to the *Bill of Rights*: insularity, disquiet as to judicial legitimacy, and subservience of constitutional norms to ordinary politics. These elements mark retreat from the brief engagement with the ideas of postwar constitutionalism by the Warren Court. The Warren Court, however, was not based on a prolonged public debate culminating in the adoption of a new constitutional bill of rights setting down institutional roles designed to give constitutional guarantees effective protection.

That the U.S. Supreme Court's rejection of the Warren Court's strong protection of equal human dignity, as the core of constitutional rights-protection, should provide a guide for interpretation of the Canadian *Charter* by some Canadian judges must surely stand as one of the stranger developments within modern constitutional discourse. One would have thought that the application of comparative constitutional analysis to the *Charter* would have turned all eyes elsewhere, to find the *Charter*'s roots and institutional legitimacy in the shared values and purposes of the postwar world in which we live and in which our *Charter* was formulated.

The judges who prefer a deferential approach to the *Charter*'s limitation formula stand committed to the lessons learned from the New Deal crisis that so traumatized American constitutional thought in the early twentieth century. The end of that era marked the triumph of legislatures over the courts. Social legislation attuned to public welfare supplanted outdated, regressive ideas of market neutrality in the form of sacrosanct contract and property rights. Recent historical analysis has, however, rehabilitated the *Lochner* era judiciary to some extent, recognizing that its allegiance to economic liberty was neither personal indulgence nor an expression of judicial class bias. Rather, it was a futile attempt to retain a traditional idea of limited government and residual liberties, cherished in a pre-industrial economy — not a misguided negation of democratic government.[135] Nonetheless, the prospect of strong, judicially enforced rights-

protection have looked to the *Charter* as the primary or partial model for their own development. *Charter* cases are cited in many other jurisdictions today as part of the growing trend to trans-jurisdictional constitutionalism.

135 M.J. Horwitz, "Forward: The Constitution of Change: Legal Fundamentality without Fundamentalism" (1993) 70 Harv. L. Rev. 30; O.M. Fiss, *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888–1910*, vol. 8.

protection continues to carry the taint of *Lochner, i.e.*, the spectre of judges imposing their own elite values on society against legislative initiatives designed to protect a wider public, especially the disadvantaged. The *Charter*, constructed upon its postwar rights framework in the shadow of democratic failure combined with unprecedented state atrocities, moves beyond that debate. Therefore, modern rights-protecting instruments not only provide a framework for economic activity and public welfare but also ensure fidelity to the principles of liberty, equality and respect for human dignity. Judicial review does not undermine the democratic function. On the contrary, it intensifies accountability and broadens representation. It thus legitimates the democratic, majoritarian process in an increasingly diverse and pluralistic society.

Judges who resist the *Charter*'s postwar commitments and institutional framework on a post-*Lochner* template seek to ensure that rights-protection does not once again rigidify into a complex, judicially constructed doctrinal labyrinth that offers safe passage only to the rich and powerful. They prefer to keep the system flexible, fluid, contextual, and responsive. These aspirations are admirable. They do not, however, necessitate preemptive deference to majoritarian institutions. In fact, the *Charter* addresses these very concerns in ways that do not divest legislatures of their important role. Thus the *Charter* gives no privilege to pure economic rights, an omission designed to preclude any tendency of rights protection to privilege the privileged.[136] The non-discrimination provisions are generous and open to further expansion. The guarantee of security of the person has demonstrated capacity to promote fair distribution of limited resources. The interpretive provisions highlight gender equality, pluralism and diversity.

Moreover, other grounds for a deferential approach to rights adjudication, also deriving from the post-*Lochner* paradigm, should have minimal traction in Canada. Interpretive methodology based on fidelity to text and original understanding, tarnished by their instrumental, conservative agenda in the United States context, stand on more legitimate ground in Canada. We have a new

(New York: Macmillan, 1993); H. Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, N.C.: Duke University Press, 1993).

136 The *Charter* responds to the critique that rights-protection is socially retrograde by providing interpretive directives as to gender equality and multiculturalism, often proxies for exclusion, bias, prejudice, stereotypes and disadvantage. By prohibiting state discrimination on an open list of prohibited grounds, and by permitting affirmative action initiatives, the *Charter* does not stand in the way of progressive policy.

constitutional text, one that marks the culmination of a prolonged, well-informed and participatory debate about the strengths and weaknesses of existing institutions, which rights to protect and how best to deliver that protection. Many models were considered and rejected, including a deferential model that was ultimately rejected not only by parliamentarians, but by the people in Parliament. The model that was chosen was attractive because it would fulfil the remedial objectives, offer an established, structured approach already operative in other Commonwealth countries and reflect Canada's international obligations. It was popular across the country because it held promise to remedy widely acknowledged failings in the legal system.

The *Charter*'s institutional arrangements should also undercut the standard American critique that strong rights protection is countermajoritarian. It vests authority over a circumscribed set of rights, plus a clearly articulated standard of limitation, in courts of law, consistent with judicial expertise, independence and individuated adjudication. In addition, it provides a statutory override that requires no more than a majority vote by a legislature willing to act expressly against the *Charter* guarantees of its constituents. There is very little that is novel in the *Charter*'s legal structure. Much of the discipline that the *Charter* imposes on government is drawn from the rule of law. Examples include the requirement that public policy stand as the product of public and deliberative democratic process in a form that is accessible and intelligible to the rightholder. Preemptive deference to a legislature that has not satisfied these standards does not fulfil any meaningful understanding of legislative supremacy.[137]

The interlocking institutional roles under the *Charter* ensure that courts can be courts and legislatures can be legislatures. Neither institution usurps the other's prerogatives. Each has an important and legitimate, freestanding, constitutional role, accentuating its institutional strengths. Judges who propose that courts should defer to the ordinary legislative process undermine the *Charter*'s complex rearrangement of institutional responsibility. In addition, they create a fissure in the unified conceptual foundation of our part-written and part-unwritten constitutional edifice.[138] If there is a sound interpretive or theoretical basis to preemptive deference to the ordinary political process in socio-economic contexts, it lies hidden.

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[137] P. Craig, "Competing Models of Judicial Review" in C. Forsyth, ed., *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) 373 and Sir J. Laws, "Law and Democracy" [1995] Public Law 72.

[138] *Secession Reference, Judges Remuneration References*, *supra* note 5.

Those who subscribe to the deferential approach to *Charter* adjudication wish to avoid repetition of the perceived errors of the *Lochner* era judiciary. But ironically, in a markedly different social and legal context, they repeat precisely the error they wish to avoid. Like the vilified judges whose work they repudiate, they cling to a constitutional model that the world has passed by. By taking up the call to deference by which the legal realists triumphed decades ago, they do not support progressive public policy. To use Sankey L.C.'s words, they illegitimately subordinate reason to custom and tradition.[139]

[139] For an explication of the relevance of the *Edwards* case for interpretation of a bill of rights, see L.E. Weinrib, "Sustaining Constitutional Values: The Schreiner Legacy" (1998) 14 S. Afr. J. Hum. Rts. 351 at 369–72.

THE STRUCTURAL CONCEPTION OF RIGHTS AND JUDICIAL BALANCING

Richard H. Pildes*

The author argues that two ideas, the protection of atomiscic human rights and the traditional balancing of those rights, are mistakenly perceived as central to constitutional adjudication in the United States and Canada. Rather than rights acting as "trumps," rights channel the kinds of reasons governments can invoke when acting in different spheres. Similarly, balancing rhetoric does not adequately describe the process of judicial decisionmaking. Instead, constitutional adjudication primarily entails judicial efforts to define the kinds of reasons that are impermissible justifications for state action in different spheres. The author demonstrates how to see traditional balancing rhetoric as obscuring a decisionmaking process that is better characterized as a judicial definition of impermissible justifications or excluded reasons.

L'auteur argumente le fait que deux idées, soit la protection des droits de la personne et l'équilibre traditionnel de ces droits, sont perçues, par mégarde, comme étant au centre des décisions constitutionnelles aux États-Unis et au Canada. Au lieu que les droits agissent en «atout», ils canalisent le genre de raisons que les gouvernements invoquent lorsqu'ils les violent. De même, le discours en faveur de l'équilibre ne décrit pas de façon adéquate le processus de la prise de décision judiciaire. Les décisions constitutionnelles englobent plutôt des efforts judiciaires visant à déterminer le genre de raisons qui représentent des justifications inadmissibles pour des actions de l'État dans des sphères différentes. L'auteur montre comment on peut voir le discours de l'équilibre traditionnel comme voilant un processus décisionnel qui relève plutôt de la définition judiciaire de justificatifs inadmissibles ou de raisons exclues.

I. INTRODUCTION

Based on American constitutional experience, two ideas are widely but, I will argue, mistakenly perceived as central to contemporary constitutional adjudication. First, that modern constitutionalism is largely organized around the protection of individual human rights (more precisely, as we shall see, around

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a particular conception of rights). As a result, constitutional conflicts are portrayed as clashes between, on the one hand, the self-regarding individual interests these rights protect and, on the other hand, "state interests" or "the common good." From this picture flows the second central idea: that the practice of constitutional adjudication essentially entails judicial efforts to "balance" individual rights against state interests in an effort to adjudicate which is "weightier." Metaphors of balancing pervade constitutional opinions, in American decisions, Canadian decisions, and elsewhere.[1] This rhetoric of balancing is a product of organizing constitutionalism around conflicts between individual rights and state interests. When rights and state interests are perceived to be in conflict, each with their claim to legitimacy, courts are drawn toward

[1] For examples of balancing language in Canadian Supreme Court decisions, see *Canadian Civil Liberties Assn.* v. *Canada (Attorney General)* (1998), 1 D.L.R. (4th) 255; *R.* v. *Lucas*, [1998] 1 S.C.R. 439; *R.* v. *Oakes*, [1986] 1 S.C.R. 103. Balancing language also appears frequently in rights cases of the Israeli Supreme Court, particularly in decisions written by the Court's current President, Justice Aharon Barak. See *e.g.* H.C. 6821/95 *United Mizrachi Bank* v. *Migdal Cooperative Village*, 49(4) P.D. 221; H.C. 806/88, *Universal City Studios, Inc.* v. *Films and Plays Censorship Board*, 43(2) P.D. 22; H.C. 1604–1601/90, *Shalit* v. *Peres & Others*, 44(3) P.D. 353. The emerging jurisprudence of the Constitutional Court of South Africa has also immediately turned to the extensive use of balancing language. See *e.g. Coetzee* v. *Government of the Republic of South Africa*, 1995 (4) S.A.L.R. 631 (C.C.); *Shabalala & Others* v. *Attorney General of the Transvaal*, 1995 (12) B.C.L.R. 1593; *S.* v. *Makwanyane & Another*, 1995 (6) B.C.L.R. 665.

Of course, these other systems, unlike the American one, work from authoritative legal texts and constitutions that contain explicit limitations clauses, that expressly limit the scope of the rights these documents recognize. *Constitution of the Republic of South Africa*, (1996) Act 108, s. 36; *Canadian Charter of Rights And Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1. The *Basic Law of Israel* also has a similar restriction. *Hok Yesod: Kevod HaAdam VeHeiruto* (*Basic Law: Human Dignity and Freedom*), S.H. 150 (1992), s. 8. In my tentative view, the presence or absence of such express limitations clauses is unlikely to affect the actual structural logic of rights in these different systems, even if it affects the language within which judicial decisions are expressed. That is, balancing language aside, these decisions will frequently be best rationalized by recognizing that rights work to exclude certain particular reasons for government action in particular spheres, and thus to protect structural differentiations of power and authority, rather than being weights in some calculus in which the strength of competing governmental interests is being somehow counterbalanced against the weight of the rights. But determining whether this is so is not only beyond the scope of this article, it would also require a more extensive immersion in the jurisprudence of these various systems than I have thus far undertaken.

"weighing" the "strength" of state interests against the "degree" of intrusion on individual rights. Balancing rhetoric then flows freely.

Since the advent of Canadian constitutionalism in 1982, many have expressed concern about the potential costs of importing rights-oriented constitutional liberalism. Thus, the comparative political scientist Seymour Martin Lipset has speculated that the mere enactment of the *Charter of Rights and Freedoms* will necessarily "Americanize" Canadian politics:[2]

> Perhaps the most important step that Canada has taken to Americanize itself — *far greater in its implication than the signing of the free trade treaty* — has been the incorporation into its constitution of a bill of rights, the Charter of Rights and Freedoms, placing the power of the state under judicial restraint ... [T]he Charter makes Canada a more individualistic and litigious culture ... By enacting the Charter, Canada has gone far toward joining the United States culturally.

Many Canadians find this spectre uninviting, based on a perception of rights-oriented constitutionalism drawn from the American experience. Charles Taylor, the philosopher, asserts that Canadian culture has traditionally been organized around the model of citizen participation and that the American model of rights poses a threat to that tradition.[3] More dramatically, Allan Hutchinson appeals to Canadians to reject constitutionalism altogether because a "rights-centred society becomes little more than an aggregate of self-interested individuals who band together to facilitate the pursuit of their own uncoordinated and independent life projects — a relation of strategic convenience and opportunism rather than mutual commitment and support."[4] And W.A. Bogart worries that a distinct Canadian cultural identity will be engulfed by the rise of a liberal individualism inextricably associated with the birth of Canadian constitutionalism.[5]

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2 S.M. Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (Toronto: Canadian-American Committee, 1989) at 225–26 [emphasis added].

3 C. Taylor, "Alternative Futures — Legitimacy, Identity, and Alienation in Late Twentieth Century Canada" in A. Cairns & C. Williams, eds., *Constitutionalism, Citizenship, and Society in Canada*, (Toronto: University of Toronto Press, 1985) 183 at 209, describing the rights model as identifying "the dignity of the free agent ... more with the bearer of rights than with the citizen participator."

4 A.C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 90.

5 W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life in Canada* (Toronto: Oxford University Press, 1994) at 262. Former Prime Minister and Minister of Justice, Kim Campbell, has similarly been reported to assert that the *Charter* promotes a rights discourse that threatens Canada's ability to accommodate divergent interests. See S.M. Lipset & A.B. Pool, "Balancing the

In this essay, I pursue two themes that I hope will illuminate central aspects of American constitutional practice and, in doing so, perhaps allay some small aspects of these Canadian concerns. The first theme addresses the role that rights play in actual American constitutional practice, as opposed to in some strands of constitutional theory or contemporary liberal political philosophy. This theme has large cultural resonances, for once we get clear on the role rights actually play in adjudication, we can better examine the cultural consequences of "rights-oriented liberalism." The second theme is more narrowly focused on techniques of judicial decisionmaking. With a more accurate picture of the way American constitutional rights work in place, I will argue that, both in theory and practice, judicial "balancing" of rights versus interests plays a less significant role than is generally appreciated. Balancing imagery has become a ritualistic incantation in modern constitutionalism but, judicial imagery notwithstanding, I do not believe balancing describes the actual process of adjudication in large areas of American constitutional law.

My two themes are closely related. It is as a result of a particular conception of rights — which I will call the atomistic conception — that the perceived need to "balance" arises. Once we replace this conception of rights with one more accurately descriptive of American constitutional practice, it will also become easier to see and describe the alternative to balancing that also better describes the actual techniques of constitutional adjudication. My approach here is interpretive or phenomenological: I mean to describe essential features of American constitutionalism as an actual and ongoing social practice. The analysis offered is not an exercise in normative political theory about rights or constitutionalism as much as it is redescription. With respect to my two themes, American constitutional practice is frequently misunderstood, both by judges who participate in it as well as by academics who comment on it. The effort here is to illuminate that practice more precisely.

Individual and the Community: Canada Versus the United States" (1996) 6 Responsive Community 37 at 41–42.

II. TWO CONCEPTIONS OF CONSTITUTIONAL RIGHTS

Much of American constitutional law is, of course, cast in the language of protecting individual rights: rights to free speech, equal protection or democratic participation — to vote, form parties, petition the government. But when we examine these rights closely, what exactly is their analytical structure?

The most influential picture is perhaps Ronald Dworkin's view of rights as "trumps."[6] In the canonical text of rights-oriented liberalism, *Taking Rights Seriously*, Dworkin defined rights as claims that may not justifiably be limited by appeals to the common good. This constitutionalism takes rights seriously precisely by recognizing that "[t]he prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do."[7] Rights must permit individuals to take an action "even if the majority would be worse off for having it done."[8] This is the picture of the direct clash between the interests of individuals and that of the community, with rights trumping the second to secure the first.[9]

Dworkin's account is offered as both a descriptive portrayal of liberal constitutionalism and as normative political philosophy. Were it an accurate portrait, the spectre of atomism would indeed loom large: the very point of rights-based adjudication would be to prefer the self-regarding interests of individuals to even the most powerful of concerns for the common good of the political community. But Dworkin's account stays far removed from the level of actual constitutional practice; he does not examine in any detail the phenomenology of constitutional adjudication.[10] Had he done so, he would

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6 R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 184–205.

7 *Ibid*. at 193.

8 *Ibid*. at 194. See also *ibid*. at 204 (governments "must not define citizens' rights so that these are cut off for supposed reasons of the general good.").

9 A similar picture is presented in Nozick's influential account of rights as "side constraints," in R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 29.

10 For criticism of Dworkin's constitutional jurisprudence for being too "top down," see R.A. Posner, "Legal Reasoning from the Top Down and from the Bottom Up" in *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995) at 171–97; C. Sunstein, review of *Freedom's Law: The Moral Reading of the American Constitution* by R. Dworkin (1996) 214 New Republic 35. Jeremy Waldron, while endorsing my analysis of how constitutional rights work, argues that Dworkin does not actually hold the "rights as trumps" view I describe here. J. Waldron, "Pildes on Dworkin's Theory

quickly have encountered one immediate stumbling block: American courts permit rights to be limited, even when applying the most intensive judicial scrutiny, for reasons that have little to do with the kinds of reasons Dworkin's theory would make relevant.[11] That is, governments can infringe even the most fundamental rights if its justifications are sufficiently "compelling" and the means used are the least restrictive available. Rights are not general trumps against appeals to the common good or anything else; instead, I believe they are better understood as channelling the *kinds of reasons* government can invoke when it impinges on rights. Moreover, this is not an exceptional doctrine for aberrational contexts, but a defining element of rights adjudication.

An alternative account of the way rights work — one I will call a structural conception — is more closely tied to these features of actual constitutional practice.[12] The reason that courts determine the scope of rights with reference to the justifications government offers for limiting them is that rights are *not* best understood as trumps for individual interests over collective interests. Instead, rights are better understood as means of realizing certain collective interests; their content is defined with reference to those interests. Rights do protect the interests of individual right claimants, but not only these interests. An intended and justifying consequence of rights is that through protecting the interests of specific plaintiffs, rights also realize the interests of others, including collective interests. In other words, the justification for many constitutional rights cannot

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of Rights" (2000) 29 J. of Leg. Stud. 301. For my continued analysis of why Dworkin does indeed argue for the "rights as trumps" view, see R. Pildes, "Dworkin's Two Conceptions of Rights" (2000) 29 J. of Leg. Stud. 309.

[11] Dworkin argues that a proper justification for limiting a right is that other competing rights are at stake. But in Dworkin's account, "competing rights" must be understood in a particular way. It must be limited to competing rights other members of society might have as individuals; it cannot mean the rights "of the majority as such, which cannot count as a justification for overruling individual rights." Dworkin, *supra* note 6 at 194.

[12] For initial efforts to suggest this account of rights, see R.H. Pildes & E.S. Anderson, "Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics" (1990) 90 Colum. L. Rev. 2121 at 2154–58. Those views were influenced in part by earlier work of J. Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986) at 258: ("At least some constitutional rights are primarily means of formal or informal institutional protection of collective goods."). The view now outlined in the text draws from Raz's subsequent work, most importantly, J. Raz, "Rights and Individual Well-Being" in *Ethics in the Public Domain* (New York: Oxford University Press, 1994) at 44–60.

be reduced to the atomistic interest of the rightholder alone.[13] As Joseph Raz puts it, "Though he gains from the benefit the right secures to others, the weight and importance of the right depends on its value to those others, and not on the benefit that this in turn secures to the right-holder."[14]

Raz argues that most constitutional rights serve a particular kind of collective interest, the preservation of "common or public goods" (in the sense economists have long used the terms).[15] These are non-excludable goods, the benefits of which are either available to all or none, like clean air or national defense. So, too, traditional liberal rights, such as freedom of speech or democratic participation, realize goods that are common in this sense; the cultural benefits of such rights are available generally. The importance of the structural conception of rights is that it clarifies that the point and justification of constitutional rights is not the enhancement of the autonomy or atomistic self-interest of the rightholder, but the realization of various common goods.[16] Once

[13] Of necessity, I write quite broadly here. To qualify, there is likely no single unitary conception of the role rights play in American constitutional practice. Rights serve different purposes in different contexts. Professor Fallon has nicely catalogued some of these different purposes: rights sometimes seem to further the individual interest in substantive well-being; at other times, they preserve individual interests in autonomous choice; in still other contexts, rights protect interests of individuals or groups in maintaining the social bases for self-respect, so that here, rights protect "dignitary" interests. See R.H. Fallon, Jr., "Individual Rights and the Powers of Government" (1993) 27 Ga. L. Rev. 343. In these various contexts, it is possible that a different account of the role of rights and the relevance and techniques of balancing must be offered than the one I develop here. My focus here is on a particular — but, I believe, pervasive — context in which constitutional law invokes rights: where rights do their work by marking out the boundary lines between different spheres of political authority.

[14] Raz (1994), *supra* note 12 at 51–52.

[15] *Ibid*. at 52. See also *ibid*.: "The protection of many of the most cherished civil and political rights in liberal democracies is justified by the fact that they serve the common or general good."

[16] Note that "common goods" in this sense are a distinct *kind* of good and not a loose formulation for whatever might be thought to maximize social welfare. The argument is not that rights serve to promote the general welfare, if that is taken in an utilitarian sense of maximizing the satisfaction of existing preferences, or total welfare. Rather, the claim is that rights realize one distinct type of good, namely, those goods that are "common" in the economic sense.

Raz does not, however, systematically defend this view by showing that rights do not, on some occasions, serve other kinds of collective interests — including maximizing total social welfare. Moreover, Raz offers such an expansive conception of common goods — in his view, freedom of contract, of occupation and of marriage

rights are understood this way, important implications follow for both the broad question of the culture "rights-oriented liberalism" creates and for the more specific techniques of judicial decisionmaking.

Before turning to these implications, I want to suggest one reason that the mistaken, atomistic view of rights is common. The technical rules of American standing doctrine require that plaintiffs suffer direct, individuated and redressable harms before they can invoke the power of federal courts to vindicate claims of constitutional rights.[17] As the Court put it recently, plaintiffs must distinguish their claims from "a generally available grievance about government — claiming only harm to [their] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large."[18] This rhetorical

define the meaning and significance of these realms and hence realize common goods — that one might worry whether the concept becomes tautological. I myself am uncertain that actual constitutional practice recognizes only those rights that can be said to sustain common goods, at least if that concept is understood in an appropriately precise sense. But the aim of this essay is to suggest that the general logic of rights is structural, not atomistic; once the role of rights in realizing collective interests is recognized, the question of precisely what these collective interests might be with respect to different rights must await another occasion.

17 The Court recently restated the "irreducible minimum" that is constitutionally required for standing under Article III of the Constitution:

> [A] party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court," and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative."

Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. *City of Jacksonville*, 113 S. Ct. 2297, 2301–02 (1993) [citations omitted] (quoting *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976); *Allen* v. *Wright*, 468 U.S. 737, 752 (1984)); see C. Sunstein, "What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III" (1992) 91 Mich. L. Rev. 163 (discussing modern standing jurisprudence); see also H.J. Krent & E.G. Shenkman, "Of Citizen Suits and Citizen Sunstein" (1993) 91 Mich. L. Rev. 1793 (responding to Sunstein's analysis of standing).

18 *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2143 (1992).

emphasis on plaintiffs as vindicating their own interests, not generalized grievances, perhaps makes it natural to conclude that rights serve principally to protect atomistic, individual self-interests.

But this inference mistakes the role of standing doctrines. As courts articulate quite explicitly, these doctrines are justified as means of realizing values associated with the separation of powers.[19] The effect of these doctrines is to limit the class of rightholders who can vindicate claims of right. Yet the justifications for those limitations are not grounded on the internal logic of constitutional rights, but rather on values external to those rights: in particular, on a conception of the proper institutional boundaries between courts and other political institutions. Standing doctrines require that plaintiffs suffer individuated harm before courts are appropriate institutional forums for resolving the dispute. But that says little about what range of interests a given right protects once a particular plaintiff is a proper vehicle for vindicating the right.

The structural view of rights asserts that most constitutional rights are justified because, by serving the interests of the right-claimant, they serve collective interests in the realization of various common goods. Standing doctrine merely seeks to ensure that the first link in this chain is sufficiently strong; that the interests of the person claiming the right are palpably at stake in a particular way. Once they are, the logic of the structural conception then comes into play. With this less atomistic understanding of rights now sketched out, we can begin to suggest why balancing plays less of a role in constitutional adjudication than many believe.

[19] See *e.g. Allen* v. *Wright*, 468 U.S. 737, 752 (1984), "standing is built on a single basic idea — the idea of separation of powers."

III. ALTERNATIVES TO BALANCING

The conundrums of judicial "balancing" have puzzled many.[20] The analytical structure of this balancing process has remained mysterious. What does it mean to "balance" seemingly incommensurable entities, such as rights and social welfare? What determines the "weight" courts assign to various state interests? How "great" must an intrusion on a right be before a state interest is compelling, substantial, important or legitimate enough to overcome it?

Once rights are understood in structural terms, however, a path out of the balancing forest can more readily be discerned. Contrary to the connotations of balancing, constitutional adjudication is most often a qualitative process, not a quantitative one. This follows, I will suggest, once the structural understanding of rights is recognized as best characterizing actual constitutional practice. The American experience of constitutional law does not entail, as often as many think, "balancing" burdens on individual rights against the "weight" of competing state interests. Instead, constitutionalism primarily entails judicial efforts to define the *kinds of reasons* that are impermissible justifications for state action in different spheres.

In this way, courts seek to realize those specific common goods the pursuit of which is the point of recognizing particular constitutional rights. Constitutional law involves judging whether government actions are consistent with these common goods in areas marked off through the recognition of rights. We should, I suggest, see the American Constitution as recognizing numerous distinct spheres of interaction, each governed by its own logic of norms that defines the kinds of reasons for which government can appropriately act. Government can infringe on rights for reasons consistent with the norms that characterize the common goods that those rights are meant to realize. But when government infringes rights for reasons inconsistent with these common goods, it violates them.

This is the means through which the recognition of rights promotes common goods, not atomistic self-interests, in actual constitutional practice. Put in other terms, "rights" are best understood as the way constitutional law marks the

[20] For discussion of these puzzles, see Symposium, "When is a Line as Long as a Rock is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication" (1994) 45 Hastings L.J. 707; T.A. Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale L.J. 943.

boundaries between different spheres of political authority. Rights are the tools constitutional law uses to maintain appropriate structural relationships of authority.

The observation that the structural aspects of the constitution's design — separation of powers, federalism, bicameralism, judicial review — were intended to protect individual rights is familiar.[21] My point here is that we would do well to appreciate the way this relationship between rights and structures runs in the other direction as well; rights often serve less to protect atomistically conceived individual interests and more to protect structural relationships. Perhaps more broadly, my aim is to suggest that a far thinner line separates the rights side of constitutionalism from the structural side than we usually recognize — or perhaps, that this very divide is itself illusory and misleading. In our teaching and thinking, we typically carve constitutional law into its rights-protecting components and its structural components. The cost of doing so might be to miss the mutually reinforcing connections between rights and structures. After describing this process with more precision, I will illustrate these theoretical and somewhat abstract claims with numerous concrete examples.

A. Exclusionary Reasons Versus Balancing

Much of American constitutional adjudication can be seen to involve what the philosophy of practical reasoning calls "exclusionary reasons."[22] An exclusionary reason identifies particular reasons as inappropriate justifications for government action. When certain reasons are ruled out as permissible bases for action, they are simply excluded from being given any potential weight in a decisionmaking calculus. These reasons are not, instead, weighed against

[21] See *e.g. Morrison* v. *Olson*, 487 U.S. 654, 727 (1988) (Scalia J., dissenting): "The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom."

[22] Here too my thinking has been much influenced by Raz, who developed the concept of exclusionary reasons in J. Raz, *Practical Reason And Norms* (London: Hutchinson, 1975) [hereinafter *Practical Reason*] and elaborated in the postscript to the second edition of this book in 1990. For critical commentary on the concept of exclusionary reasons, see W. Edmundson, "Rethinking Exclusionary Reasons: A Second Edition of Joseph Raz's *Practical Reason and Norms*" (1993) 12 Law & Phil. 329; C. Gans, "Mandatory Rules and Exclusionary Reasons" (1986) 15 Philosophia 373; M.S. Moore, "Authority, Law and Razian Reasons" (1989) 62 S. Cal. L. Rev. 827; S.R. Perry, "Second-Order Reasons, Uncertainty, and Legal Theory" (1989) 62 S. Cal. L. Rev. 913.

countervailing reasons in order to find where the net balance of reasons lies. Rather, rights adjudication consists of evaluating the kind of reason the state is offering to justify its action, and assessing whether that kind of reason is constitutionally appropriate as a justification for the state action which courts are reviewing.

This understanding of rights does not entail the kind of balancing often thought to characterize constitutional adjudication. Rather than weighing the interests of the individual with those of the state, courts evaluate the reasons for state action in different spheres. No balancing of the conventional sort occurs, for this exclusionary-reasons approach simply requires courts to identify whether government action has been justified by one of these prohibited reasons.[23] My argument is that this approach — this conception of the way rights actually function — better characterizes much of constitutional decisionmaking than does the more familiar balancing alternative. Rather than balancing the strength of individual rights against the strength of competing state interests, courts evaluate the different kinds of reasons that are off limits to government in different arenas.[24] Of course, rights play a number of different roles in American constitutional adjudication, as they do or presumably will elsewhere as well. I do not mean to argue that this exclusionary-reasons view, or what I sometimes call the structural conception of rights, describes the exclusive way rights work. But I do claim that this view more incisively describes one of the major ways rights discourse actually functions in adjudication, and that this view offers an

[23] See J. Raz, *Practical Reason and Norms*, 2d ed. (London: Hutchinson, 1990) at 190: "The very point of exclusionary reasons is to bypass issues of weight by excluding consideration of the excluded reasons regardless of weight."

[24] A focus on defining "excluded reasons" will not completely eliminate balancing. Constitutional adjudication, like practical reasoning more generally, might be thought to take at least two forms. See Raz, *supra* note 22 at 25–48. The more familiar occurs when there are reasons for and against an action. Given conflicting reasons, we must decide which are stronger and override the others. Genuine clashes between individual rights and state interests take this form; for these problems, we must confront the conundrums of balancing and resolve them in some other way. I have offered a view of how to conceive rational judicial choice amidst the seeming incommensurabilities of "rights" and "state interests." See Pildes & Anderson, *supra* note 12 at 2121; R.H. Pildes, "Conceptions of Value in Legal Thought" (1992) 90 Mich. L. Rev. 1520. For similar views, see F. Schauer, "A Comment on the Structure of Rights" (1993) 27 Ga. L. Rev. 415. This essay emphasizes the second context, in which decisions are made by recognizing that certain reasons are simply excluded from the acceptable bases for action. When this method is at work, the problem of balancing drops out of consideration.

important alternative — both normatively and descriptively — to the more familiar "rights as trumps" or atomistic conception of the nature and role of constitutional rights.

The atomistic conception of rights might be pictured as reasoning "from the inside out" — it starts with an emphasis on the burdens government imposes on individuals, and on rights as recognitions of the essential dignity, autonomy or freedom of the person. The structural conception focuses on questions more external to the self-interests of those asserting rights — it reasons "from the outside in" by focusing on the legitimate scope of state authority in the specific structural arena at issue. More than might be expected turns on this difference. On the structural view, rights are the means for enforcing the differentiations of political authority characteristic of liberal societies;[25] rights become pragmatically useful judicial tools for policing the reasons excluded from being legitimate justifications for state action in different spheres.

B. Examples

The examples that follow draw from disparate areas: the establishment clause, voting rights and several free-speech conflicts. In each, I argue that American courts do invoke the rhetoric of atomistic rights; that this approach obscures what courts actually do in the cases and spawns conceptual confusion; and that the structural conception better illuminates the actual decisions being reached. In none of these areas is judicial balancing necessary or, indeed, actually taking place.

1. *The Establishment Clause: Differentiating Religion from Politics*. The establishment clause of the American First Amendment precludes government from making any law "respecting the establishment of religion."[26] Recent Supreme Court opinions are cast in a rhetoric suggesting that establishment claims centre on atomistically conceived individual rights. Thus, a sine qua non

[25] For the argument that strategies of differentiation were central to the emergence of the American republican and constitutional tradition, see R.H. Pildes, "Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law" (1994) 45 Hastings L.J. 711.

[26] U.S. Const. amend. I.

for an establishment clause claim is quickly becoming a showing that government has "coerced" individuals on matters of religious conviction.[27]

But it is difficult to see the cases as actually turning on the magnitude of individual burdens on personal religious conscience government has imposed. First, if a showing of individualized "coercion" were indeed required, existing doctrine could be explained only by stretching "coercion" far beyond its conceptual content in other legal areas. Even to address core violations of the establishment clause, "coercion" would have to be interpreted so broadly as to become essentially empty.[28] Religious proselytizing by the government, for example, is presumably unconstitutional.[29] Yet to address this straightforward application of the doctrine, advocates of the "coercion" test, such as Kennedy J., must resort to asserting that governmental "speech may coerce."[30] That generates the correct result if state proselytizing remains unconstitutional, but treating speech itself as coercive, particularly with a noncaptive audience is, at the least, anomalous. As an amendment to the coercion approach, some suggest distinguishing state action that "annoys" individuals on religious grounds from that which exerts subtle "pressures and influences."[31] But such refinements still

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[27] See *e.g. Lee* v. *Weisman*, 112 S. Ct. 2649, 2655 (1992); *Allegheny County* v. *Greater Pittsburgh A.C.L.U.*, 492 U.S. 573, 659–62 (1989) [hereinafter *Allegheny County*], (Kennedy J., concurring in part and dissenting in part). Kennedy J. was joined by Rehnquist C.J. and Scalia and White JJ.

[28] In a critique of the "coercion" standard, one of its former proponents now acknowledges that "an emphasis on coercion *could* tend toward acquiescence in more subtle forms of governmental power"; that for this reason "it is vital to understand the concept of coercion broadly and realistically"; and that the establishment clause should ban sectarian government proselytizing, but that such a doctrinal conclusion would bear "no logical connection to the coercion test." M.W. McConnell, "Religious Freedom at the Crossroads" (1992) 59 U. Chic. L. Rev. 115 at 159, 158, 162.

[29] See *e.g. Allegheny County*, *supra* note 27 at 661 (Kennedy J., concurring in part and dissenting in part) (arguing that the constitution forbids government actions that "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion"); *Wallace* v. *Jaffree*, 472 U.S. 38, 60 (1985) ("The government must pursue a course of complete neutrality toward religion."); see also McConnell, *supra* note 28 at 162 ("Justice Kennedy is on solid ground in arguing that our government does not have free rein to proselytize").

[30] *Allegheny County*, *supra* note 27 at 661 (Kennedy J., concurring in part and dissenting in part) ("Speech may coerce in some circumstances ...").

[31] See *e.g.* McConnell, *supra* note 28 at 159. This approach stems from McConnell's desire to distinguish "the actual effects of governmental power" from what he calls "mere appearances." *Ibid*. at 158. The very point of the excluded reasons perspective, however, is that effects and appearances cannot be so sharply separated.

remain tied to a focus on harms measured atomistically. They substitute different gradations of psychological intrusiveness for coercion, but they demand that courts conceive establishment clause cases as requiring at the first step a judicial measurement of the degree of burdens on individual rights. In the fashion characteristic of the atomistic rights conception, these approaches struggle to reason outward from burdens on individual interests.

The structural perspective, on the other hand, focuses more directly on the boundary line that the establishment clause should be interpreted to create between religious and political spheres. The relevant question is whether *the reasons* for the government action in question are consistent with this differentiation. The exercise of state power itself is the object of judicial evaluation: are the reasons justifying this exercise permitted or excluded in light of the best interpretive understanding of the separation of religious and political spheres? This approach places less emphasis on "weighing" the extent of individualized harm than do doctrinal tests that emphasize coercion, pressure or influence.[32] No balancing of this intrusion against state interests takes place. For example, state religious advertisements are unconstitutional regardless of how one might characterize or measure their burden on individuals; the only justifications that can be offered to account for them involve principles or reasons that are constitutionally excluded as a basis for state action.

In this context, then, rights do not serve (at least exclusively) to protect individual aspects of conscience. Instead, their role is to secure a common good: the kind of political culture in which government maintains a proper respect for the boundaries between religion and politics. In contexts like these, courts should be understood to use rights structurally: to enforce the relevant differentiation between different spheres. In controversial cases, there is typically room for debate about whether courts have properly understood the common good at issue, such as the precise boundary between religion and politics. But that should not obscure that it is the interpretation of that common good, not an atomistic conception of rights, that courts are addressing.

[32] If this perspective seems to imply that *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 485 (1982), is incorrectly decided, because it suggests that mere "psychological consequence[s]" do not generate establishment clause standing, that implication would be correct.

2. Voting Rights: Constructing the Democratic Sphere. Voting-rights cases similarly reveal the structural conception of rights at work. They also illustrate how modern judicial rhetoric obscures this fact. Two of the defining cases in the right to franchise area, *Lassiter* v. *Northampton County Board of Elections*[33] and *Harper* v. *Virginia State Board of Elections*,[34] have long seemed inconsistent to commentators in both method and substance. In *Lassiter*, the Court upheld North Carolina's conditioning of the franchise on satisfactory passage of a literacy test.[35] But seven years later in *Harper*, the Court, dramatically reversing precedents of only fifteen years earlier, held that the Constitution prohibits states from conditioning voting in state elections on payment of state poll taxes.

Lassiter invokes neither the language of "fundamental rights" nor "strict scrutiny." Instead, it waxes on about the "wide scope" and "broad powers" states possess to "determine the conditions under which the right of suffrage may be exercised."[36] In contrast, *Harper* ends with ringing oratory defining voting as a fundamental liberty, restrictions of which must be "closely scrutinized and carefully confined."[37] From these differences in rhetoric and outcomes, many conclude the cases simply reflect two different eras in fundamental rights analysis. *Harper* is a sea change which *Lassiter* cannot endure. On this common view, literacy tests cannot "survive the properly herculean demands of strict equal protection review;" hence *Lassiter* is a relic which "antedated the era of exacting scrutiny of restrictions on the franchise."[38] That is, both cases involve weighing individual rights against state interests; the only difference was that at the time of *Lassiter* voting was not yet considered a weighty enough right.

This view stems from the atomistic conception of the right to vote. But from the outset, it should seem suspect, and here too, the structural conception is more faithful to actual adjudication. To begin at the simplest level, Douglas J. wrote both decisions; presumably he and three other Justices who joined both *Lassiter* and *Harper* found the two consistent. Moreover, Douglas J. had taken the view

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33 360 U.S. 45 (1959) [hereinafter *Lassiter*].

34 383 U.S. 663 (1966) [hereinafter *Harper*].

35 The Court acknowledged that literacy tests might be unconstitutional in two circumstances. First, such a test would be unconstitutional on its face when it gives state officials insufficiently constrained discretion to determine what constitutes satisfactory passage. Second, even a test fair on its face would be unconstitutional when applied in a discriminatory manner. *Lassiter*, *supra* note 33 at 53.

36 *Ibid*. at 50–51.

37 *Harper*, *supra* note 34 at 670.

38 L.H. Tribe, *American Constitutional Law*, 2d ed. (Minneola, New York: Foundation Press, 1988) § 13–15 at 1093.

that poll taxes were unconstitutional as early as 1951.[39] Thus, even at the time *Lassiter* was decided, his was one vote for the view that poll taxes and literacy tests differed. Moreover, his *Harper* opinion refers approvingly to *Lassiter* and offers no self-conscious suggestion of a new direction in voting-rights jurisprudence. And in the years since *Harper*, the Court has continued to rely on *Lassiter*. In short, the Court itself has never seen the contradiction or tension between these pivotal voting-rights cases that many commentators see.

Once constitutional analysis moves away from balancing metaphors and focuses on excluded reasons, the relationship between these two decisions can be better seen. Both reflect the view that voting is a distinct sphere of public action, structured by a distinct set of constitutional norms. These norms govern the *kinds of reasons* that will be treated as proper or excluded bases for state action in this sphere. Literacy tests and poll taxes differ, in the Court's view, precisely because they rest on different justifications and reflect different theories about constructing the common good of the democratic sphere. The cases address essentially the same issue: the kinds of reasons that are permitted and excluded as a basis for state regulation of this common good. But poll taxes and literacy tests rest on radically different justifications; one kind of justification is permissible while the other is not. This follows not from how weighty or fundamental voting is, nor from voting conceived as some atomistic interest. Instead, it stems from the Court's interpretation of the norms that structure the sphere of democratic self-government.

Once we get past the more formulaic recitations of rights and strict scrutiny, the language of the decisions clearly signals this focus on excluded reasons. Literacy tests are justified as defining a political community with the relevant competence for political participation. Rightly or wrongly, *Lassiter* views defining the common good of democratic self-government in this way to be permissible: the "ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot."[40] "Some relation" suffices because the state is acting on the basis of the *kind* of justification that the Court viewed as constitutionally permissible. But in *Harper*, it is the justification itself for poll taxes that forms the obstacle to their constitutionality. As the Court put it, to "introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor;"[41] these conditions

[39] *Butler* v. *Thompson*, 341 U.S. 937 (1951) (Douglas J., dissenting).

[40] *Lassiter, supra* note 33 at 51.

[41] *Harper, supra* note 34 at 668.

"have no relation"[42] to the proper conception of democracy and voting. There is no balancing here — no weighing of rights, burdens and governmental interests against each other. Conditioning eligibility to vote upon ability to pay a fee, however nominal, reflects a conception of the common good of democratic self-government that the Court holds unconstitutional.

This is the "excluded reasons" approach that follows from the structural conception of rights. The question is one of relevance of reasons, not their weight. What the Court inevitably assesses is the legitimacy of the State's justification. Thus, as in other areas of constitutional law, the Court focuses on whether a particular franchise condition is "germane" to the legitimate constitution of the political community.[43] What distinguishes *Lassiter* and *Harper* is not the application of fundamental rights and strict scrutiny, but judgments about how best to interpret the common good of democratic self-government. In method, the two cases are the same, which is why the Court has always treated them as completely consistent.

As with the establishment clause, the issue is not the quantum of intrusion on individual freedoms, but the nature of the reasons purportedly justifying particular collective intrusions. For purposes of political participation, the Constitution permits divisions in terms of threshold political competence, but not financial status. That is a conclusion of constitutional principle, one whose application does not require judicial balancing.

3. *Rights of Free Speech: Public Education, Democracy and English-Only Laws.* Free-speech rights are often considered the paradigm of atomistic rights, resting in the view of some on individual interests in autonomy, dignity or self-expression. But here too the structural conception of free-speech rights — in which the protection of these interests is a means towards the realization of collective interests in the preservation of certain common goods — often does a better job of accounting for actual constitutional doctrine. To illustrate the more subtle logic of speech rights, I will focus on a case that drew much attention precisely because of the apparent conflict it posed between democratic control of schools and individual rights.

[42] *Ibid.* at 666.
[43] *Ibid.* at 668.

In *Board of Education* v. *Pico*,[44] plaintiffs challenged a local school board decision to remove nine books from the school's public library. The Board initially characterized the books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy," concluding that it had a "moral obligation ... to protect the children in our schools from this moral danger as surely as from physical and medical dangers."[45] The Board appointed a joint parent-teacher committee to review the books, but rejected much of this committee's recommendation and ordered the books removed. In a divided decision, the Supreme Court held that, under certain circumstances, a decision of this sort would violate the First Amendment. The Court then remanded to determine whether these factual circumstances were indeed present.[46]

Three aspects of the Court's analysis are most significant for present purposes. First, the Court held the Board's reasons for acting to be constitutionally critical.[47] Some justifications would support book removals; others would not. Thus, the Court concluded that the First Amendment permitted the book removals if the books were not "educational[ly] suitabl[e]," or if they were pervasively vulgar.[48] But the Court distinguished these justifications from a context in which school officials exercised control over school libraries in a narrowly partisan or political manner; the Board could not constitutionally remove books for the purpose of expressing hostility to the ideas they contained.[49] Thus, the constitutionality of the decision depended upon the purposes for which it had been taken. Second, to support this result, the Court further asserted that in public schools, students had a right to receive ideas. This

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44 457 U.S. 853 (1982) [hereinafter *Pico*]. The academic commentary on the case includes J.C. O'Brien, "The Promise of Pico: A New Definition of Orthodoxy" (1988) 97 Yale L.J. 1805; M.G. Yudof, "Library Book Selection and the Public Schools: The Quest for the Archimedean Point" (1984) 59 Ind. L.J. 527; W.A. Kamiat, "Note: State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship" (1983) 35 Stan. L. Rev. 497.

45 *Pico, ibid*. at 857. The books included: K. Vonnegut, *Slaughterhouse Five* (New York: Delacourte Press, 1968); R. Wright, *Black Boy* (London: Harper & Bros., 1945); Anonymous, *Go Ask Alice* (Englewood Cliffs, N.J.: Prentice Hall, 1971); L. Hughes, ed., *The Best Short Stories By Negro Writers* (Boston: Little, Brown, 1967).

46 No single opinion commanded a majority of the Court. When referring to "the Court" I will be focusing on the plurality opinion of Brennan J., joined by Marshall and Stevens JJ. White J. wrote separately to concur in the judgment, *Pico* at 883; Blackmun J. wrote separately concurring in part and concurring in the judgment, *Pico* at 875.

47 *Ibid.* at 871.

48 *Ibid.* at 871.

49 *Ibid.* at 872.

First Amendment right was described as a necessary corollary to student rights of free speech and political participation.[50] Third, in accord with modern styles of constitutional analysis, the Court suggested the conflict implicated two competing interests that had to be "balanced in some way": the student "right" to receive information and the legitimate state interest in inculcating community values through public education.[51]

Framed this way, the Court's analysis is vulnerable to telling criticisms, all raised in strong dissents. If students have an affirmative right to receive information, what difference should the reasons for the Board's actions make?[52] Substantive rights guarantee certain states of affairs, not untainted decisional processes. As one dissent correctly observed, "[B]ad motives and good motives alike deny access to the books removed."[53] The dissents then added that students were not in any way entitled to the resulting state the Court's decision suggested; even the Court acknowledged that the Board had substantial discretion in its initial book-purchasing decisions. Had the Board not purchased the controversial books in the first place, students would have been in the same position as they were following removal. Finally, the dissents argued that, once the Court endorsed the principle that schools legitimately perform an "inculcative function," decisions over library content that enacted this function could hardly violate the First Amendment. This inculcative function and the vaguely defined student "right to receive information" were in direct conflict. Either the right being recognized was unintelligible or the Court was failing to take the schools' inculcative role seriously.[54]

Pico is vulnerable to these criticisms not because it is wrong, but because the Court's rhetoric conceptualized the problem in the formulaic terms of conventional atomistic rights rhetoric. The plaintiffs' argument became a claim that "their" rights were being violated. At that point, the Court began to generate the problems the dissents identified, including the Court's purported need to "balance" this right against legitimate state interests in public education.

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50 *Ibid.* at 867.

51 *Ibid.* at 864.

52 *Ibid.* at 890–91, 897 (Burger C.J., dissenting). See generally M.H. Redish, "The Content Distinction in First Amendment Analysis" (1981) 34 Stan. L. Rev. 113, arguing that focus on reasons for government action undervalues harms to First Amendment from the action's effects.

53 *Pico*, *supra* note 44 at 917 (Rehnquist J., dissenting).

54 See *ibid.* at 888, 892 (Burger C.J., dissenting).

But from the structural perspective, a case like *Pico* does not primarily address the discrete interests of specific individuals; it is better understood as the effort to define the common good of public education by interpreting and enforcing the differentiation between politics and education. Consider several immediate problems with the individualistic rights conception here. First, if rights protect individual freedom in autonomous choice, what force can this kind of right have in the context of public schools? From the start, the autonomy of minors, particularly students, is substantially constrained in ways impermissible when adults are involved (including the initial requirement of compulsory education itself). Moreover, the concept of an affirmative right to receive information is surely elusive at best. Suppose, as the dissent argued, the students had ready access to these books through avenues other than the school library.[55] In what way would the book removal decision then infringe their information-receiving rights? In more traditional contexts, government cannot justify content regulation by arguing that the speaker could say the same things elsewhere. But that principle is easy to apply with rights of self-expression; it becomes considerably more difficult for an asserted right to receive information. The scope of any such right must inevitably be exceptionally indefinite. Finally, recall also the dissent's argument that if rights are involved, courts should be concerned with the effects of the school board's decision rather than the justifications for it.

A better answer must begin, as the structural view of rights does, by recognizing the crucial role of context. A student "right" to receive information could not possibly mean all information, disseminated in any way. Any such right must be more contextually qualified: it must be interpreted in ways consistent with the legitimate educational purposes of public schools. But that quickly brings the underlying issue of structural relationships to the surface. If any "right" is involved, it can only be to a specific kind of educational environment — one organized around norms that give that environment its distinct integrity. "Rights" here, then, can only be surrogates for defining an institutional space with a particular character. But since it is these kinds of

[55] "[T]he most obvious reason that petitioners' removal of the books did not violate respondents' right to receive information is the ready availability of the books elsewhere. Students are not denied books by their removal from a school library." *Ibid.* at 915 (Rehnquist J., dissenting).

structural understandings that do the real work, judicial analysis would be improved by focusing on them more directly than atomistic rights talk suggests.[56]

The structural differentiation implicitly at work in *Pico* must rest on something that might be sketched in the following terms: there is a constitutional distinction between public education designed to develop critical, rational and democratic capacities, and public education designed to ensure that students conform to currently prevailing community perceptions of "correct" ideas.[57] Of course these principles exist in tension and the line between them cannot be drawn sharply. Nonetheless, it is only interpretation and resolution of this tension that can begin to make sense of this kind of conflict, not individual rights rhetoric.

Notice again that this kind of structural approach makes the reasons for the book removal critical — precisely because preserving various common goods requires enforcing the public understandings that maintain the distinct character of diverse common goods. These goods exclude certain reasons from being appropriate bases for state regulation of those goods. Justice Blackmun

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[56] This is the approach the Court took in another school speech case, *Tinker* v. *Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). In prohibiting a school from blocking students from engaging in silent political protest in the schools by wearing arm bands, the Court did not seek to "balance" student rights against the school's interest in inculcating dominant community values. Instead, the Court recognized the basic principle that a state may not "so conduct its schools as to 'foster a homogeneous people,'" 393 U.S. at 511 (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 402 (1926)). Thus the immunity of students engaging in nondisruptive political protest was protected on the instrumental ground that such speech contributed to the proper educational role of the schools: exposing students to differing perspectives on controversial issues.

[57] For a fuller elaboration of this democratic theory of education, see Kamiat, *supra* note 44; A. Gutman, *Democratic Education* (Princeton, N.J.: Princeton University Press, 1987). Gutman argues that the theory of democracy itself should be understood to require that authority over education be shared among parents, citizens and professional educators, none of whom should be understood to have a monopoly on this authority, *ibid*. at 42. Moreover, this authority is always to be constrained by two substantive principles: "nonrepression" and "nondiscrimination." The former prohibits educational policy from suppressing "rational" deliberation of competing conceptions of the good life and the good society; the latter requires that "all educable children be educated," *ibid*. at 44–45. Together, these constraints seek to assure that the inculcative functions of education remain consistent with democracy itself. As she puts it: "[A]dults must therefore be prevented from using their present deliberative freedom to undermine the future deliberative freedom of children," *ibid*. at 45, and "[c]itizens and public officials cannot use democratic processes to destroy democracy," *ibid*. at 14.

instinctively expressed this approach in a separate concurrence that offered a more structural focus than the Court's more conventional atomistic rights analysis. As Blackmun J. put it, the result in *Pico* could best be understood in terms of a "general principle" whose enforcement necessarily turns on inquiry into excluded reasons: "[T]he State may not suppress exposure to ideas — for the sole *purpose* of suppressing exposure to those ideas — absent sufficiently compelling reasons."[58]

Perhaps such an analysis, with its focus on defining the principles legitimating exercises of governmental authority in various spheres, is almost disarmingly simple. With the proliferation of line drawing, balancing, multi-factor tests and similar modern techniques, the Constitution has taken on what has rightly been called a "formulaic" cast.[59] This contemporary effort to forge a rigid analytical architecture for doctrine has made it more difficult to focus on basic structural principles concerning the relationship between different spheres of authority. A virtue of more self-conscious adoption of this structural analysis is that it recaptures[60] a simplicity and clarity that might further the articulation and understanding of public values.[61]

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58 *Pico, supra* note 44 at 877 (Blackmun J., concurring).

59 R.F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkeley: University of California Press, 1989) at 121–22, criticizing modern doctrine's tendency to lead to a "formulaic constitution."

60 In Pildes, *supra* note 25 at 712–14, I argue that this kind of structural reasoning was characteristic of late nineteenth-century constitutional analysis and was replaced with the rise of more overtly instrumental analysis associated with legal realism.

61 In response to concerns regarding purpose-oriented constitutional doctrines, it is worth noting in this context that, as the structural approach emphasizes, the conflict in *Pico* is precisely over social understandings. The actors involved already understand the conflict in these terms. Their aim is not simply to bring about a certain end result — it is to do so on the basis of particular purposes widely understood as the basis for their action. Changing social understandings is central to their goal. In *Pico* itself and similar cases, book removal is often done with great fanfare and much publicity, and occasionally with book burning. The Second Circuit Court of Appeals noted in *Pico* that "[d]efendants conducted themselves ... in a manner calculated to create a public uproar. ... They insured that the impression would be created that freedom of expression in the District would be determined in some substantial measure by the majority's will." *Pico* v. *Board of Educ*., 638 F.2d 404, 416 (2d Cir. 1980); see also Kamiat, *supra* note 44 at 534, n. 126 (discussing the contexts of similar cases). A central point of these struggles is the establishment of control over how the boundary between schools and the community is understood. The contest is not over the particular books at issue, but over what purposes and principles local communities can invoke in regulating public schools. It is a contest for control over the meaning of institutions. Judicial emphasis

Finally, reconceptualizing rights in cases like *Pico* in structural rather than atomistic terms helps dissolve certain confusions endemic to the more individualist interpretation of rights. Whether "rights" have been violated or "pressured"[62] becomes less critical. Actions affecting public schools — whether of school administrators, legislators or local parents' organizations — ought not be taken for reasons inconsistent with the principles that define public education as a distinct kind of common good. Similarly, questions of whether these actions coerce students legally or even psychologically are often misdirected. The proper focal point is the action itself, when taken by the State: whether the values expressed through it are consistent with the best constitutional understanding of public education as a common good. By appreciating that in practice, rights are often justified due to their efficacy in realizing common goods, it becomes easier to avoid the conundrums of balancing and, more importantly, to recognize that the logic of American constitutional rights is not nearly as inherently atomistic as concerned critics worry.

A final First Amendment problem, recently before the Supreme Court,[63] further illustrates this point. In a sharply divided opinion, the Ninth Circuit recently held *en banc* that Arizona's "English-only" laws, adopted through voter initiative as a state constitutional amendment, violated First Amendment speech rights of government employees.[64] The plaintiff, Maria-Kelley Yniguez, was a bilingual employee of the Arizona Department of Administration who handled medical-malpractice claims against the state. Before the amendment, she spoke Spanish to exclusively Spanish-speaking claimants. As judicially interpreted, the English-only law prohibited all governmental employees from speaking other than in English when performing their official duties.[65]

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on the school board's justifications for acting, then, directly engages the conflict in the terms in which it is already understood. And once certain purposes are established to be impermissible, pursuing the same ends more covertly would in many contexts be self-defeating.

62 See K.M. Sullivan, "Unconstitutional Conditions" (1989) 102 Harv. L. Rev. 1413 at 1500–503.

63 *Arizonans for Official English* v. *Arizona*, 117 S.Ct. 1055 (1997).

64 *Yniguez* v. *Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (*en banc*), vacated and remanded, *Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055 (1997).

65 *Ibid.* (1995) at 931.

The Court of Appeals majority struck this law down as infringing with the speech rights of public employees. In reaching that conclusion, the court relied on traditional doctrines "balancing" the First Amendment rights of public employees against the government's interests in regulating those it hires.[66] Previous cases had recognized distinct government interests justifying the regulation of employee speech rights toward the end of ensuring that public functions be performed efficiently and effectively. The court concluded, however, that the English-only law did not serve those interests closely enough, given the infringement on individual rights.

But surely this formulation miscasts the terms of the conflict (even if standing rules and doctrinal continuity encourage or require this way of framing the issue). First, this conflict is not about "the rights" of public employees to free speech, at least not in the atomistic conception of rights. As in the other cases discussed above, any rights recognized here do not protect only or, in this case even primarily, the interests of the right holder. Public employees do not have rights of free speech as a means of respecting their individual interests in autonomy or self-expression. If constitutional doctrine recognizes rights here, it is because doing so is a means of realizing interests in addition to those the formal right bearers might have. It is the interests of those whom government *serves*, not employs, that are most powerfully at stake here (even if they cannot claim a "right" to be serviced in their own language). More broadly, the question is the kind of public good that government can create in the public sphere: what kind of common public culture can government create in its institutional practices? To begin to make sense of the court's decision, we must immediately recognize that acknowledging rights here does not serve atomistic interests, but collective and structural ones. In other words, as an account of the legal practice of rights-oriented constitutionalism, the atomistic conception is again wrong.

Second, to assimilate the kind of justifications the State relies on here for regulating its employees to the efficiency-enhancing justification used in other government employee cases is equally misleading. English-only laws exist not to make government more efficient, but to assert a particular conception of the public sphere and of the political culture. Advocates of such laws presumably believe that, particularly in the absence of other forms of collective identity (shared religion for example), a common American identity must be constructed

[66] The seminal case in this line has generated what is known as "the *Pickering* balancing test." See *Pickering* v. *Board of Educ. of Township High School Dist.*, 391 U.S. 563 (1968).

out of practices such as use of a common language in public institutions.[67] That is, these laws exist precisely to realize a common good, as supporters of these laws define that good. The constitutional clash therefore is not between the "rights" of public employees versus the strength of governmental interests in regulating those rights. The clash is over competing conceptions of a particular common good: the official public culture of the state, as expressed through its language commitments. That is, the question is necessarily the *character* of the common culture that government may constitutionally seek to create as it defines the public sphere. Unavoidably, rights discourse here simply serves as a vehicle for courts to define the character of such common goods.

Conceptualizing this case as one of individual rights — or, more precisely, of rights understood atomistically — fails for reasons the dissent brings out tellingly. Taking the majority's rights rhetoric at face value, the dissent argued that the court had wrongly adopted "the dangerous notion that government employees have a personal stake in the words they utter when they speak for the government."[68] But, the dissent went on, government employees have no personal stake in what they say because that speech is in effect the government's, not theirs. No rights even exist here that might be subject to "balancing"; government can require employees to adhere to its policy positions. To take an example from the dissent, surely a state social worker who disagreed with a local government's policy of encouraging single mothers to enter the workforce would have no First Amendment right to keep her job and encourage mothers to stay home.[69]

These points are powerful — but only if one misunderstands the discourse of rights. True enough, public employees do not have a right to turn public offices into personal soapboxes. They do not have a personal stake in what they say in their official capacity; in many ways, government can indeed require that they adhere to the party line in performance of their public duties. But the requirement that they do so is legitimate only if that party line itself is one that government is constitutionally permitted to adopt. The American Constitution limits government to acting on the basis of certain permissible reasons in

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[67] Thus, the former Speaker of the House Newt Gingrich, in advocating a national English- language law passed by the House of Representatives, argued: "Is there a thing we call American? Is it unique? It is vital historically to assert and establish that English is the common language at the heart of our civilization." E. Schmitt, "House Approves Measure on Official U.S. Language" *New York Times* (2 August 1996) A10.

[68] *Supra* note 64 at 962 (Kozinski J., dissenting).

[69] *Ibid.*

constructing common goods such as the public sphere. When the common good being pursued is legitimate, government can require its employees to endorse that policy. Thus, the state could require its employees to support, in the performance of their official duties, a policy of encouraging single mothers to work. If English-only laws are unconstitutional, it must be because their justification reflects a view of the common good that government cannot endorse. Only *after* courts reach this conclusion can it make any sense to conclude that such policies violate the "rights" of public employees.

Definitions of the common good, not analysis of rights, therefore drive decisions in this area of the First Amendment as well. Rights serve as technical means for bringing into court these issues of the definition of the common good. But the content of the rights recognized follows from the definition of the particular common good at issue, not the other way around. And rights are vehicles not for atomistic, self-regarding interests of the right holders, but for protecting collective interests and structural concerns.

C. The Structural Approach: General Considerations

Across many areas of constitutional doctrine, American academics are increasingly coming to assert that judicial decisions turn less on the material effects state action produces and more on distinguishing permissible from impermissible justifications for state action.[70] No one has yet

[70] For a general theoretical treatment, see E.S. Anderson & R.H. Pildes, "Expressive Theories of Law: A General Restatement" (2000) 148 U. Pa. L. Rev. 1503. With respect to the First Amendment, Robert Post has argued that such rights serve largely to differentiate distinct public spheres of various common goods, such as the sphere of self-government, the sphere of bureaucratic management and the sphere of community life. R.C. Post, *Constitutional Domains: Democracy, Community, and Management* (Cambridge, MA: Harvard University Press, 1995). From a different perspective, Vincent Blasi has argued that First Amendment "rights" are primarily concerned with checking the kinds of justifications government relies on to interfere with speech. V. Blasi, "The Role of Strategic Reasoning in Constitutional Interpretation: In Defense of the Pathological Perspective" (1986) Duke L.J. 696; V. Blasi, "The Pathological Perspective and the First Amendment" (1985) 85 Colum. L. Rev. 449. In the Fourteenth Amendment area, I have argued that the recent racial-gerrymandering decisions do not turn on whether atomistically conceived individual rights have been violated, but on whether government has corrupted the structure of democratic institutions by designing them with too excessive a reliance on race. R.H. Pildes & R.G. Niemi, "Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District

synthesized these discrete doctrinal studies into a larger vision of constitutional

Appearances After *Shaw* v. *Reno*" (1993) 92 Mich. L. Rev. 483 at 499–527. With respect to the dormant commerce clause, Don Regan has argued that the principle emerging from the cases is not whether state regulation imposes too substantial a burden on interstate commerce in light of the local benefits realized, but on whether state regulation rests on an impermissible justification: protectionist purposes. D. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause" (1986) 84 Mich. L. Rev. 1091. With respect to the takings clause, Jed Rubenfeld has argued that the case-law is best rationalized by recognizing that decisions turn on what justifications government offers for interferences with private property, not on economic calculations concerning the size of diminution of economic value. J. Rubenfeld, "Usings" (1993) 102 Yale L.J. 1077. With respect to property rights more generally, Carol Rose and others have insisted that rather than only protecting avaricious self-regarding interests, such rights also promote cooperation, responsibility and attentiveness to others. See *e.g.* C.A. Rose, *Property and Persuasion* (Boulder, CO: Westview Press, 1994) at 37, ("A property regime, in short, presupposes a kind of character who is *not* predicted in the standard story about property."); C.A. Rose, "Rhetoric and Romance: A Comment on Spouses and Strangers" (1994) 82 Geo. L.J. 2409 at 2411, (property rights draw "people into a fruitful moderation and mutual attentiveness"); R.C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991) at 123. See also J. Rubenfeld, "The Right of Privacy" (1989) 102 Harv. L. Rev. 737 at 804, arguing that constitutional rights of privacy should not be understood as protecting fundamental individual rights, but rather that "[t]he right to privacy is a political doctrine" in the sense that it serves to limit government power from totalizing conscriptions of the individual. For the argument that the *Bill of Rights* as a whole was conceived less as a protection of atomistically understood individual liberties and more as a set of structural mechanisms for maintaining popular sovereignty, see A.R. Amar, "The Bill of Rights as a Constitution" (1991) 100 Yale L.J. 1131. For other articles that seem to reflect similar views about the centrality of government justifications and the maintenance of differentiations between distinct spheres as more helpful than conventional rights analysis at illuminating actual constitutional practice, see D. Cole, "Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech" (1992) 67 N.Y.U. L. Rev. 675; L.M. Seidman, "Public Principle and Private Choice: The Uneasy Cast for a Boundary Maintenance Theory of Constitutional Law" (1997) 96 Yale L.J. 1006. For an important analog in the area of legislation, see the argument that antidiscrimination statutes are best understood as means of enforcing principles of differentiation, in which certain bases for action are ruled out in particular spheres, rather than as means of seeking a more persuasive transformation of cultural attitudes. R.M. Hills, Jr., "You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws" (1997) 95 Mich. L. Rev. 1588 (reviewing A. Koppleman, *Antidiscrimination Law and Social Equality* (New Haven: Yale University Press, 1996)).

practice, but the fact that several scholars working in disparate fields have independently noticed the same doctrinal phenomenon is suggestive. Let me sketch the general methodological features of judicial decisionmaking that emerge as the alternative to balancing once the place of the structural conception of rights in actual American constitutional practice is recognized.

The focus on differentiation and excluded reasons leads courts to emphasize two issues. Neither is typically associated with the atomistic conception of rights adjudication. First, the justifications for governmental actions are paramount in assessing the constitutionality of those actions. This needs to be stressed because the American Supreme Court sometimes suggests precisely the opposite: that constitutional doctrines should not be based on the line between whether the government's justifications are legitimate or not.[71] But the boundaries between

[71] *Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."). Even since these decisions, the Court has steered an uneven course when considering the relevance of purpose in different fields of constitutional scrutiny. See *e.g. Edwards* v. *Aguillard*, 482 U.S. 578, 586–87 (1987) [hereinafter *Edwards*] ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham"); *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985) ("For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion [that the statute have a secular purpose], the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."); *Hunter* v. *Underwood*, 471 U.S. 222, 228 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor."); *Mueller* v. *Allen*, 463 U.S. 388, 394–95 (1983), stating that the Court has a "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"; *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."); *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or awareness of consequences. ... It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."); *City of Richmond* v. *United States*, 422 U.S. 358, 378–79 (1975) ("Annexations animated by such a purpose have no credentials whatsoever for '[a]cts generally lawful may become unlawful when done to accomplish an unlawful end' ... An annexation proved to be of this kind ... is forbidden ... whatever its actual effect may have been or may be.") [citation omitted]. As one commentator summarizes the case-law, "the Court's decisions do indicate a general

spheres of distinct common goods are themselves simply matters of cultural understandings; these understandings permit only certain reasons to justify state action in certain spheres. To enforce these boundaries is necessarily to enforce these understandings. As a result, whenever rights adjudication works structurally and not atomistically — as I claim it often does — courts must necessarily evaluate the government's underlying justifications for its actions.

Moreover, this point is powerful enough that, even when two actions produce the same material consequences, they should be evaluated differently whenever they rest on distinct justifications.[72] For constitutional and other purposes, it is a mistake to treat an action as independent from the reasons behind it, for those reasons give actions their distinct social meanings. Two state actions are not the same — ethically, expressively and sometimes legally — if they are taken for different reasons. How an action comes about shapes its social meaning — and therefore what it is.[73]

The atomistic conception of rights can obscure this important fact by focusing on the quantum of individualized injury at issue. In the takings clause area, the focus becomes "diminution of economic value." In the establishment clause area, the emphasis becomes how much individualized "coercion" is involved. In the First Amendment area, the issue turns on how much "infringement" on self-expression is at stake. In the dormant commerce clause area, the question becomes how much interstate commerce is "burdened" in light of the local benefits achieved. But these formulations do little to explain the actual practice of constitutionalism in these fields. Once the *de facto* role of the structural conception of rights is appreciated, it becomes easier to see how much courts instead focus on the justifications for the state action at issue. The structural

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tendency, when all other things are equal, to grant greater deference to Congress and to state legislatures so far as the inquiry into purpose is concerned." Tribe, *supra* note 38 at § 12–15, 817.

72 This is one way of understanding the Court's controversial conclusion in *Palmer* v. *Thompson*, 403 U.S. 217 (1971) [hereinafter *Palmer*], that a city did not violate the Constitution in closing its segregated swimming pools to avoid constitutionally mandated integration. From a material perspective, one might assert that absent an affirmative individual right to a city-provided pool, a city can close its existing pool for good reasons, bad reasons, or no reasons at all. The Court endorsed this reading of *Palmer* again in *Washington* v. *Davis*, 426 U.S. 229, 242–43 (1976), describing *Palmer* as a case in which the city's closing of a municipal pool in response to desegregation orders had extended "identical treatment to both whites and Negroes."

73 See L. Lessig, "The Regulation of Social Meaning" (1995) 62 U. Chic. L. Rev. 943.

approach recognizes that a significant part of what matters about interpreting and evaluating state action are the reasons that justify it.[74]

The second general methodological point is this: when the structural approach is at work, courts are necessarily making interpretive judgments about how to characterize, for constitutional purposes, various common goods. Different common goods, or different spheres, are structured by different sets of constitutional norms. Some of these norms provide constitutional integrity to the sphere of religion, others to public education, still others to voting or democratic politics itself. The question then follows, to what authoritative sources do or should courts look in this value-laden role of giving content to distinct common goods (this is sometimes referred to as the problem of defining "baselines" in modern constitutionalism[75]). This question of how courts do or should define the boundaries between separate spheres of distinct common goods raises questions of constitutional theory I cannot address here. Rather, my aim is to sketch the general kind of questions that courts must necessarily confront when the illusory

[74] This emphasis on the reasons or justifications for state will, for some, raise familiar concerns about judicial inquiry into legislative purposes. See *e.g. Palmer, supra* note 72 at 224 ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment"); *Edwards, supra* note 71 at 626–37 (Scalia J., dissenting); *Kassel* v. *Consolidated Freightways Corp*., 450 U.S. 662, 703 (1981) (Rehnquist J., dissenting); see also *supra* note 71. But judicial review of legislative justifications and motives might well be the task judges are most well positioned to perform. As my colleague Don Regan has written, "[I]f we ask what subject-matter judges as a class are most knowledgeable about (aside from legal doctrine), it is surely politics. It is not physics, chemistry, biology, engineering, economics, social psychology" or other tools that might be necessary in evaluating the effects, rather than the justifications, of public policies. D.H. Regan, "Siamese Essays: (I) *CTS Corp*. v. *Dynamics Corp. of America* and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation" (1997) 85 Mich. L. Rev. 1865 at 1872–73. Moreover, the purported difficulties with purpose analysis often rest on misconceptions about the task — for example, the view that it requires courts to probe the subjective states of mind of public actors. See *e.g. Edwards, supra* note 71 at 626–37 (Scalia J., dissenting). Evaluating the justifications for public actions does not require divining the hidden, private motives behind them. Indeed, at times, the justifications are explicitly articulated. When state action mandates public-school prayer, there is no disagreement about the justifications the state offers in defence. The constitutional question is whether these justifications are consistent with the First Amendment. Even when no such explicit justification is available, the process is one of constructing a narrative account that provides the most convincing explanation of the reasons that an action has been taken — just as with any judicial act of purposive statutory interpretation.

[75] See *e.g.* C. Sunstein, "Lochner's Legacy" (1997) 87 Colum. L. Rev. 873 at 875.

rhetoric of balancing is put aside and the more important role of the structural conception of rights is recognized.

IV. CONCLUSION

I close with a few words about the narrower topic of judicial techniques, then with some broader suggestions about rights-oriented constitutionalism. With respect to the mechanics of judicial decisionmaking, we sometimes make the theory of adjudication unduly complex. In many contexts, problems of "balancing" arise from a misconception of the role constitutional rights play in actual practice. Partly as a product of legal conventions like standing doctrines, we too readily understand "rights" as protections against highly specific individualized harms — affronts to individual entitlements to liberty, dignity or autonomy. Once this individualistic conception is embraced, constitutional conflicts become organized around the dynamics of individual rights and clashing state interests. The rhetoric of balancing, as well as the apparent problems that balancing entails, then dominates constitutional discourse.

But constitutional rights often play another role. They are linguistic tools for defining the boundaries between separate spheres of political authority. In this role, rights are the legal technique for protecting distinct common goods.[76] Rights serve this function by signalling different "excluded reasons" that cannot be the justification for government action in different spheres. The "right" to vote means that government may not make financial means a basis for defining political competence; the "right" to free speech means that government may not attempt to politically indoctrinate public-school students; the "right" to freedom of religious conscience means that government may not act for the purpose of endorsing religion or religious sects.

[76] I do not mean to argue that the excluded reasons approach is sufficient to explain all of constitutional law. Rights play many roles, and no doubt many problems must continue to be understood to involve direct conflicts between rights and state interests. See *supra* note 13. My claim is only that not all problems described in these terms are, in fact, best understood this way.

The "excluded reasons" approach to constitutional law entails a method of decisionmaking different from that offered by those who assume courts engage in "balancing."[77] When courts define excluded reasons, they are not best understood as balancing individual rights against state interests. Judicial rhetoric aside, the process is not the purportedly quantitative one of assigning comparative weights to these incommensurable entities. Defining excluded reasons is instead a qualitative task, one that requires courts to evaluate the justifications for public action against the principles that give different common goods their unique normative structure. This approach may be less complex than the seemingly more sophisticated and rigorous ones of balancing, multi-factor formulas, and other purportedly analytical techniques. But it has the countervailing virtue of coming much closer, in my experience, to describing the way judges actually decide cases.

With respect to rights-oriented constitutionalism more broadly, my aim has been to show that the purported contrast between individual rights and the common good has been drawn too broadly. Nothing in the logical structure of rights entails that, as some Canadians fear, a "rights-centred society becomes little more than an aggregate of self-interested individuals."[78] Nor need rights always be viewed as trumps that individual interests exert over collective concerns. Exploration of actual American constitutional practice, as opposed to more abstract philosophical accounts of rights, clarifies the ways in which rights often serve to *realize* certain common goods, rather than to stand against them.

Critics of rights, including some Canadian ones, worry that rights adjudication inherently will construct a more atomistic political culture. But whether rights bring about this kind of culture or some other in any particular

[77] Note that the view of rights as trumps and of constitutionalism as involving clashes between rights and the common good need not logically entail the "balancing" rhetoric courts so often invoke. Dworkin himself, the principal proponent of the rights as trumps view, is also well known for his arguments against balancing rights against the common good in some kind of utilitarian sense. For Dworkin, it follows from the very nature of rights that this kind of balancing is inappropriate; the point of rights is to define interests not subject to being overridden in pursuit of the common good. Dworkin, *supra* note 6 at 198–204. Here as throughout, I mean to be describing features of actual constitutional practice; judges routinely do invoke a rhetorical framework in which rights are pitted against appeals to the common good and balancing imagery is then deployed purportedly to resolve the clash.

[78] See Hutchinson, *supra* note 4 at 90.

constitutional system does not depend on rights recognition *per se*. It depends on what content courts give to the character of the common goods that the rights recognized help construct.[79] As an analytical matter, rights need not be understood in the terms the atomistic conception offers. And as a sociological matter, rights adjudication in the United States has not worked only as the atomistic portrayal suggests. The structural conception of rights, in which rights serve as means to differentiate the boundaries between distinct common goods, describes a good deal of American constitutional practice.

The technical problem of judicial "balancing" thus provides a window into broader issues of the practice of rights-oriented constitutionalism. In our understandings of rights, I suggest we need to modify the atomistic conception with recognition of the more structural role rights often play. As a result, in our understanding of constitutional adjudication, we can see how balancing rhetoric often obscures a decisionmaking process better characterized as the judicial definition of impermissible justifications or excluded reasons. In worrying about the cultural effects of importing constitutionalism into new political systems, we need to start from a rich appreciation of the complexity of actual American constitutional practice.

[79] Indeed, some of those who initially asserted the *Charter* would make Canada more individualistic already appear to have backed away from that claim a bit. Thus, in a recent essay, Seymor Martin Lipset now argues that despite the *Charter*'s guarantee of individual liberties, Canada "has maintained its historic preference for the interests of the community over the rights of the individual." Lipset & Pool, *supra* note 5 at 3. This essay goes on to assert that "Europeans and Canadians [in contrast to Americans] define constitutional rights more consistently with the social contract notions put forth by Immanuel Kant and Jean-Jacques Rousseau." *Ibid*. at 38. Thus, Lipset recognizes that neither rights guarantees nor constitutionalism *per se* produce an atomistic political culture; much depends on how courts, inevitably drawing on background cultural understandings of diverse political cultures, interpret the relevant common goods that rights often exist to protect.

LIBERTY RIGHTS, THE FAMILY AND CONSTITUTIONAL POLITICS

Hester Lessard*

The pursuit of parental claims under section 7 of the Charter *has required courts to expand the liberty rights jurisprudence beyond the confines of a minimal notion of physical liberty. In so doing, the Supreme Court of Canada has added to a small but growing number of cases that recognize an "irreducible sphere of personal autonomy" or privacy rights under section 7. The parental rights claims, however, are particularly contradictory, revealing a deeply embedded and more pervasive tension between the individualist values of classical liberalism and the deference to traditional family values typical of conservative ideologies. The key features of these two currents in legal and political discourse are examined and compared in order to explicate more fully their uneasy fusion in the parental rights case-law. The constitutionalization of traditional family relationships represented by the parental rights decisions provides an important counterpoint to* Charter *case-law that aims to introduce notions of substantive equality and pluralism to family law discourses.*

La poursuite de demandes de prestations parentales en vertu de l'article 7 de la Charte *a exigé des tribunaux qu'ils élargissent la jurisprudence des droits de la liberté au-delà des limites de la simple notion de liberté physique. En agissant ainsi, la Cour suprême du Canada est venue enrichir un petit nombre grandissant de causes qui reconnaissent «une sphère irréductible d'autonomie personnelle» ou des droits à la vie privée en vertu de l'article 7. Cependant, les demandes de prestations parentales sont particulièrement contradictoires en ce sens qu'elles révèlent une tension profondément ancrée et plus envahissante entre les valeurs individualistes du libéralisme classique et la déférence des valeurs familiales traditionnelles des idéologies conservatrices. Les éléments clés de ces deux courants du discours légal et politique sont examinés et comparés dans le but d'expliquer plus en détail leur fusion précaire dans la jurisprudence des droits parentaux. La constitutionnalisation des relations familiales traditionnelles telles qu'elles sont représentées par les décisions en matière de droits parentaux fournit un contrepoint important à la jurisprudence de la* Charte *qui cherche à introduire des notions substantielles d'égalité et de pluralisme dans le discours du droit de la famille.*

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I. INTRODUCTION

Two quite distinct conceptions of liberty have structured Canadian jurisprudence.[1] The tension between them reflects a broader tension between classical liberalism and conservative ideologies. In recent times, the entrenchment of the *Charter* has rendered more explicit the legal discourse concerning the nature of liberty. Particularly prominent as the focal point for discussion has been section 7 of the *Charter* which specifically guarantees "everyone ... the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Legal analysis of the nature of liberty and of its classical liberal and conservative versions has been further complicated by parallel currents in the *Charter* jurisprudence, most notably the ongoing tension between classical conceptions of formal equality and more modern conceptions of substantive equality in the jurisprudence relating to the section 15 equality guarantee. However, the constitutional liberty jurisprudence, although not immune to contemporary revisions of classical liberal values, has been less receptive to them than the equality jurisprudence. This relative intractability of classical notions of negative liberty may lie in their foundational nature. Negative liberty encapsulates on an individual level the definitional opposition between the state

[1] This analysis draws on and is indebted to an essay by Patrick Macklem that explores variations on individualist and collectivist themes in both pre- and post-*Charter* constitutional discourse. Macklem presents classical liberalism and pluralist liberalism as two ideological variations on the individualist theme, while conservatism and socialism provide two parallel variations on the collectivist theme. P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117. I should note here that, unlike Patrick Macklem, I have used the term conservativism rather than toryism throughout this chapter in order to link the conservative strain of *Charter* discourse to the broad philosophical tenets of conservative thought as well as to the particular manifestation of those tenets in British and Canadian tory political traditions. However, many writers use the terms interchangeably when discussing Canadian political ideologies. Gad Horowitz, writing about Canadian politics, provides the following helpful correlation: "By 'conservativism' I mean not the American conservativism which is nineteenth century liberalism, but toryism — the British conservativism which has its roots in a pre-capitalist age, the conservativism that stresses prescription, authority, order, hierarchy, in an organic community." G. Horowitz, "Tories, Socialists and the Demise of Canada" in H.D. Forbes, ed., *Canadian Political Thought* (Toronto: Oxford University Press, 1985) 353 at 353.

and the citizen which permeates the liberal vision of the political community. Thus, under section 7, the older tension between traditional conservative ideologies and classical liberalism continues to play an important role in structuring the scope and character of the liberty protection.

In this essay, I set out to examine the tension between conservative and classical liberal ideologies in the context of the jurisprudence on the liberty rights of parents. I will use as my two main examples the Supreme Court of Canada decisions in *Jones* v. *The Queen*[2] and in *B.(R.)* v. *Children's Aid Society*.[3] Both of these cases reveal a Court that is deeply divided in its approach to the relationship between individual rights protections and family relationships. The division is rooted, in part, in the difficulty of melding the individual rights framework of the *Charter* — so vigourously liberal in its design — with conservative family values. In both *Jones* and *B.(R.)*, the Court failed to achieve majority support for any of the various approaches to resolving this difficulty. However, in the latter case, a plurality of four judges came together in support of what I have called a neoconservative synthesis. In short, the *B.(R.)* plurality somewhat awkwardly fused conservative conceptions of the family onto the fundamentally liberal design of the liberty rights protection. Most of this essay is taken up with plotting this ideological map of judicial politics; namely, the tension between conservativism and classical liberalism, as it is played out in the two cases.

Although the labels classical liberalism, modern liberalism, conservativism and neoconservatism evoke sharply opposed systems of political thought, I refer to them as porous and shifting clusters of values rather than rigid categories. A focus on the *Charter* inevitably places a discussion of liberty within the boundaries of contemporary liberalism and generates a set of alternative visions of liberty rights that are reconfigurations of, rather than divergences from, liberal principles and a given set of constitutional rules and concepts. Thus my claim to "plot a map" is slightly artificial and risks oversimplification. Nevertheless, the tension in constitutional doctrine between liberal and conservative values is sufficiently distinct to yield a useful, if broadly drawn, template of ideological and normative commitments. The template provides a sense of what is at stake politically in this area of judicial decisionmaking. As well, the process of developing the template offers an opportunity to unpack the resonances and contradictions that underlie the jurisprudential version of the popular discourse of neoconservatism.

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2 (1986), 31 D.L.R. (4th) 569 (S.C.C.) [hereinafter *Jones*].

3 (1995), 122 D.L.R. (4th) 1 (S.C.C.) [hereinafter *B.(R.)*].

My focus on parental liberty rights automatically eliminates the large number of section 7 cases that have been concerned with the fairness and procedural propriety of individual interactions with the state. The bulk of the cases under the liberty prong of section 7 have been challenges to criminal or penal law that rely on a relatively straightforward meaning of liberty as freedom from state-imposed detention or incarceration. As a consequence, the discussion in these latter cases has concerned the second stage of analysis; namely, whether the deprivation of liberty — understood as the risk of incarceration or detention — was consistent with the principles of fundamental justice. This jurisprudence has had a significant impact on the criminal and penal justice system in Canada, in particular on the rules of evidence and the procedures whereby an accused is brought to trial and tried.[4] However, most of these cases have shed very little light on the content of the liberty interest in the first part of the right beyond a rudimentary notion of physical liberty defined negatively as nondetention.[5]

[4] There are also a small number of significant decisions that are considered examples of substantive rather than procedural due process in that they address the substantive nature of proof within the penal process. *Reference Re Section 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 (S.C.C.) [hereinafter *Motor Vehicle Reference*], discussed in the next section of this essay, is the first and foundational case in this line of jurisprudence. This case addressed the constitutionality of B.C. legislation that makes it an absolute liability offence to be found driving with a licence subject to a prohibition or suspension. The legislation provided for a penalty of imprisonment. The case stands for the proposition that the combination of absolute liability with the possibility of imprisonment violates the section 7 right not to be deprived of physical liberty except in accordance with the principles of fundamental justice. Another example is *R.* v. *Vaillancourt* (1987), 39 C.C.C. (3d) 193 (S.C.C.). Here, the Court invalidated a felony murder provision which allowed a conviction of murder without proof of an intent to kill. Although these cases place substantive limits on state power, they are very tightly tied to notions of moral innocence and of fairness of process in penal proceedings. Indeed, they illustrate the difficulty of separating procedural from substantive issues, at least in this area. As the cases add very little to notions of the scope of section 7 outside the realm of entitlements to fairness in penal proceedings, I shall not, except for the discussion of the interpretive directives set out in the *Motor Vehicle Reference*, cover them in this essay. For a comparative discussion of the impact of constitutional rights on the criminal law, including the criminal law doctrine of intent, in the United States and Canada, see R. Harvie & H. Foster, "Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the Charter" (1992) 24 Ottawa L. Rev. 39, in particular at 92–98.

[5] I do not mean to suggest that this notion of liberty is unimportant or never controversial. Lately, it has become critical in debates over the legal regulation of pregnant women; in particular, over the detention of pregnant women whose substance abuse allegedly

Parental liberty rights now form an important thread in a small but developing section 7 jurisprudence on privacy rights or, more specifically, "rights to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference."[6] Among the rights included under this "negative privacy" rubric, parental liberty rights raise most directly questions about the nature of family and its place in the constitutional order.

harms the fetuses they carry. For example, the majority in *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.*, [1997] 3 S.C.R. 925, a case involving an application to detain a woman on the grounds that her solvent addiction endangered her fetus, referred to the right of the individual "to live and move in freedom" as "the most sacred sphere of personal liberty." *Ibid*. at para. 46, per McLachlin J. Constitutional liberty interests were not fully analyzed as the majority found there was no legal basis on which a court could make such an order. Major J. dissented but did not analyze the constitutional liberty interests of pregnant women other than to stipulate that no order should issue unless the woman in question had decided not to exercise her right to an abortion but to carry the fetus to term. *Ibid*. at para. 133, per Major J.

6 *Godbout* v. *Longueuil,* [1997] 3 S.C.R. 844 at 893, per La Forest J. In *Godbout* v. *Longueuil,* La Forest J., writing for a minority consisting of himself and two others, built on his reasons for the plurality in *B.(R.)* and found that section 7 liberty protects the individual right to choose where to establish a home. The other six judges in *Godbout* v. *Longueuil* came to the same result without resort to section 7 of the *Charter*. Another key strand in the privacy jurisprudence is represented by Wilson J.'s separate concurring reasons in *R.* v. *Morgentaler* (1988), 44 D.L.R. (4th) 385 [hereinafter *Morgantaler*], in which she asserted that section 7 liberty rights extended to the decisions of women to continue or terminate a pregnancy, see discussion *infra* at note 37. In *R.* v. *Heyward,* [1994] 3 S.C.R. 761, Cory J. for the majority found that *Criminal Code* restrictions on loitering violated section 7 liberty. The liberty interest can be understood here in terms of unrestricted physical mobility, thus aligning it closely with the nondetention interpretation of liberty. However, the liberty interest in *R.* v. *Heyward* contemplates also the freedom to wander in public spaces and, in that sense, involves an important element of personal choice and decisional autonomy. Thus parental decisions, reproductive decisions and decisions about where to live and where to wander now mark out this small but growing area of privacy jurisprudence under the liberty prong of section 7. In none of these decisions, save *R.* v. *Heyward*, does the "personal decisional autonomy" interpretation of liberty rights achieve majority support. However, in *Blencoe* v. *British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307 [hereinafter *Blencoe*], the majority in reasons by Bastarache J. asserted that section 7 liberty extends beyond "mere freedom from physical restraint" and protects "decisions of fundamental importance." *Ibid*. at 340. Bastarache J. cited, among others, the *B.(R.)*, *Morgentaler* and *Godbout* decisions for support. However, he went on to state that the claim in *Blencoe* did not fall within the ambit of the section 7 liberty protection. *Ibid* at 340–43.

In the first half of the essay, I set out the basic premises of the classical liberal and conservative approaches to liberty rights followed by an examination of how they manifest themselves in *Jones*, the first Supreme Court of Canada case to address the constitutional dimension of parental liberty claims. I then move to a discussion of the resonances between the neoconservative literature of family values and the expansion of judicial support for a parental liberty right textured by traditional notions of the family and family relationships. This latter point will be developed using the *B.(R.)* case. In the conclusion of the essay, I summarize two recent cases — *G.(J.)* v. *New Brunswick*[7] and *Winnipeg Child and Family Services* v. *K.L.W.*[8] — which, in the aftermath of the unresolved divisions in *B.(R.)* provided solid constitutional grounds for parental rights claims under the security prong of section 7. In respect to these later cases, I discuss briefly another synthesis in the parental liberty jurisprudence, one which is rooted in the tension found more prominently, as mentioned earlier, in the equality case-law; namely, the tension between classical liberalism and more contemporary conceptions of the nature of liberal commitments.

Before embarking on the discussion set out above, I deal with a few preliminary points. In particular, I explain how the focus of this essay fits within the basic framework of analysis for section 7. I also note the key holdings relating to the potential scope of section 7 developed in the early years of *Charter* litigation.

II. PRELIMINARY POINTS

A. The Framework of Analysis

Section 7 states:

> Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The two-part structure of the guarantee — the articulation of three core values in the first part and the reference to fundamental justice in the second — immediately presents interpretive issues concerning the relationship between the two parts as well as among the values in the first part. The Supreme Court has held that the three introductory values inform each other and must therefore reinforce rather than contradict each other, and that none is paramount to the

[7] [1999] 3 S.C.R. 46 [hereinafter *G.(J.)*].
[8] [2000] 2 S.C.R. 519 [hereinafter *K.L.W.*].

other.[9] Furthermore, the Supreme Court has stated that it prefers to keep the three branches of section 7 "analytically distinct to the extent possible."[10] The Court has found, in addition, that the two parts of the overall guarantee do not create separate freestanding rights but rather dictate a two-stage analysis in making out a single claim.[11] In other words, the right to liberty cannot be viewed apart from the fundamental justice qualifier, and in fact the two parts are frequently taken to modify each other. The seriousness of the interest invoked under the first "three values" part of the provision will be a factor often in determining what standard of fundamental justice applies under the second part.[12] Indeed, in practice, the analysis often proceeds sequentially, starting with consideration of the values in the first part before moving on to the discussion of fundamental justice.[13] As I hope to show in this essay, the two-part structure of section 7 analysis has facilitated the otherwise awkward integration of socially conservative views of the family into an organizing framework that is explicitly and vigorously liberal in its design and commitments.

I use the phrase "right to liberty" to mean the liberty component of the overall guarantee, thus conceptually separating the liberty interest from the fundamental justice qualifier. However, as ultimately the two parts comprise one right, I look also at how the analysis of fundamental justice reflects and is often integral to the primary commitments underlying the interpretation given to the liberty component.

B. The Potential Scope of Section 7 and Sources of Analysis

In the *Motor Vehicle Reference*,[14] a foundational case in section 7 jurisprudence, the Supreme Court of Canada enunciated a rhetorical commitment to the expansive, rights-enhancing potential of section 7. First, although the majority clearly viewed the fundamental justice phrase as a qualifier that narrows the scope of overall protection, it nevertheless advocated a rights-focused

9 *Rodriguez* v. *British Columbia* (1993), 107 D.L.R. (4th) 342 (S.C.C.) at 388, per Sopinka J. for the majority [hereinafter *Rodriguez*].

10 *Blencoe*, *supra* note 6 at 339, per Bastarache J. for the majority.

11 *Ibid*.

12 *Ibid*.

13 See *e.g. R.* v. Beare, [1988] 2 S.C.R. 387 and *Morgentaler*, *supra* note 6.

14 *Supra* note 4. As noted earlier, the Court in this case found that the combination of absolute liability and mandatory imprisonment is contrary to the *Charter* right not to be deprived of physical liberty except in accordance with the principles of fundamental justice.

interpretive approach to fundamental justice. In other words, it viewed fundamental justice from the perspective of promoting and safeguarding the individual from the overbearing state, rather than from the state perspective of administrative convenience and reasonableness. To reinforce its point, the majority indicated that analysis of fundamental justice must be directed at the purposes of protecting the three core interests and warned that "the narrower the meaning given ... the greater will be the possibility that individuals may be deprived of these most basic rights."[15]

Second, the majority asserted that fundamental justice principles should not be equated with natural justice principles nor treated as rules that are entirely procedural in content. Indeed, the majority rejected the helpfulness of the substantive/procedural dichotomy, identifying it as an American constitutional doctrine and one that ill fits the design of the *Charter*. It noted that "the dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap."[16] This latter directive appears to contemplate judicial scrutiny of governmental *objectives* as well as of governmental *means* for accomplishing those objectives, thereby significantly enlarging the scope of constitutional review.

Finally, the *Motor Vehicle Reference* majority directed future courts to look for the principles of fundamental justice in the "basic tenets of the legal system" rather than exclusively in the adjudicative process. The majority strengthened this stance by proceeding to minimize the interpretive weight of deliberations by

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[15] *Ibid*. at 548 per Lamer J. (as he then was). Wilson J., in dissent, was even clearer. She would have permitted the three values in the first part of the guarantee to be invoked as the basis for a claim without reference to fundamental justice and stated that she preferred not to characterize the fundamental justice phrase as a qualification but rather as a further protection of the three basic values. *Ibid*. at 564–65. According to the majority, if a claimant fails to show that fundamental justice principles have been violated, the claim fails, notwithstanding a deprivation of life, liberty and security of the person. Therefore, in practice, the fundamental justice qualifier is a serious limitation. However, the *Motor Vehicle Reference* majority, within those constraints, seemed to favour an interpretation of fundamental justice that measured the requirements flowing from the qualifying phrase in terms of the individual's vulnerability rather than the state's priorities. In more recent decisions, fundamental justice has become, for the most part, an opportunity to justify, on the grounds of important state interests or administrative burdens, procedures which fall short of strict due process guarantees. See discussion *infra* accompanying notes 83–89 for the development of this latter view.

[16] *Ibid*. at 546.

the framers of the *Charter* with respect to the scope of section 7.[17] It also downplayed the relevance of *Bill of Rights* jurisprudence that had given comparable provisions a narrow procedural content. These sweeping commitments to an evolutionary and forward-looking interpretive approach to the "newly planted 'living tree' which is the *Charter*"[18] cleared the way, however, not for the suggested discussion of first principles and constitutional values, but for a historical textual analysis of the wording of the *Charter* and section 7, with heavy reliance placed on the common law antecedents for *Charter* protections for the accused. In summary, the *Motor Vehicle Reference* was distinctly cautious in its eventual exploration of the "basic tenets" of the legal system. However, it marked out the analytic framework for section 7 jurisprudence in terms that, at least formally, evinced a commitment to a generous, rights-enhancing approach to both the "three values" and the fundamental justice parts of the guarantee.

III. THE CLASSICAL LIBERAL DISCOURSE OF LIBERTY RIGHTS

A. Introduction

The key components of the classical liberal view of individual liberty are directly rooted in the moral and political values that underlie liberal legal systems and thus have a broad familiarity. To the extent that the *Charter* is a quintessentially liberal document, this understanding of liberty fits comfortably with the phrasing and analytic structure of the *Charter*. The central characteristics of the classical vision of liberty are the primacy of the individual, a negative notion of liberty founded on a starkly drawn public/private split, and a complicated and often ambivalent array of justifications for the sanctification and durability of traditional family institutions and values in liberal societies.

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17 In submissions before the Parliamentary committee considering the entrenchment of the *Charter*, federal justice officials stated their belief that fundamental justice meant roughly the same thing as judicially developed rules of procedural due process and of the principles of natural justice, thereby precluding substantive review of legislative policy. *Ibid*. at 551.

18 *Ibid*. at 554.

1. *The Individual*

Within classical liberal constitutional discourse, the individual, abstractly conceived, is the key political actor around whom the institutions of government and civil society are designed and whose happiness and security is the object of political organization. As Anthony Arblaster comments,[19]

> Liberal individualism is both ontological and ethical. It involves seeing the individual as primary, as more 'real' or fundamental than human society and its institutions and structures. It also involves attaching a higher moral value to the individual than to society or to any collective group. In this way of thinking the individual comes *before* society in every sense.

The ontological separation of the individual from community gives rise to an abstract and, therefore, relatively empty notion of the individual and to a conception of society as a collection of atomistic individuals rather than a community. These aspects of classical liberal individualism — its radical primacy and its abstract character — converge with particular power in the analysis of liberty rights, dictating a right understood in negative terms of noninterference rather than positive terms of facilitation and support.

2. *The Public/Private Split: Negative Liberty and the Hostile State*

Classical liberalism defines liberty in starkly negative terms as freedom *from* impediments, barriers or interferences rather than as freedom *to* pursue some particular goal or activity. The Hobbesian formulation puts it quite clearly:[20]

> "LIBERTY, or FREEDOM, signifieth (properly) the absence of Opposition; (by opposition, I mean external Impediments of motion. ... A FREEMAN, *is he, that in those things, which by his strength and wit he is able to do, is not hindered to do what he has a will to.*"

Thus the scope of the private sphere of individual liberty is potentially limitless. Interferences with liberty due to such personal attributes as insufficient "strength and wit," or lack of talent, ability or wealth, are internal to the individual and thus analytically irrelevant. Conversely, the "external

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[19] A. Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Basil Blackwell, 1984) at 15.

[20] T. Hobbes, *Leviathan Parts One and Two* (New York: Macmillan, 1968) at 170–71 [emphasis added]. Isaiah Berlin is commonly credited with problematizing the distinction between negative and positive liberty. I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1982) at 118–72. However, Hobbes more clearly focuses on the state as the main obstacle to liberty. Indeed, he is famous for his assertion that liberty depends on the "silence of the law." Hobbes, *ibid*. at 178.

impediment" is exclusively and fundamentally the state, which is cast in a narrow coercive role aimed at maintaining minimum conditions of order and stability. The more subtle shadings and intertwinings of public and private power as well as the range of roles assumed by the modern liberal state disappear in classical liberalism's binary account of politics as a contest between the freedom-seeking individual and the potentially repressive state.[21]

3. *The Family*

The traditional family has always played a key but uneasy role in classical liberalism.[22] The early architects of liberal thought were clear in their rejection of the notion that the patriarchal family provides the basis for a hierarchical political order. However, the liberal alternative of a political order founded on the individual consent of the governed left the patriarchal family intact, thereby ensuring the persistence of gender hierarchies within both the public and private spheres of liberal society. For example, John Locke, although critical of patriarchal claims regarding the divine origins of the power of husbands over women, ultimately explained women's subordinate legal status in terms of women's natural inequality.[23] Hobbes invoked custom and expediency, namely

[21] There are numerous concessions to a more contemporary view of the role of the state in both the design of the *Charter* and the case-law. See, for example, the large role accorded countervailing "public" interests under section 1, the legislative override provision in section 33, and the recognition of the importance of affirmative action in addressing group-based discriminatory harms under section 15(2). However, the classical tensions between the individual and the state, private freedom and public order, and liberty and coercion provide the starting point as well as governing framework for these modifications.

[22] Feminist scholars have paid particular attention to the role of family in liberal political theory. For an overview of feminist discussions of the place of familial relations and values in classical liberal theory, see M. Butler, "Early Liberal Roots of Feminism: John Locke and the Attack on Patriarchy" (1978) 72A Amer. Poli. Sci. Rev. 135; Z. Eisenstein, *The Radical Future of Liberal Feminism* (New York: Longman, 1981); J.B. Elshtain, ed., *The Family in Political Thought* (Amherst: University of Massachusetts Press, 1982); C. Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988); C. Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (Stanford: Stanford University Press, 1989); I. Makus, *Women, Politics, and Reproduction: The Liberal Legacy* (Toronto: University of Toronto Press, 1996).

[23] J. Locke, *Two Treatises of Government: A Critical Edition*, P. Laslett, ed. (Cambridge: Cambridge University Press, 1960) at 47; J. Locke, *Second Treatise of Government*, C.B. MacPherson, ed., (Indianapolis: Hackett, 1980) at 44. Makus and several other feminist writers make much of the ambiguities in Locke's construction of women, in particular, his assumption that women are equally capable of reason, his claim that, for

that women, although men's natural equals, must be coerced into customary familial roles in order to ensure the reproduction, order and continuity of the political community.[24]

Arguments based on an intertwining of nature and choice typify the contemporary liberal justification for the durability of and primacy accorded the traditional family within the liberal order. The "nature" part of the justification is generally implied rather than directly asserted. The persistence of the natural family is simply the "natural" outcome of the consciously willed choices of individuals in privately ordering their lives. Social relations are transactional in nature and arrangements such as marriage and shared parenthood are viewed as the product of agreements between individuals who seek self-definition through choosing and planning their lives.[25] Nevertheless, within this fundamentally classical frame, some judges have endeavoured to provide an analysis of individual rights that takes account of the substantive nature of barriers to the exercise of civil rights and liberties.[26]

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the most part, husbands and wives wield equal power within the family, and the importance of the Lockean notion of boundaried individuals for women's autonomy. Makus, *supra* note 22, 54; M. Butler, *supra* note 22; D. Belevsky, "Liberty as Property" (1995) 45 U.T.L.J. 209; M. Shanley, "Marriage Contract and Social Contract in Seventeenth-Century English Political Thought" in Elshtain, *supra* note 22, 80. Clearly, from a feminist perspective, Locke's political theory sets off in a more fruitful direction than the object of his critique; namely, Sir Robert Filmer's justification of the absolute power of monarchs and fathers. However, in general I agree with those writers who have focused on the manner in which the Lockean world is profoundly structured to consign women to secondary and subordinate roles within both the public and private spheres. See Pateman, *The Sexual Contract*, *supra* note 22; Pateman, *The Disorder of Women*, *supra* note 22; Eisenstein, *supra* note 22.

24 Hobbes, *supra* note 20 at 162–70; T. Hobbes, *De Cive: The English Version*, H. Warrender, ed., (Oxford: Clarendon Press, 1983) at 121–28. See also Makus, *supra* note 22 at 52. Makus argues that the Hobbesian scheme not only views men and women as natural equals but also recognizes the unique power of life or death that women wield with respect to their infants. Thus, conferring rights on women threatens the Hobbesian community as there are few incentives for the self-interested Hobbesian individual to bear or raise children.

25 For a discussion of how the liberal ideology of the autonomous individual both obscures and reinforces gendered stereotypes concerning motherhood and the "natural" predilections of women, see J. Williams, "Gender Wars: Selfless Women in the Republic of Choice" (1991) 66 N.Y.U.L. Rev. 1559.

26 See discussion *infra* notes 37–40 of Wilson J.'s reasons in *Morgentaler*, *supra* note 6, and of L'Heureux-Dubé J.'s reasons in *G.(J.)*, *infra* note 137.

The framework for the classical liberal vision of liberty and for section 7 analysis more generally is articulated in the *Motor Vehicle Reference*, discussed in the preceding section of this essay. The majority's presumptively rights-expanding stance is the hallmark of the classical liberal approach within judicial discourse. A number of versions of this stance have developed in the subsequent case-law. However, because of my focus on the parental liberty decisions, I use Wilson J.'s decision in *Jones*[27] as my central example. *Jones*, as noted earlier, was the first case to raise the issue of parental liberty rights before the Supreme Court of Canada. Although Wilson J.'s discussion on this point is contained in a dissent, her reasons have been influential in subsequent liberty cases. I also outline in brief form Wilson J.'s restatement in her concurring reasons in *Morgentaler*[28] of the elements of a section 7 liberty analysis. Like her reasons in *Jones*, Wilson J.'s reasons in *Morgentaler* have been a key part of a small but significant jurisprudence of liberty rights that extends the scope of liberty rights beyond the notion of a right of nondetention.

B. *Jones* and Decisional Autonomy

In *Jones*, a pastor of a fundamentalist church who ran a school for the children of members of his religious community refused to obtain the documents required by the Alberta government to license his school or certify the instruction received by his own children. The Reverend Jones believed that his authority to instruct his pupils came directly from God. On this basis he argued that the legislative regime requiring him to obtain permission to teach on pain of a fine or imprisonment violated his right to freedom of religion and his parental rights as an aspect of the section 7 right to liberty to educate his own children as he saw fit.[29]

In the freedom of religion part of her analysis, Wilson J. found that the legislative regime was facilitative of rather than hostile to religious freedom and that any burden it imposed on the Reverend's religious convictions was so formalistic and technical as to be trivial. However, in her analysis of section 7, Wilson J., dissenting alone, was willing to find that the Alberta regime interfered not only with the Reverend Jones' physical liberty through the threat of imprisonment but also with his parental liberty, and in a manner which offended fundamental justice. The majority reasons by La Forest J., in contrast, found that

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27 *Supra* note 2.

28 *Supra* note 6.

29 For a fuller description of the legislative provisions, see *infra* notes 72–74 and accompanying text.

the legislative regime was consistent with the principles of fundamental justice without examining the liberty component of the claim. Justice La Forest reasoned that any liberty claim the Reverend Jones might have would not survive the fundamental justice analysis.[30]

Justice Wilson outlined the notion of parental liberty in bold and clear strokes. Her starting point was the aspirations of the restless and rebellious individual of classical liberalism or, as she put it "the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be nonconformist, idiosyncratic and even eccentric — to be, in today's parlance, 'his own person' and accountable as such."[31]

In explaining how this general notion of self-ownership and self-realization yields a more specific right of parental liberty to educate one's children in accordance with one's conscientious beliefs, she wrote: "The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world. The right to educate his children is one facet of this larger concept."[32]

Justice Wilson invoked for support a number of U.S. cases on family privacy that accord constitutional protection to aspects of family relations.[33] However, her analysis differed significantly. The reasoning in the American family privacy cases typically proceeds by placing marriage and parenthood alongside other established social institutions and practices such as a free market and the pursuit of "the common occupations" to present a socially textured and conservative picture of the meaning of liberty.[34]

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30 See discussion *infra* notes 71–84 and accompanying text.

31 *Jones*, *supra* note 2 at 582.

32 *Ibid.* at 583.

33 For example, she refers to *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Griswold* v. *Conneticut*, 381 U.S. 479 (1965). *Ibid.* at 581, 583.

34 Thomas Grey argues that the family privacy cases, including the contraception and abortion cases, protect "only the historically sanctified institutions of marriage and the family." T. Grey, "Eros, Civilization and the Burger Court" (1979–80) 43 L. & Contemp. Prob. 83 at 87.

In contrast, Wilson J.'s approach found its justification not in tradition, but in the abstract principle of individual moral autonomy. The rightsholder, in her account, is clearly and emphatically an individual for whom collective practices and institutions circumscribe and threaten rather than enrich liberty.[35] Not surprisingly then, her morally autonomous parent is someone who finds fulfilment through deliberately making parental choices and decisions with respect to children's education.

A familial authority structure — of parents reigning over children in a social context structured by systemic gender inequality — is implicit in this vision but is likely to remain buried except in cases in which parents explicitly disagree or in which children's interests are directly asserted in argument by an appointed representative or the state. There are two consequences of this erasure of the contextual and structural elements underlying the exercise of parental choice. First, it permits a portrayal of familial attachments and responsibilities as merely instrumental in the self-fulfilment of the choosing, planning individual rather than as inherently valuable in themselves. The latter view of family relations is, in contrast, more typical of the conservative vision of the social world. Second, by leaving unexamined the familial context in which the Reverend Jones made his choices, that context becomes "naturalized," becomes the unalterable historical backdrop against which the liberal individual strives for self-definition and autonomy. The specific attributes and institutional forms of the Jones family are treated as irrelevant to the analysis of Reverend Jones's parental right to make decisions and choices about family members. To sum up, in their reliance on the powerful linkage between liberty and choice, as well as the lack of scrutiny of the social context of choice, Wilson J.'s reasons typify the reconciliation of classical liberal principles with the sanctity and privileging of the traditional family within liberal societies.

Justice Wilson's fundamental justice analysis, in the spirit of the classical liberal approach to *Charter* interpretation, was designed to expand rather than compromise her initial and broad characterization of the right. Thus, in *Jones*, she gave very little consideration, at this stage, to the administrative concerns of the state. Instead, she accepted Reverend Jones's argument that legislation which narrowly restricted the scope of the defence's evidence violated the principles of fundamental justice.[36] She concluded by finding that the Alberta government failed to justify its violation of section 7 rights in accordance with the strict standards imposed by section 1, and thus that the legislation must fall.

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[35] *Jones*, *supra* note 2 at 582.

[36] *Ibid.* at 585.

C. *Morgentaler* and the Liberal Paradigm

The theory of liberty rights underlying Wilson J.'s reasons in *Jones* is reaffirmed subsequently in her concurring reasons in *Morgentaler* in which she argued for recognition of a protected sphere of reproductive liberty in relation to abortion decisions made by women during the first two trimesters of pregnancy.[37] As in *Jones*, she presents in *Morgentaler* the modern liberal subject within the classical framework of individual/state relations. Liberty is no longer understood in terms of property rights and contractual freedom. Instead, individual proprietary interests are displaced by a notion of self-ownership. Similarly, choice comes to signify not economic choice but the inviolability of moral and conscientious choices. The protected area of decisional autonomy, in Wilson J.'s view, is not unlimited but extends to "important decisions intimately affecting their private lives."[38] Although the individual does not live in "splendid isolation,"[39] communal norms and collective structures of authority are presumptively threatening. Thus, liberty is still understood primarily in the oppositional binary terms of the classical vision of politics. In addition, courts stand outside politics when they pursue their role of maintaining the fence-line of rights between private freedom and public coercion.

Finally, it should be noted that this notion of liberty often produces a "formal equality" pluralism of individual moral choices that renders it impossible to distinguish between the decision of the Reverend Jones to inculcate his children with majoritarian Christian values and the decision of a woman to terminate her pregnancy. The risk is that both decisions or choices can be presented as aspects of the individual's developing sense of moral autonomy and self-authorship without reference to contextual factors which can significantly differentiate individual choices and their implications in relation to key liberal values. In *Morgentaler,* Wilson J. addressed this risk, at least partially, by alluding to the social consequences for women of their decisions regarding pregnancy. She elaborated that control of reproduction is integral to women's aspirations for

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[37] The other two sets of reasons that, together with those of Wilson J., make up the majority, struck down the challenged *Criminal Code* provisions by finding that they interfered with women's section 7 rights to physical and psychological security of the person and failed to conform to standards of procedural justice contained in the second part of section 7. *Supra* note 6 per Dickson C.J.C. at 392–420 and per Beetz J. at 420–61. While Wilson J. agreed with this analysis of the issue, she maintained that "to fail to deal with the right to liberty ... begs the central issue in the case." *Ibid.* at 484.

[38] *Ibid.* at 490.

[39] *Jones*, *supra* note 2 at 582.

equality.[40] Thus her individual rightsholder, so classical in her stance toward intrusions by the state, is nevertheless given the texture of a specific history and set of social relations. Importantly, however, it is the texture of marginalization and of exclusion from the liberal political community. To this extent, the reasons by Wilson J. in *Morgentaler* depart from the more classical stance taken in *Jones*. They offer, instead, a glimpse of a substantive liberty analysis that seeks to incorporate a more contemporary sensitivity to the systemic and historically rooted nature of barriers to full inclusion in the liberal community. The conservative discourse of liberty rights offers a starkly different portrait of the nature and place of the individual rightsholder.

IV. THE CONSERVATIVE DISCOURSE OF LIBERTY RIGHTS

A. Introduction

The conservative mode of constitutional discourse under the *Charter* operates despite the essentially liberal commitments underlying any constitutional protection of rights; namely, the presumed structural antagonism of the public/private split and the primacy of the individual. As Patrick Macklem has commented in his essay on constitutional ideologies, "[I]n its pristine form, the conservative vision at the level of constitutional law precludes explicit, independent judicial consideration of individual constitutional rights against the state."[41] Macklem goes on to suggest that the arena within which the conservative vision of the individual as part of a web of hierarchical relations is most clearly articulated is the common law.[42] Not surprisingly then, the conservative rendering of liberty rights under the *Charter* is largely accomplished by drawing on the common law as a source of values in detailing the content of rights and of the principles of fundamental justice, thereby indirectly constitutionalizing common-law principles and underlying norms.[43] Thus, it is possible to discern a distinctly conservative notion of constitutional protections in *Charter* jurisprudence which can be linked to the broader history of conservatism in Canadian political culture.

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40 *Morgentaler*, *supra* note 6 at 491.

41 Macklem, *supra* note 1 at 129.

42 *Ibid.*

43 As pointed out in the introductory section, the *Motor Vehicle Reference* — although couched in the expansive, rights-enhancing rhetoric of the liberal approach — set the pattern early on for drawing on the common law in order to articulate the "basic tenets of the legal system" on which principles of fundamental justice are founded. See *supra* notes 14–19 and accompanying text.

The key theoretical elements of the conservative vision of liberty rights are the centrality of traditional institutions of civil society in sustaining individual liberty, the identification of the traditional family and associated values as essential features of the social and political order, and a more complex role for the state in both supporting and posing a threat to traditional institutions and values.

1. *The Individual and Society*

From the conservative standpoint, the radical individualism characteristic of classical liberalism is tempered by the political significance of community bonds, and autonomy is understood in terms of the capacity to forge and pursue responsibilities and relationships within a set of socially sanctified institutions. Anthony Quinton identifies this as the principle of organicism.[44] In describing society from the conservative viewpoint, he writes:[45]

> "It is not composed of bare abstract individuals but of social beings, related to one another within a texture of inherited customs and institutions which endow them with their specific social nature. The institutions of society are thus not external, disposable devices, of interest to men only by reason of the individual purposes they serve; they are, rather, constitutive of the social identity of men."

Liberty within this organic and interdependent community is necessarily founded on "a complex assortment of historic rights, laws, traditions, political institutions and corporations."[46]

The organic principle gives rise to a conservative mode of constitutional discourse which treats the social context of rights claims — the relationships and institutions within which they occur — as analytically important. However, consistent with conservative ideology, it is a particular aspect of the social context that has value; namely, traditional practices and established institutions, the history of authoritative modes of interaction and dominant customary norms. These particularized factors provide the benchmark against which to measure a claim's significance, and liberty is given both texture and vigour by reinforcing existing practices and social patterns. By the same token, marginal, unorthodox or extremist practices and communities are more likely to be viewed as threats to, rather than expressions of, liberty rights.

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44 A. Quinton, *The Politics of Imperfection* (London: Faber & Faber, 1978) at 16.

45 *Ibid.*

46 I. Gilmour, *Inside Right: A Study of Conservatism* (London: Hutchinson & Co., 1977) at 64.

2. *The Family*

The privileging of traditional familial institutions and formations in themselves rather than in instrumental terms fits comfortably into the conservative vision of the organic political and social order. As mentioned earlier, the common law acts as a rich source of conservative values. This is particularly true of conservative notions of the hierarchical relations between husbands and wives, and fathers and children. With respect to the former, Blackstone's summary of the legal consequences of marriage at common law provides the most succinct articulation of gendered authority relations within family law before the wave of nineteenth- and early-twentieth-century reforms. As Blackstone put it: "By marriage, husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and *cover*, she performs everything."[47]

The erasure of the legal personality of married women at common law was directly linked to their erasure as economic actors. During marriage, their husbands typically either "assumed ownership or at least control of their property."[48] In addition, married women, having no property of their own out of which to satisfy contractual obligations, were barred from entering into contracts on their own behalf and thus were kept from playing any significant role in the sphere of the market.[49] Although legislative reforms aimed at dismantling the legal structures of inequality began at the end of the nineteenth century, the gendered nature of economic inequality persists and matrimonial property regimes remain the focus of efforts to bring about change.[50]

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47 W. Blackstone, *Commentaries on the Laws of England*, vol. 1, 17th ed., (London: Richard Taylor, 1830) at 441 [emphasis in original, footnotes omitted].

48 L. Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press, 1983) at 25.

49 *Ibid.* at 27–28.

50 For an account of the historical background of these changes, see Holcombe *ibid.*; M.L. Shanley, *Feminism, Marriage and the Law in Victorian England, 1850–1895* (London: I.B. Tauris & Co., 1989) at 221–30 [hereinafter *Feminism, Marriage and the Law*]; M. McCaughan, *The Legal Status of Married Women in Canada* (Toronto: Carswell, 1977). For a discussion of the Canadian reforms of the 1970s, see J. Payne, "Family Property Reform as Perceived by the Law Reform Commission of Canada" (1976) 24 Chitty's L.J. 289; W. Holland, "Reform of Matrimonial Property Law in Ontario" (1978) 1 Can. J. Fam. L. 1. For examples of recent reform efforts, see Law Reform Commission of British Columbia, *Working Paper on Property Rights on Marriage Breakdown* (July 1989); Ontario Law Reform Commission, *Report on Family Property*

A second consequence of the common law's erasure of married women's legal personality during this period was that married women had no parental rights in relation to their own children.[51] In contrast, paternal power over children was absolute[52] and viewed as necessarily so in order to ensure "the identification of legitimate heirs"[53] and "the orderly devolution of property and status within patrilineal families."[54] The common law courts regarded paternal authority as a right and given by nature, and would only interfere in extreme cases of immorality or unfitness to parent.[55]

Law (1993); Law Reform Commission of Nova Scotia, *Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (March 1997).

51 For a discussion of the implications for child custody law, see S. Maidment, *Child Custody and Divorce: The Law in Social Context* (London & Sydney: Croom Helm, 1984) at 108–10. In contrasting the parental roles of mothers and fathers, Blackstone remarked that "a mother, as such, is entitled to no power, but only to reverence and respect." Blackstone, *supra* note 47 at 452.

52 Maidment suggests that the notion of absolute paternal rights arose at the end of the thirteenth century in the context of a society organized around kinship and community and continued to develop, even as the conjugal unit displaced more extended kin networks in the sixteenth and seventeenth centuries. Maidment argues that "nuclear family actually became more patriarchal and more authoritarian, mirroring the growth of the State, and the political and legal authority of the King as the *parens patriae*." Maidment, *ibid*. at 109. She locates the beginning of the decline of the power of fathers and husbands in the middle of the eighteenth century, using Lawrence Stone's term of "affective individualism" to describe the more "egalitarian and companiate nuclear family" which began to emerge during that period. *Ibid*., citing L. Stone, *The Family, Sex and Marriage in England 1500–1800* (Harmondsworth: Penguin, 1979).

53 *Ibid.* at 111.

54 B. Hoggett, *Parents and Children*, 2d ed. (London: Sweet and Maxwell, 1981) at 119.

55 *Re Agar-Ellis*, [1883] 24 Ch. D. 317. Maidment describes this case as the highpoint in the British jurisprudence according nearly absolute custodial rights to fathers. *Supra* note 51 at 98. See also, *Feminism, Marriage and the Law*, *supra* note 50 at 131–55. It is important to note that the rule of paternal right only applied to legitimate children. Unmarried mothers were typically accorded sole custody of their illegimate children. However, as Carol Smart points out, the seemingly paradoxical treatment of the rights of married and unmarried mothers to their children was by no means aimed at empowering or privileging the latter. As she comments, the custodial right of unmarried mothers "was meant to reflect the stigma of bastardy and the poverty of the unmarried mother's status. Poor women were, in any case, often forced to put their illegitimate children and themselves into the workhouse in order to survive." C. Smart, "Power and the Politics of Child Custody" in C. Smart & S. Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge, 1989) 1 at 7.

Historians have pointed out that this model of the family represented, at most, the experience of familial relations within aristocratic households and is unrepresentative of the class diversity in familial roles and relations during this and preceding historical periods.[56] This disjunction between the complexity of experience and the legally articulated ideal, however, raises concerns about the coercive impacts and legitimacy of law. More specifically, the simplified imagery of fatherhood, motherhood and the family in legal discourse often provides the measure of inclusion and exclusion in family or of the fitness and unfitness of parents in the regulation and adjudication of familial relations. Even today, despite the spate of statutory reforms to the common law, the conservativism of the common-law imagery of the family emerges in judicial reasoning as a form of judicial "common sense" which reinforces and appears to rationalize economic, social and racial hierarchies.[57]

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[56] B. Gottlieb, *The Family in the Western World from the Black Death to the Industrial Age* (Oxford: Oxford University Press, 1993). Gottlieb concedes that both formal legal norms and social customs reflected the privileging of husbands and fathers. However, she makes the point that the ideal was most closely realized in aristocratic households. Husbands and wives in the middle and lower classes each performed complementary and essential roles. Moreover, in some instances, wives could not afford to simply complement their husbands' work and did whatever work was available. *Ibid*. at 92–93. Martha Bailey makes the related point that although mothers had no legal rights to access after marital breakdown, it "was considered ungentlemanly, and even immoral, to deprive mothers of access to their children without good cause." M. Bailey, "England's First *Custody of Infants Act*" (1995) 20 Queen's L.J. 391 at 394.

[57] For example, Susan Boyd observes that ideologies of motherhood which reflect "privileged notions of white, male-headed, nuclear families" may be crucial to understanding how government or social welfare policies, for instance, or court decisions, have difficulty meeting the needs of black mothers and black families because of their assumption that black, female-headed families are "dysfunctional and pathological." S. Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Can. J. Fam. L. 79 at 94 [hereinafter "Some Postmodernist Challenges"]. In addition to examining the disjunction between dominant ideologies and the diversity of women's experience, much of the discussion in Boyd's article concerns the exclusive — and thus exclusionary — focus of feminist criticism on the gendered dimension of familial ideologies. For a more recent return to these themes, see also S. Boyd, "Is There an Ideology of Motherhood in (Post)modern Child Custody Law?" (1996) 5 Soc. & Leg. Stud. 495. A similar point has been made with respect to a disjunction between ideologies of fatherhood and social diversity by Richard Collier in *Masculinity, Law and the Family* (New York: Routledge, 1995) 187–88. For an example of a critical examination of the race, class and gender specificity of the dominant ideology of motherhood in the context of the impact of Canadian child welfare systems on First

As in the case of the status of husbands and wives, the nineteenth and twentieth centuries saw the introduction of both legislative and judicial changes to the status and entitlements of mothers and fathers as part of a reform process that is still ongoing.[58] What Blackstone termed the "empire of the father"[59] was significantly qualified in the nineteenth century by the introduction of statutory rules which gave judges discretionary authority to award mothers access to their children and, in cases concerning young children, custody.[60] Although this represented a significant shift in both legal and social constructions of the family and parenthood, orders favouring mothers continued to reflect a patriarchal model of parental authority and guardianship. One commentator on this period in English-Canadian history observes that "mothers were awarded custody only when they were living under the protection of some other male, usually their fathers or brothers, and only if they had not disqualified themselves by an adulterous relationship or some other conduct that the Canadian courts considered unseemly."[61] Another has suggested that the change represented a shift from familial patriarchy to social patriarchy under which the purpose of the social and legal order is "*not* male privilege *per se* but control of reproduction through control of women."[62]

Nations women, children and communities, see M. Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's L.J. 306.

58 For an account of these reforms, see Maidment *supra* note 51 at 89–149. Although couched in the gender-neutral terms of custodial versus access parents' rights and responsibilities, the recent cases of *Young* v. *Young*, [1993] 4 S.C.R. 3 and *Gordon* v. *Goertz*, [1996] 5 W.W.R. 457 (S.C.C.) deal directly with the broader social debate concerning the respective parenting roles of mothers and fathers.

59 Blackstone, *supra* note 47 at 453.

60 For an account of the development of this qualification of paternal rights in nineteenth-century Canada, see C. Backhouse, "Shifting Patterns in Nineteenth Century Canadian Custody Law" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: The Osgoode Society, 1981) 212.

61 *Ibid*. at 212. See also Martha Bailey's discussion of the first reforms to child custody law in nineteenth-century Britain. Bailey concludes that although the reform represented an important challenge to paternal authority within the patriarchal family, it was "hobbled by the patriarchal norms" which characterized the dominant view of the family both inside and outside the reform movement. Bailey, *supra* note 56 at 437. See also *Feminism, Marriage and the Law*, *supra* note 50 at 131–55.

62 S. Boyd, "From Gender Specificity to Gender Neutrality?: Ideologies in Canadian Custody Law" in Smart & Sevenhuijsen, *supra* note 55, 126 at 131. Both Boyd and Backhouse link the loosening of the rule of husbands and fathers to the split between the household and the workplace as a result of industrialization and the development of a notion of childhood as a unique stage of life requiring a familial environment and

In the early part of the twentieth century, gendered legal rules were replaced with the welfare or "best interests of the child" principle, and mothers and fathers became gender-neutral parents who, in interspousal custody disputes, could compete as formal equals for the role of custodial parent.[63] This shift reflects the ascendancy of classical liberal ideals of formal equality over conservative notions of a society ordered around natural and customary hierarchies. However, the conservative ideology of the natural and patriarchal family reconstituted itself in legal discourse as the nuclear family within which breadwinner fathers exercised both familial and economic authority and mothers were natural caregivers and nurturers. During this period the courts continued to portray the parental relation as the "fundamental natural relation"[64] and the

female nurturing. *Ibid*. at 130–31 and Backhouse, *supra* note 60 at 212–13. Again, recently historians have disputed the notion that childhood is a recent invention, pointing to evidence that parents have always felt deeply about their children and pondered the difficulties of childrearing. However, most concede that there has been a significant increase in the amount of attention focused on children within households. R. Smandych, "Changing Images of Childhood and Deliquency" in J.H. Creechen & R.A. Silverman, eds., *Canadian Delinquency* (Scarborough: Prentice Hall Canada, 1995) 7 at 12; Gottlieb, *supra* note 56 at 11–76, 111.

63 Maidment, *supra* note 51 at 130–48, traces the development of the welfare principle in British family law from 1886 to 1973. Backhouse traces parallel developments in English-speaking Canada at the end of the nineteenth century. She notes that the reallocation of parental power was accompanied by an enlargement of the role of the state in supervising parenting and as guardian of children of unfit parents. Backhouse, *supra* note 60 at 232–41. Canadian developments in the twentieth century are discussed by J. McBean, "The Myth of Maternal Preference in Child Custody Cases" in K. Mahoney & S. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 184; S. Boyd, "Some Postmodernist Challenges" *supra* note 57 and "Child Custody, Ideologies and Employment" (1989) 3 C.J.W.L. 111.

64 *Hepton* v. *Maat* (1957), 10 D.L.R. (2d) 1 (S.C.C.) [hereinafter *Hepton*]. *Hepton* stood for the proposition that birth parents have a presumptive right of custody which should prevail over the claims of the state even when state-approved foster or adoptive parents can furnish a home of "easier circumstances and better fortune." *Ibid*. at 2. The family in *Hepton* was a married couple, recently emigrated from Holland, who had placed their infant twins for adoption during a period of personal financial crisis and later sought to revoke their consents to the adoption. Until 1985, this presumption in favour of birth ties applied — at least theoretically — even when the birth parent was young, female, unmarried and economically vulnerable unless there was significant evidence of her unfitness. In *King* v. *Low* (1985), 16 D.L.R. (4th) 576, the Supreme Court of Canada replaced this presumption with the "best interests of the child" standard which some have argued permits decisions that fall harshly and disproportionately on parents — especially young single mothers — who are socially marginalized, members of

family — implicitly consisting of a heterosexual couple and children — as the social unit underlying the communal order.[65] In addition, although interspousal custody law increasingly employed the language of formal equality in assessing competing parental claims, the notion that the best interests of children required female, "at-home" nurturing persisted. The narrow statutory exception to father custody of the late nineteenth century became, in the first half of the twentieth century, a judicially articulated, broad rule of maternal preference — called the "tender years doctrine" — in custodial disputes involving young children. Feminist scholars have pointed out that while this gave some women an advantage in negotiating and obtaining custody, the idealization of female nurturing "had conflicting implications for women."[66] In particular, it gave explicit sanction to the notion that women were biologically disqualified from engaging in activities in the public spheres of paid labour, professional careers or political office. Again, it is important to recognize the ideological rather than empirical character of this portrait of social roles, and its intersection — often with contradictory effects — with cultural, racial and class-based norms of appropriate social and familial behaviour.[67]

racialized groups or economically disadvantaged. Thus, the emphasis in *Hepton* on the "natural" character of parental relations arguably might be seen to produce more equitable results. However, it does so at the expense of any recognition of the cultural, political and social issues at stake. The two standards seem to leave us caught between seriously flawed analytic frameworks: one supports a mythologizing of family ties as naturally ordained and the other deploys the rational and abstract language of formal equality to legitimize substantive inequalities.

65 *Hepton*, *ibid*. at 1. As Rand J. put it: "[T]he Sovereign is the constitutional guardian of children but that power arises in a community in which the family is the social unit." *Ibid*.

66 Boyd, *supra* note 62 at 133.

67 See *supra* notes 54–55 and accompanying text. Recently, gendered preferences in interspousal custody law have been more thoroughly displaced by the gender-neutral language of formal equality and the assumption that parents freely enter into agreements regarding their domestic responsibilities from positions of equal bargaining power within the spheres of both the market and family. Again, this represents an even more pronounced shift from conservative to liberal views of the social and political order. However, as explained in the preceding section, liberal justifications of traditional family arrangements on the basis of choice simply bury the reliance on natural hierarchies and biological roles a little deeper. In addition, feminist analyses point out that mothers seeking custody under the current regime often find themselves caught between the conservative ideology of motherhood and the liberal ideology of equality, *i.e*., cast as insufficiently nurturant or as having foregone primary caregiving if they have extensive or non-traditional involvement in paid work or, alternatively, as morally and economically responsible for any poverty they may experience as a consequence

3. The Role of the State

A relatively positive role for the state is contemplated by the conservative notion of "liberty connected to order." As Edmund Burke elaborated: "The distinguishing part of our constitution is its liberty ... But the liberty, the only liberty I mean, is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them. It inheres in good and steady government, as in its substance and vital principle."[68]

A number of writers have alluded to the central role the conservative vision of the state — as a positive as well as negative force — has played in forming a distinctive Canadian political culture.[69] This complex view of the state manifests itself in an analysis of fundamental justice principles which is shaped to accord flexibility and latitude for the state to pursue the business of governance. Thus the overall liberty right under section 7 is exercised by an individual who is inextricably situated in a network of specific governmental arrangements. The latter must be preserved and deferred to presumably because, over time, they have proven themselves crucial in sustaining a society of free individuals. This is in contrast to the interpretation of fundamental justice in the strictly rights-enhancing approach taken by Wilson J. in *Jones* and, in formal terms, by the majority in the *Motor Vehicle Reference*. To put the point simply, within the liberal paradigm, the individual experience of liberty is prior to and in opposition to the public sphere of government; within the conservative paradigm, individual liberty rights are textured by the history and patterns of state responsibility within an organic social order.

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of their roles as full-time homemakers. See Boyd, *supra* note 62; B. Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28 Osgoode Hall L.J. 303.

68 E. Burke, "Speech at His Arrival to Bristol" in *The Works of Edmund Burke*, vol. 1 (London: George Bell, 1902) at 441. For a more contemporary rendering of the connection between liberty and state ordering within conservative thought, see R. Scruton, "Law and Liberty" in *The Meaning of Conservatism* (London: MacMillan, 1984) c. 4.

69 See *e.g.* R. Whitaker, *A Sovereign Idea: Essays on Canada as a Democratic Community* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 9; G. Horowitz, "Conservatism, Liberalism, and Socialism in Canada: On Interpretation" in J. Axenstat & P. Smith, eds., *Canada's Origins: Liberal, Tory, or Republican?* (Ottawa: Carleton University Press, 1995) 21 at 25; W. Christian & C. Campbell, *Political Parties and Ideologies in Canada: Liberals, Conservatives, Socialists, Nationalists*, 2d ed. (Toronto: McGraw-Hill Ryerson, 1983) at 28.

In summary, the key points of divergence in classical liberal and conservative approaches to liberty are rooted in rival conceptions of society which, in turn, generate conceptions of the individual, the family and the public order which are in direct tension with each other. Moreover, the uneasiness of the fit between the sanctification of the traditional family and the liberal notion of community in which the *individual* is the social unit contrasts with the ease with which the notion of a "community in which the *family* is the social unit"[70] fits into conservative discourse. Several elements of the conservative vision of liberty are contained in the fundamental justice analysis contained in La Forest J.'s majority decision in *Jones*, in particular the deference to existing patterns of state regulation and the antipathy toward an atomistic conception of the individual. The articulation of a conservative vision of the family under the liberty protection is explored in the discussion of the emergence of a neoconservative jurisprudence in the third part of this essay.

B. *Jones*: Fundamental Justice and "Madmen"

As noted earlier, the *Jones* majority refrained from any consideration of the nature of the liberty interest in section 7, instead dismissing the claim on the basis that the legislation operated in a manner consistent with the principles of fundamental justice. In arguing that the state had unconstitutionally interfered with his parental liberty right to educate his children as he saw fit, the Reverend Jones relied solely on the procedural dimension of fundamental justice. The Alberta legislation at issue specified that a pupil is excused from compulsory attendance at a government-run school if the pupil is attending a government-approved private school or if a government official provides a certificate stating that the pupil is obtaining efficient instruction outside the school system.[71] Under the legislation, such a certificate is the only recognized means to rebut a charge of truancy.[72] The Reverend Jones argued that the limitation on what is allowed as evidence of efficient instruction prevents a full answer and defence to a charge of truancy and, thus, is contrary to the principles of fundamental justice. He further elaborated that the process put in place by the legislation sets up government schools as the exclusive model of efficient instruction and gives an official with a vested interest in the government system the power to judge whether instruction outside the system is efficient.[73]

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[70] *Hepton*, *supra* note 64 at 1 [emphasis added].

[71] *School Act*, R.S.A. 1980, c. 3, ss. 142(1) and 143(1)(a) & (b).

[72] *Ibid*., s. 143(1)(a).

[73] *Jones*, *supra* note 2 at 596.

The majority's approach to these arguments had none of the attention displayed by Wilson J.'s dissent to the perspective and concerns of an individual who is faced with the machinery and resources of a state-initiated prosecution. Instead, the majority made it clear that the justice of the process set up by the legislation should be viewed with great deference to the compelling state interest in educational quality and to the exigencies of complex administration. In La Forest J.'s words, "No proof is required to show the importance of education in our society or its significance to government ... [which is] known and understood by all informed citizens."[74] Similarly, the means chosen by the Alberta government to implement educational objectives were characterized as so obviously expedient and reasonable that supporting evidence was unnecessary.[75] Justice La Forest concluded by observing that "the provinces must be given room to make choices regarding the type of administrative structure that will suit their needs."[76] In the majority's view, anything short of what it termed manifest unfairness and arbitrariness is consistent with fundamental justice principles. The wide berth given to assertions about the reasonableness of state processes by the majority is in sharp contrast to Wilson J.'s sceptical scrutiny of the same claims.

The majority explained its readiness to dismiss Reverend Jones's complaint partly in terms of a refusal to allow the *Charter* to constitutionalize and thereby judicialize day-to-day aspects of governmental administration.[77] However, the injection of such considerations, refreshingly modest though they are, at the rights-defining rather than rights-limiting stage of analysis is rooted, perhaps, in a much deeper politics. The deference to school officials and the Department of Education is consistent with a conception of liberty that stresses sustaining the traditional institutions of public and private life within which individuals are formed and develop their identities. In Canada, a large state role in providing primary and secondary education is a long-established part of the social and, arguably, the constitutional order.[78] In addition, the incorporation of the

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74 *Ibid*. at 594.

75 *Ibid*.

76 *Ibid*. at 598.

77 *Ibid*. at 597. La Forest J. is critical of Reverend Jones's attempt to characterize the process for determining the efficiency of home instruction as "being … in the nature of a judicial hearing." *Ibid*.

78 Although there is no common-law or constitutional right to education, several provisions in the Canadian constitution contemplate a state school system. See references to separate schools in s. 93 of the *Constitution Act, 1867* ((U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5) and to language in primary and secondary schools in s. 23 of the *Constitution Act, 1982*, being Schedule B to the

communal and social aspects of individual liberty into the meaning of the right itself, reflects, as Quinton puts it, the notion that "the institutions of society ... are constitutive of the social identity of men."[79] Finally, judicial modesty regarding the role of the courts and the refusal to strictly scrutinize government procedures and goals in accordance with elaborate doctrinal standards can be linked to the more general conservative conviction that courts and the legal system should serve rather than police political arrangements and priorities.

The majority reasons are suffused also with the sense that the Reverend Jones is an extremist and, as such, threatens the social stability and order necessary to individual liberty. The majority quotes the trial judge's description of the Reverend Jones as a "stiff necked parson"[80] and, despite the long history within Canada of religious control of education, goes on to describe his claim as "rather unusual in its specific setting and its intensity."[81] Recall that the Reverend Jones made it clear it would offend his beliefs even to ask permission from the state to run his divinely authorized school.[82] From the classical liberal viewpoint, which strongly influences Wilson J.'s dissent, these extremist aspects of the Reverend Jones's beliefs and behaviour qualify him as, to use her words, a "nonconformist, idiosyncratic … eccentric"[83] person whose liberty is all the more precious in light of his intransigent posture regarding the state school system; within the conservative value system, the Reverend Jones's extremism signals danger rather than freedom. As Edmund Burke queried: "Is it because liberty in the abstract may be classed amongst the blessings of mankind, that I am seriously to felicitate a madman, who has escaped from the protecting restraint and wholesome darkness of his cell, on his restoration to the enjoyment of light and liberty?"[84]

The Reverend Jones, in the hands of the *Jones* majority, has overtones of Burke's "madman," a figure better consigned to "wholesome darkness" than permitted to burden judicial resources and the communal order with his claims of liberty.

Canada Act 1982 (U.K.), 1982, c. 11. As well, an array of statutory prohibitions and obligations presume a public primary and secondary school system. See also, A.W. MacKay, *Education Law in Canada* (Toronto: Emond Montgomery, 1984) at 37–48.

79 Quinton, *supra* note 44.

80 *Jones*, *supra* note 2 at 588.

81 *Ibid.* at 592.

82 *Ibid*. at 587.

83 *Ibid*. at 582.

84 E. Burke, "Reflections on the Revolution in France," *supra* note 68, vol. 2 at 282.

In summary, the majority's analysis of fundamental justice in *Jones* provides a snapshot of the way in which a conservative liberty-rights discourse tempers the classical liberal principles which strongly shape the *Charter*. In particular, analysis of the liberty component of section 7 is often avoided, thereby postponing the difficulty of reconciling conservativism's organically connected individual with the presumptively unconnected individual captured so directly by classical liberal notions of negative liberty. However, such reluctance is absent from the fundamental justice analysis. In keeping with conservative precepts, the latter is viewed through the lens of the difficulties faced by the state and the historical patterns of authority within both public and private spheres rather than through the lens of the priorities and preferences of an individual whose liberty is threatened rather than nourished by collective structures and practices.

The conservative approach to fundamental justice dominates the later jurisprudence of the Supreme Court. The most explicit discussion of the tension between the liberal and conservative analysis of fundamental justice occurs in *Rodriguez* v. *British Columbia (Attorney-General)*.[85] *Rodriguez* concerned a challenge to the *Criminal Code* prohibition against assisting a person in the commission of suicide. The majority, in reasons by Sopinka J., found that the interest represented by the claim came within the scope of the section 7 protection for security of the person but that the prohibition was consistent with the principles of fundamental justice.[86] Fundamental justice, for the majority, was repeatedly described as reflecting the state's interest, legal traditions and societal concerns rather than the interests, concerns and perspectives of the individual rightsholder.[87] Justice McLachlin's dissenting reasons took issue with this characterization and advocated an analysis the core of which was a focus on the individual's interest in fairness. Justice McLachlin conceded that some fundamental justice principles are coherent only when the state's interest is taken into account but was adamant that, in general, *Charter* complainants should not bear the onus of demonstrating the unreasonableness of the state's action.[88]

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85 *Rodriguez*, *supra* note 9.

86 *Ibid*. at 388–97.

87 *Ibid*. at 396.

88 *Ibid*. at 416–20.

V. THE NEOCONSERVATIVE SYNTHESIS: INDIVIDUAL LIBERTY AND FAMILY VALUES

Parental liberty challenges under the *Charter* present the Court with the conundrum that underlies liberal justifications more generally for the privileging of traditional family institutions and values in liberal societies: in short, how does one reconcile the liberal principles of individual freedom which seem so clearly contemplated by the liberty protection with the predominantly conservative vision of familial relations that has characterized much of the legal regulation of the family in liberal societies?

One approach to resolving this tension is contained in the synthesis that underlies neoconservativism. As a number of commentators have pointed out, neoconservatism melds the individualism and hostility to the state characteristic of classical liberalism with the social and moral traditionalism of Burkean conservatism.[89] The current popularity of antistatist ideologies and discourses, particularly in the area of economic regulation, is often referred to as neoliberalism. It takes place against the backdrop of the period roughly from the 1940s to the 1970s during which western liberal democratic societies such as Canada, in varying degrees, moderated the radical individualism and antistatism of classical liberal ideology by embracing the Keynesian notion of the welfare state.[90] The relationship between these two "neos"[91] — neoconservatism and neoliberalism — is complex and the terms are often used interchangeably. I use the term neoconservativism to indicate the resurgence of traditional social and moral values, leaving the term neoliberalism to refer to the rehabilitation of

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89 See *e.g.* P. Steinfels, *The Neoconservatives: The Men Who Are Changing America's Politics* (New York: Simon & Schuster, 1979) at 24; S. McBride & J. Shields, *Dismantling a Nation: Canada and the New World Order* (Halifax: Fernwood Publishing, 1993) at 36 [hereinafter *New World Order*]; S. McBride & J. Shields, *Dismantling a Nation: The Transition to Corporate Rule in Canada* (Halifax: Fernwood Publishing, 1997) [hereinafter *Corporate Rule*]; D. King, *The New Right: Politics, Markets and Citizenship* (Chicago: Dorsey Press, 1987) at 25.

90 For an account of the rise of neoliberalism, see McBride & Shields, *New World Order* and *Corporate Rule*, *ibid.*; King, *ibid.*; B. Cooper *et al.*, eds., *The Resurgence of Conservativism in Anglo-American Democracies* (Durham: Duke University Press, 1988); L. Philipps, "The Rise of Balanced Budget Laws in Canada: Legislating Fiscal (Ir)responsibility" (1996) 34 Osgoode Hall L.J. 681 at 70815; C. Harris, "The Devolution of Decisionmaking: Political and Gendered Implications of Restructuring" (1997) [unpublished].

91 I have borrowed from Carol Harris, who calls them the "two 'neo' impulses." Harris, *ibid.* at 7.

nineteenth-century classical economic theories, in particular the notion that a market unimpeded by the state is both efficient and self-sustaining.[92] In popular and political discourse, the two dimensions — the moral and the economic — are often presented as complementary and intertwined insofar as neoliberal economic reforms look to neoconservative values, such as respect for the traditional family, to address the social consequences of dismantling the welfare state.[93] In this section, I explore how the neoconservative strand has surfaced in *Charter* jurisprudence. I focus on what I view as the centre piece of this phenomenon as the courts exhibit it; namely, the deployment of the vigorous

[92] McBride and Shields use the term neoconservativism to describe the Mulroney government's advocacy of policies reflecting laissez-faire economic analysis, promotion of free trade, an attack on the Keynesian liberal state and the revival of social traditionalism in their original account of recent ideological shifts in Canadian politics. *New World Order*, *supra* note 89 at 24–37. In their more recent revision of the earlier work, the authors switch to the term neoliberalism in order to place "emphasis on the central component of the ideological direction — its neoclassical (liberal) economic orientation." *Corporate Rule*, *supra* note 89 at 12. I am interested in focusing on the role family and familial ideologies play in this economic and ideological shift and so have used the term neoconservativism to bring the discourse of traditional family values more firmly into the discussion.

[93] The recent flood in Canada of editorial comment lauding the two-parent family as the only appropriate setting for childrearing and attacking reliance on daycare is an example of the turn to traditional values and family forms to address the consequences of government slashing of economic and social supports for poor people, single mothers and persons with disabilities. See *e.g.* "Rethinking Child Care" *The Globe and Mail* (25 October 1997) D6; M. Zyla, "Hacking Away at Family Life" *The Globe and Mail* (16 January 1998) A22; A. Thomas, "The Time Bomb of Daycare" *The Globe and Mail* (17 January 1998) D6; W. Thorsell, "In Support of the Two Parent Family" *The Globe and Mail* (17 January 1998) D6; J. Richards, "The Case For Subsidizing the Traditional Family" *The Globe and Mail* (26 January 1998) A17. Although the Keynesian welfare state was criticized by feminists for reinforcing a gendered and racialized social order, many of these critics pointed to the ways in which welfare provision simultaneously opened up opportunities and identities for women as political actors. See P. Baker, "The Domestication of Politics: Women and American Political Society, 1780–1920" and F. Fox Piven, "Ideology and the State: Women, Power, and the Welfare State" in L. Gordon, ed., *Women, the State, and Welfare* (Madison: University of Wisconsin Press, 1990). Critics of the current dismantling of the Keynesian welfare state have identified the ways in which "[p]rivatization and welfare cuts often simply mean that social services are shifted from the paid work of women in the public sphere to the unpaid work of women in the domestic sphere." J. Brodie, "Restructuring and the New Citizenship" in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) 126 at 127–40.

rights-enhancing rhetoric of liberalism to accomplish the ostensibly contradictory purpose of sanctifying the traditional family as the institutional repository of fundamental social and constitutional values. I use *B.(R.)*[94] as the primary example of a judicial discourse which combines an explicitly conservative set of family-related values with the premises underpinning classical liberal rights protections. I start, however, with a sketch of the broader counterpart of this latest doctrinal trend, the rise in popular and political discourses of neoconservative family values.

A. Family Values and Neoconservative Discourse

A few years ago, the existence of an "unofficial" caucus of Tory politicians advocating the protection of the traditional family was described in the national media as "one of the most influential groups of politicians in Canada."[95] The account went on to identify the reasons for the group's activities as "a pervasive fear that the traditional family unit is crumbling under pressure from feminists, homosexuals, activist judges, special interest groups and the *Charter of Rights*."[96] This perception that the traditional family is both the cornerstone of society and is about to crumble in the face of an onslaught by social radicals has produced a wide-ranging literature. For example, George Gilder has argued that the only route out of poverty is the "maintenance of monogamous marriage and family"[97] and that "[c]ivilized society is dependent upon the submission of the short term sexuality of young men to the extended maternal horizons of women."[98] Similarly, in his critique of the erosion of liberal values within the academy, Allan Bloom castigated feminists for not only undermining the core commitments of liberal education but also offending nature with their insistence that abstract values of justice are more important than familial values of love and care and the classic female virtue of modesty.[99] The latter, in Bloom's account, was centrally important "in the old dispensation" because it "governed the powerful desire that related men to women, providing a gratification in harmony with the procreation and rearing of children, the risk and responsibility of which fell naturally — that is, biologically — on women."[100]

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94 *Supra* note 3.

95 "Tory Politicians Form Family Compact" *The Globe and Mail* (3 June 1992) A1.

96 *Ibid.*

97 G. Gilder, *Wealth and Poverty* (New York: Basic Books, 1981) at 69.

98 *Ibid.* at 70.

99 A. Bloom, *The Closing of the American Mind* (New York: Simon & Schuster, 1987) at 99–100.

100 *Ibid.* at 101.

A prime Canadian example of this literature is William Gairdner's *The War Against the Family*, which epitomizes the importance to neoconservative political thought of the traditional family as well of the sense of it being under siege by social radicals who have successfully captured the state. For Gairdner, Western civilization is structured around an "inherent and deadly conflict between statism and the whole idea of the private family."[101] The expansion of the welfare state, the shift from formal to substantive theories of equality, and the substitution of rationalism for tradition, of moral relativism for moral hierarchy, converge in undermining family as the locus of individual freedom and the keystone of democracy. In Gairdner's text, the nuclear family form — "*a married man and woman living together with their dependent children*"[102] — is variously described as "primal and inescapable,"[103] cross-cultural and cross-historical,[104] "natural" and "universal."[105] More specifically, patriarchy is necessary because it is both economically and socially efficient, it channels men's "frightening" strength and natural sexual and physical aggression into social reproduction and ordering, and it is the only alternative to governmental supremacy.[106] Gairdner applauds the nineteenth century for getting women out of the paid workforce and into the homes "where mothers wanted to be" and for treating the family as a social unit with higher importance than the individual.[107] In Gairdner's view, the health of the family and, thus, of society more generally, is under direct threat from "strident, whining, petty feminists," and radical homosexuals who refuse to "[mind] their own business,"[108] and who use AIDS to promote their sexual agenda.[109]

More recently, as mainstream parties across the political spectrum endorse the dismantling of state provision of social welfare, the views of Bloom and Gairdner have found their way into policy papers on restructuring the Canadian welfare state. Of particular significance is the recurrent suggestion that social

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101 W. Gairdner, "Introduction" in *The War Against the Family* (Toronto: Stoddart, 1992) at 10.

102 *Ibid.* at 59.

103 *Ibid.* at 55.

104 *Ibid.* As Gairdner puts it: "Whether a natural family is wandering forlorn in the desert, or living with parents, aunts, uncles, cousins, servants, and a few cows and goats under the same roof on a medieval farm, or with unrelated friends in a utopian commune, or in a single-family dwelling in a modern suburb, that does not alter the primal fact." *Ibid.*

105 *Ibid.*

106 *Ibid.* at 79–83.

107 *Ibid.* at 80.

108 *Ibid.* at 357.

109 *Ibid.* at 401.

assistance benefits, rather than structural and social inequalities, "create" welfare dependency and poverty.[110] The idea that social welfare is "bad" for poor people is especially pronounced in discussions of the link between lone motherhood and poverty, leading to suggestions that tax, divorce, support and benefit regimes should explicitly reinforce the heterosexual two-parent family through a system of economic incentives and disincentives.[111] The analysis is often framed in terms of a concern for child poverty and welfare and, in this regard, displays some of the same rhetorical excesses of Gairdner and Bloom. For example, feminists are characterized as seeking to eliminate men from parenthood thereby creating "bad" neighbourhoods and harming children by condemning them to poverty and denying sons male role models.[112] Conversely, traditional marriage is characterized as a cross-cultural, cross-historical and therefore time-tested institution for the efficient rearing of children.[113]

B. *B.(R.)* and the Neoconservative Synthesis

Although the extreme tone of crisis that permeates the writings of Gairdner and his ilk is absent from *Charter* jurisprudence, the cases which endorse familial values share the posture of invoking a common sense "natural" solution to social dysfunction while at the same time claiming adherence to liberal principles of individualism and negative freedom. The key section 7 case is *B.(R.)* in which the plurality crafts an individual right to parental liberty that incorporates both a liberal hostility to the state and an embrace of conservative family values. As the decision is complicated by the splits between the judges, I start by outlining the various judicial approaches to parental liberty which accompany the plurality's reasons. I then examine the plurality's deployment of the liberal rhetoric of individualism and hostility toward the state to constitutionally entrench a traditional notion of parental authority. I also explore the way in which this enshrinement of parental liberty is detached from the non-conforming religious aspects of the claim. Finally, I comment on the explicitly gendered dimensions of parental rights as they have manifested themselves in other areas of constitutional jurisprudence.

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110 See *e.g.* J. Richards' discussion of the way benefit provision undermines the "Lutheran ethic" in recipients and "Prussian discipline" in the administrative providers. J. Richards, *Retooling the Welfare State* (Toronto: C.D. Howe Institute, 1997) at 153–61.

111 *Ibid.* at 202–13 and 250–57; D. Allen, "Some Comments Regarding Divorce, Lone Mothers, and Children" in *Family Matters: New Policies for Divorce, Lone Mothers, and Child Poverty* (Toronto: C.D. Howe Institute, 1995) at 258–84.

112 Richards, *supra* note 110 at 207–10.

113 Allen, *supra* note 111 at 265.

1. *The* B.(R.) *Decision*

As in *Jones*, the Court in *B.(R.)* was confronted with parents from a nonconforming religious community. Here, parents refused to consent to blood transfusions for their infant child despite medical opinion that the child's life was in danger and a transfusion might be necessary. The parents based their refusal on their religious beliefs as adherents of the Jehovah's Witness faith. They challenged the subsequent temporary wardship order in favour of child protection authorities, arguing that it violated their rights to freedom of religion and to parental liberty.

Again, as in *Jones*, the *B.(R.)* case presented the Court with an opportunity to avoid any consideration of the nature of the liberty interest in section 7. In other words, it would have been possible to dispense with the case by stating that, whatever the merits of the argument about liberty rights, the state acted in a manner consistent with the principles of fundamental justice. All the judges who heard this case agreed that, ultimately, there was no violation of section 7 and the parents' claim must fail. As noted in the context of *Jones*, avoidance of discussion of individual liberty at the first stage of section 7 analysis allows a conservative view of the social world to coexist, albeit somewhat uneasily, with the explicitly liberal framework of the *Charter*. However, only one of the presiding judges, Sopinka J., took that route.[114] The other eight judges were willing to discuss and disagree on aspects of the scope of section 7 liberty.

Chief Justice Lamer took the narrowest position on the scope of the liberty right, asserting that section 7 liberty is limited primarily to a protection against state interferences with physical liberty in the context of the administration of the justice system. Thus, rather than simply avoiding discussion of a broader right, Lamer C.J.C. made it clear that he rejected such an expansion altogether.[115]

A group of three judges, in reasons by Iacobucci and Major JJ., took a slightly less circumspect position than Sopinka J., stating that they were willing

[114] *B.(R.), supra* note 3 at 84.

[115] *Ibid.* at 10–25. Note, however, that Lamer C.J.C. subsequently supported the recognition of parental rights under the security prong of section 7. See discussion *infra* at notes 134–42. Also, Lamer C.J.C.'s position on the narrow ambit of liberty rights has now been clearly superseded by the decision in *Blencoe, supra* note 6. In *Blencoe*, Bastarache J., for the majority, relying in part on Wilson J.'s reasons in *Morgentaler* and the La Forest J. reasons in *B.(R.)*, found that section 7 liberty protects inherently private and fundamental personal choices. *Blencoe, supra* note 6 at 340–43.

to assume without deciding that section 7 extended to parental liberty. They did so in order to make the point that such a liberty interest must be defined in a way that respects the life and security rights of children. They asserted that a parental right to withhold necessary medical care from a child would be, by definition, outside the scope of the liberty protection. Thus, the group of three took a cautious and very tentative "middle" position. Although willing to contemplate extending liberty rights to the familial context, this group was taken aback by the prospect of parents and children competing against each other in a *Charter*-defined family of rights-holding individuals.[116]

Finally, a plurality of four judges in reasons by La Forest J. was prepared to unconditionally commit itself to a notion of liberty broad enough to include "the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care."[117] The blending of a conservative view of familial relations implicit in this statement with the analytic features of vigorous rights protection exemplifies the emergence of a neoconservative family values discourse under the *Charter*. It differs from the indirect sanctioning of the traditional family — found in decisions such as Wilson J.'s dissent in *Jones* — in its willingness to more clearly and explicitly entrench conservative values as constitutional values. In short, conservative values move out of the unexamined and "naturalized" background of personal attributes and relations and onto the centre-stage of directly enshrined constitutional principles.

2. *The Plurality and a Neoconservative Jurisprudence of Parental Liberty*

In staking out its position, the four-judge plurality endorsed Wilson J.'s analysis in *Jones* and *Morgentaler*, characterizing the constitutional right to liberty in terms of a broad, open-ended negative zone of freedom from state constraints on individual "personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."[118] Justice La Forest specifically linked the concept of liberty to privacy, choice and human dignity and to classical notions of the separation between public and private, state and family. At this point, one might speculate that La Forest J. was finally agreeing with the substance of Wilson J.'s dissent in *Jones*. What is distinctive about the plurality reasons in *B.(R.)*, however, is their explicit acceptance of the way in which firm recognition of individual rights often protects the rights of those who are structurally and socially privileged. Recall that Wilson J. in

[116] *Ibid*. at 85–88.
[117] *Ibid*. at 40.
[118] *Ibid*. at 38–39.

Morgentaler sought to avoid such outcomes by texturing her delineation of a very broad and negatively structured liberty right with references to the social and historical disadvantagement of women. The *B.(R.)* plurality introduces a different sort of texture to its characterization of parental rights; namely, the texture of well-established and customary social hierarchies. This emerges in the plurality's analysis of parent-child relations.

Although La Forest J. makes it clear that there is no way to directly entrench the family itself in the scheme of individual protections in the *Charter*, he points out the social reality which implicitly stands behind Wilson J.'s account of the self-regarding parent; namely, that "[t]he concept of the integrity of the family unit is itself premised, at least in part, on that of parental liberty."[119] In other words, an individual parent's rights include the right to "choose" to have a family and maintain (naturally) authoritative parental relationships. Justice La Forest emphasized this point by quoting from Nicholas Bala and J. Douglas Redfearn to the effect that parental interests, as distinct from family interests in upholding the family unit, entail "parental authority — a *parental* right to enjoy family life and control various aspects of a child's life, free from unnecessary outside interference."[120] Thus, La Forest J. endorsed a specific notion of parent-child relations in accordance with which children are only notionally present as legal persons and rightsholders. Although he asserted that "[c]hildren undeniably benefit from the *Charter*, most notably in its protection of their rights to life and to the security of their person," he went on to suggest that there is no way that children can assert these rights other than through their parents.[121] Justice La Forest pointed out that children's interests, as distinct from parental interests, only get consideration under the *Charter* indirectly in terms of the state's interest under section 1 in limiting parental rights. Again, La Forest J. made it clear that the state's interest in this regard is not the same as children's interests or rights.[122]

Justice La Forest continued this constitutionalization of the traditional structure of the family by stating that the individual right to liberty directly translates into society's customary privileging of parental authority to bring up and make choices for children. Furthermore, the source for La Forest J.'s

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119 *Ibid.* at 35.

120 N. Bala & J.D. Redfearn, "Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights" (1983) 15 Ottawa L. Rev. 274 at 281, quoted by La Forest J. in *B.(R.), supra* note 3 at 35.

121 *B.(R.) supra* note 3 at 42.

122 *Ibid.*

elaboration of parental liberty in these terms was not abstract principles of the sovereignty and dignity of individuals metaphorically represented by the nonconformist Reverend Jones but rather the common law. In sum, the vision of the family presented by the plurality is deeply and explicitly conservative, especially in its endorsement of common-law-based notions of parental authority; however, the distinctive packaging in the language of individual rights gives these otherwise familiar values their neoconservative twist.

3. *The Plurality and Religious Difference*

As mentioned earlier, the judges in *B.(R.)* were unanimous in finding that, whatever the merits of the parental liberty claim, the state had acted in a manner consistent with fundamental justice and thus the claim must fail. Indeed, the plurality's fundamental justice analysis left behind the rhetoric of liberal individualism and the natural opposition between individual parents and the state. Instead, it returned to the conservative approach and viewpoint sketched out in the majority reasons in *Jones*, invoking both the traditional role of the state in policing subordinate religious and cultural practices as well as respect for the authority wielded within the legal arena by established medical institutions and discourses.

The two-part structure of the section 7 argument also allowed for another kind of shift and splitting of approaches in the *B.(R.)* plurality reasons. At the liberty stage of the analysis, the purely parental aspects of the claim were presented in an abstract and universalized form. Here the Bs are portrayed as universal, ungendered, culturally and religiously detached parents who simply want to care for and make unspecified medical decisions about their infant. They are "parents unmodified" and, as such, seem to speak to the concerns of all parents for their children's well-being and to an understandable distress when key decisions regarding the care of their ill children are removed from their control. The nonconforming religious character of the actual choices of the Bs with respect to their infant's medical treatment only become an issue at the fundamental justice stage of the analysis. At this point, in contrast, the Bs appear as extremist and unreasonable figures, as inhabitants perhaps — along with the Reverend Jones — of conservativism's gallery of "madmen." In short, the Bs no longer represent distraught parents trying to wrest their infant from the hands of a powerful and indifferent state but alarmingly and perplexingly stubborn adherents of a set of dangerous religious beliefs and practices. Indeed, the case loses some of its narrative coherence. Is it possible, one wonders, that the parents in the historically and socially sanctified family of the first part of the decision are the same people who seem to be demanding a religiously based right to

endanger their infant's health in the second part? When posed against the backdrop of these contextualized religious "differences," the state's administrative imperatives and historical interest in protecting children take on a foundational quality and emerge uncontested as the overriding interests.

An additional consequence of the reversal in the narrative presentation of the Bs is that the complexity of their argument is sidelined and only briefly mentioned. Of particular note is the refusal of the Bs to accept a simplified account of the tension between the state and family underlying most child-protection regimes. Pointing to conflicting medical evidence with respect to their child's medical needs, the Bs argued that the law — in the face of such uncertainty — should defer to parents' religious convictions and values rather than to whichever set of medical experts the judge at first instance deems most credible.[123] However, the Bs' attempt to unravel, in this manner, the connections between state power, legal certainty and medical discourse and to introduce a more pluralized notion of legal truth was cut short by the plurality. Invoking the rules that demands respect on the part of appellate courts for the weighing of evidence by the trier of fact, the plurality refused to pursue the Bs' attempt to critically deconstruct the role of medical expert evidence in usurping the judicial function.[124] In conclusion, in the plurality reasons in *B.(R.)*, a number of discursive features ensure that the purportedly universal parent who stands at the centre of the first part of the liberty analysis is, in effect, a person whose understanding and practice of parenting conforms to dominant cultural norms. Those features are facilitated by the two-part structure of section 7 and include the separation of the parental aspects of the claim from the religious aspects, the shift from an abstract to a particularized discourse and the refusal to acknowledge the substantive impacts of the formal constraints on appellate review.

4. *The Gendered Context of Parental Liberty*

The *B.(R.)* plurality did not address the question of parental disputes between adult members of the family who, unlike children, are able to be more than notionally present within the constitutional discussion. For example, what happens when individual adults — mothers and fathers — are in conflict with

[123] *Ibid.* at 42.

[124] *Ibid.* at 34. For a fuller discussion of this aspect of the case see, see H. Lessard *et al.*, "Developments in Constitutional Law: The 1994–95 Term" (1996) 7 Supreme Court L.R. 81 at 123–27.

each other over parental issues? How does the constitutional recognition of parental liberty rights affect such conflicts?

Carol Smart has stressed the point that "children form part of the nexus of power within family relations."[125] To the extent those relations are gendered, it makes sense to analyze the way power circulates not only along the parent-child axis but also and simultaneously between mothers, fathers and others in a parental or caregiving role. As Smart observes:[126]

> [T]he presence of children in the household creates the potential of a power nexus that parents can exploit positively or negatively in relation to one another as a consequence of their social constitution as mothers and fathers. Structurally speaking, children create a specific field of power relations between parents, and the subsequent power claims that parenthood potentiates are linked to the question of gender.

The shift away from gendered preferences and into the neutral language of the "best interests of the child" in legal discourse often hides or ignores these power relations. For example, in *Jones* and *B.(R.)* the nonspecific term "parent" obscures the axis of gender power that structures relations within heterosexual marriages and unions. We can only speculate about how the educational and medical treatment decisions are arrived at within the Reverend Jones and B households. The relations between the parents remain private and irrelevant to the determination of the nature of parental liberty. While the Bs are referred to in the plural throughout *B.(R.)*, they are assumed to be advancing a single set of claims. There is no mention or reference to a partner or spouse of the Reverend Jones in *Jones*. The assumption of parental unity in both instances illustrates the way in which facially neutral legal concepts may indirectly sanction social hierarchies within the private sphere. However, in a 1995 *Charter* equality case, *Thibaudeau* v. *Canada*,[127] the Court was forced to consider directly a gender analysis of power in relations between parents. Indeed, like *B.(R.)*, the case reveals the durability of conservative familial ideologies that, in this instance, take the shape of the "post-divorce 'family unit'."[128]

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125 Smart, *supra* note 55 at 1. Smart also makes it clear that she is using the term power in the Foucauldian sense of having positive as well as negative aspects and inhering in all aspects of social relationships. *Ibid*. at 2.

126 *Ibid*. at 3.

127 (1995), 124 D.L.R. (4th) 449 (S.C.C.) [hereinafter *Thibaudeau*].

128 This term is used by Cory and Iacobucci JJ. in reasons with which La Forest and Sopinka JJ. concur and which, together with reasons by Gonthier J., make up the majority. *Ibid*. at 501. For analyses of the currency of this term in Canadian cases and its implications for the legal regulation of the family, see D. Bourque, "'Reconstructing'

Thibaudeau concerned an equality challenge to provisions in income tax legislation that deal with the tax treatment of child support payments in the context of divorced spouses. The provision in question gave more favourable tax treatment to non-custodial spouses, mostly fathers, who pay child support than to custodial spouses, mostly mothers, who receive the payments on behalf of their children. The rationale for the provision was that, in most cases, an overall tax savings for the ex-spouses would result and that such savings could then be directed by the non-custodial payor towards child support. Commentators on the litigation have pointed out the way in which such tax provisions reinforce conservative familial ideologies by "tend[ing] to give men control over the distribution of tax benefits among members or former members of the heterosexual family and [by presuming] they will share those benefits with dependent women and children."[129]

The custodial mother, Suzanne Thibaudeau, challenged the tax provisions on the basis of her individual right to sex equality under section 15 of the *Charter*. Her action failed in part because a splintered majority of five judges found that, for the purposes of measuring the allegedly unconstitutional impacts of the legislation's differential treatment of divorced spouses, custodial spouses should not be viewed as individuals but as members of the "post-divorce family unit."[130] One of the dissenting judges analogized this merger of the individual interests of custodial mothers into those of the family to the historical merger of the property interests of women into those of their husbands.[131]

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the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada" (1995) 10 Can. J. L. & Soc. 1; S. Boyd, "Child Custody, Relocation, and the Post-Divorce Family Unit: *Gordon* v. *Goertz* at the Supreme Court of Canada" (1997) 9 C.J.W.L. 447; C. Young, "It's All in the Family: Child Support, Tax and *Thibaudeau*" (1995) 6 Const. Forum 107; L. Philipps, "Tax Law: Equality Rights: *Thibaudeau* v. *Canada*" (1995) 74 Can. Bar Rev. 668.

129 L. Philipps & M. Young, "Sex, Tax and the *Charter*: A Review of *Thibaudeau* v. *Canada*" (1995) 2 Rev. Const. Stud. 222 at 279.

130 As indicated in note 128, only the Cory and Iacobucci JJ. reasons, with which La Forest and Sopinka JJ. concur, actually use this term. The fifth judge making up the majority, Gonthier J., wrote separate concurring reasons. Although he did not use the term "post-divorce family unit" he implicitly endorsed such a concept in agreeing that the overall benefit to parents to whom the tax provisions apply negates the equality concerns of custodial parents such as Suzanne Thibaudeau. *Thibaudeau*, *supra* note 127 at 485–500.

131 *Ibid.* at 458, per L'Heureux-Dubé J.

The erasure of custodial spouses as rightsholders in *Thibaudeau* seems more pointed and deliberate than the parallel erasure of children's interests in the plurality reasons by La Forest J. in *B.(R.)*. Perhaps for this reason the melding of classical liberal values of individualism and conservative familial ideologies is less smoothly accomplished in *Thibaudeau.* In *B.(R.)* the plurality recognized children as rightsholders so long as it was clear that children have no meaningful way to assert that status.[132] Traditional notions of parental authority thus could be presented safely in combination with a family made up of rightsholding individuals. In *Thibaudeau*, custodial spouses had to be firmly excluded from the scope of the protection rather than simply not mentioned or only notionally recognized. The injurious impacts of the tax regime on individual custodial spouses had to be elided. The vision of "the community in which the [traditional] family is the social unit"[133] — so comfortably lauded as a "natural" feature in the older common-law cases — came readily to hand, reemerging as the "post-divorce family unit." Thus the shifts in *B.(R.)* and *Thibaudeau* between who counts as an individual and when, can be explained partly in terms of conservative familial ideology.

V. CONCLUSION

Since *B.(R.)* the Supreme Court of Canada has returned to the question of whether section 7 extends protection to aspects of the parent-child relationship. In *G.(J.)*, the majority, in reasons by Lamer C.J.C., found that the interference in the parent-child relationship represented by custody proceedings brought by state officials under a child protection statute constituted a violation of the "security of the person" prong of section 7.[134] Although characterizing the fundamental interest at stake as one of psychological security, the majority used the classical liberal "liberty" language of negative privacy to describe the

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[132] As noted earlier, a group of three judges in reasons by Iacobucci and Major JJ. was clearly concerned about the erasure of any meaningful consideration of the rights of children and made the point that a parental liberty right would have to be defined in a manner that takes account of the constitutional life and security interests of children. See *supra* note 116 and accompanying text.

[133] This is the phrase used to describe the fundamental importance to the political order of the family, which is constituted by natural relations of parents to children, in *Hepton*, *supra* note 64. The case is a prime example of the legal articulation of a conservative discourse of family relations. See discussion *supra* notes 61 to 65 and accompanying text.

[134] *Supra* note 7, per Lamer C.J.C. at 76–80.

constitutional harm.[135] Justice L'Heureux-Dubé, in concurring reasons, characterized the right as both a liberty and security interest.[136] A subsequent case, *K.L.W.*,[137] focused on the apprehension of children under child protection law, specifically the warrantless apprehension of children in nonemergency situations provided for under the Manitoba regime. In this case, L'Heureux-Dubé J., for the majority, invoking Lamer C.J.C.'s reasons in *G.(J.)*, found that apprehensions of children by state officials acting under child protection statutes trigger the constitutionally protected security concerns of both parents and children.[138] Justice Arbour, in dissenting reasons, agreed with this aspect of the majority's holding.[139]

These two cases — *G.(J.)* and *K.L.W.* — place parental rights claims under section 7 on a solid footing, albeit under the security prong of the protection.[140] Furthermore, the divergence between the majority and the concurrence in *G.(J.)* offers an important insight into the relative tenacity of the neoconservative synthesis — the fusion of traditional family ideologies with classical liberal rights protection norms — found in La Forest J.'s plurality reasons in *B.(R.)*. As noted earlier, Lamer C.J.C.'s delineation of parental rights in his majority reasons in *G.(J.)* was cast in the classical mould of a negative liberty right

135 Lamer C.J.C. described direct state interference into the parent-child relationship as a "gross intrusion into a private and intimate sphere" and emphasized the stigma associated with being found an unfit parent. *Ibid.* at 78.

136 For an extended analysis of the parental rights portions of this case, see H. Lessard, "The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring" Osgoode Hall L. J. [forthcoming].

137 *Supra* note 8.

138 *Ibid.* at 568–70.

139 *Ibid.* at 532–33. The split in the Court in *K.L.W.* revolved around the question of whether the principles of fundamental justice require prior judicial authorization of a nonemergency apprehension. L'Heureux-Dubé J. held, for the majority, that a prompt postapprehension hearing was sufficient to meet the constitutional standard of procedural fairness under section 7 principles of fundamental justice. *Ibid.* 570–89. Arbour J. disagreed, holding that both the substantive and procedural dimensions of fundamental justice demand, at the very least, an *ex parte* hearing to obtain prior judicial authorization of nonemergency apprehensions and that the failure to do so under the Manitoba regime could not be justified under section 1 of the *Charter*. *Ibid.* at 533–50.

140 In the aftermath of *Blencoe*, in which a broad liberty protection extending to fundamental personal choices is recognized by the majority, it is probably no longer necessary to avoid the liberty characterization of parental rights. *Supra* note 6 at 340–43.

despite his insistence that the interest is more appropriately described as a security interest.[141] Justice L'Heureux-Dubé, in concurring reasons, although willing to invoke both the liberty and security guarantee in relation to the section 7 claim, did not challenge Lamer C.J.C.'s characterization and, indeed, approved of La Forest J.'s plurality reasons in *B.(R.).* However, unlike her colleagues, L'Heureux-Dubé J. asserted that the claim in *G.(J.)* implicated the section 15 equality guarantee and that equality concerns should inform the section 7 analysis. She alluded, in particular, to the social context of female, lone-parent poverty and the systemic disadvantages stemming from ablism, racism and colonialism that disproportionately characterize the parental respondents in child protection proceedings.[142] Thus, like La Forest J. in *B.(R.),* L'Heureux-Dubé J. in *G.(J.)* sought to provide texture and specificity to a liberty right which, by definition, is conceived in negative and therefore, very open-ended abstract terms. Rather than the texture of traditional societal values, however, L'Heureux-Dubé J. invoked the texture of broadly based social disadvantagement. In this respect, L'Heureux-Dubé J.'s attempt to contextualize liberty rights — directed at the features that marginalize the individual claimant rather than at dominant social values — was a better "fit" with the liberal values underlying the framework of rights protection than La Forest J.'s analysis in *B.(R.).* Justice L'Heureux-Dubé's approach in *G.(J.)* finds a parallel in that of Wilson J. in *Morgentaler,* discussed earlier. However, unlike Wilson J., L'Heureux-Dubé J. did not attempt to articulate her vision of substantive liberty rights under the section 7 guarantee itself but rather argued for an interpretation that takes account of the interplay between different *Charter* guarantees and strives for an overall coherence.[143]

Together, these two sets of reasons — those of Wilson J. in *Morgentaler* and of L'Heureux-Dubé J. in *G.(J.)* — demonstrate how the rigidly classical framework within which liberty rights are typically understood might be reworked to reflect the more socially textured individual of section 15 substantive equality analysis.[144] At the same time, the lack of support on the Court for either of these approaches and L'Heureux-Dubé J.'s seeming unwillingness to challenge the fundamentally negative character of the liberty

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141 *Supra* note 7 at 76–80.

142 *Ibid.* at 99–101.

143 *Ibid.* at 99.

144 For a summary of currents in equality jurisprudence and, in particular, the tension between the abstract individual of formal equality and the textured individual of substantive equality, see Lessard *et al.*, *supra* note 124 at 87–99.

protection itself, attest to the difficulty of pursuing this more progressive variation on the liberal theme of the *Charter*.[145]

Justice L'Heureux-Dubé's analysis in *G.(J.)* thus remains a minority voice within the new-found consensus on the protection of parental rights under section 7. Although she secured majority support in *K.L.W.*, once more she did not reexamine or question Lamer C.J.C.'s classical portrayal of parental interests in *G.(J.)*, nor that by La Forest J. in *B.(R.)*.[146] Meanwhile, the neoconservative family values discourse found in the *B.(R.)* plurality reasons was repeated not only in the *Thibaudeau* equality decision but also in *Thibaudeau*'s companion cases, *Egan* v. *Canada*[147] and *Miron* v. *Trudel*.[148] As noted earlier, the *Thibaudeau* case on equality rights invoked conservative and historically outdated notions of interspousal relations in the name of the "post-divorce family unit." Some of the judgments in *Egan* and *Miron* echo this neoconservative

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145 L'Heureux-Dubé J.'s unwillingness to challenge the fundamentally classical conception of liberty underlying the liberty jurisprudence may lie in a pragmatic understanding of the normative and ideological limits of the rights framework. In an earlier decision, *Young* v. *Young*, *supra* note 58, L'Heureux-Dubé J. expressed her misgivings about the applicability of the *Charter* provisions protecting religious and expressive freedoms to familial relations, especially to the parent-child relationship. She referred to the essentially public character of such freedoms, in contrast to the essentially private character of family relationships. Thus she seemed willing, to some extent, to disregard the formal linkage between *Charter* application and government action and to engage, instead, in an explicitly normative discussion of the nature of social and political relationships in relation to *Charter* values. *Ibid.* at 89–90.

146 The split in *K.L.W.*, however, reflects in part a disagreement over the relation between children's constitutional interests and parents' constitutional claims. The dissent's position that both procedural and substantive principles of fundamental justice demand prior judicial authorization for nonemergency apprehensions was based in part on concern that children's constitutional interests receive adequate protection. Arbour J. placed children's interests in protection from harm from parents on an equal par with children's interests in remaining within their parent's custody should it turn out that fears about harm were unfounded. She concluded that the protection of children's constitutional interests necessitates prior judicial authorization, on an *ex parte* basis if circumstances militate against notice for any nonemergency apprehension. *Supra* note 8 at 553–49. L'Heureux-Dubé J. took the view that the special vulnerability of children to harm from family members, the difficulty of obtaining evidence of imminent harm on short notice and the fact that the risks associated with prior authorization procedures fall exclusively on the child if it turns out that harm is occurring, requires that situations of serious risk be treated on a par with emergency situations. *Ibid.* at 574–87.

147 (1995), 124 D.L.R. (4th) 609 [hereinafter *Egan*].

148 (1995), 124 D.L.R. (4th) 693.

perspective. In *Egan*, a block of four judges in concurring reasons by La Forest J. defended its finding that the exclusion of same-sex couples from government pension schemes is reasonable on the following terms:[149]

> [M]arriage has from time immemorial been firmly grounded in our legal tradition ... [b]ut its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate.

In this manner, just as *Thibaudeau* exposed the gendered dimension of the constitutionalized family, the plurality reasons in *Egan* exposed its heterosexist dimension.[150] In *Miron*, the same block of four in dissenting reasons by Gonthier J. rejected an equality challenge to the privileging of married spouses in relation to common-law spouses in legislation regulating accident insurance coverage. In the course of doing so, Gonthier J. asserted that legislative distinctions which reflect "some objective physical or biological reality, or fundamental value"[151] are not discriminatory and relied on the American familial privacy cases to defend the primacy of the marriage institution as such a value.

Despite the strong conservative voice in the *Thibaudeau* trilogy, recent equality jurisprudence tells a more auspicious tale about the strategic use of *Charter* litigation to achieve progressive social change. The deep divisions regarding the nature of equality revealed in the *Thibaudeau* trilogy were resolved ostensibly in the Court's decision, four years later, in *Nancy Law* v. *Canada*.[152] In *Nancy Law* a unanimously supported framework for section 15 analysis was accomplished by merging bits and pieces of several approaches into one. In crafting its approach, the Court in *Nancy Law* did not incorporate the explicit deference to social tradition and established norms found in the conservative sets of reasons in the *Thibaudeau* trilogy, a deference that is presented in those conservative reasons as a limit internal to the right itself. Rather, the *Nancy Law* decision introduced its own version of an internal limit on what counts as an equality violation. In doing so, the Court used the comparatively neutral

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149 *Egan*, *supra* note 147 at 625.

150 The majority in *Egan* recognized the violation of the equality rights of same-sex spouses. However, of that majority, Sopinka J. found that the exclusion is a reasonable limit under section 1, thus providing majority support for the dismissal of the same-sex challenge. *Ibid*. at 653–56, per Sopinka J.

151 *Miron*, *supra* note 148 at 704. A majority in *Miron* found that the equality rights of common-law couples had been violated and that the government action was inconsistent with section 1. *Ibid*. at 725–37 per L'Heureux-Dubé J. and at 737–58 per McLachlin J.

152 [1999] 1 S.C.R. 497 [hereinafter *Nancy Law*].

language of a correspondence between the grounds of discrimination and the actual needs, circumstances and capacities of claimants. In accordance with this correspondence test, legislative distinctions based on one of the section 15 enumerated or analogous grounds that mirror or correspond to the actual situation of a group do *not* violate section 15 as long as the distinction made does not have the effect of undermining human dignity.[153] In light of the recent history of sharply divergent approaches to equality analysis, the internalized "saving" effect of correspondence to "real life" or actual differences risks inviting arguments about correspondence to majoritarian practices and values.[154] The risk was soon put to the test. In *M.* v. *H.*,[155] decided shortly after *Nancy Law*, a majority for the Court found that the exclusion of same-sex couples from regimes imposing an obligation of spousal support violates the equality guarantee. Thus, the result in *M.* v. *H.* suggests that the correspondence component in the *Nancy Law* analysis will not automatically construct dominant heterosexual practices and heterosexist norms as reflections of "real life" needs, capacities or circumstances, thereby shielding such practices and norms from equality challenges.

However, it should be noted that an explicitly conservative version of the correspondence test was pursued in *M.* v. *H.* in the dissenting reasons by Gonthier J. In short, echoing the conservative sets of reasons in the *Thibaudeau* trilogy, Gonthier J. argued that the legislative exclusion of same-sex couples from spousal-support regimes must be viewed in light of the unique biological and social role played by opposite-sex couples with respect to procreation.[156] Placed on that footing, the challenged legislative distinction, Gonthier J. elaborated, meets the correspondence test. As he put it, the distinction is based on "a true appreciation of the facts," of "the necessarily gendered nature of the [opposite-sex] relationship, which in a great many cases leads to economic dependency based on gender, often (though not always) due to children."[157]

153 *Ibid.* at 537–38.

154 The Court in *Nancy Law* seemed to be aware of this danger, stipulating that legislative action which achieves valid social purposes for one group of persons; *i.e.*, meets the correspondence test with respect to that group, cannot frustrate equality claims where the effects of such action on another group of persons are at odds with the purposes of the equality guarantee. In addition, the Court seemed to view the correspondence step of the analysis as a way of "saving" affirmative-action-style initiatives that seek to ameliorate disadvantage by singling out a particular group in need of accommodation or support. *Ibid.*

155 [1999] 2 S.C.R. 3.

156 *Ibid.* at 130–31.

157 *Ibid.* at 142.

Pending equality challenges to the heterosexist character of the common law of marriage may provide insights that more clearly attest to the ease with which the neutrally phrased correspondence test in the *Nancy Law* framework can accommodate an explicitly conservative rendering of its limiting effect on equality protection.[158]

At the present moment, the conjunction of the section 15 equality cases and the section 7 parental rights cases presents a portrait of a Court trying out a number of ways, some of them in direct conflict with each other, of locating and characterizing familial relationships in the language of *Charter* rights and values. The section 7 cases differ from the equality cases in that they purport to constitutionalize dominant institutions and practices and present them as individual rights. The equality cases, in contrast, threaten simply to disqualify distinctions that conform to such institutions and practices from counting as unconstitutional discrimination. The question remains whether equality decisions, such as that in *M.* v. *H.*, which make the texture and history of social disadvantagement analytically significant are, in fact, on a collision course with parental rights decisions that seem to place the texture and historical legacy of conservative family ideologies at the core of an otherwise negatively structured, and therefore presumptively empty, abstraction. In addition, one must ask whether the newly minted "family rights" under section 7 will contribute to the legitimacy given in the political arena to policy initiatives that tout the traditional family as a central part of the solution to what neoliberal governments construct as the "problems" of welfare dependency, child poverty and large public debt loads.[159]

The elasticity of the judicial discourse of rights and its reliance on large, negatively drawn abstractions such as privacy or liberty, as well as on slippery doctrinal concepts such as "correspondence to actual facts," provide ample room for the contradictory currents of Canadian politics to coexist. To some extent, this fluidity is healthy, providing room for the "push and pull" of engaged debate by individuals and social groups around fundamental political and constitutional values. However, the pursuit of emancipatory understandings of political

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[158] See *e.g. EGALE Canada Inc.* v. *Canada (Attorney General),* [2001] B.C.J. No. 1995, (B.C.S.C.), online: QL (BCJ).

[159] The tendency of *Charter* jurisprudence to favour rights claims that result in the privatization of the social costs of reproduction has been observed with respect to early *Charter* cases. See J. Fudge, "The Public/Private Distinction: The Possibilities of and Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L. Rev. 485.

community, familial relations and the role of law through *Charter* litigation must always keep an eye, not only to the broader context of the politics surrounding family issues, but also to the normative, ideological and institutional constraints that distinguish legal discourse from political discourse more generally. Historical notions of family relationships find resonance and support in the common-law roots of our legal traditions and concepts. At the same time, the distinctiveness of rights discourse under the *Charter* is in part attributable to its historical and conceptual debt to the classical liberal understanding of the liberal political community. The fusion of these two currents in the judicial discourse of parental rights removes a large measure of elasticity from the otherwise open-ended promise of individual liberty rights.

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TRADITION, PRINCIPLE AND SELF-SOVEREIGNTY: COMPETING CONCEPTIONS OF LIBERTY IN THE UNITED STATES CONSTITUTION

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The "liberty" protected by the United States Constitution has been variously interpreted as the "liberty" of thinking persons to speak, worship and associate with others, unimpeded by onerous state law; the "liberty" of consumers and producers to make individual market choices, including the choice to sell one's labour at any price one sees fit, free of redistributive or paternalistic legislation that might restrict it; and the liberty of all of us in the domestic sphere to make choices regarding reproductive and family life, free of state law that might restrict it on grounds relating to public morals. Although the United States Supreme Court has never done so, the same phrase could also be interpreted as protecting the positive liberty of individuals to engage in decent work, to enjoy general physical safety and welfare, and to be prepared for the duties of citizenship. Such a progressive interpretation, in fact, might be more in line with the overall purpose of the Reconstruction Amendments, of which the right to not be deprived of one's liberty without due process of law, is a part.

La notion de «liberté» qui est protégée par la constitution des États-Unis a été à tour de rôle interprétée comme étant la «liberté» d'expression, de religion et d'association, sans contrainte de coûteuses lois des États; la «liberté» des consommateurs et des producteurs de faire des choix de marché individuels, y compris le choix de vendre son travail à n'importe quel prix jugé approprié, libre de législation paternaliste ou de répartition qui pourrait limiter cette activité; et notre liberté à nous tous qui vivons dans cette sphère de faire des choix relatifs à notre vie reproductive ou familiale, sans contrainte qu'une loi de l'État puisse limiter ces décisions pour des raisons de morale publique. Bien que la Cour suprême des États-Unis ne l'ait jamais fait, le même terme pourrait aussi être interprété de manière à protéger la liberté positive d'individus désirant faire un travail honnête, profiter d'une sécurité et d'un bien-être physiques généraux et assumer les responsabilités d'un citoyen. D'ailleurs, une telle interprétation progressive pourrait mieux s'inscrire dans la raison d'être globale des amendements de reconstitution dont fait partie le droit de ne pas être privé de sa liberté sans application régulière de la loi.

I. INTRODUCTION

Is individual liberty protected by the United States Constitution? And if so, of what does it consist? In one sense, the United States Constitution is about liberty and little else: taken in its entirety, the Constitution aims to ensure the political liberty of the states to govern free of the encroachments of the federal

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government; it aims to ensure the liberty of the national Congress to act pursuant to its enumerated powers free of interference by the executive branch (and *vice versa*), and at least some of the first ten amendments aim to ensure that the individual not be deprived by the national and arguably state governments as well of particular liberties: a state may not, for example, interfere with the individual's liberty to speak, worship or publish, nor may it deprive him of his political liberty to vote. It is also clear that several clauses of the Constitution, but particularly the so-called "due process" clauses of the Fifth and Fourteenth Amendments, aim to protect the individual against unjust deprivations of his liberty of movement without due process of law: neither the state nor the federal government may arrest, detain and incarcerate individuals indefinitely without some sort of legal process. Again, several clauses of the Constitution uncontroversially guarantee such a right.

However, while the Fourteenth Amendment does unambiguously (or at least uncontroversially) preclude the states from depriving an individual of his or her life, liberty or property "without due process of law," it is not at all clear whether this clause or the comparable clause in the Fifth Amendment confers upon the individual any absolute right to liberty — no matter how liberty might be defined — beyond the more limited and procedural guarantee that liberty of movement not be taken away without some sort of "process." Thus, while an individual surely has a right not to be deprived of her liberty without legal process, it is not clear that the same clause confers upon the individual *any* right to liberty that cannot be infringed by the substance of laws that have no procedural defect. And again, this is true regardless of the meaning we give the word "liberty." It is simply not clear, for example, that the individual, by virtue of the Fourteenth Amendment or the Constitution in its entirety, enjoys a sphere of what Isaiah Berlin taught us all to call "negative liberty,"[1] within which he can conduct his own self-regarding private affairs in any way he sees fit, and within which he can rest assured that he will be unimpeded by state laws that require him to refrain from doing what he would otherwise be inclined to do, or to take action which he would, all things being equal, choose not to take. Nor is it clear whether the individual, or groups of individuals, enjoy a sphere of "liberty" of the sort celebrated by Mill: a liberty to try to put into practice various competing conceptions of the good life, free of paternalistic intervention, and from which we might all learn, much as we purportedly learn, through federalism, from the

[1] I. Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) 118.

societal experiments undertaken by our fifty somewhat autonomous states.[2] Far less clear is the constitutional status of what Berlin called in his famous essay "positive liberty,"[3] or more simply, freedom from unjust oppression, or subordination: a right to be truly the author of one's own fate. By virtue of the Thirteenth Amendment, we unambiguously enjoy a right not to be enslaved. But it is not at all clear that the Fourteenth confers upon us a correlative right to the kind of liberty Berlin understood as the self-mastery that is slavery's opposite.

And, given that it is not clear whether such an abstract sphere of liberty is protected in principle, or what its content might be, it is not surprising that every more specific attempt to implement such a "liberty interest" has also been plagued with uncertainty. Rather, Supreme Court authority in the liberty cases tells us little more than how each temporal Court views each contested liberty. As a result, even the status of the particular liberties on which the Court has spoken remain unclear. Thus, to take some examples of negative liberty, it is simply unclear that either the language or history of the due process clause of the Fourteenth Amendment, or for that matter of the Constitution taken as a whole, can fairly be read as conferring upon the individual the "liberty," for example, to freely contract to work for more than a certain number of hours or for less than a certain wage, free of the interference of state laws limiting this right. In the first few decades of this century, the *Lochner* Court[4] said it did, but that view has since then been firmly and repeatedly renounced.[5] It is also unclear whether parents have the liberty to send their children to a private school where instruction is in a language other than English, contrary to a state law requiring English-only education. The Court in *Meyers* v. *Nebraska*[6] said they do, and that result apparently still stands.

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2 J.S. Mill, "On Liberty" in *Utilitarianism, On Liberty, and Considerations on Representative Government* (London: J.M. Dent & Sons, 1972) 65.

3 *Supra* note 1 at 131–44.

4 In *Lochner* v. *New York*, 198 U.S. 45 (1905) the Supreme Court held that a state statute limiting the number of hours worked by bakers violates the guarantee of liberty in the Fourteenth Amendment. Between 1905 and 1937, the Court invalidated a large number of state and Congressional enactments under a similar reading of the due process clause of the Fourteenth Amendment.

5 See *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937).

6 262 U.S. 390 (1923).

It is unclear whether the clause confers upon the individual the "liberty" to engage in sodomitic sex acts, unburdened by state anti-sodomy laws criminalizing such behaviour, or a right to marry someone of the same sex free of laws forbidding such unions. The Rehnquist Court in *Bowers* v. *Hardwick*[7] said no to the first question and has not spoken to the second, but the result in *Bowers* may have been implicitly overturned in the *Romer*[8] case, in which the Court found some constitutional protection for gay and lesbian citizens in the equal protection clause of the Fourteenth Amendment. It is also not clear, from the text or history, whether the individual enjoys the "liberty" to marry polygamously, in the face of laws and even state constitutions forbidding it, or the "liberty" to engage in adultery, fornication or adult incest free of laws criminalizing such conduct. No Court has ever held that she does. Similarly, it is not clear whether an individual has the freedom to use contraceptives or seek an abortion, free of laws forbidding those interferences with reproduction, or a right to kill herself with or without the aid of the doctor should she find herself terminally ill and in unbearable pain, free of laws forbidding suicide. The Court revisits the abortion decision almost every term, but the law is still radically uncertain. The best that can be said is that women do enjoy some right to an abortion before viability, but it is no longer the case that that right is "fundamental," or that state laws restricting it are to be subject to "strict scrutiny."[9]

The Court has recently held that one state's ban on physician-assisted suicide was constitutional,[10] thus casting some doubt on the existence of a so-called "right to die," but it fell far short of unambiguously affirming or denying the existence of such a right. What the Court has never managed to do, however, is to articulate an overarching rationale or principle for any of these so-called "negative liberty" cases. As a consequence, even the results of many of the decided cases are not terribly secure, and the meaning and scope of virtually all of them is not clear. Again, after more than a hundred years of discourse, it remains radically uncertain, from either the text or history or judicial precedent, whether the Constitution, and more specifically the Fourteenth Amendment, confers upon the individual a sphere of negative liberty or freedom within which he or she is free to form an autonomous life unimpeded by the substantive constraints that may be imposed upon that life by the power of state law.

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7 478 U.S. 186 (1986).

8 *Romer* v. *Evans*, 517 U.S. 620 (1996).

9 *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992).

10 *Washington* v. *Glucksberg*, 521 U.S. 702 (1997).

The status of claims to "positive liberty" are, if anything, even less clear. It is not at all clear from either the text or the history of the Fourteenth Amendment that the individual has a right to be free of the oppressive burden of private violence, even if that violence is unchecked, unregulated and undeterred by the state. A fear of undeterred private violence may well leave the victimized individual with substantially less positive freedom than he would have without it — such an individual is far less the "author of his own fate" than one who is free or unimpeded by such threats. But there is surely no consensus — in fact there is little more than a whisper of a suggestion from commentators — that the individual enjoys, through the Fourteenth Amendment's guarantee of "liberty," the right to be free of such a burden. The Supreme Court, furthermore, has never so held, and in fact has recently stated, albeit in *dicta*, very much to the contrary, that there is no constitutional right to a police force.[11] There is similarly no consensus — again, little more than the barest whisper on the part of commentators, and absolutely no Supreme Court support — that the individual has the right to be free of the threat of severe material deprivation, or the right to full employment. Severe material deprivation, as well as chronic unemployment, also interfere, and mightily, with the individual's enjoyment of positive liberty; with his or her ability to master his own fate, to author his own destiny and to be a slave to no one. But there is little support from commentators and virtually no support from this Court or any prior that the Constitution, through the due process clause, protects the individual "positive liberty" to be free of such burdens.

More generally, it is not at all clear that the individual enjoys what could best be construed as a constitutionally bestowed right to be positively free of the oppressive or subordinating actions of private actors, whether they be exploitative employers who refuse to pay a living wage, racist hate groups burning crosses, or abusive spouses, and regardless of whether the resulting oppression comes to be so severe as to resemble the status of enslavement. Again, commentators have only rarely suggested that such an interpretation of the Constitution might be a fair one, and the Court has held, in a solid line of cases dating from the reconstruction era,[12] squarely against it: the Constitution speaks only to the actions of states and state actors, and neither to the actions of private parties nor to the inaction of states in their failure to respond to those private acts.

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[11] *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189, 196–97 (1989).

[12] *The Civil Rights Cases*, 109 U.S. 3 (1883).

This alone presents a puzzle. Why has there been so little clear guidance by the Court, and so little by way of suggestion from commentators, on the meaning of the liberty clause of the Fourteenth Amendment as a means of protecting either the negative or positive liberty of individuals against acts of oppression from others, whether the "others" be states or other entities? To bring the issue quickly into focus, the equal protection clause of the Fourteenth Amendment — whose language is at least as opaque as the liberty clause — has been the vehicle for dramatic transformations of American culture and the subject of countless interpretative exercises by commentators, many of them radically utopian.[13] The liberty clause, by contrast, has yielded little fruit. In a society so unambiguously and overwhelmingly committed, at the rhetorical level, to "liberty," and so seemingly hostile, for most of its history, to claims of "equality," this seems, simply, odd. The clause that expressly guarantees liberty has provided precious little of it, beyond guarantees of process. Nor has it served well as aspiration: neither commentators nor political activists have made much rhetorical use of it toward the end of expanding our popular understanding of the liberty to which we are entitled.

To be sure, and as suggested above, the Supreme Court has, from time to time in our history, used the "due process" guarantee of the Fourteenth Amendment to protect a sphere of "liberty" that goes beyond the mere protection of procedural rights. It uses it today as well, primarily to protect the "liberty" of men and women to use contraception, and of women to obtain previability abortions free of the criminalization of such procedures by states. That history, however, far from providing either a starting point of analysis for greater elaboration of the underlying norm, or even inspiration for its future development, provides at least part of the explanation for the lack of it. The history of the Court's use of the due process clause toward the end of protecting so-called "substantive" liberty is a profoundly ignoble one, and that fact alone may act as a serious drag on contemporary development of the doctrine.

[13] P. Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991); C. MacKinnon, "Reflections on Sex Equality under Law" (1991) 100 Yale L.J. 1281; O. Fiss, "Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: Why the State?" (1987) 100 Harv. L. Rev. 781; R. Colker, "Anti-subordination Above All: Sex, Race, and Equal Protection" (1986) 61 N.Y.U. L. Rev. 1003.

First, in the middle of the nineteenth century a slaveholder in the infamous *Dred Scott* case[14] essentially argued, and successfully, that the analogous Fifth Amendment "due process clause" protected his property interest in slaves and his liberty to own them, free of interference by the national government. Civil war was the consequence of this earliest invocation by the Supreme Court of an individual's constitutionally protected "liberty" against laws which seemingly constrained it. More recently, in the first three decades of the past century, the Court accepted the argument of employers and propertied classes that the Fourteenth Amendment's due process clause protected the individual's substantive "liberty" to freely contract for labour unburdened by redistributive or paternalistic state or national legislation that limited it.[15] Thus, it was individual freedom or liberty, protected by the Fourteenth Amendment, that served as the vehicle during the first three decades of the past century for the constitutional voidance of scores of legislative attempts by both states and Congress to ameliorate the harshness of markets in times of severe economic distress. That use of the "substantive due process" clause as well is now universally renounced. The *Dred Scott* decision, of course, was overturned by a war, and the *Lochner* case and its progeny by a series of judicial decisions in the late 1930s and 1940s, but both *Dred Scott* and the *Lochner* era left their mark. Any contemporary attempt to breathe life into the "substantive due process" clause of the Fourteenth Amendment, or even into the very idea that the Fourteenth Amendment should protect some degree of individual liberty against pernicious legislation, is heavily burdened by this historical record: the two clearest examples of attempts by the Court to do precisely that constituted unambiguous moral monstrosities. Both in *Dred Scott* and in *Lochner* the Court protected the substantive negative liberty of "individuals" — in the first case, the negative liberty to own slaves and in the second the negative liberty to contract — and in both cases the Court wreaked havoc upon the nation by so doing.

In modern times, as noted, the Court has "revived" the due process clause of the Fourteenth Amendment from the supposed beating it took during the retreat from *Lochner*, and has employed it once again toward the end of protecting liberty: this time, not the liberty of employers and employees to contract free of paternalistic and redistributive legislation constraining it but the individual liberty of men and women to use birth control,[16] and of individual women to

[14] *Dred Scott* v. *Sandford*, 60 U.S. 393 (1857).
[15] *Lochner* v. *New York*, 198 U.S. 45 (1905).
[16] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

procure abortions free of "moralistic" legislation forbidding those sales.[17] This modern "revival" of substantive due process toward the end of protecting "personal" rather than "economic" liberty, however, has done little to rehabilitate the concept of "liberty," or our understanding of its relation to other constitutional goals. Rather, the protection of abortion and contraceptive use through the due process clause has proven to be extraordinarily controversial, and left the Court open to the charge of hypocrisy: why is it, after all, that the "liberty" to procure an abortion is to be protected, but the "liberty" to work for less than the minimum wage not only unprotected but vilified?

In part, of course, the controversy over *Roe* v. *Wade* and its progeny is entirely a function of the nature of the abortion debate itself: for some, abortion is a cornerstone of individual freedom and women's equality, but for others it is the unjustified destruction of human life. Given that fact, decisionmaking surrounding abortion at any level — the individual's decision to procure one, the locality's attempt to regulate it, the state's attempt to criminalize it, Congress's attempt to provide funding for it or its adamant refusal to do so, and the Court's attempt to constitutionally protect it — is guaranteed to prove divisive. But *at least* in equal measure, the contemporary debate *within legal circles* about the protection of the right to obtain an abortion established by *Roe* v. *Wade* and then redefined in *Casey*, is a debate over the wisdom of protecting individual liberty — no matter what its content — through the due process clause of the Fourteenth Amendment. Simply put, if the *Lochner* reasoning was so abominable, it's not clear how *Roe* can be so right. Again, neither *Lochner*, nor its repudiation, nor *Roe*, rest on a clear and clearly stated principle of constitutional law. It remains simply unclear — as a matter of text, of history, or for that matter of political theory — whether the Constitution does or should protect a sphere of individual liberty, no matter how defined, and no matter whether it does or doesn't include a right to obtain an abortion, against state encroachment. To the extent that the debates surrounding *Roe* and *Casey* can be traced to underlying debates regarding the scope of the Fourteenth Amendment, then it is fair to say that the so-called "abortion wars" have been fuelled by two seemingly unrelated open questions of constitutional jurisprudence: whether there is any protected sphere of individual liberty, and how we should go about defining its content.

[17] *Roe* v. *Wade*, 410 U.S. 113 (1973).

In the sections below, I will take up various attempts to define the content of the liberty protected by the Fourteenth Amendment. But first, one must ask the more basic question, and that is whether there is *any* such protected sphere. Justice O'Connor, speaking for a divided Court in *Planned Parenthood* v. *Casey*, stated unequivocally that the answer is yes: the Supreme Court, she argued, has *never* read the liberty phrase of the due process clause as having *no* substantive content.[18] Therefore, she concluded, the only fair question goes to its content, not its existence. Nevertheless, O'Connor J., and the Court, might be wrong. There are sound reasons, some grounded in constitutional methodology, others in political theory and others simply in politics, for resisting O'Connor J.'s conclusion, and it's worth at least enumerating what those reasons might be.

II. IS LIBERTY CONSTITUTIONALLY PROTECTED BY THE FOURTEENTH AMENDMENT?

First, the grammar and language of the text seem at best ambiguous with regard to the general claim that the Constitution protects individual liberty, if not hostile to such an outcome. The Fourteenth Amendment by its language unambiguously precludes the state from depriving someone of their liberty without due process of law, but simply does not explicitly provide for any more absolute right. And, as countless commentators have pointed out,[19] the text is utterly devoid of reference to any of the more particular liberties that have been urged under the general concept: there is no mention anywhere in the Constitution of the trimesters of a pregnancy, the point of viability, contraceptive devices, sodomitic acts, assisted suicide, home- or private-schooling, or yellow dog contracts. The history of the passage of the Amendment as well, at least according to the commentators that have investigated it, yields surprisingly little — again, to draw a contrast, there is much less documentation of what the reconstruction congress intended, than is the case regarding the equal protection clause.[20]

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18 *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 834 (1992).

19 J. Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*" (1973) 82 Yale L.J. 920; R. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990) 111–17.

20 For an attempt to provide a robust interpretation of a relatively meagre historical record, see C. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1995).

But perhaps most important, the precedential history of the clause, as suggested above, is disheartening. Surely, if the history of *Dred Scott* and *Lochner* teach us anything at all, it is that at least two out of three of the historical attempts by the Court to carve out such a sphere have been spectacular moral disasters (the third, of course, being the modern reproductive rights cases), and furthermore, disasters of a particular sort: individual liberty, judicially defined by unelected, nonrepresentative judges drawn from the elite classes, was won through the exploitation first of slaves and then workers, and through the process of invalidating democratically drawn legislation designed to ease or eliminate those oppressions. *Dred Scott* and *Lochner* both present the unseemly and grotesque picture of unelected judges protecting economic privilege by ruling legislation passed by the somewhat more representative branches unconstitutional — legislation that in both cases was aimed at alleviating the plight of subordinate classes.

Thus, it is not only advocates of judicial restraint who have urged that the Court should refrain from aggressively or ambitiously reading into the Fourteenth Amendment a dollop of individual liberty. Leftists and progressives have also expressed concern, and even alarm, at the prospect of doing so. Individual liberty does, at least much of the time, seem to come with a cost: sometimes to equality, sometimes to community and sometimes simply to civility. The individual's "liberty," after all, is virtually by definition the liberty to exercise, exploit or exert one's own forces — one's own advantages — upon the social and natural world, with the fully intended and invariable consequence being that that exertion will be felt by the world in an "unequal" way. Otherwise, it will hardly bear the mark of one's individual effort. The consequence of this freeing of individual exertion, energy and advantage is, oftentimes, a serious threat to egalitarian goals. The celebrated "liberty" of the powerful, economically advantaged individual, for example, is at times nothing but the liberty to amass wealth through the concentrated, unimpeded and unregulated acquisition of surplus labour value. The liberty of even the economically disempowered but racially or sexually privileged individual may mean little more than the liberty to express hate through symbolic or real acts of violence, or the liberty to profit through the pornographing or prostituting of women's bodies.

The other side of the coin is equally troubling: the "liberty" of the less-powerful, less-advantaged individual is at least on occasion nothing but the obfuscating and legitimating freedom to participate consensually in practices that clearly harm her, while profiting others: the liberty to prostitute oneself, to sign a yellow dog contract or to sell one's reproductive services as a "surrogate" mother. These "liberties" of the weak to freely engage in their own exploitation

might be best understood as examples of what Professor Corea has provocatively called "junk liberty": such liberty being to the real thing what junk food is to real nutrition.[21] The conclusion to be drawn from progressive suspicion is clear enough, and is simply a word of caution: constitutionalizing individual liberty, particularly in a legal and social culture that refuses to "constitutionalize" any but a formal entitlement to equality, runs the serious risk of skewing our fundamental political and moral commitments in a seriously regressive direction.

On the other hand, it seems to many — particularly to liberals and libertarians — almost inconceivable that the United States Constitution does not in some way protect individual liberty against unreasonable or overly intrusive state and national lawmaking. For this group — which today includes a majority of the Supreme Court — protection of some measure of at least negative liberty is logically mandated by the structure of the Constitution, and by the moral and political truths on which it rests. How could the Constitution possibly *not* protect self-regarding acts that do no discernible harm to others? The question seems to answer itself. We protect speech and thought, all toward the end of widening the sphere of individual autonomy; there simply is no principled distinction, in this context, between speech-acts and other acts that are of equal consequence to the individual and his self-definition, and of equal irrelevance to the legitimate interests of others. Furthermore, that the constitutional text speaks only ambiguously of the general right, and is silent on its more specific entailments, says nothing: the Constitution does not make explicit reference to exclusionary rules, to three-part "*Lemon*" tests regarding Church and State claims,[22] to "strict scrutiny," rational basis or intermediate review regarding equal protection claims. The word "equality," after all, unlike the word "liberty," does not even appear in the Constitution. That articulation of a liberty-based jurisprudence requires of the Court that it actively probe the moral and political implications of our commitment to an amorphous concept does not count against the necessity or desirability of the enterprise. Nor does it differentiate it from any other field of constitutional jurisprudence.

To this group, the progressive and leftist objections to the project of constitutionalizing liberty count for even less. For libertarian defenders of liberty, of course, the tension between individualist and egalitarian goals is a plus

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[21] G. Corea, "Junk Liberty" in D. Kelly Weisberg, ed., *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work and Reproduction* (Philadelphia: Temple University Press, 1996) 1112 at 1112–14.

[22] *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

rather than a minus: that constitutionalizing liberty might come at the cost of gains in substantive equality is not something to worry over, it is something to expect and even value. Liberty just *is* inegalitarian, and a commitment to one is a commitment to the other. For other and more liberal (rather than libertarian) defenders of liberty, the apparent tension or conflict between liberty and equality is, first of all, by no means necessary and might be more apparent than real. If understood as a guarantee of positive liberty, of course, the tension disappears altogether: positive liberty is as conducive to equality as negative liberty is hostile. But even if limited to negative liberties, the relation between liberty and equality is not necessarily the one-way street a too-quick reading of our history might suggest: protection of individual liberty should, in general, protect attacks on the citadel of privilege no less than the privilege itself. A protection of negative liberty should, for example, protect the acts as well as the speech of the labour organizer no less than the contractual act and speech of the employer. It should protect the anarchist, agitator, organizer and social critic no less than the media mogul. It should protect the drop-out no less than the successful entrepreneur.

But in another sense, again from a liberal perspective, progressive objections to liberty are as oddly beside the point as are economic-conservative and libertarian celebrations of it. Liberty, at least for some liberals, should best be understood as a political ideal in service of neither regressive nor progressive economic ends. At least for some, the protection of or guarantee of liberty should be in service of, in essence, a sphere of *anarchy*: a sphere of creative chaos — neither egalitarian nor hierarchic — within an otherwise structured constitutional order. What a constitutional right of individual liberty would protect, ideally and in its essence, would be neither the rights of privilege nor the forces of progress, but the powers of nonconformity. On this vision, it is the true, hard-core, eccentric nonconformist — the Timothy Learies, the Noam Chomskys, the Adrienne Riches, the Gordon Liddys, the Camille Paglias, the Margaret Sangers, the Ken Keseys, the Molly Ivenses — and not the business tycoon or the labour organizer, who should be the beneficiary of an expansive conception of substantive liberty, and the character toward whom the promise of liberty should be aimed. On this vision, again, whether such protection serves progressive or regressive ends is not wholly irrelevant, perhaps, but nor should it be determinative of the scope of that protected sphere, and certainly not of its existence.

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On the other hand, there is no necessary reason to think that an anarchic understanding of liberty would serve regressive ends, and some reason to think it would not: if it is the nonconformist, rather than the enterprising business tycoon, who is going to be the real beneficiary of an expansive, liberal understanding of liberty, that nonconformist — the man who chooses a same-sex partner in marriage, the woman who chooses to control rather than to acquiesce in her natural reproductive cycles, or the dying patient who chooses to acquiesce in a natural order rather than be lured by the false promise of empowerment and control offered by medical interventions — is, after all, at least as likely to express a meaningful challenge to the status quo, as to legitimize through his individualistic inclinations a world which does little but relentlessly reward aggression against others in the guise of liberty, and maybe more so. At any rate, the quintessential promise of liberty, for the liberal, is certainly not the liberty to exploit the weakness of others, or excel in various markets, any more than it is to organize the weak against the strong. It is, rather, quintessentially the liberty to dissent: to live one's life in defiance or disregard of the socially mandated order of things, whether that defiance or disregard is prompted by eccentricity, genius, obstinacy or sociopathology, and whether it promises an improved order, a regression or nothing but a measure of chaos. It is toward the protection of that potential for chaos that the liberal hopes to pit constitutional guarantees.

III. THE CONTENT OF LIBERTY

If we assume *arguendo* that the Fourteenth Amendment provides some protection of individual liberty beyond a guarantee of due process, of what does that liberty consist? One can discern, I think, at least four quite different answers to that question, reflecting four contrasting political and moral orientations toward constitutional law. Two of those four, and the first two I shall discuss, constitute the poles of internal constitutional discourse: they can be found within the case-law as well as within constitutional commentary. The second two I will discuss come from outside traditional constitutional canonical sources, but have nonetheless played a role in the development of constitutional principles.

A. Traditionalism

The first possible response, ardently argued by Scalia J. and somewhat less fervently by Rehnquist C.J., is that the substantive due process clause protects, if anything, the liberty of the individual to engage in practices sanctified by historical, cultural traditions, that might from time to time be challenged by pernicious, ill-conceived, mendacious, envy-driven or simply precipitous if not promiscuous legislative whims of the elected representative branches. The

Constitution in its entirety, and the due process clause specifically, aims, on this view, to conserve social tradition against democratic change. The liberty the individual has that is worth protecting against democracy, then, is simply the "liberty" to engage in these traditions. Justice Scalia first articulated this understanding of due process in a footnote in *Michael H.* v. *Gerald D.*,[23] a case in which a biological father had unsuccessfully sought to assert a due process liberty interest in his relationship with his biological son, against the force of a state law that conclusively presumed the paternity of the marital husband at the time of the child's birth against all subsequent challengers. In denying the claim, Scalia J. explained that as there was no tradition of protecting such biological familial relationships, and indeed a good deal of tradition on the other side, there was no "liberty" of the individual's that could or should be protected. In a long footnote, he elaborated on his reasoning:[24]

> [In deciding whether a practice is a protected liberty] [w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If ... there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent ... Because ... general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. ... Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

What "tradition," and what individual liberty to engage in it, might meet such a test? And what conceivable tradition, and individual liberty to engage in it, might ever be threatened by legislation, that does, after all, as Brennan J. complained,[25] typically restate and bolster, rather than buck, societal tradition? Is there any specific, particular tradition that might on occasion be so threatened by legislation, that the Court would be justified, on Scalia J.'s criteria, in voiding legislation so as to protect the tradition? The obvious contender is simply the traditional nuclear family, and the cluster of practices, rites, rituals and privileges it embraces. Consider, for example, this admittedly far-fetched hypothetical: a state legislature, in a fit of whimsy, political correctness or religion-baiting, momentarily loses its collective good sense and passes a law outlawing the entire institution, or at least removing the state from its operations. Clearly, the then threatened "tradition" of state-sanctioned marriage, on Scalia J.'s test, might

[23] 491 U.S. 110 (1989).
[24] *Ibid*. at 127–28, n. 6.
[25] *Ibid*. at 137–41.

bestow upon individuals who wish to participate in it a "liberty" worth protecting, constitutionally, against this ill-conceived legislative assault. Whatever might be the case regarding other "traditions" of our collective past, if any are to receive constitutional protection against legislative change or abolishment, surely this tradition is one that should.[26] The family, after all, is older than the state, is arguably more basic to civic society and in this hypothetical state is more embattled. Should a state join those cultural forces trying to weaken it, surely an entirely proper role of the Constitution, and of the unelected judges who are charged with the duty of upholding it, is to protect it and the liberty of individuals to engage in it against such challenges.

Whatever might be the merits of this traditionalist approach to the content of substantive due process, the Court itself has only fitfully adhered to it and, outside the context of marriage and family, never unambiguously embraced it. Oddly, Scalia J., its firmest advocate, declined a recent opportunity to endorse and expand upon it. In *Romer*,[27] after all, the citizens of Colorado voted to use their state Constitution to state explicitly what is only implicitly guaranteed, on this view, in the federal Constitution: that the traditional, nuclear, heterosexual family needs protection against democratically approved ordinances that effectively weaken the tradition by sanctioning radically divergent alternatives to it. On a traditionalist approach to the Constitution, and to liberty, not only should "Amendment Two" have been found to not violate federal constitutional norms, but on the contrary it should have been applauded for doing explicitly what the federal government does only implicitly: aligning the Constitution, and the idea of constitutionalism with a beleaguered tradition against precipitous and ill-thought change. Justice Scalia, however, certainly the most forceful spokesperson for a traditionalist approach to liberty, did not defend the Amendment on this ground; he instead argued far more conventionally that the Amendment was constitutionally permissible (rather than laudatory), and on the utterly conventional and nontraditionalist grounds that to state otherwise would constitute a departure from norms of neutrality. Perhaps not too much can be read into this pregnant negative: because of the odd way in which the question arose, the case did not, after all, directly pose the question whether an *individual* has a constitutionally protected liberty to the preservation of the traditional nuclear family. Nevertheless, that Scalia J.'s defence of the constitutionality of the Coloradan constitutional amendment made no reference to his own traditionalist conception of constitutionalism is at least worthy of mention.

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[26] See generally *Zablocki* v. *Redhail*, 434 U.S. 374 (1978).

[27] 517 U.S. 620 (1996).

Should the Court ever embrace a traditionalist approach to the due process clause of the Fourteenth Amendment, however, the *Romer* case as well as the "Preservation of Marriage Act" passed by Congress make vividly clear what at least some of the problems with such an approach might be. First, of course, a traditionalist reading renders the clause almost a dead letter — which may of course be a fully intended result. Neither state legislatures nor Congress are particularly hell-bent on the destruction of time-honoured traditions; for the most part, laws do indeed reflect and enforce rather than defy tradition. To characterize "liberty" as consisting of the individual freedom to behave in a hide-bound traditional way in the face of legislative encouragement to behave non-traditionally is not only perverse, but generally pointless. Whatever it is that induces in us an inclination toward conformity, it seems to be shared in large measure with whatever it is that drives legislation. And neither force seems to have much to do with what we have come to call liberty.

But second, if the inclination to define and confine the due process clause by reference to "tradition" is driven by an urge to render the meaning of the clause definite — and to thereby hem in the discretion of the federal judiciary — its proponents would undoubtedly be disappointed should such a reading ever prevail. Justice Scalia's adamant insistence to the contrary in his dissent in *Casey* notwithstanding, "traditions" are not "facts" — or at least, they are no more facts than are the liberal, ideal principles of autonomy to which the conservative Justice wishes to contrast them. The marriage and gay rights cases demonstrate the point. No legislature is going to do something so bizarre as to revoke wholesale the privilege to marry. But a legislature well might *expand* the privilege of marriage so that it also covers individuals who want to marry someone of the same sex. Another might someday wish to expand it so that it covers individuals who want to marry more than one person at a time, or expand it so that it covers individuals below the present age of consent. In all of these cases, whether the legislation in question destroys, strengthens or is utterly neutral toward the "tradition of marriage" is an entirely contingent, and contestable question: it obviously depends upon how we define the tradition, and it just as obviously won't do to define the tradition by reference to extant law when the law is in transition. Whether gay marriage is hostile to the tradition of marriage depends upon whether heterosexual coupling is necessary to it or isn't; whether loving, committed intimacy is the central point of marriage or isn't; whether consensual contracting is at its heart or isn't; or whether the nuclear family with dual parenting by biologically connected parents is central to it or isn't. None of these are obviously correct or incorrect accounts of the "tradition" of marriage. Before we can decide whether or not our liberty to participate in traditions has been threatened by some legislative encroachment, we must have

some sense of what those traditions are. That is not going to be an easy task, and it will certainly prove no more "definite" an inquiry than the so-deplored, open-ended inquiries into our "principles" that it is intended to replace.

B. Precedent

The second possible way to define the content of our liberty protected against legislative encroachment might be called "precedential" or "principled," to distinguish it from the traditionalist account described above. On this account, embraced most explicitly by Brennan J., but with its most recent defence that of O'Connor J.'s opinion for the Court in *Casey*,[28] the liberty protected by the due process clause is the liberty to engage in those modes of conduct analogous to practices that the Court has, in prior and not-yet-overturned case-law, explicitly protected. This account, like the traditionalist, gives not so much an answer to the question "what liberties are to be protected," but instead, a roadmap to answering the question. Instead of pointing toward societal tradition, however, the interpreter is pointed toward judicial precedent. If behaviour can be analogized to behaviour already protected by precedent, then one has a liberty to engage in it free of state interference.

Thus, to take some examples, to decide, as the Warren Court had to, whether a married couple has the right to take birth control in the face of state laws criminalizing such a practice, the Court had to decide whether that practice was or wasn't sufficiently similar to earlier practices regarding home and hearth that had already received protection, such as the decision to home-school one's children, or to decide in what language one's children should be taught. The Court in *Griswold*[29] decided it was sufficiently similar and accordingly struck the law. To decide whether an individual has the right to contraception, the Court next had to decide whether that decision was or wasn't sufficiently similar to the now-protected practice of contraception use by married couples. It decided it was.[30] Several years later, to decide whether a woman has the right to obtain an abortion, the Berger Court had to decide whether that practice was or wasn't sufficiently similar to the practice of using contraception.[31] (It is.) A decade later, to decide whether an individual has the right to engage in sodomitic sex acts in the face of state laws criminalizing such conduct, the Rehnquist Court had to

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28 505 U.S. 833, 848 (1992).

29 381 U.S. 479 (1965).

30 *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

31 *Supra* note 17.

decide whether that practice was or wasn't sufficiently similar to the practice of using contraceptions or procuring abortions. (It isn't.)[32] To decide whether an individual has the right to marry someone of a different race, the Court had to decide whether such a practice is sufficiently similar to earlier protected practices. (It is.) To decide whether an individual has the right to marry someone of the same sex or to commit suicide with the assistance of a physician, the Court will someday have to decide likewise.

There are many difficulties with this precedential approach to liberty, even if we leave aside its obvious and much commented upon indeterminacy, not the least of which is that, as Scalia J. rightly complained in his masterful dissent in *Casey*, it does indeed smack of *real politik*.[33] The liberty of the individual, on this understanding, is defined by reference to the past political successes of the Court — not by reference to ideals, the framers' intent and societal traditions, all of which seem like more solid foundations upon which to rest decisions invalidating democratically derived legislative results. This seems neither reasoned, rational nor principled. It resembles more than anything the "follow the leader" mentality of the common law courts so derided by Justice Holmes:[34] surely, as he thought, there must be a better reason to follow a rule of law than that it was so laid down during the reign of Henry IV or Earl Warren. And surely, there must be a better reason to protect women's access to abortion services, protect the liberty of the dying or allow men and women to marry partners of the same sex than that those practices resemble practices protected by earlier courts. If there's not, we do indeed need to rethink the liberty at stake.

Second, the precedential approach to the content of liberty forces upon the advocate what I have elsewhere called a "discourse of sameness"[35] that carries a very real danger of false generality. In the quest to render the litigated practice a protected "liberty," the advocate, and then the Court, must stress the similarity of that practice to a past practice — and in so doing will often elide very real differences. Virtually *all* of the cases in the so-called modern due process revival illustrate the point. The practice of taking birth control, for example, is about as different as the practice of deciding to send one's children to private schools, or teach them in a language other than English, as two practices can be. Protecting

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32 *Bowers* v. *Hardwick*, 478 U.S. 186 (1986).

33 505 U.S. 833, 998 (Scalia J., dissenting).

34 O.W. Holmes, "The Path of the Law" quoted in M. Lerner, ed., *The Mind and Faith of Justice Holmes* (Boston: Little, Brown, 1943) 83.

35 R. West, "Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law" (1997) 65 Fordham L. Rev. 1313.

the decisions of the parents regarding their children's education aims to protect, insulate *and thereby strengthen* the parent-child family unit. By contrast, it is almost oxymoronic to suggest that protecting the decision of even married couples, but surely of single individuals, to have sex free of reproductive consequences aims to strengthen the family. In fact, it is fair to characterize the entire societal revolution sparked by technological advances in birth control as aimed at *severing*, rather than strengthening the connection between heterosexual practices and familial responsibilities and ties. The decision to use birth control, for many, is the very antithesis of the sort of decision the Court characterized as paradigmatic to both practices: the decision to participate in family life in a carefully deliberated, responsible fashion. The decision of the individual to contracept nonmarital intercourse, perhaps not for all but certainly for many, is driven by a desire to maximize, not minimize, the distance between sexual activity and family life. The claims to the contrary in *Griswold* and *Eisenstadt* — that the decision to use birth control is more like than unlike the decisions of parents regarding their children's education — particularly given our current understanding of the "sexual revolution" of the 1960s, just seem flatly bizarre.

Let me take the question of gay marriage as a final example. Although this has not yet crystallized into a liberty-based constitutional challenge, it is easy enough to see how the argument might proceed: just as, as was unsuccessfully argued in *Bowers*, gay sex is enough "like" straight sex such that the criminal prohibition of the former should be regarded as unconstitutional, so gay marriage, one might argue, is enough "like" traditional marriage so as to bring the former practice under the umbrella of a protected liberty. In other words, the argument that the individual's liberty to engage in sodomitic acts, or to enter into a marriage with a partner of the same sex, ought be constitutionally protected requires, on this understanding of due process, that there be in effect no salient difference, and many significant points of similarity, between gay and straight sex and between gay and heterosexual marriage. It may well be, of course, that there are many similarities. But it is also true that there are salient differences. My critical point here is simply that the "discourse of sameness" that a precedential approach to liberty requires, either diverts us from the work of exploring those differences and their meaning, or worse, inclines us to deny their reality.

Some of those differences, of course, the advocate of gay marriage may be inclined to deny or mute for purely strategic or political reasons. But others are differences we should be celebrating, or at least, differences we should explore. Let me just mention two. First, as I have argued at some length elsewhere, and will only mention here, lesbian and gay marriage, as an institution, would be entirely free of the crippling history of mandatory, nonconsensual "marital rape" that has for most of our history made heterosexual marriage a barrier to, rather than a safe haven for, women's autonomy and equality.[36] Lesbians and gays entering marriage would not enter it with the expectation that one partner has a legal entitlement to the sexual services of the other regardless of the other's desires, and hence would not enter it with the expectation of dominance and submission that still define, for many, the contemporary reality, as well as the sorry history, of our heterosexual marital institutions.

Second, lesbian and gay marriage would have at its heart, as conservatives tirelessly remind us, sexual and affective acts which are through and through non-reproductive. The moral and social consequences of this difference are of course open to question, including whether are not there would be any of any import. But it is a question we ought to leave open, and not close by the question-begging route of asserting a natural sameness where there is not one, particularly where, as here, the particular difference is one that might bring a moral improvement, rather than detriment, to our public lives. The non-reproductive sexual act, at its best, when engaged in by partners in a committed and loving relationship is an affective and deeply moral gesture *of caring*, and when it is directed toward someone with whom one will never pool one's genetic endowments, and precisely because it is *not* potentially reproductive, it is, arguably, a *less* selfish, rather than a more selfish, act. Were we to change our conception of marriage so that it included, rather than excluded, couples whose relationships were consummated by such intimate, loving and moral acts of care, not only our institution of marriage but our understanding of the connection between acts of care and relationships of commitment, between being thou- and I-centred, between attending to another and replicating oneself in another, might change and improve, as well. Let me stress: whether or not this moral reorientation might happen is pure speculation. But a discourse that commits us solely and monotonously to stressing sameness and similarities will by definition blind us to possibilities of growth — possibilities that might enhance our lives, and which a frank and careful inquiry into the differences among us might highlight.

[36] *Ibid*. at 1229–30.

C. Self-Regarding Conduct

The third possible meaning of the liberty protected by the due process clause is unabashedly liberal, and can be drawn directly from Mill's famous essay: the individual is entitled to the liberty to act in any way he or she sees fit so long as those actions cause no harm to others. It is never sufficient grounds for prohibiting behaviour that the behaviour in question might harm the actor himself. Nor is it sufficient grounds that the legislature or the public view the behaviour in question as *immoral*. Should this understanding of liberty be embraced by the Court, as Ronald Dworkin has urged,[37] some of the more difficult due process cases would be readily resolved: *Bowers* itself, from this liberal, antipaternalistic perspective, appears to be unambiguously unconstitutional, as do various laws prohibiting doctor-assisted suicide of dying patients. Laws prohibiting gay marriage would have to be sustained, if at all, solely on the grounds of as-yet-unproven claims about the threat of gay sex to the stability of the institution of marriage.

Whether or not paternalistic or moralistic legislation is justified is a very old question that I won't revisit here beyond just three quick and critical observations. First, outside of the area of gay politics, the relevance of such a limiting principle seems to be dwindling. There aren't that many examples of purely self-regarding conduct and, correlatively, there aren't that many examples of unambiguously moralistic legislation that can't be justified by reference to something other than purely moralistic arguments. Motorcycle helmet laws, for example, are not really "paternalistic" in any but a formal sense; the reduction in traffic fatality rates saves insurance premium payers as well as taxpayers substantial dollars. Even the much maligned "war on drugs," if it is foolish, surely isn't foolish because it targets self-regarding behaviour; as any relative, friend or child of a drug addict knows, "recreational drug use" profoundly affects both the user's intimate and farther-flung community.

[37] See R. Dworkin, "Liberty and Moralism" in *Taking Rights Seriously* (Bristol: Duckworth, 1977) 240; and R. Dworkin, *Freedom's Law* (Cambridge, MA: Harvard University Press, 1996).

Second, protecting even purely self-regarding but destructive behaviour by reference to our now time-honoured "right to be left alone" and our smug if not juvenile insistence that we always know what's best for us, runs serious risks of what the critical scholars have for some time now called "legitimation" problems:[38] our right to engage in consensual, self-regarding behaviour free of the paternalistic judgments of others tends to "legitimate" both in the actor's mind and in others whatever real harms those behaviours may in fact cause. That we have a negative liberty right to prostitute ourselves, for example, free of the paternalistic authority criminalizing that behaviour, may do little for the cause of freedom but much toward the end of legitimizing the oppressions within economic markets and sexual relations both: the consensual trade, by virtue of its consensuality, does tend to mask or at least divert our attention from the quite real harms those trades may be doing even the consenting partners, much less the rest of us. Similarly that we are given a right to kill ourselves may in the end do very little to further our freedom, but much to obfuscate our lack of a right to health care.

And third, even within the arena of gay politics, it's not clear that what is gained — the liberty to engage in self-regarding "victimless" conduct free of the censorial voice of the community — is worth either what is implicitly conceded by it, or what is lost, in opportunity costs. What is conceded, in this case, as in all cases in which a negative liberty right is urged to engage in conduct judged by the community as immoral, is, precisely, the immorality of the conduct. Liberty rights are only needed, and only asserted, where the community condemns the behaviour. The argument that we should be free to engage in the conduct free of the condemnation does nothing to challenge the grounds for the condemnation itself. Both that implicit concession, and the opportunity-cost it implies — the opportunity to engage conservative arguments against homosexuality on their own terms — ought give us pause.

The case against homosexuality, both by thoughtful conservatives and the public, does not rest solely on the consequential harms, abstract or otherwise, such behaviour occasions on the individual that engages in homosexual practices. The case rests, rather, and more starkly, on the behaviour's *immorality*. Immoral behaviour, if indulged, makes for immoral people and immoral people

[38] D. Kennedy, "Legal Education as Training for Hierarchy" in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Basic Books, 1998) 54; R. Gordon, "Unfreezing Legal Reality: Critical Approaches to Law" (1987) 15 Fla. St. U. L. Rev. 195.

make for an immoral civic society. This virtue-based argument is not trivial, and is not one that liberals can afford to dismiss; in fact *in form* it is quite sound. If all adults tomorrow practiced widespread necrophilia, there may be no liberally understood harms to anyone, but it's quite reasonable to think that as self-regarding as this behaviour may be, there would nevertheless be a more than discernable deterioration of the quality of our public and private moral lives and hence of our lives generally understood. The conservative and public case against homosexuality is parallel, and it needs to be addressed on its own terms.

The opportunity-cost of the negative-liberty argument for gay sex and gay marriage, then, is simply the cost of the opportunity to argue for the essential morality of these relationships. This is not an opportunity we can afford to pass up, in part because the argument is not a terribly difficult one. Like all committed intimate relationships (and arguably, as suggested above, in some ways more so than heterosexual relationships), homosexual committed relationships prompt each participant to care for another, which in turn models an attitude of care for others. Whether homosexuality results from an orientation that is biologically or socially determined is of absolutely no consequence to this claim: a committed intimate relationship between caring partners — whether same-sex or opposite-sex — is a good thing. It is a good way to live out an adult life, and a good position for all of us from which to move from private to public daily life. That these unions do not produce children genetically tied to both partners may be or may not be of much consequence: they do routinely produce children genetically tied to one, and the labour investment of the second parent produces a degree of stability at least comparable to that found in traditional heterosexual homes. And, that the sexual coupling is not of a "reproductive type," as argued by the new natural lawyers,[39] may have religious significance, but its secular consequence is either mysterious, ambiguous or nil. I don't mean to elaborate any of these contentions here. I only wish to point out that the essentially libertarian argument for gay sex and marriage — that it harms no one other than the actors, that intervention is paternalistic and that moralism can't justify legislating against it — mutes them, and unfortunately so. These are not hard arguments to make, and may well find a larger and more receptive audience than is commonly believed.

[39] J. Finnis, "Law, Morality, and 'Sexual Orientation'" (1994) 69 Notre Dame L. Rev. 1049. See also R. George & G. Bradley, "Marriage and the Liberal Imagination" (1995) 84 Geo. L.J. 301; and H. Arkes, "Questions of Principles, Not Predictions: A Reply to Macedo" (1995) 84 Geo. L.J. 321, both responding to S. Macedo, "Homosexuality and the Conservative Mind" (1995) 84 Geo. L.J. 261.

D. Positive Liberty

I want to elaborate in a bit more detail on one final possible understanding of the content of the liberty protected by the due process clause, and that is that what the clause protects is the individual's so-called "positive" liberty to self-mastery. Although a grammatically permissible interpretation of the phrase, the notion that the Fourteenth Amendment might be centrally concerned with positive liberty — alone of the four positions discussed in this piece — has received virtually no support from the Supreme Court, and almost none from commentators. Not only conservatives and liberals, but for the most part progressive commentators as well, widely assume that the "liberty" protected by the Fourteenth Amendment, if it exists at all, is essentially negative.[40] Whatever the scope of the "liberty" protected, the consensus seems to be that it surely can't extend so far as to protect our positive liberty. Again, the Court and virtually all major commentators — conservatives, liberals and progressives alike — are surprisingly united in this view.

It is, clearly, an important assumption, particularly as regards the relationship between the Constitution and economic distributions of wealth. If it is true, as so many either insist or simply assume, that the Fourteenth Amendment protects, at most, negative liberty, then the due process clause of the Fourteenth Amendment is either hostile to or irrelevant to legislative redistribution aimed at lessening the inegalitarian impact of markets. Let me take these points in order. First, if the "negative liberty" protected by the phrase includes economic liberties, as was argued during the *Lochner* era, then it is hostile: as was argued during those decades, legislative redistributions of wealth are impermissible intrusions on the protected negative liberty to contract freely. Second, if the due process clause protects not contractual freedom but rather personal, sexual and familial freedom, as is now held both by liberals and (to a lesser degree) the modern Court, then it is essentially irrelevant: such liberty would not constitute an obstacle, but nor would it constitute a vehicle for greater egalitarianism in contemporary life. In modern discourse, conservatives are now trying to re-enliven the *Lochner* reading, putting the weight of constitutional law and rhetoric once again squarely behind propertied interests,[41] while liberals are

[40] See D. Currie, "Positive and Negative Constitutional Rights" (1986) 53 U. Chi. L. Rev. 864; F. Cross, "The Error of Positive Rights" (2001) 48 U.C.L.A. L. Rev. 857. But see S. Bandes, "The Negative Constitution: A Critique" (1990) 88 Mich. L. Rev. 2271.

[41] R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985). See also W. Treanor, "The Original Understanding of the Takings Clause and the Political Process" (1995) 95 Colum. L.

trying to maintain the integrity of the *Roe* interpretation[42] — but both sides are as one in viewing the Constitution's protection of liberty as a protection of negative liberty only. But so long as the mainstream argument over the meaning of liberty is premised on the assumption that whatever its content it must be negative, the liberty to which the Constitution entitles us will be either antagonistic to or irrelevant to attacks on class privilege.

However, this widespread and highly consequential assumption, that the liberty protected by the due process clause must be negative, is in my view mistaken. Let me return to Isaiah Berlin's influential distinction to make the point. To repeat, "negative liberty," Berlin argued, by which he meant that which is involved in the question "What is the area within which the subject ... is or should be left to do or be what he is able to do or be, without interference by other persons?"[43] is but one of two primary meanings the ideal has taken over the course of history. The other meaning — which, according to Berlin, is by far the more historically dangerous of the two, but which, he is equally clear, is just as fundamental an historical longing — is liberty in its positive sense, by which he meant that which is involved in answering the question "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"[44] The two meanings of liberty, he famously insisted, are quite different. A good deal of negative liberty is consistent with a deprivation of positive liberty, and *vice versa*:[45]

> Freedom in [the negative] ... sense is not, at any rate logically, connected with democracy or self-government. ... [T]here is no necessary connexion between individual liberty and democratic rule. The answer to the question "Who governs me?" is logically distinct from the question "How far does government interfere with me?" It is in this difference that the great contrast between the two concept of negative and positive liberty, in the end, consists. For the "positive" sense of liberty comes to light if we try to answer the question, not "What am I free to do or be?," but "By whom am I ruled?" or "Who is to say what I am, and what I am not, to be or do?" The connexion between democracy and individual liberty is a good deal more tenuous than it seemed to many advocates of both. The desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that of a free area for action, and perhaps historically older. But it is not a desire for the same thing.

Rev. 782; B. Thompson, Jr., "Judicial Takings" (1990) 76 Va. L. Rev. 1449.

42 D. Cruz, "'The Sexual Freedom Cases'? Contraception, Abortion, Abstinence, and the Constitution" (2000) 35 Harv. C.R.-C.L. L. Rev. 299.

43 *Supra* note 1 at 121–22.

44 *Ibid*. at 122.

45 *Ibid*. at 129–131.

If Berlin's general account here is even close to accurate, then the widespread assumption that the liberty prong of the Fourteenth Amendment as necessarily concerned with negative liberty, and negative liberty only, is simply bizarre. Rather, given their history, it is surely at least possible to read the reconstruction amendments, taken in their entirety, as essentially concerned with providing a guarantee of positive liberty, and it is equally possible to interpret each of the Fourteenth Amendment's major provisions — the due process clause and the equal protection clause — in light of that overriding objective. Surely, it is at least possible to argue that what the Fourteenth Amendment added to the Constitution was not an ideal of equality at all, but a guarantee that the states and Congress protect the positive liberty of each citizen, and a mandate that states and Congress use law to protect that freedom. The point of the Amendment, in other words, might be liberty, not equality at all — equal protection is the means by which the goal, liberty, is to be achieved. But liberty is the goal of the amendment, and understood in the context of the history that produced it, it must be positive, not negative, liberty that the states are required to protect.

Why positive, not negative liberty? Well, what is positive liberty? Again, according to Berlin — who not only coined the phrase, but then became its most severe critic — positive liberty is, simply, the polar opposite of slavery: the self-mastery at the opposite extreme from the state of being enslaved. It is the liberty to be free of the power over oneself of others. It is the urge to be in a state of self-mastery. Berlin wrote:[46]

> The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. ... I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer — deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them. This is at least part of what I mean when I say that I am rational, and that it is my reason that distinguishes me as a human being from the rest of the world. I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.

[46] *Ibid*. at 131.

The reconstruction amendments, of course, are there to ensure the political and moral victories won in the civil war, central to which was the abolition of slavery. The Fourteenth Amendment, however, clearly forbids more than slavery *per se*. Not only must the states not permit slavery, but they must also not deprive the citizen of liberty. What does that add if not simply a measure of negative liberty? Surely it is possible that what it means for the state to be required to not deny liberty is that the state must not only police against actual enslavement but must guarantee legal protection for this condition of self-mastery.

It remains an open question, of course, what sorts of conditions constitute such a state of servitude as to deprive a citizen of an entitlement to positive liberty. Again, though, it should surely be possible to argue that economic oppression constitutes a sort of economic servitude or, put positively, that some minimal degree of economic power is a necessary condition of the self-mastery central to the liberty of which we are guaranteed. At least, it has been the common ground of advocates of private property, from Adam Smith to Jack Kemp, that the answer to both questions is clearly yes. If so, then the Fourteenth Amendment speaks rather directly to economic slavery: it's unconstitutional.

Finally, this reading has the added virtue of suggesting a reading of the equal protection clause that is both more logical and historically grounded than any of the various readings current today: the point of the equal protection clause, on this approach, is not *equality* — equal is in the clause as a modifier, not a noun — but *protection*.[47] For the state to fail to protect a class of persons against the aggression of another class is, in effect, to permit the first group to be enslaved by the other — should the state deprive the first of the protections of the criminal law, for example, the first would be at the mercy of — they would be subject to the whims of — the second group, who would thereby become, in effect, sovereigns over them. That is a perfectly adequate definition of a relationship of slavery — the slave owner is not subject to the sanctions of the criminal law in his relations with the slave. The state, then, is required to provide such "equal protection" of law. This interpretation too leaves open an important issue, and that is "protection against what?" Violation of natural rights would have been the eighteenth- as well as nineteenth-century answer to such a question, but today we have to answer it pragmatically. Clearly, protection against violent assault is included — again, that echoes the historic purpose of the Amendment. By

[47] See generally J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* (Berkeley: University of California Press, 1965).

analogy, protection against economic exploitation might be a logical extension. All I want to suggest here, however, is that if we take seriously the account of positive liberty described in a seminal essay by a modern philosopher who was one of that ideal's harshest critics, it is impossible to avoid the conclusion that the Fourteenth Amendment, no less than the Thirteenth and Fifteenth, was aimed at protecting positive, not negative, liberty. The Amendment guarantees, on this reading, the power to be master of one's self, rather than an illusory sphere of "self-regarding" and unimpeded action.

IV. CONCLUSION

Where does this leave us? Liberty jurisprudence will continue to play some role in American life, so long as abortion, and perhaps euthanasia and homosexuality as well, continue to divide us. Beyond those questions, however, it's not clear that the essentially negative conception of liberty that has animated the "due process" revival we have witnessed in the last thirty years will greatly impact upon our political process. And even questions surrounding euthanasia laws and homosexuality, if recent case-law is any guide, are more likely to be resolved under the equal protection clause than as questions of liberty. Outside of the troubling terrain of abortion laws, then, "liberty" may be in danger of becoming a dead letter so long as we insist, as the Court insists, on its essential negativity.

And, whether the liberty guaranteed by the Fourteenth Amendment will play any kind of a role in our economic lives, is even less clear. It is unlikely that this or any future Court will revisit the regressive and libertarian doctrine of the *Lochner* days. It is (at least) equally unlikely, however, that this or any future Court will open an inquiry into the possible positive understandings of that nebulous guarantee. Surely, the constitutional text, and arguably its history, could support a more positive and potentially more transformative understanding of liberty — one which would directly speak, for example, among much else, to conditions of "economic servitude," of un- and under-employment, of workplace conditions and severe impoverishment. Again, if the liberty guaranteed by the Fourteenth Amendment is understood in a "positive" sense, then such a result should be unproblematic: if the Constitution protects our right of "self-mastery" then there are quite real constitutional constraints on the income disparities and power differentials that the markets generated by the negative freedom of individuals might produce.

Such a reading of the Fourteenth Amendment, however, is not likely to emanate from this Supreme Court, and possibly from any Court, and not only for crass political reasons. Rather, the social and economic upheaval such a reading would require may well be beyond the powers and jurisprudential self-understanding of the judicial branch of government. It does not follow, however, that such a reading is wrong. What follows is that such a reading, if right, must emanate from state, local and national representatives prepared to act on it, and must originate from, as well as ultimately be heard by, a citizenry that embraces not only the conception of rights it entails, but the correlative conception of civic responsibility on which it rests. For a positive understanding of the liberty guaranteed by the Constitution, in other words, to "take root" and "bear fruit," would require not just a reinterpretation of our constitutional norms — although it would certainly require that. It would require a transformation of our civic heart as well. Only with such a transformation might a positive interpretation of liberty be read as an integral, rather than anomalous part of our collective self-understanding, and of our aspirational, albeit contradictory, defining document.

THE PURPOSE OF CANADIAN EQUALITY RIGHTS

Donna Greschner*

The equality provisions in the Canadian Charter of Rights and Freedoms *protect the individual's rights to belong to three types of communities simultaneously: the universal community of human beings, the Canadian political communities, and individual identity communities. These rights ensure the diversity of our multicultural country. The author examines the historical antecedents of* Charter *equality provisions and the purposive approach to their interpretation. The author concludes that the Supreme Court of Canada is moving towards a "full membership" model of equality rights which ensures that membership in identity communities cannot be the basis for exclusionary or discriminatory treatment.*

Les dispositions concernant les droits à l'égalité contenues dans la Charte canadienne des droits et libertés *protège les droits des individus à appartenir à trois types de communautés simultanément; la communauté universelle des humains, les communautés politiques canadiennes et les communautés de l'identité individuelle. Ces droits assurent la diversité de notre pays multiculturel. L'auteur examine les antécédents historiques des dispositions relatives aux droits à l'égalité contenus dans la* Charte *et leur interprétation fondée sur l'objet visé. L'auteur conclut que la Cour suprême du Canada se dirige vers un modèle de «membre de plein droit» des droits à l'égalité ce qui garantit que l'appartenance à une communauté d'identité ne peut pas servir de base de traitement exclusif ou discriminatoire.*

> *There is no more important task in approaching any* Charter *right than that of characterizing properly its purpose.*[1]

> *[W]hat lies at the heart of the equality guarantee is protection from discrimination.*[2]

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1 *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para. 33, per L'Heureux-Dubé J. (dissenting).

2 *Harrison* v. *University of British Columbia*, [1990] 3 S.C.R. 451 at para. 44, per Wilson J. (dissenting).

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I. INTRODUCTION

This essay argues that the primary purpose of Canadian equality rights[3] is to protect the individual human interest in belonging, simultaneously, to several communities. The purposive approach to *Charter* interpretation asks what interests equality rights seek to protect. I argue that section 15 protects our interest in belonging to three communities: first, the universal community of human beings; second, the political communities of Canada; and third, and unique to section 15, identity communities.[4] More specifically, section 15

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[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[4] By "identity communities" I mean "social groups," as Iris Marion Young defines them in her important book, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 43: "A social group is a collective of persons differentiated from at least one other group by cultural forms, practices, or way of life. Members of a group have a special affinity with one another because of their similar experience or way of life." Social groups are defined by a sense of identity "in terms of the cultural forms, social situation and history that group members know as theirs, because these meanings have been either forced upon them or forged by them or both," *ibid.* at 44. With social groups, members may find themselves to be members of a group, although people may leave the group and enter new ones: "Many women become lesbian after first identifying as heterosexual. Anyone who lives long enough becomes old," *ibid.* at 44. Young contrasts social groups with aggregates, which are simply any classification of persons according to some attribute (*e.g.*, the street they live on, the sports they play, their source of income, *etc.*), and with associations, which are collections of individuals who come together for specific purposes. Young also points out that persons have many attributes that are independent of group identities and are able to transcend or reject a group identity with varying degrees of difficulty, *ibid.* at 45.

While I believe that the groups protected from discrimination by section 15 are "social groups" in the sense that Young uses the term, I prefer the term "identity community" for two reasons. First, because the term "particular social group" is used in immigration law to designate Convention refugees (see *Canada (Attorney-General)* v. *Ward* (1993), 103 D.L.R. (4th) 1 (S.C.C.)), using "social group" to refer to groups

proclaims that people who belong to groups demarcated by sex, race or other features also belong to larger communities: they are members of the human family, and they belong to the legal and political creation called Canada and to its constituent units, the provinces.[5] Membership in groups defined by enumerated grounds, such as race or sex, cannot be used as reasons to deny full membership in political communities or the human family. This goal is neatly encapsulated by McIntyre J.'s statement in the Supreme Court's first section 15 case, *Andrews* v. *Law Society of B.C.*, that the essence of equality is the accommodation of differences.[6] Diverse groups, in order to receive the benefits of full membership in the Canadian community, need not change and contort themselves to become like existing members. Rather, the community welcomes and makes room for them. "Equality law seeks to protect and promote belonging; to allow others into the fold, and to encourage and cement our bonds of community."[7] Accommodation, in this sense, is the antithesis of assimilation.

In a recent decision, *Law* v. *Canada*, the Supreme Court of Canada stated that the purpose of section 15 is to prevent the violation of essential human dignity.[8] A law will violate section 15 if it has the effect of demeaning a person's dignity. This formulation of purpose unequivocally designates equality rights as *human* rights, and thus protects belonging in the universal family of human beings, the first of these three categories. However, I argue that this purpose, while undeniably and necessarily a part of equality rights, is not its specific or unique content. The impetus and aspiration behind equality law is fulfilling an individual's desire to belong, simultaneously, to a number of different

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contemplated by section 15 may create confusion. Second, the term "identity community" or "identity group" conveys the importance to the individual of belonging to the group; membership affects the way the person perceives herself and the way she is perceived by others. "Social" may erroneously connote "frivolous."

5 The *Charter*, *supra* note 3, binds every political unit created by the Constitution. The federal and provincial governments, in their legislative and executive capacities, are covered by virtue of s. 32(1)(a) and (b), respectively, of the *Charter*. As well, the *Charter* clearly includes the Territories. Subsection 32(1)(a) specifically includes all matters relating to the Yukon and Northwest Territories as within the authority of Parliament. Section 30 deems a reference to a province, legislative assembly or legislature of a province as including the Yukon and the Northwest Territory or to the appropriate legislative authority, which would now include Nunavut.

6 [1989] 1 S.C.R. 143 at 169.

7 W. Pentney, "Belonging: the Promise of Community, Continuity and Change in Equality Law 1995-96" (1996) 25 C.H.R.R. C/6 at C/6.

8 *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 51–54, 59, 62, 69–71, 88ff [hereinafter *Law*].

communities, all of which are part of, but not usually coextensive with, the universal family of human beings. In short, equality rights are not *only* about dignity. Rather, they aim to redress discrimination on pernicious grounds. They protect against the harm of exclusion in its multifarious forms and ensure that all persons enjoy the benefits of belonging to the important communities that comprise Canada. This understanding of equality rights is substantive,[9] in that it requires examining the impact of laws and policies on people to determine whether they are accorded full membership in the larger community.

Part II outlines the purposive approach to constitutional interpretation, describes the need to belong as a human interest, and sketches the importance of diverse communities in Canadian constitutionalism. Part III applies the purposive approach to equality rights, examining the historical antecedents and specific words of section 15. It concludes that the provision sprang from the desire to promote the inclusion of all Canadians as full members of the community. Overall, the notions of membership and exclusion, by better capturing the underlying concerns and aspirations of section 15, provide the most coherent interpretation of Canadian history and practise. Part IV discusses several features of the Court's interpretation of equality rights. While the Court's articulation of section 15's purpose emphasizes dignity, its analytical approach to resolving cases rests on an historical and contextual understanding of discrimination, one that examines the harms suffered by members of identity communities. The Court is moving toward a "full membership" model of equality rights that seeks to ensure that Canadian political communities do not use individuals' membership in identity communities in exclusionary ways. This is the unique core of section 15, the purpose of *Canadian* equality rights.

[9] In recent decisions, such as *Eldridge* v. *British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624 [hereinafter *Eldridge*], and *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, the Court has stressed that equality rights protect a substantive understanding of equality. I explore what this means in D. Greschner, "The Right to Belong: The Promise of *Vriend*" (1998) 9 N.J.C.L. 417 at 430–35.

II. THE PURPOSIVE APPROACH AND CANADIAN COMMUNITIES

In its early *Charter* judgments rendered in the 1980s, the Supreme Court first articulated the purposive method of *Charter* interpretation. In *R.* v. *Big M Drug Mart Ltd.*, Dickson C.J.C. outlined this overall approach:[10]

> In *Hunter et al.* v. *Southam Inc*... this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada* v. *Skapinker* ... illustrates, be placed in its proper linguistic, philosophic and historical contexts.

The purposive method outlined by Dickson C.J.C. generates several imperatives for constitutional interpretation. First, it rejects excessive abstraction in the project of giving meaning to section 15. Abstraction is not dispelled altogether, since the necessity to generalize or abstract from specific circumstance inures in the very idea of constitutional law. However, interpretations must be informed by contextual features, such as "the character and larger objects of the *Charter*" and "the historical origins of the concepts enshrined." At a minimum the purposive approach requires consideration of the context that produced section 15 as a constitutional right. This historical context does not mean searching fruitlessly for the drafters' motives or shackling judges

[10] [1985] 1 S.C.R. 295 at 344 [emphasis added, hereinafter *Big M Drug Mart*]. See also *Edmonton Journal* v. *Alberta*, [1989] 2 S.C.R.1326 at 1352–56, per Wilson J., for an elaboration of the purposive method and its dictate to engage in contextual reasoning. For a general discussion of contextual reasoning, see S.M. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountibility" (1999) 22 Dal. L.J. 126.

to specific interpretations of the text that held sway in the past.[11] Rather, the contextual method deduces meaning from a variety of factors and circumstances, with particular attention to the interests that a *Charter* provision is intended to address.

Second, the purposive approach, with its injunction to pay close attention to context, rejects over-zealous importation of doctrines from foreign jurisdictions. Although one method of avoiding abstraction is to incorporate foreign doctrine and discourse, this move encounters the danger of ignoring the particular underpinnings of our own history. Consider, as one example, the differences between section 15 and the political history and jurisprudence of the American equal protection clause. The Canadian and American equality provisions differ dramatically in language.[12] More than a century separates their time of drafting. The *Charter* took some of its inspiration and specific content from human rights legislation that every Canadian jurisdiction had enacted prior to 1982. By contrast, in the United States the equal protection clause preceded statutory protection by a century. Moreover, Canada has not one, but two specific provisions that deal with sex equality,[13] in addition to the prohibition on sex discrimination in section 15. In the United States the failure of the sex equality provision (the Equal Rights Amendment) to win ratification has rendered constitutional protection of sex equality dependent on judicial interpretation of the equal protection clause. A number of other differences between the two texts, such as Canada's protection of equity programs,[14] call for considerable

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[11] In its first *Charter* decision, *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357, the Court reiterated the famous "living tree" metaphor as a guide to constitutional interpretation. As well, it quickly rejected the search for the drafters' intention as the appropriate focus of *Charter* interpretation: *Reference Re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 486.

[12] Compare s. 15, *supra* note 3, to the American equal protection clause in the Fourteenth Amendment: "No State shall … deny to any person within its jurisdiction the equal protection of the law." U.S. Const. Amend. XIV.

[13] Sections 28 and 35(4) of the *Charter*, *supra* note 3. Section 28 reads: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." In 1983, s. 35(4) was added to s. 35, which declares rights of the Aboriginal peoples of Canada. Section 35(4) reads: "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons." See *Constitutional Amendment Proclamation*, 1983.

[14] See s. 15(2), *supra* note 3. In *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950, the Court ruled that this provision is an interpretative aid to s. 15(1), not a separate defence or exception [hereinafter *Lovelace*].

sensitivity in obtaining guidance from American doctrine.[15] This is not to say that Canadians should interpret section 15 with a wilful blindness to American jurisprudence. Rather, the interpretation of section 15 must be firmly grounded in Canadian experience and history.

To begin, what is meant by "purpose"? Chief Justice Dickson states the purpose of a guarantee must be understood in relation to "the interests it was meant to protect."[16] The purpose is the reason, or reasons, for inserting a guarantee, such as section 15, into the Constitution. To put the matter in another way, every guarantee is intended to protect human interests. Thus, the first step in a *Charter* analysis is to identify the interests that underlie the provision. In *Hunter* v. *Southam*, for instance, the human interest was the individual's reasonable expectation of privacy;[17] in *Big M Drug Mart*, it was the individual's freedom to hold and manifest conscientiously held beliefs, of which religious beliefs are paradigmatic.[18]

There is no doubt that the individual interest in belonging to groups is a human interest of fundamental value. Though trite and mundane, it is nevertheless important to reiterate that human survival and identity requires individuals to live in communities. The old African aphorism that "a person only becomes a person through other people"[19] aptly encapsulates one's need of other people in order to become a human being. Exchanges with others, which require living in a group, are essential to acquiring languages of expression, which, as

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15 For a general discussion of the Supreme Court's attitude toward American jurisprudence, see C. Manfredi, "The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms" (1992) 40 Am. J. Comp. L. 213. For a critique of the Supreme Court's use of the American notion of discrete and insular minorities, see D. Gibson, "Analogous Grounds of Discrimination under the Canadian Charter: Too Much Ado About Nothing" (1991) 29 Alta. L. Rev. 772.

16 *Big M Drug Mart*, *supra* note 10.

17 [1984] 2 S.C.R. 145.

18 *Big M Drug* Mart, *supra* note 10.

19 I first heard this aphorism during discussions at an African National Congress conference in South Africa. The conference had been convened in May 1991 to discuss the text of a constitution for a post-apartheid South Africa. Many African participants expressed concern about entrenching rights with too individualistic a flavour, and several of them referred to this aphorism in arguing for a conception of rights that would recognize the importance of communities in the flourishing of human beings.

Charles Taylor reminds us, is a prerequisite to becoming full human agents.[20] Nor, once people have acquired the languages needed for self-definition, do they lose the urge to live in communities. According to psychologists, the individual's desire to belong to a group and to live as a member of a community is one of the deepest and most critical human yearnings. Glasser lists the need to belong as one of six basic human needs, along with the need to survive and reproduce, the need for freedom, the need for power and the need for fun.[21] For Glasser, these needs are not equivalent, as poignantly proven by people who attempt suicide because they are lonely, and lack a sense of belonging to another person or a group. Other theorists also rank the need to belong as more important than many other needs. For instance, Maslow's theory of motivation proposes that "meeting the need for belonging is a necessary precondition to higher needs such as the desire for knowledge."[22]

Promoting the interest in belonging animates the vast range of communitarian conceptions of political life. However, liberal philosophy also positions belonging as a key concept; taking into account the need to belong does not make a political philosophy illiberal. For instance, in the influential liberal theory of John Rawls, a sense of belonging rests behind the concept of self-respect. In identifying the primary goods (those that have a use whatever a person's rational plan of life), Rawls distinguishes between natural and social primary goods. The former includes health and vigour, while the latter includes rights and liberties, powers and opportunities, and income and wealth.[23] Amongst the social primary goods, he assigns the central place to self-respect, the sense that one's life plan is worth carrying out. Self-respect can be attained only through relationships with other people: "Now our self-respect normally depends upon the respect of others. Unless we feel that our endeavours are honoured by them, it is difficult if not impossible for us to maintain the conviction that our ends are worth advancing."[24] At a minimum, receiving the respect of others requires their recognition that the recipient belongs to the human family. Unless we feel that others accept us as human beings capable of

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20 C. Taylor, *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1995) at 230–31.

21 As quoted in N. Chubb & C. Fertman, "Adolescents' Perceptions of Belonging in Their Families" (1992) 73 Families in Society 387 at 387.

22 See C. Goodenow & K. Grady, "The Relationship of School Belonging and Friends' Values to Academic Motivation Among Urban Adolescent Students" (1993) 62 Journal of Experimental Education 60 at 68.

23 J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 62.

24 *Ibid*. at 178.

designing life-plans, we are incapable of possessing self-respect. This minimum form of respect need not come from all other people; the group offering respect may be small or large, social or chosen. For instance, Chubb and Fertman's study shows that the self-esteem of children, which overlaps considerably with self-respect, has a direct relationship with their sense of belonging to their families.[25] Rawls states: "Thus what is necessary is that there should be for each person at least one community of shared interests to which he belongs and where he finds his endeavours confirmed by his associates."[26] Isaiah Berlin forcefully makes the related point about political relationships in his famous essay, "Two Concepts of Liberty." An individual's sense of identity and self-worth is inextricably determined by the recognition and status accorded the groups to which she or he belongs.[27] Individuals may feel unfree because they are members of "an unrecognized or insufficiently respected group."[28]

Political philosophy, no less than psychology, recognizes that the need to belong is not the only human need. People also need freedom as individuals within their communities, a need expressed in constitutional documents as rights to autonomy, privacy, expression and conscience, to name a few. In one sense, the central question of political philosophy is how to balance, reconcile or promote simultaneously if possible, the fundamental interests of individuals in freedom and belonging — what Berlin called negative and positive liberties. The larger purpose of modern constitutionalism, as James Tully perspicaciously observes about the Canadian Constitution, "is to mediate the two goods whose alleged irreconcilability is often seen as the source of current constitutional conflict: freedom and belonging."[29] Since section 15 must be interpreted within

25 Chubb & Fertman, *supra* note 21 at 391.

26 Rawls, *supra* note 23 at 442.

27 I. Berlin, " Two Concepts of Liberty" in *Four Essays on Liberty* (London: Oxford University Press, 1969) 118 at 154–60. This point was cited with approval by Dickson C.J.C. in *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 at 746 [hereinafter *Keegstra*]. Similar arguments and conclusions, but from a more sociological perspective that draws on G.H. Mead as well as Hegel, are developed in A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, MA: MIT Press, 1996).

28 Berlin, *ibid*. at 157.

29 J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 31–32.

the "character and larger objects" of the Constitution as a whole, one can expect that it addresses or contributes to both these fundamental interests.[30]

Let us turn to the "character and larger objects" of one part of the Constitution, the *Charter of Rights and Freedoms*. First and foremost, the *Charter* is undeniably a human rights document. The wellspring of the modern human rights movement is the idea that every human being, by virtue of being human, belongs to one community, the human family. Often this idea of a common humanity is expressed in the language of inherent human dignity,[31] a formulation that owes much in modern times to Kant: "[I]t was the Kantian notion of dignity's absolute and intrinsic character that promoted its inclusion into modern constitutions and human rights conventions in the wake of Nazi Germany's crimes during World War II."[32] The *Universal Declaration of Human Rights*, for instance, begins with "a recognition of the inherent dignity and ... the equal and inalienable rights of all members of the human family."[33] For the drafters of international human rights conventions, and for some philosophers, "human rights are based upon or derivative of human dignity. It is because

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30 This argument, by itself, does not entail that s. 15 is about belonging. The argument is merely that the Constitution, of which s. 15 is a part, protects both freedom and belonging. It would be possible for a specific provision to promote only individual freedom and not belonging in any meaningful sense.

31 Dignity is a contested concept, one about which philosophers disagree on matters of content, origins and relationship to other notions, such as self-respect, autonomy and worth. See the collection of essays in R. Dillon, ed., *Dignity, Character and Self-Respect* (New York: Routledge, 1995).

32 I. Englard, "Human Dignity: From Antiquity to Modern Israel's Constitutional Framework" (2000) 21 Cardozo L. Rev. 1903 at 1921. Englard notes that connecting dignity to human rights requires a broadening of Kant's conception of dignity from a moral achievement, attained by autonomous individuals, to a universal attribute of empirical persons.

33 GA. Res. 217(III), UN GAOR, 3d. Sess., Supp. No. 13, UN Doc. A/810 91948, 71. Similar statements about inherent human dignity are contained in the *International Covenant on Economic, Social and Political Rights*, 16 December 1966, Can T.S. 1976 No. 46, 993 U.N.T.S. 3 (entered into force 3 January 1976), and the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976). Modern constitutions often contain express declarations of dignity, such as Article I (1) of the *Basic Law of the Federal Republic of Germany*: "The dignity of man shall be inviolable." Statutory human rights instruments also refer to human dignity. See *e.g. The Saskatchewan Human Rights Code*, S.S. 1979, c. S–24.1, s. 3(a) that proclaims that one of the *Code*'s objects is "to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family."

humans have dignity that they have human rights."[34] Sometimes the common bond of humanity is expressed as intrinsic human worth, a formulation that may be slightly different from dignity.[35] One legal variant of this idea is the "right to equal concern and respect."[36] The basic idea, however, remains the same: every person, as a human being, belongs to a universal community from which no one can be excluded, designated as Other or treated as an object or a stranger. The *Charter* as a whole, by virtue of the fact that it is a human rights document that proclaims fundamental human rights, protects this interest in belonging to the human family.

The concept of human rights, with its emphasis on the universality of the human family, the idea that everyone possesses basic rights by the mere empirical fact of being a human being, fights a contrasting and virulent notion of belonging. For belonging also has a negative meaning: ownership. Children reveal their understanding of this sense of belonging when they assert that their toys belong to them. Toys are their possessions, their belongings, and in this context, belonging means exclusivity, ownership and control. This sense of belonging reaches its nadir in the concept and practise of slavery, when a legal system considers one person to own another and enforces that ownership with the law's full fury. Slaves are not members of the community but objects of ownership for those who enjoy the benefits of membership. The harms of exclusion from this community are severe and tragic for individuals. Because the designation of groups as non-human typically accompanies, or precedes, some of the world's most horrific evils, such as slavery, genocide and apartheid, the human rights movement's stress on the notion of belonging to one human family cannot be underestimated.

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[34] A. Gewirth, "Human Dignity as the Basis of Rights" in M.J. Meyer & W.A. Parent, eds., *The Constitution of Rights: Human Dignity and American Values* (Ithaca: Cornell University Press, 1992) at 10. Gewirth advances a controversial case for deriving all human rights from human dignity. A contrasting view is that of Jacques Maritain, who argues simply that having dignity is the equivalent of having rights, that one has dignity if one has rights. Gewirth argues that dignity is the antecedent of rights, not the equivalent.

[35] The classic analysis of dignity's complex character is the essay by A. Kolnai, "Dignity," which is reproduced in Dillon, *supra* note 31, 53.

[36] The now classic articulation and defence of the right to equal concern and respect is by Ronald Dworkin, beginning with *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977). In some passages (*ibid.* at 198–99) he uses human dignity as perhaps connoting something different from "equal concern and respect," but for the most part the terms seem interchangeable.

The Court has frequently said that the concept of human dignity "inspires the *Charter*."[37] In cases that interpret freedom of expression,[38] section 7's liberty and security interests,[39] and the right to be free from unreasonable search and seizure,[40] the Court has noted that the particular provision at issue promotes human dignity. If human dignity underlies the entire *Charter*, then perforce it must also underlie the equality rights in section 15. Moreover, since section 15 is about equality, it is to be expected that it would involve human dignity. As Meyer notes, "One's human dignity, if it is a mark of anything, is a mark of one's equality on some fundamental level with other human beings."[41] As well, the common humanity of all individuals explains section 15's opening words, which declare that *everyone* has equality rights. This is the interest that underlies McIntyre J.'s words in *Andrews*, that all persons ought to know that "they are recognised at law as human beings equally deserving of concern, respect and consideration."[42] In *Law* v. *Canada*, a unanimous Court firmly declares "the protection of human dignity" as the overriding purpose of section 15, its description of dignity encompassing self-worth, self-respect, personal autonomy, self-determination and other values.[43]

Individuals belong to the human family, but at the same time they also belong to a number of groups that operate as identity communities — those social groups bound by common religious beliefs, language, sex, culture, ethnicity or history in ways that shape the experiences and characters of individuals. Identity communities may be chosen; examples include, for the most part, one's marital

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37 *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 86. See also *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 136 (per Dickson C.J.C.); *R.* v. *O'Connor*, [1995] 4 S.C.R. 411 at para. 63 (per L'Heureux-Dubé J.); and a recent decision, *Blencoe* v. *British Columbia Human Rights Commission*, [2000] 2 S.C.R. 307 at para. 76: "The *Charter* and the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter*."

38 *Keegstra*, *supra* note 27.

39 See *e.g. R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 (per Wilson J.); *Rodriguez* v. *British Columbia*, [1993] 3 S.C.R. 519 at 592 (per Sopinka J.); *R.(B.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

40 See *e.g. R.* v. *Monney*, [1999] 1 S.C.R. 652; *R.* v. *Godoy*, [1999] 1 S.C.R. 311.

41 M.J. Meyer, "Dignity, Rights and Self-Control" (1989) 99 Ethics 520 at 524.

42 *Supra* note 6 at 171 ("The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration").

43 *Supra* note 8 at para. 53.

status and, for many people, their religious affiliation.[44] But, perhaps more importantly, they include communities that people are born into or find themselves in and can exit from only with the greatest of difficulty, if at all.[45] To take sex as an example, a baby's future is dramatically affected by her or his sex, from the microscopic level of referential pronouns in birth announcements to the macroscopic questions of future earnings, occupations and likely lifespan. With these identity groups, individuals have no choice about the fact of their membership. Furthermore, the meaning of membership — the group identity — may be constructed and forced upon its members by the actions of the larger society.[46] There are choices being made to frame differences in exclusionary ways, not by the oppressed group, but its oppressors.

The Canadian Constitution has long recognized the importance of several identity groups, as evidenced by the provisions on denominational education[47] and the deliberate omission of Québec from section 94 of the *Constitution Act, 1867*. These provisions protect identity communities, especially those organized around the official languages and, to a lesser and overlapping extent, the traditional religions associated with English- and French-speaking Canadians. Indeed, the federal structure of Confederation resulted from the desire in the 1860s to create a common political identity for residents of British North America while at the same time preserving their specific cultural identities. LaSelva argues that Canada would not have become a nation without a robust federal system to protect cultural diversity: "[T]he very existence of Canada has depended on the ability to compromise, the recognition of difference, and the willingness to create a community of belonging that seeks to include all

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44 The extent to which membership in an identity group is a matter of choice has acquired importance because of the Supreme Court's test for analogous grounds, as explained in *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203. The majority opinion stresses that the enumerated grounds are "immutable or changeable only at unacceptable cost to personal identity" (*ibid.* at para. 13). Therefore, immutability, or constructive immutability, of a ground is a condition of its being analogous to the enumerated grounds.

45 Some identity communities are easier to switch in and out of than others. Changing one's religion is relatively easy compared to changing one's sex, and changing one's ancestry is impossible. See Young, *supra* note 4 at 42–48.

46 *Ibid*.

47 These provisions are s. 93 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, and its companion provisions in the statutes establishing the new provinces, such as s. 17 of the *Saskatchewan Act*, S.C. 1905, c. 42.

Canadians."[48] Canada has a history of delicate and often asymmetrical federal arrangements that, in the words of Samuel LaSelva, "recognizes that citizens have both a common identity and different identities."[49]

This "historic unwillingness to choose either 'the one' or 'the many' has produced a complex sense of community"[50] that pervades constitutional politics and law. For instance, it runs through the provisions pertaining to the admission of new provinces, beginning with Manitoba in 1870 and ending with the culturally specific terms of union between Canada and Newfoundland in 1949. These provisions indicate that the Constitution is deeply imbued with provisions that protect the diversity of communities. Although descriptions of Canada as a mosaic and the United States as a melting pot greatly oversimplify the complex and often contradictory historical tensions and patterns in both countries, these labels nevertheless carry a significant grain of truth. For Canadians, the need to belong is not satisfied by the opportunity to assimilate. Indeed, LaSelva would argue that Confederation could be seen as a decisive rejection of an assimilationist imperative. Perhaps one reason for the failures of the Meech Lake and Charlottetown Accords can be found in a general unwillingness to cast in constitutional stone any greater detail about the nature of the communities that comprise Canada, for fear that including some features will exclude others and thus diminish the very respect for diversity that grounds Canada's political nationhood.

The *Constitution Act, 1982* now offers broader protection to identity communities. It expands the constitutional rights of the two official language communities,[51] includes protection for Aboriginal peoples[52] and recognizes the multicultural heritage of Canadians.[53] Most importantly for our purposes, the equality rights prohibit discrimination against persons because of their membership in identity groups. The enumerated grounds (and analogous ones) can no longer be deployed by governments as reasons to exclude members of

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48 S. LaSelva, *The Moral Foundations of Canadian Federalism* (Montreal & Kingston: McGill-Queen's University Press, 1996) at 195.

49 *Ibid*. at 3.

50 *Ibid*. at 9.

51 *Supra* note 3, ss. 16–23.

52 *Ibid*., ss. 25 and 35.

53 *Ibid*. Section 27 reads: "This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." See L.-V. Tran, "The Canadian Charter of Rights and Freedoms: Justification, Methods, and Limits of a Multicultural Interpretation" (1996) 28 Colum. Hum. Rts. L. Rev. 33, for an analysis of a multicultural interpretation of the *Charter*.

these groups from the benefits, privileges and opportunities available in the larger community, including participation in workplaces, educational institutions and the abundance of programs and activities that provide a rich texture to the fabric of everyday life.

Here is where one finds the unique core of section 15, one that does not, unlike the goal of promoting human dignity, underlie all the other rights. Section 15, with its list of grounds, is aimed at *ending discrimination against members of groups*, those who suffer the harms of exclusion on enumerated or analogous grounds. No other provision has this broad goal. The only related provisions that use similar language are sections 28 and 35(4), which prohibit sex inequality. Ensuring that section 15 protects our belonging in identity groups, that our membership is not used in discriminatory ways by the larger society, is the special contribution of section 15 to Canadian constitutionalism. In Part III, I argue that the historical antecedents of section 15 and its drafting further confirm that it is about remedying discrimination against groups — or, to put it in the positive — promoting inclusion of all individuals as full members of Canadian society.

The *Charter* as a whole also, and indisputably, protects the right to belong to the political communities that operate within the constitutional structure. Specific *Charter* provisions, such as the rights to vote, hold office and live and work in any province, directly protect belonging to the three political communities represented by the federal, provincial and territorial governments.[54] That these rights are about political communities is evidenced by their bestowal on citizens and permanent residents, unlike the rights expressed in other *Charter* provisions. For instance, the rights in sections 7 and 15 are enjoyed by everyone, whether citizen or not.[55] All persons subject to Canadian jurisdiction may expect

[54] Section 3 (the right to vote in federal and provincial elections, and to be qualified for membership in the House of Commons or legislative assemblies) and s. 6 (mobility rights) (*ibid.* ss. 3 and 6).

[55] Section 7 begins with "Everyone has the right to ..." (*ibid.* s. 7). The Court has interpreted "everyone" in s. 7 to include every human being physically present in Canada and thus amenable to Canadian law, including illegal immigrants (*Singh* v. *Canada (M.E.I.)*, [1985] 1 S.C.R. 177 at 202) and to exclude corporations because life, liberty and security of the person are attributes of human beings, not corporations (*Irwin Toy* v. *Québec*, [1989] 1 S.C.R. 927 at 1004). Although the Supreme Court has not yet issued a definitive ruling on s. 15's opening words of "Every individual," the phrase has been interpreted in the same manner as s. 7 by lower courts for the same reasons. See P. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Carswell, 1999) at 685–86.

governments to respect these rights, unlike the rights that accrue to members of the political community. These political rights protect people's need to belong to political communities, ones in which they participate as citizens with the ability to shape their political and economic life in cooperation with others. (This form of belonging builds on the first. Only if a community recognizes people as human beings with inherent dignity will it proceed to accord them political membership.) But democratic rights are not alone in promoting belonging. Section 15, by prohibiting any governmental action that excludes people on the basis of enumerated or analogous grounds, also protects belonging to political communities, and its ambit is broader than political communities referred to in sections 3–5. For instance, in *Benner* v. *Canada*, the Court ruled that sexist citizenship criteria violated section 15.[56] In *Corbiere* v. *Canada*, it ruled that denying the vote to off-reserve band members in band elections violated section 15.[57] Section 15 promotes the participatory goals of other *Charter* sections.

Thus, in summary, the Constitution as a whole protects belonging in the human family (by virtue of containing human rights), identity groups and political communities. It is against this backdrop of belonging's necessary and critical role generally in constructing constitutional purposes that one must turn to section 15. With respect to section 15, a purposive interpretation incorporates the concept of universality that underlies all human rights documents — every individual has inherent human dignity, and is entitled to equal concern and respect as a member of the human family — and the reality that membership in both identity groups and political communities is critical to individuals, and protected by the Constitution generally. Examining the concerns that shaped equality laws prior to and during the drafting of section 15, shows that the harm that section 15 seeks to overcome and prevent is exclusion from communities on the basis of the enumerated or analogous grounds. It aims to prevent not only exclusion by explicit membership criteria — the formal rules of exclusion — but also by the more indirect and less formal ways in which people are marked as second class, as less than full members, and not permitted to participate fully in the opportunities and riches of a society.

[56] [1997] 1 S.C.R. 358.

[57] *Supra* note 44.

III. THE POLITICAL AND HISTORICAL CONTEXT IN 1982

The purposive method requires looking at the "language chosen to articulate the specific right or freedom" and the "historical origins of the concepts enshrined."[58] In short, the "linguistic, philosophic and historical contexts"[59] of section 15 at the time of its enactment is crucial. In this part I briefly examine the currents of history that produced section 15, and argue that the belonging interest is a common theme in the many strands and movements that coalesced to produce equality rights in their 1982 form.

One legal predecessor to the *Charter*, and an important component of the historical context, is the human rights legislation enacted prior to 1982 that prohibits discrimination on a number of specified grounds. The enactment of general antidiscrimination laws began with the *Saskatchewan Bill of Rights, 1947*.[60] The Co-operative Commonwealth Federation, a prairie populist party, had included "equal economic and social opportunity without distinction of sex, nationality or religion"[61] as a plank in its first program, adopted in 1932. When it formed the government of Saskatchewan in 1944, its goal of enacting a bill of rights gained political support because of the atrocities of the Second World War. The bill was passed in 1947. The *Bill of Rights* had two parts. First, it affirmed the fundamental freedoms of speech, assembly, association and religion, the right to participate in elections and freedom from arbitrary imprisonment.[62] These freedoms were enjoyed by everyone. Second, it forbade racial and religious discrimination in employment, housing, property ownership, membership in professional and trade associations, education and access to public services.[63] This part received the lion's share of attention in the Legislative Assembly. The Attorney General, J.W. Corman, in moving second reading of the *Bill of Rights* on 19 March 1947, summarized it as follows: "Generally speaking, Mr. Speaker, the Bill attempts to make it the law of this

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58 *Big M Drug Mart, supra* note 10 at 344.

59 *Ibid*.

60 *Saskatchewan Bill of Rights*, S.S. 1947, c. 35.

61 See *Provisional Program of the Federation*, section 4, being part of the *Calgary Programme, 1932* (reproduced in W. Young, *The Anatomy of a Party: The National CCF 1932–1961* (Toronto: University of Toronto Press, 1969) at 303–304).

62 *Supra* note 60, ss. 3–7.

63 *Ibid.*, ss. 8–16. More precisely, the prohibited grounds of discrimination were race, creed, religion, colour and ethnic or national origin. Section 2 defined "creed" as religious creed. The nonreligious grounds of race, colour and ethnic or national origin are different methods of prohibiting ancestry as a ground of discrimination.

land, the law of Saskatchewan, that the racial and religious minorities of our province shall enjoy the same rights as others in respect of jobs, education, business, professions and access to public places."[64]

The historical record shows that the purpose of the *Bill of Rights* was to ensure that everyone resident in Saskatchewan could participate fully in the life of the province without regard to membership in identity communities of race, nationality or religion. The speeches given in the Legislative Assembly emphasize this goal. In his introductory remarks, the Attorney General spoke about the diversity of Saskatchewan's population, noting that less than half the population was of Anglo-Saxon origin. He condemned the prejudice and exclusion suffered by people of other national origins. In supporting the legislation, he asked whether any other province had "such a wonderful opportunity of showing the rest of the world how people of diverse nationalities can live together in peace, in harmony and in good will."[65] The goal was to ensure that anyone could work and prosper in Saskatchewan regardless of their ethnic origin, race or religious beliefs. Several years later Premier Tommy Douglas aptly described the aspiration as transforming Saskatchewan into "an island of tolerance and good will ... a haven of neighbourliness."[66]

Thus, the *Bill of Rights* sought to promote belonging. It recognized that Saskatchewan society was comprised of many different groups and that these groups belonged to the political community — the province. Beginning in 1947, persons could not be denied jobs, services or housing because of their race, nationality or religion. They could not be told that one occupation, business or other sector of human activity was out of bounds for them because they possessed these characteristics. For the drafters of the *Bill of Rights*, discrimination meant excluding someone from employment, housing, public services or other aspects of community life. Their law proclaimed that membership in identity groups could no longer be a reason for exclusion from provincial society.

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64 Saskatchewan, Legislative Assembly, *Debates and Proceedings* (19 March 1947) at 990.

65 *Ibid.* at 988.

66 As quoted in 1993 by the Honourable Robert Mitchell, Attorney General of Saskatchewan, in defence of an amendment to prohibit discrimination against gay men and lesbians: Saskatchewan, Legislative Assembly, *Debates and Proceedings* (29 April 1993) at 1315.

Many other provinces enacted human rights legislation throughout the subsequent three decades, and Parliament enacted the *Canadian Bill of Rights*[67] in 1960 and the *Canadian Human Rights Act*[68] in 1978. Modern human rights legislation continues the theme and aspiration of the original Saskatchewan law. For instance, the current *Saskatchewan Human Rights Code* has the stated objective to "promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family and ... discourage and eliminate discrimination."[69] Since 1947, legislators have increasingly acknowledged that other groups, not just those defined by race or religion, also suffer exclusion from full participation and relegation to second-class status in political communities. Hence the prohibited grounds of discrimination now include the most common and pernicious methods of excluding groups and treating them as unworthy of full membership.[70] As well, since 1947 human rights advocates and commissions have increasingly understood that methods of exclusion take many forms. The development of several important human rights principles, such as the prohibition of harassment and adverse-effects discrimination, sprang from a deeper understanding of the forms of exclusion. For instance, human rights law has accepted for several decades that sexual harassment in the workplace operates as a highly effective exclusionary device to keep women out of the workplace or make them feel unwelcome and second class.[71]

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67 S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

68 *Saskatchewan Human Rights* Code, R.S.C. 1985, c. H–6.

69 *Supra* note 33, ss. 3(a) and (b). Similar objects are contained in most human rights statutes.

70 The *Saskatchewan Human Rights Code* now prohibits discrimination because of race, creed, religion, colour, sex, sexual orientation, family status (defined as being in a parent-child relationship), marital status, disability, nationality, ancestry, place of origin and receipt of public assistance. Other jurisdictions have similar lists.

71 By the early 1980s, human rights commissions had accepted the argument being made by many women and feminist organizations that sexual harassment was sexual discrimination, and they were taking complaints on that basis. See A. Aggarwal, *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1987) at 10–12. For a brief history of the early resistance of some commissions to recognizing sexual harassment as sex discrimination, see C. Backhouse & L. Cohen, eds., *The Sexual Oppression: Sexual Harassment of Working Women* (Toronto: Macmillan, 1978) at 118–19.

One obvious debt the *Charter* owes to human rights statutes is its list of enumerated grounds. The grounds included in section 15 were already contained in the human rights statutes of most jurisdictions.[72] Some, such as race and sex, were prohibited grounds in every statute, while others had already been widely, though not unanimously, accepted by the legislatures and Parliament. The other debt to the statutory experience was the inclusion of the "open-ended" clause in section 15. One message from the experience from 1947 onwards was the need to add to the prohibited grounds to ensure that the laws remained in tune with understandings of harm. For instance, most jurisdictions had prohibited discrimination on the basis of disability prior to 1982, as the exclusion and segregation of persons with disabilities became increasingly unacceptable. Section 15 was deliberately made open-ended to permit equality rights to respond to the changing appreciation of discrimination.[73]

Another historical and philosophical source of understanding of section 15's purpose is the women's movement. As part of the broader human rights movement, it greatly influenced and assisted the work of legislatures and human rights commissions in their understanding of discrimination. More specifically, feminist struggles throughout the 1970s contributed to the final language of section 15. They campaigned against the narrow and sexist interpretation that the courts had given to the equality provision in the *Canadian Bill of Rights*. In particular, they advocated adding "equal benefit" to section 15, in part to overcome the ruling in *Bliss* v. *Canada (A.-G.)* that equal protection did not cover benefits such as unemployment insurance.[74] They also argued for inclusion of "equality *under* the law" to overcome the formalistic interpretation of "equality *before* the law" that had prevented Indian women from succeeding in their challenge to the sexist membership provisions of the *Indian Act*.[75] In addition, the *Charter* contains several provisions that resulted directly from the active engagement of organized feminist groups in constitutional matters.

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[72] For a description and discussion of the grounds in 1982, see W. Tarnopolsky, *Discrimination and the Law* (Toronto: Richard De Boo, 1982) at 294–328.

[73] A. Bayefsky, "Defining Equality Rights" in Bayefsky & Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1 at 47–51. She also notes that many presenters argued that an open-ended clause was necessary to ensure that the *Charter* kept pace with Canada's international commitments.

[74] [1979] 1 S.C.R. 183.

[75] *Canada (A.-G.)* v. *Lavell*, [1974] S.C.R. 1349 [hereinafter *Lavell*].

Section 28 was added to ensure strong protection against sex discrimination.[76] One year later, in 1983, section 35(4) was added for the same reason.[77] While the women's movement did not have as great an impact as it would have liked on constitutional renovation as a whole, it did have a critical role in producing the equality provisions in the *Charter*.

Feminism is a vast and diverse movement that encompasses considerable substantive differences in political beliefs, strategies and visions. It is wrong to think of one feminist theory or one feminist position. Nevertheless, common threads run through versions of feminism. In an important article, Denise Réaume argues that the commonality and internal cohesiveness of feminist jurisprudence and politics is provided by the goal of alleviating the exclusion of women.[78] In canvassing leading feminist positions, she concludes that the harm that women complain about, under any rubric of feminism, always has exclusion at its core:[79]

> A feminist critique of law is, negatively, an analysis of how some or all women have been excluded from the design of the legal system or the application of law, and positively, a normative argument about how, if at all, women's inclusion can be accomplished. The concept of exclusion unifies substantially diverse conceptions of women's experience and the politics and strategies of inclusion.

Réaume identifies two forms of exclusion. First, explicit exclusion covers the set of rules that define separate spheres for women and men, sometimes in legislation and other times in judicial interpretation, to deny women inclusion in key institutions or important rights in the private sphere. Examples from history include the prohibition on women in the legal profession and the explicit exclusion of women from legal custodianship of their children.[80]

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[76] For the story of s. 28's inclusion, see P. Kome, *The Taking of 28* (Toronto: The Women's Press, 1983); S. Razack, *Canadian Feminism and the Law* (Toronto: Second Story Press, 1991) 27–41.

[77] The story of s. 35(4)'s inclusion has not yet been fully told. For a brief description, see B. Schwartz, *First Principles, Second Thoughts* (Montréal: Institute for Research on Public Policy, 1986) 95–102.

[78] D. Réaume, "What's Distinctive About Feminist Analysis of Law?" (1996) 2 Legal Theory 265.

[79] *Ibid.* at 273.

[80] *Ibid.* at 275.

Second, implicit exclusion operates when rules or norms are formulated or applied using men as the standard, without regard to women's needs and experiences. The circumstances and conditions of women's lives are excluded from the design of ostensibly sex-neutral rules. Réaume points out that with the demise of most instances of explicit exclusion, feminist attention has turned to the pervasive lack of attention or outright dismissal of women's characteristics in the design of legal rules. As a paradigmatic example of implicit exclusion, she refers to the legislative regime for unemployment insurance at issue in *Bliss*. Because pregnancy was not a reason for men to be absent from work, it was omitted from the grounds of coverage for unemployment insurance, and when pregnancy was finally added, it was made subject to more stringent conditions. Women with children were seen as less committed to employment and less in need of unemployment protection.[81] In short they did not belong as permanent members of the workforce. Réaume offers a lengthy and perspicacious analysis of the implicit exclusion that continues to operate in the construction, interpretation and application of rules throughout the legal system.[82]

As the *Bliss* example illustrates, the interest in belonging must always extend to more than simply limited entry and participation on conditions that are set by the existing members. For instance, if women are relegated to clerical positions in an organization, they are being treated as outsiders to its important networks and positions of power. The metaphor of the "glass ceiling" signifies well the exclusion that women experience from the upper echelons of the corporate hierarchy. Women may be labelled as "second-class" members. This apt term from passenger travel communicates well the reality that while all people may be riding on the same train, some people have first-class status that entitles them to more privileges and better treatment.

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81 *Ibid.* at 281.

82 Implicit exclusion, just like explicit exclusion, has potentially devastating effects for women. Fortunately, since the Supreme Court's decision in *British Columbia (Public Service Employees Relations Commission)* v. *B.C.G.S.E.U.*, [1999] 3 S.C.R. 3, the legal standard for discrimination and its defences, such as "*bona fides* occupational requirement," no longer depends on whether courts classify the impugned action as direct discrimination (explicit exclusion) or adverse-effects discrimination (implicit exclusion). When the Court issued its decision, this unified approach had already been required by some human rights statutes.

The women's movement and other human rights groups pressed for changes in the original draft of section 15 during the hearings before the Joint Committee in 1981.[83] The impetus behind two important amendments, those stemming from judicial interpretations of the *Canadian Bill of Rights* in *Lavell* and *Bliss*, was concern about explicit exclusion (direct discrimination) and implicit exclusion (adverse-effects discrimination). In *Andrews*, Justice McIntyre described this history as important evidence of the purpose of section 15.[84] The reasons for the changes provide further evidence that section 15 was intended to protect the interest in belonging.

First, the Joint Committee added the term "equal under the law" to supplement the exceedingly narrow meaning given to "equal before the law" by the Supreme Court in *Lavell*.[85] Jeannette Lavell was one of thousands of Indian woman stripped of their Indian status and denied the ability to pass status to their children because they had married non-Indian men. She complained that the *Indian Act* discriminated on the ground of sex because Indian men who married non-Indian women did not lose their status. Indeed, Indian men automatically bestowed Indian status to their non-Indian wives and any children of the union. The Supreme Court held that Indian women were not denied equality before the law because all Indian women were treated alike and all Indian men were treated alike. Indian women may not have been equal under the law but they were equal before the law. The decision was met with considerable criticism and, several years later, the Human Rights Committee of the United Nations held that the *Indian Act* provision did constitute sex discrimination.[86] The Joint Committee recommended adding the words "equal under the law" in section 15 to prevent a similar line of reasoning and result in the future.[87]

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83 For a description of section 15's history, see D. Gibson, *The Law of the Charter: Equality Rights* (Calgary: Carswell, 1990) 36–45; Bayefsky, *supra* note 73.

84 *Supra* note 6 at 170.

85 *Lavell*, *supra* note 75.

86 *Lovelace* v. *Canada* (1983), 1 Can. Hum. Rts. Y.B. 305 (U.N.H.R.C.).

87 After hearing concerns about the omission of "equal under the law," which could continue the narrow *Lavell* reasoning, and with the federal government on 12 January 1981, indicating its willingness to accept a change, the Joint Committee recommended the addition. See Special Joint Committee of the Senate and the House of Commons, *Minutes and Proceedings of Evidence*, 1st Sess., 32nd Parl., 1980–81, Issue No. 57 (13 February 1981) at 57:12.

The injustice suffered by Mrs. Lavell, which the Court did not rectify, was exclusion from her identity community. The impugned law was an explicit membership rule. Indian women who married non-Indians were stricken from the membership rolls of their bands and from the list of Indians kept by the Department of Indian Affairs. Only Indians may live on the reserve, participate in band elections and receive other benefits that accrue with Indian status. For Indian women like Mrs. Lavell, the consequence of their marriages was physical and political removal from their communities, an ouster backed by the sanction of law. They became outsiders. There was *sex* discrimination here: women suffered ouster and exclusion from a group for marriage when men did not. This was direct discrimination at its most blatant.[88]

Second, the Joint Committee recommended adding "equal benefit" to ensure that the courts would not repeat the decision in *Bliss*.[89] Stella Bliss could not receive regular unemployment insurance benefits because she left work on account of pregnancy. The first unemployment insurance provisions did not include pregnancy as a legitimate reason to leave the workforce. When pregnancy was added, it was made subject to more stringent conditions that Bliss could not meet. The unstated premise of this statutory regime was that women did not belong in the workforce because of their capacity to become pregnant. If they were in the workforce anyway and unable to work continuously because of pregnancy, they would be valued less than other workers unable to work. The Supreme Court held that the *Canadian Bill of Rights* did not help Bliss because it guaranteed only equal protection of the law, not equal benefits.[90] The Joint Committee added "equal benefit" to preclude similar reasoning in the future.[91] The harm that Bliss suffered and that the committee intended to remedy is the harm that Réaume identifies as implicit exclusion. Unemployment insurance rules were drafted without attention to women's needs and experiences. When women's needs were brought into the light of public policy, they were tacked on

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88 The lingering effects of this particular injustice came before the Court in *Corbiere* v. *Canada*, *supra* note 44. Most of the Aboriginal people living off-reserve, and thereby unable to vote in band elections, were women who had lost status because of marriage, and therefore their children and grandchildren.

89 *Supra* note 74.

90 The Court also held that the distinction was not sex-based because it was between pregnant persons and non-pregnant persons, with any distinction created by nature and not by legislation. This line of reasoning was rejected in *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1242–44, and similar reasoning with respect to persons with disabilities was disavowed by La Forest J. in *Eldridge*, *supra* note 9 at 621.

91 See Special Joint Committee of the Senate and House of Commons, *supra* note 87.

as an afterthought rather than causing a fundamental redesign of the statutory regime. This was adverse-effects discrimination at its most blatant.

Another change at the committee stage further buttresses the position that the interest in belonging underlies section 15. At the conclusion of its hearings the committee recommended adding "mental or physical disability" to the list of prohibited grounds of discrimination.[92] In a recent article on disability and the constitution, David Lepofsky outlines the legislative history of the provision.[93] He emphasizes that the harm that persons with disabilities complained about was the harm of exclusion, of being kept out of the community, shunted into institutions and not permitted to participate as full members of the community. Persons with disabilities insisted on adding "disability" to section 15 because they viewed it as a legal mechanism to gain access to employment, education, housing and public services. Sometimes they still suffer the harm of explicit exclusion, but their exclusion today is more frequently perpetuated by the methods of implicit exclusion. Laws, policies, buildings and services are designed without any attention to their needs and circumstances. Persons with disabilities still suffer the full range of adverse-effects discrimination.[94]

This perusal of the historical, philosophic and linguistic context of section 15, while not comprehensive, provides evidence that the interest underlying equality rights is the interest in belonging to several different types of communities. Section 15 guards against the harm of exclusion. By bestowing rights to everyone, it outlines the scope of membership and sends the message that everyone belongs to the Canadian community. The prohibited grounds of discrimination, such as race, sex, age and disability, are unacceptable reasons for excluding members of identity groups from the benefits of full membership in society. As with other constitutional provisions, such as minority language educational rights, section 15 articulates society's aspirations about the scope and meaning of membership in different communities. The judicial task in

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92 On 28 January 1981, the Joint Committee voted unanimously to add these words to section 15. See Special Joint Committee of the Senate and the House of Commons, *Minutes and Proceedings of Evidence*, 1st Sess., 32nd Parl., 1980–81, Issue No. 47 (28 January 1981) at 91. For a comprehensive description of the testimony before the Joint Committee, and the political activities that preceded the committee's recommendation, see D. Lepofsky & J. Bickenbach, "Equality Rights and the Physically Handicapped" in Bayefsky & Eberts, *supra* note 73 at 332–40.

93 M.D. Lepofsky, "Report Card on the *Charter*'s Guarantee of Equality to Persons with Disabilities after 10 Years — What Progress? What Prospects?"(1997) 7 N.J.C.L. 263 at 272–87.

94 In *Eldridge, supra* note 9, La Forest J. acknowledges this situation.

interpreting section 15 is to determine the appropriate meaning of belonging. To state this task in the negative, judges must determine whether persons have suffered the harm of exclusion in ways that the Constitution forbids.[95]

IV. DIGNITY AND DISCRIMINATION BEFORE THE COURT

In its recent decision, *Law* v. *Canada*,[96] the Court cast the central purpose of section 15 as "protecting and promoting human dignity."[97]

> [T]he purpose of section 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[98]

Putting dignity front and centre in equality analysis has the advantage of recognizing that all people belong to the universal community of the human family. However, it has several difficulties. First, by itself it is too abstract and general to demarcate the specific province of section 15 or to assist in resolving equality litigation. As I have noted, there is a strong body of opinion that dignity

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95 D.C. Galloway, "Three Models of (In)Equality" (1993) 38 McGill L.J. 64, identified three models of inequality in the Court's jurisprudence: equal membership, social disadvantagement and human dignity. I argue that these approaches share the promotion of belonging to different sorts of communities: the political units of Confederation, identity groups and the human family.

96 *Supra* note 8. The litigation involved, once again, the criteria of eligibility for benefit programs. Nancy Law's husband died in 1991, when he was fifty and she was thirty years old. He had contributed to the Canada Pension Plan for twenty-two years. Mrs. Law was not entitled to survivor benefits because, at the time of his death, she did not meet the statutory conditions: she was not over thirty-five, did not have dependent children, nor was she disabled. In other words, she was a healthy, childless, young woman. She argued that criterion of being over thirty-five constituted discrimination on the basis of age, and thus violated s. 15. The unanimous Court disagreed. Although the policy drew a distinction on the basis of age, it did not discriminate because the distinction did not violate human dignity. The *Law* decision is important because it articulates the "human dignity" purpose of s. 15 and establishes a general methodology for equality claims.

97 *Ibid*. at para. 54.

98 *Ibid*. at para. 51.

underlies all human rights documents.[99] The dignity interest is not unique to section 15, nor even especially characteristic of equality rights. For instance, the protection of human dignity is also the overriding objective of autonomy rights, such as section 7's right to liberty and security of the person. Indeed, features of *Law*'s description of dignity could be applied without modification to describe the purpose of section 7; for example, the *Law* statement that "Human dignity ... is concerned with physical and psychological integrity and empowerment" aptly fits the interests in section 7.[100] Furthermore, the generality of dignity language does not offer much guidance in resolving equality litigation, or instruction to legislators in designing public policy. It merely changes the labels, rather than clarifying the issues: "[S]peaking of human dignity is a way of expressing a set of moral problems rather than a technique for resolving them."[101] For one thing, the concept of dignity has the same broad scope and contested meanings as the concept it seeks to explain — equality.[102] As Roger Gibbins pointedly notes, the language of human dignity fails to provide an appropriate guide for public policy, and is often deployed "as a tool to shut down legitimate public policy debate."[103] In the passage quoted above, the Court only heightens the confusion by linking "freedom," another abstract and contested concept, with "essential human dignity" in its description of the purpose of equality rights.

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99 See *supra* text to notes 29–41. In *Law*, *supra* note 8, Iacobucci J., writing for the unanimous Court, was drawing common strands from previous opinions, which had splintered badly in the infamous 1995 trilogy. It is not surprising that consensus could only be found at a very general level.

100 *Law*, *supra* note 8 at para. 53. Englard, *supra* note 32 at 1924, observes: "The notion's pervasive impact is a sure sign of its vagueness and indeterminancy."

101 D. Feldman, "Human Dignity as a Legal Value – Part I" [1999] Public Law 682 at 688.

102 Englard, *supra* note 32, maps many of the variants of dignity, noting the fundamental differences between religious and secular understandings. See also D. Beyleveld & R. Brownsword, "Human Dignity, Human Rights, and Human Genetics" (1998) 61 M.L.R. 661 at 665: "[H]uman dignity appears in various guises, sometimes as the source of human rights, at other times as itself a species of human right (particularly concerned with the conditions of self-respect); sometimes defining the subjects of human rights, at other times defining the objects to be protected; and, sometimes reinforcing, at other times limiting, rights of individual autonomy and self-determination."

103 R. Gibbins, "How in the World Can You Contest Equal Human Dignity?" (2000) 12 N.J.C.L. 25 at 28.

Second, emphasizing human dignity may submerge other important aspects of belonging. While it is important to reiterate that everyone belongs to the human family, equality rights developed in response to *specific* forms of exclusion and protect a particular set of interests in belonging. The historical and linguistic context reveals that equality rights are about protecting identity groups from exclusion and second-class status within the larger society, a harm that can be inflicted either by direct or indirect means. Members of these groups should not be required to assimilate in order to enjoy the benefits of full membership, of inclusion in the wider society. Human dignity may be at the core of the concept of equality. But the core of equality *rights*, which are enforceable by courts against legislatures, is about discrimination on the basis of obnoxious grounds. I fear that placing human dignity at the centre of section 15 takes the focus away from discrimination and the patterns of exclusion that section 15 was intended to address.

However, the Court's decision in *Law* does not erase the language of discrimination and its history. The passage quoted above relates dignity to "the imposition of disadvantage, stereotyping or political or social prejudice," which are contextual effects that determine the presence of discrimination. In other passages, the Court links the goal of assuring dignity with the remedying of discrimination.[104] Moreover, discrimination takes centre stage in the third step of the Court's analytical framework for determining whether a law violates section 15. The three steps are as follows: first, the impugned law must draw a distinction; second, the distinction must be drawn on an enumerated or analogous ground; and third, the distinction must constitute discrimination.[105] In assessing discrimination, the Court considers four contextual factors. These factors look at the larger context within which an impugned law operates, at the effects of the law on people's lives and the historical practices of exclusion. They are doing the real work in section 15 litigation, not the abstract concept of dignity.[106]

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[104] *Supra* note 8 at paras. 52, 83.

[105] *Law*, *ibid*., requires this three-step approach, which has been followed in all subsequent s. 15 decisions.

[106] In *Law* and subsequent decisions, the third stage, with the four contextual factors, has been critical: see *e.g. Granovosky* v. *Canada (M.E.I.)*, [2000] 1 S.C.R. 703 at paras. 59–70 [hereinafter *Granovosky*]; *Lovelace*, *supra* note 14 at paras. 68–92. These factors owe much to L'Heureux-Dubé J.'s opinion in *Egan*, *supra* note 1.

These four factors require an examination of context and of the effects of a law or policy. Each is designed to uncover ways in which a group is being treated as a second-class member. The first factor is whether the claimant suffers preexisting disadvantage, stereotyping or prejudice. It looks backward to the context of history, taking into account the past societal practices that treated people unfairly. The second factor is the relationship between the ground, such as sex, and the claimant's circumstances or characteristics. Does the impugned law take into account the experiences, characteristics or needs of the claimant's group? This factor was decisive in *Eldridge*,[107] where policymakers failed to consider the needs of deaf people in the delivery of medical services. It was also decisive in *Granovosky* v. *Canada*,[108] where policy-makers did consider the needs of persons with disabilities in designing the Canada Pension Plan. The third factor is the ameliorative purpose or effects of the law. Policies that seek to correct patterns of exclusion, or assist the more disadvantaged, will typically not violate section 15. This factor also requires an examination of context because one must look at the place of groups within society to determine if they are more advantaged or disadvantaged. (This factor also points to treating section 15(2) as an exemplification of equality, not as an exception, which the Court explicitly recognizes in *Lovelace*.[109]) The fourth factor is the nature and scope of the affected interests. The more severe and localized the consequences of the law for the affected group, the more likely that the law is discriminatory. In assessing the importance of the interest, "it is relevant to consider whether the distinction restricts access to a fundamental social institution, or 'affects a basic aspect of full membership in Canadian society', or 'constitute[s] a complete non-recognition of a particular group'."[110] The application of this factor explains the difference in result between *Corbiere*, where the denial of the right to vote violates section 15, and *Granovosky*, where the denial of benefits to temporarily disabled persons on the same basis as benefits available to persons with permanent disabilities did not constitute a violation of section 15.

In addition, many decisions explicitly recognize the importance of belonging, either in their analyses or outcomes. While the Court in *Law* expressed section 15's purpose in general terms that protect belonging in the human family, it has applied section 15 in circumstances that protect our belonging in identity communities. For instance, its decision in *Corbiere* protected participation in

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[107] *Supra* note 9.

[108] *Supra* note 106.

[109] *Supra* note 14.

[110] *Law*, *supra* note 8 at para. 74. I discuss the necessity of assessing the value of the interest at stake in Greschner, *supra* note 9 at 432–33.

Aboriginal political communities; and *Vriend* prohibited exclusion from public life on the basis of membership in an identity group. In *Eaton* v. *Brant County Board of Education*, although the Court rejected a "presumption of inclusion," which would have moved it toward a full belonging model, it accepted that the harms suffered by persons with disabilities are the harms of exclusion from the larger society.[111] As well, its *Granovosky* judgment is full of the language of belonging: "Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself."[112] Moreover, in a recent equality decision, *Little Sisters Books and Art Emporium* v. *Canada*,[113] Binnie J., writing for the majority, notes that "the 'dignity' aspect of the test [for discrimination in the third stage of an equality analysis] is designed to weed out trivial or other complaints that do not engage the purpose of the equality provision."[114] This comment would indicate an important, but not necessarily central, role for the concept of dignity.

A focus on belonging as the central interest protected by section 15 changes the analysis in an equality challenge. The orientation of the Court would be grounded in the history and aspirations that led to section 15, which should strengthen the legitimacy of its decisions. The Court would seek insight from the statutory human rights jurisprudence, with its rich and detailed experience with the forms of discrimination. The analysis would have a different starting point. Instead of asking whether the impugned law creates distinctions, the analysis asks whether the claimant is suffering the harms of exclusion. The focus would be on the effects of the law on individuals and groups. Determining the suitable remedy for an equality violation would begin with a presumption of inclusion as the most appropriate method of redressing an exclusion. It may also change the result in particular cases, such as *Eaton*, where a presumption of inclusion would have required the government to justify its segregation of a disabled child against the wishes of her parents.[115]

111 [1997] 1 S.C.R. 241.

112 *Supra* note 106 at para. 30.

113 [2000] S.C.J. No. 66.

114 *Ibid*. at para. 110.

115 For critiques of this decision for its failure to be inclusionary, see Lepofsky, *supra* note 93 at 407–31; Greschner, *supra* note 9 at 434–35.

An approach to section 15 that protects the interest in belonging can be called a "full membership" model. It has the following elements. Section 15 protects the interest in belonging to the human family, the political communities of Canada and the identity groups that comprise Canadian society. Persons cannot be excluded because of their group membership, either by explicit or implicit ways, from full participation in the social, economic and political life of the country. Exclusion is indicated by legal rules that either bar or oust a group completely or render more difficult the group's entry or participation in an institution or program. The application of stereotypes and myths about groups typically indicates a failure to accord full membership. It is not relevant whether the exclusion is wrought by deliberate malice or thoughtlessness. Both explicit and implicit exclusions constitute violations of section 15 and must be justified under section 1. Distinctions *per se* are not harmful; indeed, they are necessary in allocating resources amongst members. They violate equality rights when they are used to demarcate groups as outsiders or second-class members. A "full belonging" model is a substantive understanding of equality in that it looks not merely at a law's form but at the law's effects on people's lives.

V. CONCLUSION

Equality rights are ways of accommodating different groups, of making room for everyone and of ensuring that everyone belongs to the Canadian community. This purpose flows from an examination of the historical, philosophic and linguistic context of section 15. First, the interest in belonging underlies the statutory human rights codes that predate enactment of the *Charter* and which the Court has recognized as interpretative sources for the *Charter*. Second, the interest in belonging underlies the impetus behind adding several important clauses to the *Charter*. Sections 28 and 35(4), the two gender equality provisions that must be read in conjunction with section 15, were inserted because of a feminist campaign to insert provisions in the *Charter* that would assist in overcoming the exclusion of women from communities. Third, the words of section 15 were changed in 1981 at the committee stage to give better effect to these aspirations. Thus the approach in this essay builds on the work of commissions and groups which struggled for inclusion of equality rights in the *Charter* and their continuing efforts. The protection of human dignity is part of this belonging model for two reasons: first, because human dignity or a similar understanding of universal humanity underlies all human rights, including equality rights; and second, to make it clear that the approach does not include the negative connotation of belonging as ownership. But human dignity alone does not capture the historical circumstances that equality rights are meant to redress. The articulation of section 15's purpose responds to the Canadian

experience of inequality when it considers the historical, social and economic disadvantage of identity groups. In doing so, it promotes the ideal of a community comprised of individuals with autonomy but also with antecedent, necessary, continual and rewarding connections to others.

My objective is to develop a specifically Canadian conception of equality, not because equality is anything less than a universal value, but because moving a bit closer to equality requires close attention to the particular problems and circumstances of a society. The likelihood of achieving a larger measure of equality is increased if attention is paid to our own history and the particulars of our circumstances. An approach that ties section 15 to Canadian history and the Canadian experience with discrimination stands a better chance of actually improving people's lives in important ways.[116]

On a personal note, my reflections about the purposes of human rights laws and section 15 have been formed by my work with human rights commissions.[117] In hearing the concerns of individuals and groups who came to commissions for assistance, I realized that the unifying thread of their complaints was the pain and hurt of exclusion. The Aboriginal family denied rental accommodation because of its ancestry, women subjected to harassment in their workplaces, a pregnant woman not rehired after maternity leave, the person with mobility impairment denied access to a restaurant, the non-Christian students required to participate in Christian prayers — all were receiving the message that they did not belong, as full members, to Canadian society. They felt ignored, unwelcome, like intruders. They did not want rationality in governmental action or assurances that abstract equality was theirs. They wanted to belong.

Over a decade ago, the American scholar Kenneth Karst argued that equal citizenship was the primary guarantee of the Fourteenth Amendment.[118] Its impetus was the banning of slavery, the exclusion of an entire group of people from the very definition of personhood. The great civil rights cases concerned inclusion; *Brown* v. *Board of Education* ruled that segregation — apartheid by another name — was wrong. While Karst's work reminds us that speaking synonymously of equality and belonging is not new to constitutional discourse,

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[116] J. Ross, "Response to Professor Mendes" (2000) 12 N.J.C.L. 39, makes a similar point.

[117] I served as a member of the Canadian Human Rights Commission from 1987–90 and as Chief Commissioner of the Saskatchewan Human Rights Commission from 1992–96.

[118] K. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven: Yale University Press, 1989).

he has remained almost a lone voice in American constitutional debates.[119] But their history is not ours. We will be true to our history and politics by recognizing the substantive interest in belonging that animates the Canadian conception of equality. Moreover, perhaps we can hope that the aspiration for Saskatchewan that led Corman to introduce the *Saskatchewan Bill of Rights* over fifty years ago is the inspiration that section 15 equality rights can provide for the rest of the world — to show how diverse people can live together in peace, harmony and goodwill.

[119] See *e.g.* M. Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990).

MIDDLE-CLASS WHITE PRIVILEGE

Ruth Colker*

The law and economics approach to anti-discrimination law, with its key principles of efficiency and personal autonomy, perpetuate disturbing and stereotypical attitudes about race. The author examines both educational affirmative action and employment affirmative action in the United States. Through devices such as alumni preference programs, educational institutions are able to indirectly maintain a white, propertied social and economic structure. Similarly, employers and professional organizations are able, through aptitude tests and word-of-mouth recruiting, to avoid affirmative action initiatives. By relying too heavily on the "efficiency" of law and economics, courts are ignoring non-discriminatory employment options. The law and economics approach must locate and address white privilege before criticizing minority attempts to even the score.

L'approche du droit et de l'économie à l'égard de la législation sur l'anti-discrimination, dont les principes clés sont l'efficacité et l'autonomie personnelle, perpétue les attitudes gênantes et stéréotypées au sujet de race. L'auteur examine l'action positive dans le domaine de l'éducation et de l'emploi aux États-Unis. Grâce à des moyens tels que les programmes de préférence des anciens, les établissements d'enseignement peuvent, indirectement, conserver une structure de propriété économique et sociale blanche. De même, les employeurs ou les organismes professionnels peuvent, au moyen de tests d'aptitude et du recrutement par bouche-à-oreille, éviter les initiatives de l'action positive. En se fiant trop à «l'efficacité» du droit et de l'économie, les tribunaux ignorent les options d'emploi non discriminatoires. L'approche du droit et de l'économie doit d'abord trouver et régler le privilège des Blancs avant de critiquer les tentatives des minorités à égaliser le jeu.

I. INTRODUCTION

My children wake up each morning in comfortable, warm beds in a safe neighbourhood within walking distance of an excellent public school. They are the beneficiaries of an excellent health insurance program and already have a trust fund for their college education. My son's daycare centre is equipped with computers, climbing equipment, art supplies, books and hundreds of toys. Although my son is developmentally disabled, he receives outstanding and free intervention services from the school district on a virtual one-on-one basis. My daughter's public school has a computer lab and classes with only twenty children. Our house is filled with books and educational toys, as well as two computers. If my daughter decides to apply to Harvard University someday, she can take advantage of the alumni preference for children of alumni even though I am the only person in her family tree who attended Harvard.

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In American culture, none of those advantages are called "affirmative action" by middle-class whites.[1] If, at age eighteen, my daughter has higher standardized test scores than another teenager, few middle-class whites would complain that she had an unfair advantage. And, if upon graduation from college or graduate school, she has a better academic record than another student, few middle-class whites would complain that she had an unfair advantage. In my middle-class circles, no one has ever cautioned me to think twice about taking advantage of my race and class privilege on behalf of either of my children. (I would probably be criticized if I failed to.) It is presumed that I will use my financial resources to buy opportunities for them. In other words, my daughter's race and class privilege is unlikely to cause her to have to face stigma or prejudice later in life within the middle-class circles in which she is likely to operate.[2] Stigma and prejudice face African-American but not Caucasian beneficiaries of race-based affirmative action.[3] Harvard President Derek Bok commented on this distinction in 1985 when he asked why whites resent affirmative action for blacks but do not express "similar resentments against other groups of favored applicants, such as athletes and alumni offspring."[4] In the words of Patricia Williams, "affirmative action for the children of Founding Fathers just doesn't seem to carry the stigma."[5] This well-accepted social principle within the dominant culture[6]

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1 Working-class people and racial minorities may nonetheless have a different perspective. For example, Patricia Williams acknowledges that she must "confess to a certain class envy" in reading of a family that was able to take advantage of "every imaginable privilege of Boston's 'Brahmin' society," including admissions to Harvard for "sons who couldn't read until their teens." P. Williams, "The Pathology of Privilege" (May 1996) The Women's Review of Books 1.

2 My son, of course, may face stigma for receiving assistance to ameliorate the effects of his disabilities. But this potential stigma is a consequence of his disabilities rather than his race, gender or class.

3 Of course, if my daughter were to take advantage of a gender-based affirmative action program, people might say that she would face prejudice or stigma.

4 M. Lind, *The Next American Nation: The New Nationalism and the Fourth American Revolution* (New York: The Free Press, 1995) at 169.

5 P. Williams, *supra* note 1 at 1.

6 "Embedded deep within the affirmative action debate are two durable assumptions. The first is that affirmative action means that unqualified, or lesser qualified, individuals will be selected over more qualified individuals. ... The second assumption ... is that there exists a negative relationship between affirmative action and workforce productivity." M. Selmi, "Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate" (1995) 42 U.C.L.A. L. Rev. 1251 at 1251–52. For the view that "elitism" is becoming less fashionable, see W.A. Henry III, *In Defense of Elitism* (New York: Doubleday,

reflects the emerging acceptance of law and economics in our legal and political culture.

Law and economics is winning. The work of law and economics scholars like Richard Posner and Richard Epstein now dominates antidiscrimination law.[7] This field of law uncritically helps perpetuate devices that assist propertied whites gain access to educational institutions or employment settings but seeks to destroy comparable devices that assist African Americans. While hiding behind principles like efficiency and personal autonomy, this field of law actually reflects disturbing and stereotypical attitudes about race. As we will see, black employment is inefficient whereas white employment is efficient.

II. LAW AND ECONOMICS

The two key principles of law and economics are efficiency and personal autonomy,[8] which are strongly reflected in the work of Richard Epstein. For example, he argues that government interference in the marketplace through antidiscrimination law actually harms rather than helps disadvantaged groups in society. With respect to people with disabilities, he argues that the source of their mistreatment at the workplace lies in "government interference with the control of their labor. Like everyone else, the disabled should be allowed to sell their labor at whatever price, and on whatever terms, they see fit."[9] Similarly, in the educational context, Richard Posner has argued that an affirmative-action program designed to attain proportional representation of racial minorities is inefficient because it distorts the results of pre-existing personal preferences: "[T]his sort of intervention would, by profoundly distorting the allocation of labor and by driving a wedge between individual merit and economic and

1994).

7 I use the phrase "antidiscrimination law" to include constitutional law under the equal protection clause of the Fourteenth Amendment as well as to include statutory law under civil rights statutes. For the purposes of this article, these areas of the law are conceptually equivalent.

8 "Economics has developed an extensive critique of regulation. According to this critique, market-like instruments should replace bureaucratic rules wherever possible. Substituting the former for the latter promise efficiency and liberty by lowering the cost and coercion of achieving policy goals." R. Cooter, "Market Affirmative Action" (1994) 31 San Diego L. Rev. 133 at 134.

9 R. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, MA: Harvard University Press, 1992) at 484.

professional success, greatly undermines the system of incentives on which a free society depends."[10]

As a judge, Posner has made a similar argument in an employment discrimination case. Rather than preclude an employer from using a word-of-mouth recruitment system, which perpetuated the racial segregation of the workplace, Posner applauded the efficiency of the employer's practice: "It is clear, as we have been at pains to emphasize, the cheapest and most efficient method of recruitment, notwithstanding its discriminatory impact."[11]

The personal-autonomy principle permits Epstein to question the validity of government authorizing or requiring affirmative action for a discrete subgroup of society. He writes: "There is no external measure of value that allows the legal system or the public at large to impose its preferences on the parties in their own relationship. There is thus no reason to have to decide whether we should weigh the need for merit in employment decisions against the need for diversity in workers."[12] Similarly, Posner has argued that affirmative action on behalf of racial minorities has "no logical stopping point" short of a standard of "perfect equality."[13] The government interferes with personal autonomy when it imposes its views about which subgroups are entitled to affirmative action on employers.

Posner's concern for efficiency, however, appears to dampen when such arguments are used to *support* race-based affirmative action. One argument that is sometimes made on behalf of race-based affirmative action is that it can serve as an easy proxy for socio-economic disadvantage, since African Americans disproportionately come from economically deprived households. At this point, Posner backs off from his overarching concern for efficiency. He states: "To say that discrimination is often a rational and efficient form of behavior is not to say that it is socially or ethically desirable."[14] Even if race-based affirmative action is the most efficient way to achieve socio-economic diversity, given the costs of acquiring individualized information, Posner argues that we should not permit the use of race-based categories by state actors. At that point, Posner becomes a staunch formal-equality theorist, arguing that we must not confuse what is

10 R.A. Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities" (1974) 18 Sup. Ct. Rev. 1.

11 *EEOC* v. *Consolidated Service Systems*, 989 F.2d 233, 236 (7th Cir. 1993).

12 Epstein, *supra* note 9 at 413.

13 Posner, *supra* note 10 at 18.

14 *Ibid*. at 11.

"efficient" with what is "good" or "right."[15] (By endorsing the formal-equality principle, he is also backing away from the personal-autonomy principle since he is allowing a moral stance — antidiscrimination — to trump an employer's preferences in hiring practices.) These inconsistent strands of law and economics have created a patchwork of case-law that consistently disserves the interests of African Americans who desire to gain access to higher education or employment at the workplace. Part III of this article discusses educational affirmative action and Part IV discusses employment affirmative action. As Michael Lind has stated so provocatively, entry to the professional classes in the United States "depends on two institutions: prestigious universities and state systems of professional accreditation. These represent the primogeniture and entail of the white overclass."[16]

II. EDUCATIONAL AFFIRMATIVE ACTION

Educational institutions of higher education have never relied exclusively on the "merit" principle in deciding whom to admit. Until the 1920s, admissions at elite institutions was often restricted to those males who could afford to pay the tuition and had taken courses generally only available in private schools.[17] Social and economic status therefore played an important role in admissions long before the advent of modern "testing" for admissions purposes.

Elite educational institutions modified their admissions practices in the 1920s in response to what was perceived to be a problem with their increasing identification as institutions admitting immigrant Jews and Catholics. Harvard President A. Lawrence Lowell, for example, tried to respond to this problem by imposing a ceiling on the number of Jews admitted, but backed down from this proposal after a barrage of public criticism. Instead, he invoked an alumni preference policy that discriminated against children of immigrants, many of whom were Jewish or Catholic.[18] He employed an indirect rather than direct

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15 *Ibid*.

16 Lind, *supra* note 4 at 152.

17 "Throughout most of the nineteenth century, Harvard and Yale admitted almost everyone who could meet the academic requirements and pay the tuition. While there was no institutional policy of discrimination, the colleges maintained certain academic criteria, including a Latin language requirement, that prevented many public school students from even qualifying for admission." J.D. Lamb, "The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale" (1993) 26 Colum. J.L. & Soc. Probs. 491 at 492–93.

18 *Ibid*. at 494.

method of discrimination. As a result of this policy, at least twenty-five per cent of Harvard's entering classes were the sons of graduates, a figure that has remained relatively stable ever since.[19]

Although Harvard has presumably discontinued its practice of overt discrimination against Jewish or Catholic applicants, it has never discontinued the alumni preference. The alumni preference clearly offers applicants a procedural and substantive advantage in the admissions process. Procedurally, all other applications go to an admissions committee for review before reaching the desk of the Dean of Admission. The application of a legacy applicant, by contrast, goes directly to the Dean of Admission for reading. The Dean then places comments in the file such as: "Not a great profile but just strong enough #'s and grades to get the tip from lineage."[20] The alumni preference is clearly a "preference"; an admitted nonlegacy candidate, on average, scored 130 points higher than an admitted legacy candidate for the time period 1983–1992.[21]

Although racial minorities are often targeted as obtaining an unfair advantage in the admissions process, legacy candidates obtain an equal or greater advantage. As one commentator has observed: "If legacies [in 1988] had been admitted ... at the same rate as other applicants, their numbers in the freshman class would have dropped by close to 200 — a figure that exceeds the total number of blacks, Mexican Americans, Puerto Ricans, and Native Americans enrolled in the freshman class."[22]

The legacy preference was historically introduced to intentionally discriminate against recent immigrant groups, such as Jews and Catholics. Today, it has a disparate impact against Asian Americans and other minority groups that are unlikely to be able to take advantage of an alumni preference. The Office of Civil Rights of the United States Department of Education concluded that "the higher admission rate for white applicants over similarly qualified Asian-American applicants is largely explained by the preference given to legacies and recruited athletes, two groups at Harvard that are predominantly white."[23]

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19 *Ibid*. at 495–96.
20 *Ibid*. at 501.
21 *Ibid*. at 504–505.
22 *Ibid*. at 503–504.
23 *Ibid*. at 502.

In the 1970s, elite American universities began to change their admissions policies to present an image of more racial, ethnic, religious and geographic diversity.[24] Many institutions that were historically restricted to white men were opened to women and various racial minorities. While these changes were made, some remnants of prior admissions practices remained in place and new ones were added. Alumni preference continued to benefit a subset of whites, although, for the first time, female applicants could benefit from this preference. (At state schools, political connections rather than alumni preference were often a favoured plus.[25]) Athletic preferences preferentially benefited male athletes who, at some institutions like Harvard, were also predominantly white.

A new admission policy that emerged in this time period was increased reliance on grades and especially test scores. Whereas graduation from elite secondary schools and the ability to pay were the admissions criteria prior to the 1920s, the post-Second World War era saw the emergence of purported "merit" criteria of grades and test scores. When scholarships eventually became available for students from impoverished backgrounds in the 1960s, many African Americans were still unable to attend elite institutions because of this recently invoked "merit" criteria.

Admissions testing originally began as an attempt to help make threshold judgments about candidates' abilities to succeed. Over time, however, these tests evolved "from a threshold to a relative measure" and, in turn, led to the disproportionate rejection of African-American applicants at exactly the time when they became formally eligible for admission and financial aid.[26] By the 1970s, "almost all of legal education embraced the liturgy of competitive admissions that had until the 1970s been restricted to a handful of elite law schools."[27] Today, it is estimated that only 5.9 per cent of college-bound high school seniors can meet the competitive criteria used by elite institutions, with only 0.4 per cent of college-bound African American seniors meeting these criteria.[28]

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24 *Ibid*. at 496.

25 A.J. Scanlon, "The History and Culture of Affirmative Action" [1988] B.Y.U.L. Rev. 343 at 354.

26 E.J. Littlejohn & L.S. Rubinowitz, "Black Enrollment in Law Schools: Forward to the Past?" (1987) 12 Thurgood Marshall L. Rev. 415 at 427.

27 Scanlon, *supra* note 25 at 352.

28 See J. Owings, M. McMillen & J. Burkett, *Making the Cut: Who Meets Highly Selective College Entrance Criteria* (National Center for Education Statistics, U.S. Department of Education, Office of Educational Research and Improvement, April

The question raised by these tests is what criteria of purported merit do they seek to measure. Early attacks on the Law School Admission Test (LSAT) by minority groups focused on the inability of those tests to predict success in law school. The empirical evidence suggested that the tests equally predicted success for minority and majority students, although it was not a particularly good predictor for either group.[29] Because no evidence of predictive inequality was found, "this significant flaw [in its predictability for any group] was lost in the pressure to have some testing instrument."[30] Also lost in the debate was how important it was to predict first-year grades in law school as a criterion for admissions: "If merit as defined by future academic performance is the trait required for admission, then standardized tests that predict such performance are acceptable. If future academic performance is not the sole goal of admissions the use of such tests is problematic."[31] The obsession with testing that began to overtake American culture in the 1970s therefore caused institutions to be blind to the accuracy or relevance of testing, while also discounting the significance of the disparate impact against racial minorities.

Even when institutions purportedly attempt to diversify their student body, they rarely abandon prime reliance on grades and test scores. As Derrick Bell argues:[32]

> [T]he response of educational institutions to minority demands for increased access ... serves to validate and reinforce traditional admissions policies that favor upper-class applicants over those of more modest socio-economic backgrounds, regardless of their race. As with so many other black-led civil rights reforms, preferential admissions will likely help more upwardly-mobile white than black applicants, although it is the latter who are enveloped in a cloud of suspected incompetency by these programs ... The decision to maintain grades and test scores as the prime criteria for admission advantages the upper class and ensures that the nation's economically privileged will continue to occupy the great majority of the highly sought-after seats in prestigious colleges, medical, and law schools.

Two divergent transformations in American thinking about admissions to educational institutional therefore took place in the 1970s. On the one hand, Americans increasingly believed that admissions were largely based on "merit," placing great weight in the reliability of standardized tests to evaluate merit. On

1995) at 4 (Table 1).

29 Scanlon, *supra* note 25 at 353.

30 *Ibid*.

31 D.E. Van Zandt, "Merit at the Right Tail: Education and Elite Law School Admissions" (1986) 64 Tex. L. Rev. 1493 at 1515.

32 D.A. Bell, Jr., "Preferential Affirmative Action" (1982) 16 Harv. C.R.-C.L. L. Rev. 855 at 865.

the other hand, Americans began to believe that racial minorities were the only group to sometimes gain admissions without meeting such objective criteria.[33] They were targeted as a group undeserving of admissions on merit grounds alone. In Anthony Scanlon's words:[34]

> The problem the minority students had was that they were neither politically nor academically well connected. Already told through the media and fellow students that they were less able, they did not have the network or support of 'preferentially' admitted majority students. Nor could the minority students, at most law schools, reach a critical mass that could provide its own support network.

Minority group members got singled out as a group getting "preferential" treatment while majority group members, who were even more likely to have obtained preferential treatment, were not subject to criticism or stigma. One might simply say that there were various criteria used for admissions purposes — test scores, parents' educational status, political connections, talent in male sports and race. One would not necessarily label any of these criteria as more or less appropriate or problematic. The perspective underlying law and economics, however, has cleverly assisted American society to group these criteria along racist lines — to not question the criteria that benefits whites and males and to question the criteria that benefit racial minorities.[35] This is not to suggest, of course, that law and economics has caused these groupings. It is to suggest that law and economics is a tool that has been used, in collaboration with racism, to help create this social, political and economic framework. In other words, the pre-existing desire of many people in society to view merit through a racial lens has helped facilitate the growing popularity of law and economics.

The case that best captures this collaboration between law and economics and racism is *Hopwood* v. *State of Texas*[36] because, relying on law and economics scholarship, the Fifth Circuit overturned a racial criterion in admissions while

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33 "While tirades against affirmative action regularly fill the pages of magazines and newspapers, the most disturbing form of affirmative action — preference given to children of alumni, known as 'legacies' — is usually ignored by critics." J.K. Wilson, *The Myth of Political Correctness* (Durham, NC: Duke University Press, 1995) 149.

34 Scanlon, *supra* note 25 at 354.

35 "Legacies are the oldest form of affirmative action, dating from the efforts to exclude Jews from elite colleges in the 1920s, but they have been virtually immune from criticism." Wilson, *supra* note 33 at 149. When the Office of Civil Rights investigated whether Harvard's use of legacy preference discriminated against Asian-American applicants, the office upheld Harvard's use of the legacy preference despite its adverse impact because these preferences were "long-standing and legitimate" (at 151).

36 78 F.3d 932 (5th Cir. 1995).

affirming a preference for whites. In *Hopwood*, the Fifth Circuit concluded that a university may not consider an individual's race in the application process. However, it did state that a school may consider an applicant's "relationship to school alumni."[37]

It takes little imagination to understand how the alumni factor serves to benefit only a small subset of the white population, since the University of Texas excluded blacks from consideration for admission until 1950 when the United States Supreme Court decided *Sweatt* v. *Painter*.[38] In 1971, for example, the University of Texas School of Law admitted no black students. Virtually[39] every child of every alumni from that year is white yet, in the name of formal equality, we permit an alumni preference while we do not permit a minority racial preference.

"Never have white judges, relying exclusively on the work of white scholars, spoken so authoritatively about the black experience in America," said Professor Leland Ware in criticism of the decision of the Fifth Circuit Court of Appeals in *Hopwood* v. *State of Texas*.[40] Professor Ware is correct to note that scholarship by whites played a decisive role in the Fifth Circuit's decision overturning the admissions program at the University of Texas School of Law. Richard Posner's 1974 law review article on the *DeFunis* case[41] was cited three times with approval by the court while a request by the Thurgood Marshall Legal Society and the Black Pre-Law Association to intervene was denied. Posner's work established the proposition, which could not be contradicted by these predominantly black organizations, that: "The use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America."[42] Why, then did alumni children also not face such prejudice and bigotry?

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37 *Ibid*. at 946.

38 339 U.S. 629 (1950).

39 Adoption and racial intermarriage cause me to say "virtually."

40 L. Ware, "Tales from the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education?" (1996) 23 J. C. & U. L. 43 at 78.

41 Posner, *supra* note 10.

42 *Supra* note 36 at 946 (citing Posner, *supra* note 10).

Posner's conjecture about prejudice, having been uttered in 1974 without empirical support, became a settled fact more than twenty years later when quoted by the Fifth Circuit. Had the court quoted black scholars, like Randall Kennedy, they instead would have had to deal with the more empirically based claim that "[t]he problem with this view [that affirmative action entrenches racial divisiveness] is that intense white resentment has accompanied every effort to undo racial subordination no matter how careful the attempt to anticipate and mollify the reaction."[43] As for the stigma argument, Professor Kennedy responds: "In the end, the uncertain extent to which affirmative action diminishes the accomplishments of blacks must be balanced against the stigmatization that occurs when blacks are virtually absent from important institutions in the society ... This positive result of affirmative action outweighs any stigma that the policy causes."[44] Why, one must wonder, was Judge Posner's 1974 law review cited as an authority on the effects of affirmative action on our society rather than Professor Kennedy's 1986 law review article that also sought to discuss the issue in "cost-benefit" terms but actually referred to evidence in support of its claims? If Posner is correct, why then, one must wonder, do so many African Americans support affirmative action? Are they just plain stupid? Or, are they as smart as white alumni in recognizing the value of a degree from a well-respected institution, irrespective of the admissions criteria? The importance of the *Hopwood* opinion is that it makes clear what one might only have been able to cynically suggest before — that scholars in the field of law and economics manipulate their purported concern for efficiency and personal autonomy in a way that serves the interests of propertied whites.[45]

Let us pretend for a moment that alumni preferences were held to the same strict scrutiny standard as racial preferences in cases such as *Hopwood*. They must meet a compelling state objective and use means that are narrowly tailored toward the achievement of those state objectives. In the language of law and economics, we should not permit the use of an inefficient criterion — race — as a proxy for another characteristic which we want to measure. We should insist on the use of highly accurate indicators. Employing such reasoning, the Fifth

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43 R. Kennedy, "Persuasion and Distrust: A Comment on the Affirmative Action Debate" (1986) 99 Harv. L. Rev. 1327 at 1330.

44 *Ibid*. at 1331.

45 For further discussion of the unevenness of antidiscrimination law for whites and blacks, men and women, heterosexuals and homosexuals, see R. Colker, "Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine" (1995) 7 Yale J.L. & Feminism 195.

Circuit says that it is offensive to use a racial preference as a proxy for another characteristic, such as diversity of viewpoint, because the preference does not meet the narrowly tailored portion of the constitutional standard. We should seek to use criteria that more perfectly match the characteristic we purport to measure.

Under this standard of efficiency, we could not justify the alumni preference if it was being used inefficiently as a proxy for another characteristic such as alumni donations or academic excellence. Alumni donations can be directly measured; no proxy is necessary or efficient. Moreover, giving weight to alumni donations contradicts the stated admissions criteria that is supposed to be "needs-blind." How can a process be needs-blind while also giving weight to alumni children because of the beneficial effect on fundraising? And, as Michael Lind has noted, if we justify legacy preference on a financial basis then "it might save time and trouble simply to sell diplomas for their children to rich alumni parents through the mail."[46]

Academic excellence is an often expressed justification for this preference. Harvard Dean of Admissions William Fitzsimmons justified the preference in 1991 by stating that "children of alumni are just smarter; they come from privileged backgrounds and tend to grow up in homes where parents encourage learning."[47] The empirical evidence, however, does not support this claim since these admittees, on average, have lower grades and test scores than non-legacy admittees. In addition, the standard measures of excellence (grades and test scores) probably already *overstate* the abilities of this group, because they are likely to have had the economic resources to maximize their performance on these measures. In any event, the equation of alumni children with superior academic excellence (beyond the predictions that would otherwise be made from grades and test scores) is not logical, rational or efficient. The last time Harvard compared the performance of legacy and non-legacy classmates was 1956, when a study "showed Harvard sons hogging the bottom of the grade curve."[48]

Alternatively, one might argue that the alumni preference is not intended to stand as a proxy for something else; it stands for itself — that a university values the children of its alumni preferentially because of their prior experience as children of alumni at that institution. Those children have something in common — each has grown up in a household in which one of the parents graduated from

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46 Lind, *supra* note 4 at 331.

47 J. Larew, "Why are droves of unqualified, unprepared kids getting into our top colleges? Because their dads are alumni" (1991) 23 Washington Monthly 10 at 11.

48 *Ibid*.

that institution. It is true that the composition of this group has been socially constructed. One is not inherently, biologically, an alumni child. One becomes an alumni child because of something that one's parent has done either before or after one's birth. One then acquires this trait through one's parent.

But how valuable is a group identity that has possibly only existed for one generation? And does being the child of an alumni really shape identity in any meaningful way?[49] Can it meet a compelling state-interest standard? It is hard to come up with a justification for alumni preference that comes close to establishing a compelling, or even strong, state interest.[50] In the language of law and economics, there is no objective basis for this preference.

Justifications for racial affirmative action are, in fact, much stronger. As with the alumni category, it is now commonly acknowledged that race is a socially constructed experience. Anthropologically, racial differences among humans do not genuinely exist. But, historically, we have created meaning that attaches to certain characteristics which we label "race." The social construction of those traits makes them no less real. An institution might value having someone present at a university who grew up identified as a member of a particular racial group. And, unlike the alumni preference, this form of self-identity may have been passed on for many generations and learned at an early age. The views of the members of this group need not be identical for their presence to be valuable or noteworthy. In fact, the *differences* in their viewpoints might help rebut social stereotypes such as "all blacks think alike." But their presence reflects the reality of a genuine social category.

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[49] I have observed that my daughter started to shape her self-identity with reference to her race and gender at about the age of four. For example, when we were taking a walk when she was four years old, she stopped and stared at an African-American male who was delivering the mail. His occupation was obvious both by his activity and his clothing. She then observed, "He can't be a mail carrier because his skin is too dark and he's a boy." Where she got the idea that mail carriers must be white women, I don't know. The important point is that at such a young age she was already shaping her perceptions of others (and most likely herself) according to gender and skin colour. I am quite confident, however, that she had no idea that I attended Harvard University when she made those comments.

[50] "Unlike affirmative action for under-represented minorities, which seeks to compensate for past wrongs and improve racial equality, legacy preferences serve no noble purpose. This is affirmative action for rich, privileged white students, providing special treatment for students with the most advantages." Wilson, *supra* note 33 at 151.

Posner, when he spoke about the effect on prejudice and bigotry, misunderstood the justification for more than token participation by a racial minority group at an institution. The point is not that all blacks think alike, therefore, we need more blacks to attain diversity in viewpoint. The point is that all blacks do *not* think alike and that fact will not be apparent until there are more than a token number of blacks present at an institution.

Posner is fond of reciting formal equality arguments to overturn affirmative action but it is terribly misleading to suggest that the law of educational admissions is really formally equal. Alumni preference policies are not subject to judicial challenge, despite their disparate impact against racial minorities, because disparate impact theory under the Constitution or Title VI of the *Civil Rights Act* of 1964 requires proof of "intent" to racially discriminate that courts have ruled is not available in such situations. This is why the Office of Civil Rights ruled against the Asian-American complainants in the case against Harvard University. Disparate impact existed, but no direct evidence of intent to exclude Asian Americans was found. The historical evidence that alumni preference was originally created to exclude other immigrant groups — Jews and Catholics — was not considered sufficient evidence of unlawful intent.[51]

Racial preference policies for racial minorities, however, are subject to judicial challenge because they purportedly harm whites intentionally. Formal equality results in unequal justice where whites get preferences and blacks do not. Posner's version of law and economics requires blacks to justify the obvious benefits of more than token diversity (without listening to black scholarship) and permits whites to perpetuate segregation without justification. This is not formal equality but maintenance of a white, propertied social and economic structure.

IV. EMPLOYMENT AFFIRMATIVE ACTION

Individualized employment decisions, like individualized educational admissions decisions, require the specification of criteria for selection. In the employment area, those criteria are often considered to be merit-based unless they involve race-based affirmative action. Yet many of these criteria benefit whites despite the fact that they do not correlate significantly with the capacity to perform the job in question. The criteria that disproportionately benefit whites include word-of-mouth recruiting, high school or college diploma requirements and "general intelligence" tests. When challenged as giving an unfair employment advantage to non-black candidates, these devices are often

[51] See generally Lamb, *supra* note 17.

applauded by law and economics theorists despite little evidence of fairness or efficiency. By contrast, when any system is imposed to give a "plus" to a black candidate for employment, these same theorists criticize the preference by hiding behind concerns for formal equality.

These employment criteria have not been consistent over time. Standardized testing is a twentieth-century phenomenon that began to be commonplace in civil service employment as overt race and gender barriers were eliminated. Such tests are presumed to test an applicant's ability to perform a job when, in fact, "employment tests provide only limited information regarding an individual's potential, and even less information as to the comparable abilities of competing candidates."[52] As blacks came to have more schooling in the 1970s, a college education became increasingly important,[53] although the actual value of a college degree is often presumed rather than empirically established. Whites have the opportunity to benefit from examination and education requirements irrespective of whether those criteria correlate with positive workplace performance. American culture simply presumes such a correlation.

When Epstein defends educational requirements, he does not rely on empirical evidence. Instead, he refers to the "global social perception that education, like good personal habits, is always job related."[54] And, as is typical when such assertions are made, he relies on the work of Richard Posner to support his statement.[55] Posner, in turn, created a presumption of such correlation based on "judicial and professional experience with educational requirements in law enforcement."[56] In fact, courts that have examined the empirical evidence concerning educational requirements have not shared Judge Posner's presumption or conclusion.[57] As in the *Hopwood* case, a presumption

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52 Selmi, *supra* note 6 at 1262.

53 "While the average black in 1980 now had twelve years of school, compared to twelve and a half for whites, other differences persisted. As college education became more important, whites maintained a significant advantage. In 1980, 17.1 per cent of whites had college diplomas, as compared to only 8.4 per cent of blacks." T.A. Cunniff, "The Price of Equal Opportunity: The Efficiency of Title VII After *Hicks*" (1995) 45 Case Western Reserve L. Rev. 507 at 535–36.

54 Epstein, *supra* note 9 at 214.

55 *Ibid*. at 214, n. 24.

56 *Aguilera* v. *Cook County Police and Corrections Merit Board*, 760 F.2d 844 (7th Cir.1985).

57 See *Freeman* v. *City of Philadelphia*, 751 F. Supp. 509 (E.D. Pa. 1990); *Officers for Justice* v. *Civil Service Comm'n*, 473 F. Supp. 801 (W.D. Calif. 1979); *Vanguard Justice Society* v. *Hughes*, 471 F. Supp. 670 (D. Md. 1979).

about the abilities and interests of blacks has been created by Posner's non-empirical scholarship.

A more complete picture of American employment patterns would reveal quite a different story. As Randall Kennedy explains:[58]

> [A] long-standing and pervasive feature of our society is the importance of a wide range of nonobjective, nonmeritocratic factors influencing the distribution of opportunity. The significance of personal associations and informal networks is what gives durability and resonance to the adage: "It's not what you know, it's who you know." As Professor Wasserstrom wryly observes,"'Would anyone claim that Henry Ford II [was] head of the Ford Motor Company because he [was] the most qualified person for the job?"

One area of employment that is often considered meritocratic, but which is based on a history of exclusionary tactics, is admission to the legal bar. In the early nineteenth century, admissions standards were greatly reduced to permit virtually any eligible man to practice law.[59] Women and blacks were, of course, formally excluded from the practice of law.[60] By the late nineteenth century, this practice began to come under attack as articles complained that "horde upon horde" were "connected with the practice of so noble a profession."[61] It was at this time that Christopher Columbus Langdell's views with respect to legal education came to predominate American culture. Two explanations for his influence on the profession are his ties to Harvard and his "scientific" justification for promoting legal education.[62] In other words, the elitist values of law and economics began to emerge during the age of Darwin and were partly responsible for the development of more formal standards for admissions to the bar. In 1921, and again in 1971, the American Bar Association expressed approval of the bar examination as a criterion for admission to the bar.[63] Today, only the state of Wisconsin relies on the diploma privilege for bar admission,

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58 Kennedy, *supra* note 43 at 1332–33 (quoting Professor Wasserstrom).

59 D.R. Hansen, "Do We Need the Bar Examination? A Critical Evaluation of the Justification for the Bar Examination and Proposed Alternatives" (1995) 45 Case Western Reserve L. Rev. 1191 at 1195.

60 See generally D.L. Rhode & D. Luban, *Legal Ethics*, 2d ed. (New York: Foundation Press, 1995) at 71. When the American Bar Association unknowingly admitted three black lawyers to membership in 1912, it immediately passed a resolution precluding further associational miscegenation. "The association thereby committed itself to lily-white membership for the next half-century." J.S. Auerbach, *Unequal Justice: Lawyers and Social Change in America* (New York: Oxford University Press, 1976) 65–66.

61 Hansen, *supra* note 59 at 1197–98.

62 *Ibid*. at 1199.

63 *Ibid*. at 1201.

eschewing the bar examination. Hence, reliance on the bar examination as a rigorous tool for admission to the bar is a phenomenon of the late twentieth century. The role of the legal bar to weed out the "hordes" who desired to practice law was an expression of overt class bias. This class bias persists today as "bar associations tend to concentrate on low-status attorneys who have committed improprieties, turning a blind eye to the abuses of name partners at prestigious firms."[64]

Whereas in the eighteenth and nineteenth centuries formal barriers excluded African Americans and women from the practice of law, today the bar exam disproportionately excludes African Americans from the practice of law.[65] Although one cannot prove directly that the examination requirement was created to weed out African Americans, circumstantial evidence does support this view. For example, the state of South Carolina eliminated the diploma privilege and instituted the bar examination requirement exactly three years after the first black law school opened in the state.[66] The "reading the bar" rule was eliminated in 1957, shortly after a black applicant used this method to gain admission.[67] The state of South Carolina, of course, defends each of these changes on race-neutral grounds[68] and it may be true that multiple factors (including racism) caused these changes. Similarly, in Philadelphia, applicants for admissions to the bar were photographed and black applicants were seated consecutively in the same row "to facilitate the grading of their examinations."[69] The racially conscious grading of the bar examination followed a covertly discriminatory preceptorship and registration system under which not a single black was admitted to the Pennsylvania bar between 1933 and 1943.[70] Hence, the bar exam (with its racial impact) is of recent vintage in the United States.

The bar exam persists as a selection device, despite its disparate impact, because it is thought to weed out incompetent applicants to the bar. In fact, the evidence suggests that "the bar exam is essentially an achievement test and does not test for what lawyers actually do."[71] It simply verifies a student's prior

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64 Lind, *supra* note 4 at 153.

65 Hansen, *supra* note 59 at 1219.

66 *Richardson* v. *McFadden*, 540 F. 2d 744 at 747 (1976).

67 *Ibid*. Under the "reading the bar" rule, an applicant apprenticed with a lawyer for a designated period of time and then automatically became a member of the bar.

68 *Ibid*. at 748.

69 Auerbach, *supra* note 60 at 294.

70 *Ibid*. at 128.

71 Hansen, *supra* note 59 at 1206.

privilege "that have already been tested for at least three times in a law student's career, namely, during undergraduate training, the LSAT, and law school training."[72] Recognizing the correlation between law school grades and passage of the bar examination, the Fourth Circuit stated: "An applicant for the Bar who has graduated from an accredited law school arguably may be said to stand before the Examiners armed with law school grades demonstrating that he possesses sufficient job-related skills. Why, then, any bar examination at all?"[73]

If the bar exam were required to withstand a rigorous standard of justification, it is doubtful that it would pass muster. Commenting on the selection of a cut-off score for passage of the bar exam, for example, the Fourth Circuit noted: "We tend to agree with appellants' expert that, if this second system is utilized in the precise manner described by the Bar Examiners, it would be almost a matter of pure luck if the '70' thereby derived corresponded with anybody's judgment of minimal competency."[74] And, when upholding the constitutionality of the bar exam under a very lenient constitutional standard, the Fourth Circuit acknowledged: "That is not to say that such an unprofessional approach leaves us with much confidence in the precise numerical results obtained."[75] Despite the apparent inefficiency of the bar examination, it has never been attacked by scholars in the field of law and economics. Instead, one might argue that the persistence of the bar examination is a reflection of the Langdellian trend toward trying to introduce scientific principles into the selection of lawyers, irrespective of the validity of those principles.

In fact, when the law tries to force employers to justify examination or education requirements, scholars in the field of law and economics complain loudly. The case that exemplifies this phenomenon is *Griggs* v. *Duke Power Co.*,[76] which was decided under Title VII of the *Civil Rights Act* of 1964, rather than the Constitution. As in the bar examination example, *Griggs* serves as an excellent demonstration of how educational and testing requirements change as overt entry barriers to blacks are eliminated. In *Griggs*, the employer changed the rules for promotion from labourer into higher-level jobs the day that Title VII went into effect (2 July 1965). For the first time, employees were required to pass a high school equivalency program in order to be promoted. Such

72 *Ibid*.
73 *Supra* note 66 at 749, n. 11.
74 *Ibid*. at 750.
75 *Ibid*. at 750, n. 14.
76 401 U.S. 424 (1971).

performance could only be established by achieving a proscribed score on the Wunderlic general intelligence test or the Bennett AA general mechanical test.

The United States Supreme Court concluded in the *Griggs* case that when such devices produce disparate impact against blacks, that they must be justified by business necessity.[77] Because employers have been unable to construct the evidence of test validity required under this standard, "the routine use of the Wunderlic and Bennett tests, condemned in *Griggs*, is today a thing of the past."[78] One might have expected law and economics scholars to applaud this result as it encourages employers to choose efficient, job-related selection devices rather than rely on presumptions about correlations between test scores and job performance. Instead, this line of cases has been roundly criticized as making it too expensive for employers to use testing and educational requirements that will withstand judicial scrutiny.

Richard Epstein has led the charge against requiring validation of such tests, presuming that testing serves a valuable purpose. His source for that proposition is the industry that creates and promotes these tests:[79]

> Notwithstanding their embattled status under Title VII, there is a widespread belief on the part of those who design and use general employment tests that these provide accurate and essential predictions of job success for individual workers and should therefore be regarded as an important, indeed an indispensable, aid in hiring and promotion decisions.

His reasoning is circular. He insists that we should permit educational and testing requirements to give young people an incentive to obtain more education.[80] But, of course, we could also caution young people from thinking that increased education always results in increased employment opportunities. They may want to consider other factors in seeking higher education such as the intrinsic satisfaction from such education or the differing types of jobs that may become available. Young people who choose to pursue a doctoral degree in the humanities must recognize that they may have had a higher earning potential through an inexpensive certificate program in the health-care field yet

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77 This is a higher standard than was employed in the Fourth Circuit's bar examination case. See *Richardson*, *supra* note 66 at 748: "Under the Equal Protection Clause of the Fourteenth Amendment the issue is still whether the examination is job related, albeit a less demanding inquiry [than under Title VII]."

78 Epstein, *supra* note 9 at 215.

79 *Ibid*. at 236.

80 "[B]y reducing the returns on education, it removes one of the incentives that young people have to expend money, time, and effort on acquiring an education." *Ibid*. at 215.

presumably enter the field for its intrinsic value. Carried to its logical conclusion, however, Epstein's argument would permit employers to virtually bar any individual from low-level employment who could not obtain high test scores or a college diploma irrespective of his or her aptitude for that particular job. For myself, an employer would make a terrible mistake in presuming that I was competent to perform adequately at a mechanical job, such as was at stake in the *Griggs* case, based on my ability to perform well on a general-intelligence test.

Another employment device that often harms the employment opportunities of blacks is word-of-mouth recruiting.[81] The American labour force is heavily segregated along racial lines. Because of segregation in friendship and housing patterns, word-of-mouth recruiting therefore results in perpetuation of those segregated patterns at the workplace. As the Fifth Circuit concluded in 1973, word-of-mouth recruiting "operates as a 'built-in-headwind' to blacks" at a workforce in which only 7.2 per cent of the employees are black.[82] Similarly, a 1994 University of Minnesota study of poor youths in Boston found that blacks in the sample had more schooling but lower wages than whites, because whites had better employment contacts: "Whites who found jobs through relatives earned 38 per cent more than the blacks who did. But for those who got jobs without contacts, the white-black earning gap was only 5 per cent."[83] Word-of-mouth recruiting therefore affects both employability and wages.

Word-of-mouth recruiting has been upheld as "efficient" even when the evidence demonstrates that it would have been equally efficient to notify the state unemployment service of a job opening. Then, however, the applicants would have been disproportionately black given the disproportionately high rate of unemployment in the black community. In other words, unemployment by a particular racial group is easily perpetuated if word-of-mouth recruiting rather than notification of the state unemployment office is the primary method of recruitment for an entry level job: "[T]he presence of unconscious discrimination may prevent a competing firm from recognizing the opportunity presented by the

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81 For a discussion of word-of-mouth recruiting at Bethlehem Steel, see M. Johnson, "Affirmative Action Isn't the Only Example of Group Privileges" *The Atlanta Constitution* (31 March 1996). In this example, the employer gave first preference to the children of employees and justified the preference by stating: "The son or daughter, knowing the father is present, are going to do the best they can ... That's an asset for the company."

82 *United States* v. *Georgia Power*, 474 F.2d 906, 925 (5th Cir. 1973).

83 J. Tilove, "White "Legacies" vs. Affirmative Action" *The Arizona Republic* (9 April 1995).

discriminated class of employees, further constraining the effect of market competition as a means of eradicating employment discrimination."[84] An employer may choose to pursue an application process that minimizes its costs, but which process will it choose? Will it choose to notify the state unemployment office or will it encourage employees to tell their friends and relatives of employment openings? Both mechanisms are cheap and thereby efficient. The first process, however, will usually result in large numbers of minority applicants and the second (in an already segregated workplace) will usually not.[85] A search for efficiency, combined with conscious or unconscious racism, may result in the choice of word-of-mouth recruitment. The Seventh Circuit has ratified word-of-mouth recruitment as consistent with the principles of efficiency and thereby presumed that it is also consistent with the principle of nondiscrimination. The argument by the EEOC in these cases that state employment services were not, but should have been, used for employment advertising was ignored. There is no reason to equate efficiency with nondiscrimination. Multiple efficient sources for employees exist. Why, one should ask, was a particular device chosen?

The first word-of-mouth recruitment case to be decided by the Seventh Circuit is *EEOC* v. *Chicago Miniature Lamp Works.*[86] Chicago Miniature relied primarily on word-of-mouth recruiting for the job classification in question — entry-level factory jobs. This word-of-mouth recruiting resulted in blacks, who have historically been underrepresented in Chicago Miniature's workforce, continuing to be underrepresented in its applicant pool. By contrast, this system worked to the advantage of Hispanics who were well represented at the workplace and, accordingly, the applicant pool. The trial court found for the plaintiffs in the disparate impact claim.[87] On appeal, the Seventh Circuit overruled the district court judge, finding that the factory was located in a Hispanic and Asian part of Chicago where it was unrealistic to expect blacks to desire to work. It blamed the low application rates for blacks on lack of interest in such jobs, rather than on any affirmative actions on the part of the employer.

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84 Selmi, *supra* note 6 at 1281.

85 Hence, as early as 1968, Professor Blumrosen, who has also worked for the EEOC, suggested that "a requirement outside of the South that all employers utilize the employment service with respect to all jobs will benefit Negro job seekers to a proportionally greater extent than white, and should be imposed." A.W. Blumrosen, "The Duty of Fair Recruitment Under the Civil Rights Act of 1964" (1968) 22 Rutgers L. Rev. 465 at 481.

86 947 F.2d 292 (7th Cir. 1991).

87 *EEOC* v. *Chicago Miniature Lamp Works*, 622 F. Supp. 1281 (N.D. Ill. 1985).

In the court's words: "Miniature is not liable when it passively relies on the natural flow of applicants for its entry-level positions."[88]

Eight years later, the *Miniature* holding was transformed into the conclusion that word-of-mouth recruitment is inherently "efficient" and "cheap" in *EEOC* v. *Consolidated Service Systems*,[89] a race-discrimination suit brought against a cleaning company owned by an immigrant from Korea.[90] As the defendant admitted, he relied almost exclusively on word-of-mouth recruiting to hire employees for his company, which employed unskilled employees at minimum wage. Nearly all the employees of the company were Korean American, despite the fact that the company was situated in the majority-black city of Chicago. Writing for the Seventh Circuit Court of Appeals, Posner J. affirmed the district court's decision dismissing the suit. Judge Posner was apparently heavily persuaded by the efficiency of Consolidated's hiring practices. Not less than four times, Posner J. recites that Consolidated picked the cheapest and most efficient method of hiring through word-of-mouth recruitment. As Posner J.says: "It is clearly, as we have been at pains to emphasize, the cheapest and most efficient method of recruitment, notwithstanding its discriminatory impact."[91] Judge Posner's nonempirical assertion about efficiency entirely overlooked the efficiency of notifying the state unemployment office of job openings.

Judge Posner's nonempirical assertions were recently repeated in a dissenting opinion by Seventh Circuit Judge Manion in *EEOC* v. *O & G Spring and Wire Forms Specialty*.[92] In this case, the district court found, and the court of appeals affirmed, that the defendant had failed to offer justification for its pattern of *zero* blacks hired for a six-year period preceding the filing of a charge of race discrimination against O & G. Judge Manion criticized the EEOC's overwhelming statistical case with the assertion that "English-speaking job seekers may not want to work in an environment of predominantly foreign languages."[93] As in the *Chicago Miniature Lamp Works* case, he concluded that lack of interest on the part of blacks in the area was more likely to explain the low rate of black employment than an act of discrimination by the employer. The

88 *Supra* note 86 at 305.

89 *Supra* note 11.

90 As with Posner's unsubstantiated claim in 1974 about the effects of affirmative action on blacks, an unsubstantiated claim about the effect of word-of-mouth recruiting became true when recited again eight years later.

91 *Supra* note 11 at 236.

92 38 F.3d 872 (7th Cir. 1994).

93 *Ibid*. at 888.

only evidence about the interest of blacks in such employment contradicts Manion J.'s assertion. After a complaint of discrimination was filed with the EEOC, there was a dramatic increase in applications by African Americans at the company.[94] Did African Americans all of a sudden become interested in working alongside non-English-speaking employees? As with the affirmative-action cases, Manion J. makes assumptions about blacks that one would not make about whites. This case reflected an employment setting in which Polish Americans and Spanish-speaking Americans worked side-by-side. Those two groups of whites did not share a common language but appeared to be comfortable with each other in the workplace. Yet Manion J. assumed that African Americans, who spoke yet a different language, would not be comfortable working alongside these two groups.

Manion also overlooked the arguments available concerning economic rationality in this case. Unlike the *Consolidated Service* case, O & G was located in the heart of a predominantly black neighbourhood. It was therefore economically rational for blacks to seek employment at O & G. Since Manion J. could make claim to no argument of economic rationality, he therefore invented national origin or language animus on the part of African Americans, with no testimony to support such animus in the record. It is far easier to blame unemployed blacks for their low employment record than to cast blame on O & G management.

Judge Manion's theme strongly reflects the values of efficiency and objectivity found in law and economics. To bolster his efficiency argument, he quotes Posner J.'s opinion in *Consolidated Service*: "It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring."[95] Word-of-mouth recruiting should be tolerated because it is the cheapest, even if it knowingly results in a loss of employment opportunities for African Americans.

Applying the principle of objectivity, he contends that there is no way to argue why one subgroup deserves preferential treatment over another subgroup: "By not taking the language factor into consideration the EEOC has in effect put a quota on one vulnerable group at the expense of another."[96] But the "language

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94 *EEOC* v. *O & G Spring and Wire Forms Speciality Co.*, 705 F. Supp. 400 at 403 (N.D. Ill. 1988).

95 *Supra* note 92 at 893.

96 *Ibid*. at 892.

factor" was Manion J.'s invention because the evidence showed that it did not deter the employment of two groups of whites at that workplace.

The clever move in Manion J.'s opinion is to twist a requirement for equal treatment — giving blacks and others an equal opportunity to hear about openings and be hired at O & G — into a "quota" that purportedly pits "one vulnerable group" against another.[97] The logic is that affirmative action is inefficient because it reflects non-merit-based preferences for blacks, but word-of-mouth recruitment for non-blacks is permissible because it is efficient despite its granting non-merit-based preferences for non-blacks. The measure of efficiency is the extent of black employment. When rates of black employment gets higher, we must attribute it to "quota madness"[98] rather than the removal of barriers toward advancement. When white employment declines, we must attribute it to affirmative action. Black employment is inefficient whereas white employment is efficient.

V. CONCLUSION

It is not typical for scholars to examine diverse areas of the law such as alumni preference in admissions at educational institutions and word-of-mouth recruitment in employment settings. Such an examination, however, allows us to acquire a snapshot that might otherwise escape us. We can uncover values that might otherwise remain hidden.

Alumni preferences for white children and word-of-mouth recruiting for white employees are practices that help perpetuate class advantage for a subgroup of whites in our society. Despite the inefficiency of disrupting the merit principle by limiting the applicant pool or creating a two-tiered definition of merit, these practices are upheld as praiseworthy. When blacks try to change the rules so that they, too, can have an opportunity to gain access to education or employment, they are told by whites that they are perpetuating stereotypes and stigma through affirmative action or "quota madness." Maybe it's time for whites to examine their own sources of privileged affirmative action — from private schools to safe neighbourhoods to good nutrition — and ask whether their success is really based solely on "merit." For law and economics scholars to truly apply colour blind principles, they must locate and describe white privilege, not simply the modest attempts by blacks to attempt to even the score.

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97 *Ibid*. at 892.

98 See J. Bovard, "The Latest EEOC Quota Madness" *The Wall Street Journal* (27 April 1995) A14.

Canada seems to have escaped many of the phenomena that describe the hiring and educational practices in the United States. Testing for education or employment is not as widespread in Canada as it is in the United States. Affirmative action is constitutionally protected. Canadian universities are generally public institutions, which do not have the money-conscious perspective of elite, private American universities. A formal bar exam does not serve as a barrier to admission to the Canadian bar; instead, a more practice-oriented process is used to determine who is qualified to practice law. In other words, law and economics does not seem to be winning in Canada. And, for the sake of its national commitment to multiculturalism, I hope it does not.