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ARTICLES

IS THE CONSTITUTION A CONTRACT FOR LEGITIMACY?

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The author examines whether a state's constitution has a role to play in determining how a liberal political order fends off the dangers that emerge from disagreements over morally contentious issues of public policy. He asks how a constitution can contribute to governmental respect-worthiness and legal legitimacy, and concludes that the "contractual constitution" theory alone cannot adequately answer the question.

L'auteur examine si la constitution d'un État joue un rôle dans la détermination de la mesure dans laquelle une ordonnance politique libérale peut écarter les dangers pouvant découler des mésententes sur les questions d'ordre public moralement controversées. L'auteur demande de quelle manière une constitution peut contribuer au respect, au mérite et à la légitimité juridique du gouvernement. Il conclut que la théorie de la constitution contractuelle à elle seule ne peut répondre à cette question de manière adéquate.

> [O]ur exercise of [coercive] political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy.[1]

> [E]very difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all republicans, we are all Federalists. . . .[2]

I. THE QUESTION STATED

A. What Is Not At Issue

The enterprise of law — we assume in what follows — is morally beset at every turn. Not only do legislators act wrongly when they write immoral laws, executives and judges act wrongly when they give effect to laws for which they can find no morally redemptive interpretations or modes of application in the circumstances.[3] It may or may not sometimes be an excuse that responsible officials act thus for the sake of perceived greater goods of civic fidelity, social

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1 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at 217.

2 Thomas Jefferson, *Writings*, ed. by M. Peterson (New York: Viking Press, 1984) at 493.

3 See *e.g.* Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986) at 108–12, insisting that any "full theory of law" must accommodate such a view.

peace, or the preservation of a political regime deemed on the whole to be morally worth preserving.[4] We are not here concerned to decide such questions.

What concerns us, rather, is the chance that citizens in constitutional democracies may find themselves divided deeply over when or whether the positive legal order and its ministry, legislating with regard to major, morally contentious issues of public policy, have crossed over the line of immorality too grave to be borne even for the sake of the moral goods of fidelity and "union."[5] The question before us is how a liberal political order hopes or contrives to fend off the dangers (including moral dangers) that such disagreements apparently can pose if they arise. Does a country's *constitution* have anything to do with that?

B. Government By Law, Coercion, and Principled Disagreement

We want — we need — to be societies governed by law. Government by law prevails to the extent that inhabitants of a country are predominantly disposed (a) to conform their conduct to rules and principles pronounced to be law there by some distinct class or classes of officials, (b) to organize their activities with a view to compatibility with such official pronouncements, and (c) to support, or at least to accept, the use of social force to secure compliance in general with such pronouncements. Government by law, we feel certain — and I'm confident that I speak here for readers in many democratically governed countries — carries with it the potential for incalculable benefits to everyone, achievable in no other way: call them social peace and co-operation, call them civic friendship and community, call them justice.

Now, an essential aspect of government by law, a crucial device by which we understand this social practice to bring such great ends conceivably within reach,

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[4] See *e.g.* Louise Weinberg, "Of Theory and Theodicy: The Problem of Immoral Law," in J. Nafziger & S. Symeonides, eds., *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* (New York: Transnational Publishers, 2002) 473 at 497–98. Compare Abraham Lincoln's famous public letter to Horace Greeley: "I would save the Union. . . . If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves I would do it, and if I could do it by freeing some and leaving others alone I would also do that": "Letter to Horace Greeley (22 August 1862)," in R. Basler, ed., *The Collected Works of Abraham Lincoln* (New Jersey: Rutgers University Press, 1953) at 388–89. The example is maximally poignant, because chief among the greater goods that Lincoln probably had in mind, via saving the Union, was the "ultimate extinction" of slavery across the entire territory fated to be a part either of the United States or of the Confederacy (had it lasted). See Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Lanham: Rowman & Littlefield Publishers, 2000) at 249–51.

[5] See *supra* note 3. If you think such disagreements can't happen where you are, see Symposium, "The End of Democracy? The Judicial Usurpation of Politics" [1996] First Things 18; William J. Bennett *et al.*, "The End of Democracy? A Discussion Continued" [1997] First Things 19.

is that people experience a pressure — a degree, at least, of compulsion — to support and abide by sundry specific laws and other legal acts with which they do not agree.[6] And not only acts with which they don't agree, but acts that they confidently judge to be quite wrong — witless, vicious, unjust, or all of the above — and from what they sincerely take to be a public and not just a selfish point of view. And since judgments of the public merits of legal acts rarely will be unanimous, and disagreements about this often will be not only intractable and sharp but also honest and reasonable on all sides,[7] we may as well say that the benign and urgent aims of government by law require that people experience a compulsion or pressure to abide by legal acts that, so far as they honestly can tell, simply *are* wrong, *are* unjustified on the merits, objectively and not just according to their own personal assessments.[8]

The pressure to comply may be "internal" or moral, "external" or material. A common view is it must be some of both in order for the venture of government by law to succeed.[9] The point for now is that in lending our support to the venture — and we do it every day, by countless large and small acts of compliance and collaboration with our country's governmental regime — we involve ourselves in a social mobilization of pressure and force against ourselves and others to comply with legal acts including some that very possibly are any or all of witless, vicious, and unjust.

For that, we want justification. Can a constitution supply it?[10]

C. Constitutionality as Political Justification

You might think of your country's constitution as a publicly binding statement of the terms of a political association that citizens are morally justified in supporting, using whatever force those terms permit to secure compliance

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6 See Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) at 7. This is no less true in a Kantian than in a Hobbesian view. See Immanuel Kant, *The Metaphysical Elements of Justice*, trans. by John Ladd (Indianapolis: Hackett Publishing, 1999) at s. 42; Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999) at 36–62.

7 See *e.g.* Part III, below. On "reasonable," see *infra* note 103 and accompanying text.

8 Again, I wish to emphasize that what I have just said is entirely consonant with the proposition of a moral and civic obligation resting upon legislators and judges to avoid immorality in laws and legal interpretations. Although these officials may in fact have tried their best, the country's people may remain divided as to whether they have succeeded or even really have tried.

9 See *e.g.* Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Massachusetts: MIT Press, 1996); H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 189.

10 See the first epigraph to this article.

with laws enacted in accordance with them.[11] The constitution thus would act like a contract, although — lacking actual agreement from all concerned — it wouldn't be one.

The conditions for your thinking in this quasi-contractual way about your country's constitution may be stringent, but they are far from unimaginable. It would have to be, in the first place, a constitution of a certain sort,[12] and maybe you would have to rank it high on a scale of political-moral excellence for constitutions of that sort.[13] Say it was and you did. Say this constitution provided for a strong and extensive form of judicial review of governmental acts, and say you regarded the country's constitutional judiciary as a reliable authority on questions of constitutionality — as good as yourself and your neighbors, anyway, or better. Say you have come considerately to these approving judgments regarding the constitution's substantive moral merit and the system's reliability in screening for constitutionality. Wouldn't you, then, be acting in a morally responsible way if you assumed that any demand the state might make for compliance with its laws would be morally justified — and thus you would be, too, in supporting the state's ability to make such demands effective? Your approving judgments, after all, sum up to telling you that, with rare and negligible exceptions, governmental operations in your country conform at all times to the requirements of a morally commendable constitution. Isn't that enough for anyone — or anyone reasonable — to ask?

Below, I explain why I consider these to be questions worth raising.[14] I then suggest that no robustly affirmative answer to them is available,[15] at least to liberals who take the alleged facts of "reasonable pluralism" and "oppression" with utmost seriousness.[16] I do *not* suggest that liberal political legitimacy is unachievable, or that a good constitution in no way can contribute to its achievement. I say only that I do not clearly see how full-gauge "political" or "post-metaphysical" liberals can count on any constitution for a consensualistic ("contractual" or "procedural") contribution of the sort I have just described.[17]

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11 These might be laws directly regulating conduct, or laws requiring contributions to the resources governments use in controlling events by non-regulatory means.

12 See Part II(B), below.

13 But see Part VI, below.

14 See Parts III, IV, below.

15 See Part V, below.

16 See Rawls, *supra* note 1 at 36–37. To this extent, I am aligned here with the "agonistic" school of democratic political theory. See *e.g.* Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000); James Tully, Book Review of *The Democratic Paradox* by Chantal Mouffe (2002) 30 Political Theory 862.

17 See also Frank I. Michelman, "Constitutional Legitimation for Political Acts" (2003) 66 Modern L. Rev. 1; Frank I. Michelman, "Postmodernism, Proceduralism, and Constitutional Justice: A Comment on Van der Walt and Botha" (2002) 9 Constellations 246.

II. LEGITIMACY AND THE SUBSTANTIVE CONSTITUTION

A. Legitimacy and Respect-Worthiness

Governments demand compliance with their laws and use force, when needed, to secure it. Questions arise as to whether anyone ever has a morally justified complaint about such uses of force by the government.[18] The answers sometimes are said to depend on the "legitimacy" of the laws in question or of the governmental order that seeks to effectuate them.[19]

Word use is tricky here, and I want to be careful. Questions of legitimacy are not constantly on our minds. When they do come to the fore, the occasion probably is the government's enactment or enforcement of some especially provocative law.[20] Yet we don't judge legitimacy law by law. Legitimacy (where it exists) descends to specific legal acts from the "respect-worthiness," as I'll call it, of an entire system, or practice, or "regime" of government.[21] Still, for the sake of what I hope will be clarity, I shall follow lay usage and apply the term "legitimate" to legal acts taken singly. What must be borne in mind throughout is that when we call a given law "legitimate" we imply a certain kind of favorable judgment — "respect-worthy" — of the governmental regime that produced the law (as opposed to a free-standing, favorable judgment of the law). As I use them, the two terms are strictly correlatives: to judge a given system's legal outputs legitimate is to judge the system respect-worthy, and vice-versa.[22]

So to judge a law legitimate, one need not judge it right, or just, or morally blameless, or work in which the maker can take pride. One can judge the law unjust and badly misguided, and nevertheless legitimate. One does so insofar as one judges respect-worthy — worth upholding, on the whole — the entire

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[18] This question should be kept distinct from that of whether the complaining party has a moral obligation to comply. See Allen Buchanan, "Political Legitimacy and Democracy" (2002) 112 Ethics 689 at 691–92. It is possible, at least conceptually, that such a compliance obligation would be lacking, even if the party also lacked any morally justified complaint against the state's pursuit of compliance by coercive means. See *ibid.* at 693–95.

[19] See Rawls, *supra* note 1 at 216–17: equating a liberal "principle of legitimacy" with a response to the question of when and how our exercises of our shares of coercive political power might possibly be "justifiable to others as free and equal." We speak here, of course, of "legitimacy" in its "normative," not its "descriptive" sense. See Buchanan, *ibid.* at 689.

[20] Among such occasions, I include provocative judicial constructions and applications of law, including constitutional law, in debatable cases. See Part V(C), below.

[21] See Buchanan, *supra* note 18 at 689–90: "[A]n entity has political legitimacy if and only if it is morally justified in wielding political power, where to wield political power is to attempt to exercise a monopoly . . . in the making, application, and enforcement of laws."

[22] The respect-worthiness of a governmental system would seem, for many purposes, to be a matter of degree. As I am using the term, however, respect-worthiness is a dichotomous judgment: the system either is or is not worth upholding, all things considered, including the practically available alternatives. See *supra* notes 4, 5 and accompanying text.

governmental system, or practice, that produced the law, despite that system's having produced the bad law and maybe others as bad or worse. The core idea is that if the system taken whole is respect-worthy, then the state is, so to speak, within its rights enforcing every law that issues from the system, including even very bad or immoral ones.

Some may say the case I have just posited is an impossibility, because a regime that insists on enforcing laws that really are immoral is *ipso facto* incapable of deserving respect. I offer no case against such a view. My claim is only that whoever holds it has no use for the notion of legitimacy. Legitimacy, by my understanding, is a concept that finds breathing space *only* within a scheme of thought allowing that people in a state can be justified in supporting the state's enforcement of bad or immoral laws.

It is no mystery why people might be disposed to think so. I'll bet that *you* are so disposed, probably because you associate certain commanding moral and other practical goods with the practice of government by and under law and you share the very widespread belief that achievement of these goods requires that people yield to demands for compliance with bad, wrong, and even unjust laws[23] (which, to repeat still once more, is not to deny that everyone involved in the writing and application of laws stands under obligations to avoid unjust legal enactments and interpretations as best they can[24]). These "goods of the political"[25] then — and we may include the good of respect for and co-operation with your fellow citizens engaged in democratic processes of law-making[26] — could provide moral justification for the mobilization of social pressure and public force as required to ensure compliance with each and every law that issues from the currently established governmental system.

It couldn't, however — and this will be a crucial point in my argument to come — be *whatever* governmental system *just happens* to be in force.[27] In order to be plausible, the idea that laws can be both unjust and deserving of support and enforcement must be qualified to say that this may be so, but only when the system out of which the bad laws issued is able, even so, to pass muster by a standard deemed apt to the purpose.

Now, what standard might that be? Enter the constitution. It is tempting to think that a country's constitution supplies, or codifies officially, a publicly

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23 See Part I(A), above.

24 See *supra* note 3 and accompanying text.

25 See Rawls, *supra* note 1 at 139, 157, on "the very great goods of the political."

26 See Waldron, *supra* note 6 at 100: "[T]he demand that interests me . . . is a demand for a certain sort of recognition and . . . respect — that *this*, for the time being, is what the community has come up with, and that it should not be ignored or disparaged simply because some of us propose, when we can, to repeal it."

27 See Part VI, below.

acknowledged standard for gauging the respect-worthiness of government in that country. Suppose a constitution really could do that, and suppose further that people could know that no unconstitutional acts of government ever would occur or be allowed to take effect. It would follow that no one ever could frame a publicly cognizable, moral objection to any of that government's efforts (using constitutionally authorized means) to enforce any of its laws.

B. The Substantive Constitution and its Uses

It seems that only a constitution of a particular type could be thought to carry a country's agreed or public standard of respect-worthy governmental operations. The constitutions of Canada and the United States exemplify the type I have in mind. Each of our constitutions is written. Each composes a body of norms that are generally perceived to stand apart from, and above, the rest of the *corpus juris*. Each contains not only procedural prescriptions for valid law-making and the configuration of government powers, but also a "substantive" part, a bill of individual and maybe group rights. It is the substantive part — what I'm going sometimes to be calling the "substantive constitution" — on which I wish to concentrate.

Consider what sort of difference a substantive constitution makes to the formal legal order of the country that has it. Very simply, the substantive constitution denies legal validity to certain political acts that no one doubts have been accomplished in procedurally regular ways.[28] In the lingo of jurisprudence, the substantive constitution enters into the legal system's "secondary rules" and "rules of recognition."[29] To use an example to which we shall return: In the United States today, as a consequence of our having the substantive constitution we have, a so-called Act of Congress is no more legally valid — it no more makes or affects the law of the land — if it "respects an establishment of religion"[30] than if it lacks an approving vote of the Senate.[31] But why should people wish to complicate their country's legal order in this way, piling substantive conditions of validity onto the procedural ones that inhere

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28 "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." *Constitution Act, 1982*, s. 52(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; "This Constitution, and Laws . . . which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land . . . ." U.S. Const. art VI, § 2; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

29 See generally Hart, *supra* note 9 at 89–107.

30 "Congress shall make no law respecting an establishment of religion": U.S. Const. amend 1.

31 See U.S. CONST. art I, §7, cl. 2. The claim in my text may be a bit of an oversimplification, but it is close enough to right for present purposes. See generally Kent Greenawalt, "The Rule of Recognition and the Constitution" (1987) 85 Mich. L. Rev. 621.

necessarily in any mature legal system?[32] Why, after all, should we not let the fact that something was duly decreed by solemn Act of Parliament be sufficient to make it a valid law, assuming the parliamentary institutions are decently democratic in form? Why tack on these further, substantive requirements for validity? What, really, is a substantive constitution good for? And how, if at all, does it or can it contribute to governmental respect-worthiness and legal legitimacy?

Oh, come on, isn't it obvious? Well, yes, up to a point. There *is* a plain answer to these questions, one with which I have not the slightest quarrel.[33] One might think that respect-worthy government is government whose form and operations, on the whole, are decently congenial and conducive to human interests and human rights. One might further think that the chances for such political happiness in one's country are favorably affected by insertion into the country's legal order of a given (one thinks an aptly crafted) set of substantive requirements for the legal validity of political acts, perhaps also providing — although this is a separable question[34] — for an independent judicial check on questioned political acts to make sure they comply with these substantive requirements for validity.

Such a belief can never be better than a guess, for it must rest on some mix of observation and speculation regarding the effects of the insertion on the overall play of politics in your country, and those are matters famously intricate and obscure.[35] Nor could such a belief on any single person's part ever pretend to objectivity in the sense that one could expect it to be shared by every reasonable person to whom consideration is owed in deciding what to do, because no one reasonably can expect his or her own exact ideas about what makes for decency in government — and, accordingly, about whether the constitution in question is in fact "aptly crafted" to that end — to be shared by everyone else who is reasonable. There is bound to be reasonable disagreement about these matters.[36] But still it may seem to you — I confess it does to me, although the matter is controversial — that the over-all play of a country's politics probably is spun by something like the Canadian, American, or South African charters and bills of rights in directions rightly welcome to such large

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[32] See Hart, *supra* note 9 at 91–93.

[33] For fuller discussion, see Frank I. Michelman, "Integrity and Legitimacy: Constructing the Respect-Worthy Governmental System" Fordham L. Rev. (forthcoming) ["Integrity and Legitimacy"].

[34] See generally Mark Tushnet, *Taking the Constitution Away From the Courts* (Princeton: Princeton University Press, 1999).

[35] See *e.g. ibid.*

[36] Compare Rawls, *supra* note 1 at 36–37, describing a reasonable pluralism of comprehensive ethical and philosophical views, with Waldron, *supra* note 6 at 105–106, 112–13, 152, 158–59, pointing out the inevitable, resulting persistence of reasonable disagreement over the demands of justice on matters of public policy, including at the constitutional level.

fractions of our populations as to make the insertion a morally desirable move. And that, then — a hoped-for gross beneficial effect on political outcomes — is the simple-minded, "plain vanilla"[37] answer to the question of how a substantive constitution might contribute to governmental respect-worthiness and legal legitimacy.

But often it seems we Americans — I won't try to speak for others — expect something more from our Constitution. We want it not only to promote but to underwrite a political good, and the political good we want underwritten is not just the on-the-whole respect-worthiness of government as *we* see it but *public agreement on* that point. We look to the Constitution as a safeguard against the feared divisive effects of the disagreements we can't overcome — and we know they are many and deep — about what is and is not good and right government. We see the Constitution as the core of a social pact to keep our political divisions at bay and to maintain political co-operation in spite of them. We want the Constitution, in sum, to be the locus of a political agreement on legitimacy that transcends our disagreements on policy.

Let me offer an example of how it works.[38]

III. A RULING ON CONSTITUTIONALITY — AND WHAT ELSE?

Recently, in the case of *Zelman v. Simmons-Harris*,[39] the Supreme Court of the United States gave judgment, of a sort, in a hot and long-simmering political dispute. The Court ruled in favor of the constitutionality of what we call "school vouchers." Vouchers respond to the felt desires and needs of some parents of school-age children to have their children attend non-public schools, secular or religious. A government agency issues to the parent a kind of a cheque drawn on public funds — the "voucher" — which the parent then can "cash" in payment of tuition to the non-public school of choice, assuming that school's willingness to participate in the arrangement.[40]

Why would parents feel impelled to seek off-public education at special, public expense, when free, local public education is available to all? Many do

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37 I copy Carol Rose. See Carol Rose, "The Ancient Constitution vs the Federalist Empire: Anti-Federalism from the Attack on 'Monarchism' to Modern Localism" (1989) 84 Nw U. L. Rev. 74.

38 For another, more dramatic example, see Frank I. Michelman, "Living With Judicial Supremacy" (2003) 38 Wake Forest L. Rev. 579 at 580–85, 606–609.

39 *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002) [*Zelman*].

40 A voucher scheme may make vouchers redeemable at public schools in districts other than the one where the child resides, thus possibly — for example — enabling residents of a city school district to gain entry to a suburban school that is open "free" only to residents of the suburb. For present purposes, we may regard such out-of-district public schools, to which access would not be available but (possibly) for a voucher program, as "non-public" schools.

so because they find the local public schools — the ones to which their children normally would be assigned — to be failing educationally,[41] and indeed voucher schemes often are explained as a device for upgrading educational performance all-round, by the time-honored American cure: competition.[42] Other parents may press their demands for a quite different reason, namely, a specific preference for religiously inflected schooling for their children.[43]

For religiously motivated parents who are able to obtain vouchers, the choice of where to spend them certainly will land on a religiously affiliated school, whose daily routines include a modicum, at least, of expressly religious activity and instruction. What of the parents who simply seek an alternative to what they see as failing or inadequate local public schools? It seems that they, too, may be channeled by the state's voucher program towards religious schools, depending on the specifics of the program. The scheme upheld by the Supreme Court in the *Zelman* case shows how this can happen. That scheme made vouchers available only to economically needy parents, and in amounts that would not typically cover the full cost of schooling at non-public schools actually operating in the region.[44] The vouchers thus would be acceptable only to receiver schools "willing to make up the difference,"[45] a class that religious schools seem likely to dominate.[46]

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41 See *e.g.* Charles Fried, "Five to Four: Reflections on the School Voucher Case" (2002) 116 Harv. L. Rev. 163 at 170 (citing authorities).

42 See *e.g.* Milton Friedman & Rose D. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 89–90; Milton Friedman, "The Market Can Transform Our Schools," Editorial, *The New York Times* (2 July 2002) A21 (both cited in Fried, *ibid.* at 170–71, n. 34).

43 The voucher scheme recently upheld by the U.S. Supreme Court in the *Zelman* case, *supra* note 39, made funds available only to economically needy parents of children attending "failing schools"; Fried, *supra* note 41 at 169. See *Zelman* at 2463–64. It thus did not seem to have been designed mainly or specifically for parents seeking religious education at public expense, as opposed to those simply seeking an alternative to the "failing" local public school. See *Zelman* at 2495 (Souter J., dissenting) (noting that, out of all families spending their vouchers at religious schools, only one third "embraced the religion" of the school they chose).

44 See *Zelman*, *ibid.* at 2464; Fried, *supra* note 41 at 272. The scheme in *Zelman* imposed a ceiling on what a receiving school could charge a low-income voucher user, at a level that easily would cover tuition charges at typical religious schools in the region, but also would fall well short of the typical charge at secular private schools. See *Zelman* at 2495 (Souter J., dissenting).

45 Fried, *ibid.* at 172.

46 See *e.g. Zelman*, *supra* note 39 at 2486 (Souter J., dissenting). "[T]he overwhelming proportion of . . . appropriations for voucher money must be spent on religious schools if it is to be spent at all": *ibid.* at 2495–96 (Souter J., dissenting). Of the schools participating in the scheme upheld in *Zelman*, 82 percent had a religious affiliation. Of children assisted, 96 percent used the vouchers at religiously affiliated schools. See *Zelman* at 2464. The significance of these facts is contested. See *e.g. Zelman* at 2469–71 (the Court's majority taking issue with the inference that "because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of

Not only, then, are voucher schemes widely perceived as siphoning funds from the support of financially strapped public schools.[47] They also strike many Americans as an obvious kind of state subsidy for religious education, and they anger many taxpayers by forcing them, as they see matters, to contribute to the financial support of religious institutions.[48] The schemes thus hit on American nerves at three political hot-spots at once: education, religion, and taxes. No wonder they've become a major bone of American political contention, sustained and sometimes bitter. Of course, Americans being how we are, Tocqueville could have told you where it all was headed: to court.[49]

In the *Zelman* case, the voucher scheme — enacted by the State of Ohio for the benefit of children caught in the beleaguered school system of the city of Cleveland — was attacked in court by taxpayers who claimed it was a constitutionally prohibited law "respecting an establishment of religion."[50] That claim was plausible, because the constitutional prohibition has long been held to cover not just governmental support for one religious denomination over others but also government's use of its coercive powers to support or favor religion as opposed to non-religion.[51] But the defense was plausible, too, because, first, the choice to accept a voucher and redeem it at a religious school ultimately is not the state's, it is the parent's,[52] and, second the Ohio voucher scheme quite credibly served a worthy secular public interest, that in fair educational opportunity for children caught in "a demonstrably failing public

private nonreligious schools"); *Zelman* at 2476–80 (O'Connor J., concurring) (defending at length and in detail the neutrality of the voucher system at issue in *Zelman*).

47 For example, Sandra Feldman, President of the American Federation of Teachers, contends that vouchers "really [mean] taking money away from inner city schools so a few selected children can get vouchers to attend private schools, while the majority of equally deserving kids, who remain in the public schools, are ignored." Sandra Feldman, "Let's Tell the Truth" (November 1997), <www.aft.org/stand/previous/1997/1197.html>. See Fried, *supra* note 41 at 172 and n. 36, citing authorities who take this position.

48 It is clear and undisputed that much of political energy in support of voucher schemes has come from religious schools and their supporters. See *e.g.* Fried, *ibid.* at 166–67, 171.

49 "There is almost no political question in the United States that is not resolved sooner or later into a judicial question": Alexis de Tocqueville, *Democracy in America*, trans. by H. Mansfield & D. Winthrop (Chicago: University of Chicago Press, 2000) at 257.

50 "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. 1. This clause apparently was not, at its inception, understood to impose any restriction on religious establishments at the state or local levels of government, but that it does so now is undisputed. See Gerald Gunther & Kathleen Sullivan, *Constitutional Law*, 14th ed. (New York: Foundation Press, 2001) at 1439–40.

51 The view that "government might support religion in general so long as it does not prefer one religion over another" has "never come close to commanding a majority of the [Supreme] Court." Gunther & Sullivan, *ibid.* at 1437.

52 See *Zelman*, *supra* note 39 at 2467–68. Critics contended that the Ohio program's design details so severely restricted realistic parental options as to make the choice to send a child to a religiously affiliated school effectively the state's. The Court's majority simply did not agree with that assessment. See *supra* notes 44–46 and accompanying text.

school system."[53] In the end, the Supreme Court upheld the constitutionality of voucher schemes by — did you guess? — a vote of five to four.[54]

Reasonably supportable as the action of the Court's majority may appear, and welcome as it surely is to many Americans both religious and non-religious, it is not guaranteed to quiet controversy. In fact, it could inflame civil strife or expand it, by lifting the threat of judicial invalidation that previously had been something of a deterrent — a "Maginot Line," it has been called[55] — against the advancement of voucher proposals on state and local political agendas.[56] Such proposals now will come forward, perhaps quite aggressively.[57] As they do, they surely will draw zealous opposition from large numbers of Americans, religious and non-religious, who object profoundly to the programs as a mortal danger to the public schools, a poison to the body politic,[58] or an insult to liberal constitutional morality.[59] This opposition may not be much abated by knowledge that a closely divided Supreme Court now consider such schemes to be constitutionally permissible.[60]

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53 *Zelman*, *ibid*. at 2465.

54 The majority opinion, written by Rehnquist C.J., was joined by O'Connor, Scalia, Kennedy, and Thomas JJ. Dissents were filed by Souter (joined by Stevens, Ginsburg, and Breyer JJ.), Breyer J. (joined by Stevens and Souter JJ.), and Stevens J.

55 Fried, *supra* note 41 at 174. See Stephen Holmes, "Gag rules or the politics of omission," in Jon Elster & Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 19.

56 See *e.g.* Mary Leonard, "Proponents of Vouchers See Opening" *Boston Globe* (18 November 2002) 1.

57 The *Zelman* decision merely upholds the constitutional permissibility of voucher programs where state or local political majorities see fit to enact them. No question of the freedom of political majorities to choose *against* allowing public funds to be spent on religious or other private schooling was before the Court. Even so, voucher advocates have been quick to see *Zelman* as speaking for a national settlement opposed to any such political choice as that. Pro-voucher strategists, citing *Zelman* as their proof, now are in court denouncing the constitutionality of century-old state constitutional prohibitions on the use of public funds to support religious education, and even of state prohibitions that are not religion-specific but apply to all diversions of public funds to the support of non-public schools. See *Boston Globe*, *ibid*. This comes very close to saying — to getting *Zelman* to say — that any state that maintains a tax-funded public school system is acting beyond the pale of American constitutional decency, if it either shuns support of religious schools at taxpayer expense as an obnoxious breach of church-state separation, or shuns diversions of tax money to non-public schools as unacceptably dangerous to the flourishing of the public school system.

58 See *e.g.* Breyer J.'s dissenting opinion in *Zelman*, *supra* note 39 at 2502–508.

59 There may be less elevated opposition, too. See Fried, *supra* note 41 at 165–67, attributing some fraction of historic opposition to public support of private schooling to "anti-Catholic bias."

60 The point would hold had the Court been unanimous, but the effect no doubt is exacerbated by the Court's division into sides whose contesting arguments and positions all appear to fall within the bounds of reason.

But then what question, exactly, did the Court's closely divided vote settle for Americans, or purport to settle? Let us say it settled that the positive, constitutional laws of the United States pose no barrier against a voucher scheme whose benefits are restricted to children in troubled school districts. Is that all? Consider how Charles Fried, a leading American constitutional lawyer and scholar,[61] headlines his recent commentary on the Court's decision. "So at last we have our answer," Fried begins. "[V]ouchers are all right."[62] Meaning, no doubt, that laws providing for vouchers are all right as long as they resemble Ohio's in crucial respects.[63] But what means "all right?" No doubt, in the United States today, a final judicial ruling settles whether some challenged governmental action is lawful under our constitutional positive law,[64] but is everything that is not unlawful, not unconstitutional, "all right?" Fried has got to be kidding.

And so he would seem to be. Fried, we safely may conclude, is needling his readers, joshing them. But then what exactly is the point of the needle? Fried

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61 Charles Fried is Beneficial Professor at Harvard Law School. He served as Solicitor-General of the United States from 1985 to 1989, and as Associate Justice of the Supreme Judicial Court of Massachusetts from 1995 to 1999.

62 Fried, *supra* note 41.

63 Fried is clear that the decision tells Americans nothing about the status of any voucher schemes that might cast their benefits more widely than the Ohio program did. See *ibid*. at 174, where Fried soberly describes the Court as having decided that "the Ohio voucher scheme does not violate the Constitution." Study of the *Zelman* decision does not reveal with certainty whether the Court would uphold schemes making vouchers available statewide to any parents who choose them, "failing" school district or not, a variation that plainly would pull in many parents having none but religious reasons for preferring non-public schools. As written, the *Zelman* judgment rests in part — but how crucially is unclear — on the Court's finding in the scheme before it the specific "secular purpose" of "providing educational assistance to poor children in a demonstrably failing public school system," *ibid*. at 2465; compare *ibid*. at 2185 (Souter J., dissenting): "The . . . vouchers in issue here are said to be needed to provide adequate alternatives [to failing inner-city schools]. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here." At the same time, the Court's final summation of its reasons suggests rather easy extension to more inclusive programs. See *ibid*. at 2473: "In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice." In the dissenting view of Souter J., the majority rested its decision on the "twin standards of neutrality and free choice": *ibid*. at 2490. See also *ibid*. at 2482 (Thomas J., concurring): "I cannot accept [the application of the Establishment Clause to state government in a way that would] oppose neutral programs of school choice."

64 Debate is ceaseless over what ought to be exact contours of this American practice of "judicial supremacy"; see *e.g*. Larry D. Kramer, "Foreword: We the Court" (2002) 115 Harv. L. Rev. 4, but its current status as part of the American legal order's high-ranking rules of recognition seems unchallengeable. See *e.g*. Ronald Dworkin, *Freedom's Law* (Massachusetts: Harvard University Press, 1996) at 33–35 [*Freedom's Law*].

seems to be insinuating that Americans, ingenuously, will be prone to think that the Court's action in *Zelman* teaches them something it really doesn't about the moral status of voucher programs. He points out that the five-to-four vote cannot be depended upon to have settled anything at all about the all-rightness of the programs, in view of the apparent determination of some of the four dissenting justices to continue trying to pick up a fifth vote and topple the precedent back in their favor.[65] I like to think, though, that Professor Fried is intimating something more, and more interesting: that he is afraid Americans may think they have learned from the Court's act something morally juicier than the dry legal fact that Ohio-type voucher programs are valid law — for now — in any part of the United States where duly authorized law-makers may choose to enact them.

Something more? Such as what? Such as, perhaps, that no one in the land has a morally justified complaint about impressment into compliance with voucher laws like Ohio's by the usual modes of law execution and law enforcement, the tax collector and so on. Finally — many may think or say, invoking the Supreme Court — the time has come for opponents to climb down from the moral battlements and get with the program, not necessarily forgoing all further political opposition but at least toning it down to a level in keeping with reasonable disagreement among friends who respect each others' opinions. Finally we know that such laws are good and decent enough to deserve respect and co-operation even from people who have opposed them fiercely on the merits and whose own minds on that point have not changed. ("It's over, get over it.") Had something along those lines been a part of what Professor Fried was thinking, his unspoken premise would have been that Americans are prone to believe they safely can attribute some such limited kind of non-malignancy or all-rightness — may we call it legitimacy? — to any law pronounced constitutional by the Supreme Court.

Well, I have taken liberties with Professor Fried's possibly chance remark. I have no idea whether in fact he entertains anything like the premise I've just mentioned. What I do believe is that the premise is true; that the tendency it describes is widespread among Americans.[66] That would not be surprising,

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[65] See Fried, *supra* note 41 at 163, 174–78.

[66] For a classic article noting and questioning a related tendency among some American constitutionalists, and connecting it to a history of American "constitution worship," see Henry P. Monaghan, "Our Perfect Constitution" (1981) 56 N.Y.U. L. Rev. 353 at 356–58. For a more recent indication of how deep-seated the tendency is among us, consider the following from an exceptionally thoughtful recent essay on the problem posed by immoral law to ideals and values of government by law: "Even if we do not always recognize seriously wrong law when we see it, about the slavery cases, viewed objectively, today, we can have very few doubts. The Civil War Amendments will have resolved even those. . . . Today, of course, after the Civil War Amendments, any 'interest' of a southern state in enforcing slave law would not be a legitimate one." Weinberg, *supra* note 4 at 477–78. A

because, as we are about to see, there are good, honorable, pressing reasons for *wanting* to be able to equate a law's being found substantively constitutional with it's being "all right" in the sort of guarded sense I've just been suggesting.

IV. VALIDITY, LEGITIMACY, AND PUBLIC REASON

A. The Troublesome Gap Between Validity and Legitimacy

Perhaps not every item that may have the look of a law deserves to be given effect as such, according to the secondary and recognition rules of our legal system. "Valid" is what we call the ones that do. A crude example of one that does not: Someone in the United States undergoes prosecution for violation of a relatively obscure provision of the tax law. Given the facts of the case and the terms of the obscure provision, she'd be guilty beyond a doubt, but for one little thing. Turns out the bill enacting the obscure provision somehow got printed up in the statute book without ever having received a presidential signature. In the United States, under our Constitution,[67] a bill approved by simple majorities of both houses of Congress but not by the President is not law. It lacks legal validity. By convicting and sentencing someone for a violation, a judge would commit both a professional gaffe and an abuse of office.

Legitimacy, we have seen, is quite a different matter.[68] We might say legitimacy stands midway in a triad of favorable judgments to which any legal act presumably aspires: validity, legitimacy, and rightness on the merits. A law, we have posited, does not necessarily have to be right (good, just, apt) in order for it to be legitimate, in the sense that the government acts "within its rights" by seeking to enforce compliance with it.[69] And neither does the law have to be, in that sense, legitimate in order to be valid. It seems that valid laws can issue from governmental systems or regimes that do not, on the whole, earn the sort of general respect for their legal productions connoted by "legitimacy."[70] At any rate, it often is useful to talk that way.[71] (It would be one way to understand the

question I am raising in this essay is what difference, if any, the fact of the Civil War Amendments should or can make to anyone's answer to the question of the morality, or of the legitimacy, of slave law.

67 U.S. Const. art I, § 7, cl. 2.

68 See Part II(A), above.

69 See *ibid*.

70 See *e.g.* Dworkin, *supra* note 3 at 105–107.

71 See *ibid.* at 103–104. Those strongly inclined to natural-law views may wish to protest against these usages. They may prefer to say that satisfaction of the recognition rules of an extant governmental order equates only to the "internal" or "formal" validity of the resulting law, not its "true" or "full" validity. It does not matter for the argument I am making. Where my argument posits a gap between validity and legitimacy, the natural-law devoté will have to posit a gap of exactly the same tenor between formal and full validity.

notion of a "wicked" legal system.[72]) In the pre–Civil War United States, slave laws undoubtedly had legal validity. They were duly enacted in a formal sense; the substantive Constitution then in force posed no obstacle;[73] and laws upholding and supporting slavery were generally recognized, formally and technically, as law.[74] Whether the slave codes were *legitimate*, or the governmental order that produced them respect-worthy, obviously is a very different question. Validity and legitimacy both may be virtues in laws and governmental orders, but they are virtues of quite different kinds, and legitimacy is the morally more demanding of the two.

But why should we draw such distinctions, and why should legitimacy so greatly concern us? Because, as I began this essay by saying, we want and need to be a country governed by law, and that need ensnares us, inevitably, in a mobilization of pressure upon all to comply with all valid legal acts regardless of what any one of us may think of their moral and other merits.[75] For that, as I said, we want justification, and "legitimacy" is its name. "Legitimate" is what I plead in response to a fellow citizen's complaint against compulsion to comply with a legal act that he believes to be wrong on the merits and I cannot demonstrate to be right, and maybe don't even believe to be right, or at any rate not with much conviction. In making the plea, I do not take myself off the hook for supporting enactment of a wrong and bad law (supposing I did support it). I only take myself off the hook for supporting compulsion against him to comply with the law — which, presumably, I do out of respect for the moral and other practical goods of the general social venture of government by law and for the sake of that venture's success.[76]

B. "Legitimacy" as an Appeal to "Common Human Reason"

So legitimacy is the warrant we claim for joining this collaboration in compulsion. We might compare it with a police officer's warrant to conduct a coercive search of someone's home or person. There is, of course, a very stark difference. Unlike the police officer's warrant, my legitimacy warrant does not

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72 See generally David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991).

73 Such has always been the predominant view among American lawyers and judges. There have been distinguished dissenters, including, for example, Frederick Douglass. See P. Foner, ed., *Writings of Frederick Douglass* (New York: International Publishers, 1980) at 467–80, cited in Sanford Levinson, *Constitutional Faith* (New Jersey: Princeton University Press, 1988) at 203.

74 Which is not to say that many judges did not strain to construe and apply the law in a manner favorable to liberty and inimical to bondage. For a recent, very perceptive summary and collection of authorities, see Weinberg, *supra* note 4.

75 See Part I(A), above.

76 See Waldron, *supra* note 6 at 100, speaking of "a certain sort of recognition and . . . respect — that *this*, for the time being, is what the community has come up with."

and cannot consist of an official, conclusive, authorized stamp of approval, guaranteed to take me off the moral hook. In countries where the legal order's recognition rules give them the power to do so, judges can decide for us whether laws are legally valid. No recognition rules, however, can give judges the power to tell us whether one or another regime of government is respect-worthy or, hence, whether the laws it spawns are legitimate. In the ante-bellum United States, the Supreme Court's decisions in *Prigg v. Pennsylvania*,[77] *Strader v. Graham*,[78] and *Dred Scott v. Sandford*[79] did not establish the respect-worthiness of the slavocracy or the legitimacy of the slave laws. The respect-worthiness of a government is, in the end, a sort of question that each person is responsible to decide for herself.

But we do badly want everyone's judgments to converge. More precisely, when our own judgment is affirmative, we want to feel that the reasons we have for so concluding are good enough reasons for everyone else to conclude the same. John Rawls speaks of "the liberal political ideal" — that "since political power is the coercive power of . . . citizens as a corporate body, this power should be exercised . . . only in ways that all citizens can reasonably be expected to endorse in the light of their common human reason."[80] When we conclude, in the teeth of another's protest, that it is morally okay for us to join in mobilization of compulsion against that other to comply with a given law, we feel it is incumbent on us to be able to give reasons that *she* has — that *everyone* has — to accept this as the general social practice. "Legitimacy," we might say, is the label we give to this redemptive factor, apparent to "common human" reason, which we hope to find in certain putatively wrong but valid legal acts. And by "certain" such acts what we really mean is *every valid legal act including those that happen to be wrong*, because to pronounce a legal act valid is to say that it *will* be backed by force, if need be, and the application or threat of force is what we feel the need to justify.

The sum of it is, we have a very good, morally urgent reason for wishing it to be the case that all formally valid laws are legitimate — or, in other words, are

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77 41 U.S. (16 Pet.) 539 (1842) at 611–13, holding state laws unconstitutional — as violations of a power vested exclusively in Congress to regulate in the matter of fugitive slaves — insofar as they might "interrupt[], limit[], delay[], or postpone the right[] of the owner to the immediate possession of ... [a] slave," and describing the Constitution's fugitive slave clause as a guarantee of security of property so vital to Southern "interests and institutions" that it must be deemed "a fundamental article, without the adoption of which the Union could not have been formed."

78 51 U.S. (10 How.) 82 (1850), holding that states are free without federal supervision to fashion their own laws for determining the slave or free status of any person.

79 60 U.S. (19 How.) 393 (1856), holding that the Constitution affords protection to slaveholders against acts of Congress that would have the effect of stripping them of slave property.

80 See Rawls, *supra* note 1 at 139–40.

products of a respect-worthy governmental system or regime.[81] Yet we've seen that a clear conceptual gap stands between validity and legitimacy.[82] Is there something we might do institutionally or procedurally to fill or bridge the gap or, in other words, to license a general inference from validity to legitimacy?[83]

V. THE CONSTITUTION AS CODIFIED (CONTRACTUAL) PUBLIC REASON

A. What is the Political System?[84]

Picture me pleading, in response to another's protest, that it is morally okay for me to join in mobilization of compulsion against her to comply with a given law. Successful pursuit of the social project of government by law, I say, can carry inestimably great values and benefits for everyone. It follows, I say, that everyone can have reason to accept compulsion to comply with valid laws that they judge to be wrong and unjust. But "can" have reason is one thing, and *does* have reason is another. Whether everyone *does* have reason to accept compulsion to comply with wrong but valid laws can only, it seems, depend on a judgment "everyone" makes about the country's overall, current political system. If the system is rotten to the core (*e.g.* is "wicked"[85]), a public practice of support for laws springing from it can have no value and neither can individual subscriptions to such a practice. So my plea to my complaining fellow citizen boils down to my claim on behalf of the respect-worthiness of the overall system or practice of government in our country.

How, then, is one to conceive this "overall system or practice of government" that is to be judged respect-worthy-or-not? Most straightforwardly, it seems, one would look out at what we can call the "governmental totality," the entire aggregation of political and legal institutions, laws, and legal interpretations currently in force or occurrent in the country. Here let me emphasize legal interpretations. In the United States in 1858, the governmental totality undergoing appraisal must have included the Supreme Court's decision in the *Dred Scott* case.[86] Today, it must include the ruling on vouchers in *Zelman v. Simmons-Harris*.[87] (Of course, others would emphasize, worriedly, a quite different set of recent constitutional rulings that must go into the current governmental totality, such as those upholding gay rights, abortion rights, and

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81 Alternatively, that all formally valid laws are products of a legal order sufficiently justified to make the laws that issue from it fully valid. See *supra* note 71.
82 See Part IV(A), above.
83 Or from formal to full validity?
84 I treat this question more expansively in "Integrity and Legitimacy," *supra* note 33.
85 See *supra* note 72.
86 See text accompanying note 79.
87 See Part III, above.

restrictions on abortion protest, and those restricting religious exercises in public schools.[88])

Looking out at the totality, one would ask oneself how various classes or groups of persons are faring, maybe ask how they would perceive matters from their own situations and standpoints. One would apply whatever standards of freedom, prosperity, equality, participation, and systemic capacity for self-improvement over time one considers to be applicable. Finally, one would judge whether the total performance is good enough, on the whole, to be accepted considering the practically imaginable alternatives. If one judged that it would be unreasonable to answer this question with a "no," one might then judge the governmental totality to be respect-worthy in the sense, with the consequence, that I have defined.

If we adopt this down-and-dirty, global performance view of the governmental system whose respect-worthiness is up for judgment, then what has the country's higher-law constitution (assuming it has one) got to do with it? We already have our plain-vanilla answer.[89] You know the constitution is *there*, as a part, but by no means the whole, of the governmental totality whose respect-worthiness you want to judge. You further believe that the constitution's presence there, as a part of the totality, sometimes makes a difference in governmental outcomes, either because the country's courts of law sometimes use the constitution to render laws and other acts of government ineffective (by holding them unconstitutional) or because law-makers and executives, for whatever reasons, act differently in its presence than otherwise they would. You ask yourself whether the difference the constitution's presence thus makes in the governmental totality is, over time and on the whole, for the better or for the worse.[90] If you think for the better, then that has some positive effect on the probability that you will judge the governmental totality respect-worthy.

That all seems reasonable enough. However, this sort of global-performance conception of the governmental system will be troubling to anyone looking for a *public* critical standard of systemic respect-worthiness, one that each citizen can use, credibly and trenchantly, to fend off other citizens' possible complaints about subjection to compulsion to comply with the country's laws.[91] "Good-enough" global performance seems much too opaque and chaotic a notion to serve as such a standard. Suppose someone offers the opinion that the global performance of your country's current political/legal system falls below — or falls above — the standard of being good enough considering the practically

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88 See Symposium, *supra* note 5.

89 See Part II(B), above.

90 See Levinson, *supra* note 73 at 180. Levinson refers to the Constitution as a "presence" that may or may not be deemed "encouraging" to "the establishment of a more perfect Union."

91 See Part IV(B), above.

imaginable alternatives. How could you, if you tended to disagree, go about testing which side is right, or even begin to argue for your side — especially considering that the case probably is that the two of you, although very possibly holding in common a set of nominal, abstract political values and ideals, are driven to your differing bottom lines by some pretty deep visionary differences as well as differences of situation and experience?

B. Constitutional Contractualism

So let us consider another, more strenuous way in which the constitution might come to figure in judgments of governmental-systemic respect-worthiness. People might get the idea of equating the question of the governmental system's respect-worthiness with that of the adequacy, in some sense, of the constitution. They would thus be equating the governmental system with — or reducing it to — the terms of the constitution. To keep matters from getting too complex, assume this would mean the constitution as its terms are construed and applied by authoritative rulings of the country's constitutional court or supreme court.[92] People, I am saying, find themselves drawn to the idea that as long as the Supreme Court sits to ensure that no seriously invasive or damaging unconstitutional laws are given effect for very long, they confidently can deem the governmental system respect-worthy (for that and no other reason), and so can deem the government to be acting within its rights when it demands compliance with all of its valid laws, including whatever bad ones get past the constitutional screen.

I have taken to calling this a "constitutional contractual" approach to the questions of governmental respect-worthiness and legal legitimacy. Here is why. If you use it, you start by picking out a restricted body of higher-law rules and standards for governmental performance, the ones that comprise the constitution. You then treat this special, higher-law body of constitutional rules and standards as, in effect, a contract between yourself and the government, or between the people and the government, or among all of the people respecting the government's powers over any of them. Of course, every breach gives you a claim to a local remedy, for which you appeal to the courts. But only a "total breach" (to take the term from contract law) would give rise to the global remedy of denying to the offending government any rightful power to enforce its formally valid laws against the recalcitrant; "total breach" being here defined as an unacceptably high rate of non-congruence between the governmental totality and the constitution, an eventuality you take to be guaranteed against for as long as the Supreme Court sits.

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[92] Alternatively, we could assume it means the constitution as variously understood by individual citizens. Switching the assumption would not alter the deflationary conclusion we are headed for.

Roughly and intuitively, the constitutional contractual proposition would appear to be this: A governmental system whose performance is, with few and minor exceptions, guaranteed to comply with the substantive constitution's requirements can be known, by that fact alone, not to be so awful as to merit denial of its respect-worthiness or hence of the legitimacy of whatever laws it makes. But to say that is, of course, to declare a kind of faith in the constitution. It is to grant that the constitution is what it ought to be, provides what it ought to provide, if a correlation between the government's more-or-less guaranteed compliance with the constitution and affirmative judgments of its respect-worthiness is rationally to be maintained.

Well, what is the problem? Take the Constitution of Canada. Under constitutional contractualism, all we would need to do, in order publicly to establish the respect-worthiness of government in Canada, would be to defend the Constitution before one another, as a basic political deal with which no one credibly could take serious issue. And who, after all, really could? Who could disagree with rights to life[93] or to personal security,[94] or with the sundry other liberties and rights mentioned in the *Charter of Rights and Freedoms*,[95] or with equality before the law and equal protection of the law,[96] and so on? Who could reject a fundamentally democratic constitution containing all these additional assurances? Who could can deny that when a law passes judicial muster under all these tests, or otherwise is found demonstrably justifiable in a free and democratic society,[97] that law must be sufficiently non-awful that it cannot count as a black mark against the general respect-worthiness of government in Canada? The law, after all, was enacted by constitutionally specified majorities of representatives of constitutionally specified majorities of the people, *and* it has passed a test of compliance with the substantive constitution. Once we've fixed things so that every legal act's validity depends on its having passed inspection under a good-enough constitutional bill of rights, we can, or hope we can, in view of the moral urgency of the need to do so,[98] attribute legitimacy to all valid legal acts.[99] A good constitution, if we could use it in such a way, would be serving in the role of public guarantor of the legitimacy of every valid law.

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93 See *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

94 See *ibid*.

95 See *ibid*., ss. 2, 6–14.

96 See *ibid*., s. 15(1).

97 *Ibid*., s. 1.

98 See Part IV, above.

99 Or attribute full validity to all formally valid legal acts.

C. Doubts

I have described an urgent and ambitious idea we hold — many of us, maybe all of us — about what a good constitution should do for us, should be good for. It should guarantee that every legal act that is valid in our legal system can safely be deemed legitimate. This is what makes the constitutional contract idea so appealing — its apparent ability to supply us with a clean, clear, objective basis for justification to others of our collaboration in the subjection of everyone to compulsion to comply with every valid legal act be it right or wrong.

I have led you down the garden path and now it's time to spring the trap. It seems the constitutional contractual approach to judgments of governmental respect-worthiness and legal legitimacy cannot succeed. That is, it cannot succeed in doing what we especially want it to do, which is to supply us with a clean, clear, *public* justification for our collaboration in the subjection of everyone to compulsion to comply with every valid law and legal interpretation.

Why can't it? Because, first, there is only one constitution in force in any given country at any given time, and, second, an adequately complete description of *that* constitution must include all major, currently prevailing judicial constructions and applications of its open-textured clauses. What is guaranteed us by constitutionalism (*cum* judicial review) is nothing more, and nothing less, than every valid legal act's conformity with *that* constitution, thus fully described.[100] And such a guarantee, while it may give some of us sufficient reason to grant the respect-worthiness of our country's governmental system, will not automatically give the rest of us the same reason, or even any reason. Reason-for-one is reason-for-all only on the condition that all are sufficiently in agreement about what content in a constitution makes the constituted system respect-worthy, or else it can be established that all who judge reasonably and rationally necessarily would be in such agreement.[101]

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[100] In a "global performance" conception of the governmental system undergoing appraisal for respect-worthiness, judicial constructions of the constitution count as acts of government — that is, they count as one important category within the governmental totality. See *supra* text accompanying note 86–88. By contrast, in a "constitutional contractual" conception of the governmental system, judicial constructions of the constitution count as parts of the *supra*-governmental constitutional "contract" that is supposed to supply us with a credible, public standard for deciding the respect-worthiness of the governmental totality.

[101] See the epigraph to this article. "'Reasonable' here means three things. First, a reasonable person accepts the inevitability of positive legal ordering [or government by law]. She doesn't pretend we somehow are going to get along without lawmakers making laws, and judges resolving their meanings-in-application, that have to bind everyone regardless of who likes or approves each law or each application and who does not. Second, a reasonable person accepts the fact of deep and enduring conflicts of interests and ethical visions within her society . . . . Third, she is imbued with the liberal spirit of reciprocal recognition by persons of each other as normatively free and equal individuals." Frank I. Michelman, "Relative Constraint and Public Reason: What is "The Work We Expect of Law"?" (2002)

It was, remember, precisely the hope that everyone (reasonable) could or would so agree that supposedly gave the constitutional contract approach its apparent great advantages over the global-performance approach to judgments of over-all governmental-systemic respect-worthiness. We should spell it out a bit. The hope is that people who disagree often, sharply, intractably, and reasonably over sundry concrete questions of public policy — and hence over the merits of sundry, specific legal acts — and hence, perhaps, over the balance of good or evil in the governmental totality composed of all these acts — nevertheless might all be able to agree on the rightness of a given constitution, the one in force in their country now, the one that guarantees life, liberty, equality, dignity, due process, and add or subtract whatever you like.

Can this work? The obvious worry is that the supposed objective, universal appeal of all of those abstract guarantees — life, liberty, equality, *etc.* — seems destined to leave us in the lurch when the moment comes to apply them decisively to questions of the validity of major, divisive, reasonably contested public policy measures — such as, for example, measures regarding voucher schemes, affirmative action, political campaign financing, abortion, personal control over the end of life, the death penalty, "hate speech" regulation, provision for basic economic needs, public religiosity, the balance in dangerous times between privacy and security, and so on and on and on: the list will change over time but it will never be empty, slavery once was on it.

It is very well to say that all Americans can approve and applaud the text of our Constitution and Bill of Rights. The apparent problem is that, for an American trying to decide whether to regard the constitution in force in her country as binding on judgments of the legitimacy of legal acts, and to decide this on the basis of that constitution's content, the verbiage of the nominal constitution tells her too little of what she needs to know. The "text" — as it's usually called — leaves a very great deal undecided, and in fact it's hard to shake the suspicion that only by leaving so much undecided can the text hope to draw

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67 Brook. L. Rev. 963 at 972.

The substantive constitution might speak in terms so abstract that they plausibly could be read to accommodate virtually any culturally imaginable policy choice any remotely representative government might make. See generally Steven Winter, *A Clearing in the Forest* (Chicago: University Press, 2001). In that case, the substantive constitution's real (and only) effect would be to place a substantial share of final control over policy in the hands of the country's constitutional court. Everyone might have reason to agree to *that*, if everyone had reason to regard the judiciary as a true "authority" (in the sense developed in Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 23–110), on constitutional or governmental-systemic respect-worthiness.

everyone (reasonable) into agreement that it says what it needs to say in order to deserve a binding effect on judgments of legal legitimacy.[102]

It seems I can't decide whether my country's constitution does deserve that effect by looking only at the text. I can only decide that by watching to learn more about what actually and more concretely is churned out under the banner of that text and in its name. The American text says "no" to establishments of religion, "yes" to free exercise of religion and freedom of speech, "yes" to equal protection of the laws, and "yes" to the protection of life, liberty, and property against arbitrary deprivation. That's all very nice, but is it what I need to know? Or don't I need to know things like: are the unborn protected; may convicts be put to death by the state; are vouchers allowed; is control of spending in elections allowed; is affirmative action allowed; are homelessness and starvation allowed; and so on?

In the last analysis, it seems that, if I equate my country's political system with the terms of its constitution, I cannot judge whether my country's constitution is respect-worthy, in the sense of binding on judgments of legal legitimacy, without a thumbs-up or a thumbs-down on the totality of system performance occurrent on the constitution's watch, most definitely including in "performance" all major, currently prevailing constitutional-legal holdings and interpretations. I can't in all conscience say that voucher schemes are guaranteed "all right" when they pass judicial muster under my country's constitution, until I've decided whether my country's constitution itself still is "all right" in the aftermath of the fact, just recently reported to me by the Supreme Court, that it allows voucher schemes.[103] To all intents and purposes, I am thrown back on a "global-performance" evaluation of the sufficient merit of the total governmental system to warrant attributions of legitimacy to all the legal acts that issue from it.[104]

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[102] Note that the problem here is not that there are no right answers to questions either of constitutional justice or of constitutional interpretation. It is not that there is no true or correct answer to the question of what is the right method of interpretation (it might be that of "integrity," see Dworkin, *supra* note 3) or that there is no true or correct answer, under that method, to hard questions of constitutional meaning or application. The problem is that there are no *publicly established* answers to these questions of constitutional-interpretative method and meaning, and aren't likely to be as long as "reasonable pluralism" is true of our countries. Constitutional contractualism, we might say, is long on "consensual promise" but short on "categorical force." See Ronald Dworkin, "Foundations of Liberal Equality" (1990) 11 The Tanner Lectures.

[103] Compare Louis M. Seidman, *Our Unsettled Constitution; A New Defense of Constitutionalism and Judicial Review* (New Haven: Yale University Press, 2001) at 20: "Why would the bare fact that [such-and-such a tax is] constitutionally banned cause me to change my mind about [the true merit of the tax]? It seems far more likely that I would conclude that the Constitution is bad insofar as it bars such [a tax]."

[104] For a more elaborate "proof," see Frank I. Michelman, "Constitutional Legitimation For Political Acts" (2003) 66 Modern L. Rev. 1.

VI. NARROWING THE CLAIM: GROUNDS OF CONSTITUTIONAL RESPECT-WORTHINESS

Citizens of countries like the U.S. and Canada, I have argued, have good reason to want their country's constitution to act as a sort of public contract to bridge the logical gap, or help us bridge it, between judgments regarding the formal validity of laws and judgments regarding their legitimacy and the respect-worthiness of the governmental system that produces them. Nevertheless, I have argued, such hopes, at best, are constantly and gravely imperiled. Not, however because of anything in particular that is wrong with our constitutions. The problem, I have suggested, is not in our constitutions, it is in ourselves. It is in our differences, and our resulting inability to liquidate reasonable disagreement about what a legitimacy-ensuring constitution would provide. Facts of reasonable pluralism, I have argued, dampen hopes that any possible constitution can provide a publicly objective standard for system-level appraisals of governmental respect-worthiness, capable of sealing such appraisals off from the very kinds of morally freighted disagreements over policy that make political legitimacy the devilishly elusive aim that it is for a modern, plural, secular-liberal society.

But set aside for the moment the problem of reasonable, political-moral disagreement on which my argument has dwelt. Say I have overstated the problem. One might then hope that *some* constitution, apt to the purpose, can bestow legitimacy on every conforming legal act. But one could not, even then, sanely hope that this would be true of whatever happens to be in force in one's country as a constitution, just because it is. (What about the constitution that contained *Dred Scott*?[105]) In order for you to regard it as binding in that way on everyone, this constitutional "presence" would have to display to you some contingent property or feature that makes it, in your eyes, deserve to do so. To this empowering property, whatever you may take it to be, I give the name of the "binding virtue" for constitutions.[106]

We can distinguish two broad types of binding-virtue conceptions, which I'll call "content-based" and "content-independent." In a *content-based* conception — which I expect is what most readers repeatedly have brought to mind as they've been reading along — the constitution is respect-worthy in virtue of what it says, what it "provides." The constitution commands respect because and insofar as it provides what a constitution for this country, now, really ought to

[105] See *supra* note 79.

[106] As will soon be apparent, I don't mean to exclude — yet — the possibility that the very fact of the constitution's being in-force might be just the binding virtue you are looking for. I only mean to insist that you would need a normative account or theory of why you give such force to such a fact. The brute, bare fact of in-force-ness, unadorned by such a theory, could not be enough.

provide if it's to be deemed capable both of denying validity to non-conforming governmental acts and bestowing legitimacy on all the valid ones.

In a content-independent conception, by contrast, the constitution's respect-worthiness rests on facts quite aside from any judgment you or I or any living individual might make about its substantive suitability to its assigned tasks. According to what I'll call an *acceptance-based* conception, you and I owe respect to a constitution having such-and-such prescriptive content just because of the fact — assuming it is a fact — that a dominant or core fraction of the society in which we dwell accepts just that as a binding constitution. (In cruder terms: "Hey pal, that's the constitution we use around here. Love it or leave it!") According to what I'll call an *author-based* conception, we owe respect to a constitution having such-and-such prescriptive content just because of who that constitution's authors were. Perhaps they were a set of national political ancestors called "framers." Or perhaps they were some past popular uprising we personify under the name of "the People."[107] In either case, you and I might consider ourselves and the country bound to their word by communal ties of descent, affiliation, and allegiance.

Content-independent conceptions of the binding virtue for constitutions are very puzzling to liberals.[108] I cannot, however, deny their currency in American constitutional debates and discussions, in which just about every participant, sooner or later, apparently feels pressed to resort to facts of authorship and acceptance in order finally to explain why we should allow our constitutions to

[107] See Bruce Ackerman, *We the People: Foundations* (Massachusetts: Belknap Press, 1991) [*We the People*].

[108] Content-independent conceptions seem very hard to reconcile with liberal ideals of individual and collective self-government. Why should a current generation of inhabitants allow themselves to be bound by a constitution just because it is the one laid down by members of some prior generation? Why should I concede legitimacy to some odious law, just because it is found compliant with some body of norms that a dominant fraction of the country regards as the country's constitution? What is that but the tyranny of the majority? Liberals find no refuge from these questions in "communal" (as opposed to "statistical") conceptions of collective action or political self-government, see *Freedom's Law*, *supra* note 64 at 20. On the liberal-communal account offered by Ronald Dworkin, for example, it is only adherence to a constitution having certain requisite content that can give rise to the political community to whose acts of government all present can count themselves parties. See *ibid*. at 19–32. Acceptance-based and author-based conceptions of the grounds of constitutional respect-worthiness would seem to defy this model, unless and until some reason is supplied for belief that broad public acceptance of a set of constitutional norms and practices, or authorship of them by some specific set of framers or by "the people," is at least a probable indicator of true community-constitutive content in those norms and practices (at which point the allegedly content-independent conception will be morphing into a content-based conception).

bind us in the ways we apparently do.[109] And that observation carries with it a sting.

Consider how I have argued against the possibility of treating a constitution as a legitimation contract. No constitution, I said, described with adequate completeness, can be assumed to supply a publicly objective and transparent reason — a reason that is clear and counts as such for everyone (reasonable) — to accept compulsion to comply with all constitutionally valid laws. It appears, I said, that these publicity and transparency requirements may not be satisfiable, at least not without reneging on a modern liberal commitment to take pluralism seriously.[110] That argument, it should now be clear, has presupposed a content-based conception of the binding virtue for constitutions. For anyone professing a content-independent conception, the publicity and transparency requirements would pose no particular problem.

Suppose it is a conceded fact that a particular body of norms and rules — including the rule that uncertainties of constitutional meaning and application are resolved by rulings of the Supreme Court — is both accepted by a predominant fraction of my country's population as the country's constitution and is exactly identical with a "constitution" promulgated centuries ago by honored founders. And suppose that these conceded facts, just by themselves, are sincerely believed by me to count as normatively sufficient reasons *for me* to treat the constitution as bestowing legitimacy upon all legal acts that pass judicial muster under it.[111] I must, then, no less believe that these same facts count equally as reasons *for you* and everyone else who presumes to membership here to do the same. How possibly could they not?

So there is the sting: The argument I have made against the possibility of constitutional contractualism — of treating a constitution as a legitimation contract — is avoidable by anyone willing to stand forth and embrace, as normatively warranted, a strictly content-independent conception of the binding virtue for constitutions, or the grounds of constitutional respect-worthiness. Well, you might say, whoever does *that* is not taking pluralism seriously, so my argument is safe. Maybe, but then my point would be that few succeed in taking pluralism seriously. Few of us — or so I suggest — really succeed in freeing our minds of the idea that facts of acceptance and authorship indeed can oblige us

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[109] A striking example is the work of Bruce Ackerman. Compare Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980) with Ackerman, *We the People*, *supra* note 107; see Bruce Ackerman, "Rooted Cosmopolitanism" (1994) 104 Ethics 516.

[110] See Part V(C), above.

[111] See *e.g.* William Rehnquist, "The Notion of a Living Constitution" (1976) 54 Texas L. Rev. 693.

to respect to our country's constitution deeply, and none but those few can be expected ever to get completely beyond the pull of constitutional contractualism.

But perhaps we should turn the point around. We liberals badly and for good reason *want* constitutionality to serve as a proxy for the legitimacy of every valid law.[112] It cannot credibly do so, I have argued, unless the constitution's own binding force — its own "respect-worthiness" — is allowed in some measure to depend on facts of authorship or acceptance. These observations may help explain why we liberals persist, apparently against the grain, with the idea that facts of authorship or acceptance can give binding force to a constitution.

But to explain an idea is not to justify or approve it. *Comprendre tout ce n'est rien pardonner*. I still don't myself see how, in the end, a constitution can bind for any reason other than that it deserves to bind in virtue of what it provides. If the consequence is that I am unable to cover every valid law with a guaranteed warrant of legitimacy issued by my country's Supreme Court, I can live with that.[113]

[112] See Part IV, above.
[113] See "Integrity and Legitimacy," *supra* note 33.

THE LIBERAL DUTY TO RECOGNIZE CULTURES

Alan Brudner*

The author argues that the dissonance between a liberal constitutional order and the recognition of diverse cultural communities is surmountable. He argues that there is a way of legitimating the application of liberal constitutional norms to non-liberal cultures provided that one assumes that all self-reproducing cultures are equally good. One can then reconcile the liberal duty to recognize cultures with constraints on cultural practices that are non-threatening.

L'auteur fait valoir qu'il est possible de surmonter la dissonance entre l'ordonnance constitutionnelle libérale et la reconnaissance de diverses communautés culturelles. Il fait valoir qu'il existe une manière de rendre légitime l'application de normes constitutionnelles libérales à des cultures non libérales dans la mesure où l'on accepte au même titre toutes les cultures autoreproductrices. On peut alors concilier le droit libéral de reconnaître les cultures et les contraintes non menaçantes de pratiques culturelles.

I. INTRODUCTION

Most who have thought about the matter agree that the question regarding the place of cultural communities in a liberal constitutional order is, at this stage of the latter's development, the most pressing and troublesome in constitutional theory. The problem's urgency comes from its defining what is perhaps the last frontier for liberal constitutionalism, the line at which liberalism must legitimate not only political authority but also its ways of legitimating authority to people with other ways of doing so. It is safe to say that the nearly unanimous view of people who write on this subject is that this task is impossible and that liberalism must therefore either assert its core principles against non-liberal cultures in the absence of a non-partisan justification or accept the implications of its partisan character and reform its constitution along pluralist lines.[1]

Either path carries implications productive of extreme dissonance in the liberal conscience. The first betrays liberalism's own principle of rational self-imposability as the criterion for valid authority and reveals its allegiance to public reason as the ideological pretense of an imperial power. The second

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1 For representative statements of these alternative positions, see Brian Barry, *Culture and Equality* (Cambridge: Polity Press, 2001) [*Culture and Equality*]; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

involves giving up on the idea of a common citizenship and abandoning adherents of non-liberal cultures to practices that may be inconsistent with the equal moral worth of individuals. Much recent literature on cultural diversity consists of proposed strategies for managing this dissonance, accepting its inevitability. Kymlicka, for example, deals with liberalism's cultural dilemma by equivocating on the authority of liberal constitutional norms, allowing them to define the scope of the official duty to support cultural communities (structure but not character) but shying at their enforcement against the illiberal cultural practices of the communities receiving support.[2] Carens proposes a case-by-case strategy whereby liberalism would even-handedly accommodate cultural differences on matters concerning which neutral respect for freedom of choice is indifferent, but has nothing to say about how to reconcile aloof neutrality with even-handed support or about how to justify enforcing liberalism's bottom line principles (which he views as culturally specific) to the non-liberal cultures whose practices conflict with them (Carens would enforce them whenever "we feel we ought to").[3] Shachar, meanwhile, opts for a market solution. She would turn dissonance to advantage by giving the state and religious communities co-ordinate jurisdiction in contested areas and by making them compete for the loyalty of their jurisdiction-shopping subjects in a kind of multicultural bazaar of legal regimes.[4] All of these writers try to steer their way between a violent cross-cultural imposition of Western norms and a non-violent but morally toothless cultural pluralism. None, however, thinks that this conflict can be conceptually overcome.

In this article I harness a group of concepts (living ethos, ethical life, the self-sufficient life, the reconciliation story) to the task of overcoming liberalism's dissonance with respect to cultures. I argue that there is indeed a way of legitimating the application of liberal constitutional norms to participants of non-liberal cultures provided that these agents grant one very weak assumption: that all self-reproducing cultures are equally good. This assumption is weak because it seems on its face to argue against liberalism's authority rather than to presuppose it and because cultural pluralists (Walzer, for example) themselves

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2 Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995) at 164–70 [*Multicultural Citizenship*].

3 Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Even-Handedness* (Oxford: Oxford University Press, 2000) at 14, 47.

4 Ayelet Shachar, *Multicultural Jurisdictions* (Cambridge: Cambridge University Press, 2001) c. 6 [*Multicultural Jurisdictions*].

make this claim when they dispute the legitimacy of that authority.[5] Once this assumption is granted, I argue, we can show how a liberal duty to recognize cultural diversity can be combined with strong constraints on cultural practices that do not appear to non-liberal cultures as the alien impositions of an occupying power.

We should be clear at the outset about what this task demands of us. It does not demand that we justify liberal norms to each and every culture, taken one by one, showing how each could accept those norms from the standpoint of its own core beliefs. Such a task would be foredoomed to failure (who are we liberals to decide what beliefs are central to a foreign culture?) and, what is more, unnecessary. We do not think that the authority of the law against murder is undermined just because the murderer believes he has the right to kill whenever killing would further his ends. If the subjective point of view, whether of an individual or a culture, had to be accommodated by a justification of authority, there could be no authority. In fact, however, the addressees of our justification are not cultural anarchists, for they believe that nations owe each other a duty to respect cultural autonomy and thus also a duty to tolerate foreign customs they find repugnant. They believe in this duty because they think there is something about living cultures that makes them all equally worthy of respect and concern; indeed, this is why they wonder why liberal norms should apply to non-liberal cultures. Our task, then, is to justify the application of liberal constitutional norms to people who, while adhering to a non-liberal ethos, also hold the view that all living *ethoi* are good.

II. CULTURE IN LIBERTARIAN\EGALITARIAN PUBLIC REASON

The problem of this essay can also be framed as one concerning the possibility of mutual recognition between ostensible opposites. How can the liberal state defer to and promote the distinct ways of parochial cultural communities without surrendering the authority of liberal public reason? How can cultural communities recognize the authority of liberal public reason without surrendering their independence as normative frameworks in their own right? Put that way, the difficulty of finding a place in public order for cultural communities is part of a much larger problem. It is the problem of laying down legal-institutional conditions for the mutual recognition of Law and Law's subjects such that Law's rule is validated by the assent of morally independent

[5] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 314.

individuals whose particular interests are reciprocally valued by public authority. I shall call progress toward this goal the reconciliation story.

Liberalism in its familiar variants has been unable to offer a complete answer to the challenge posed to the legitimacy of its state by traditional cultures. Consider first libertarianism. By libertarianism I do not mean the ideology of the minimal state that often goes by that name. Rather, I mean to refer to what Rawls called "the system of natural liberty."[6] Libertarianism in this sense (one might also call it classical liberalism) denotes a constitution governed by a conception of public reason according to which the latter consists in mutual respect for the most extensive individual liberty compatible with equal liberty and nothing else. That conception of public reason is quite compatible with regulation going beyond that of the "nightwatchman state" provided that the regulation's purpose is to secure the infrastructural conditions of ordered liberty, among which one may count the cohesion of the polity around values (*e.g.* self-reliance, tolerance) supportive of the libertarian constitution. Of course, libertarian public reason is hostile to regulation for the purpose of equalizing anything but liberty — starting-points or resources, for example.

Understood as a conception of public reason narrowly focussed on liberty, libertarianism accords no place in the public realm for cultural communities, no more than it does for religion. True, it protects the individual's freedom to espouse the final ends of his choice and to form, join, or leave associations of shared belief; and it reduces the costs to the individual of minority group membership by prohibiting legal fetters on occupational mobility and acquisition based on ascriptive characteristics. These are not negligible helps to minority cultures, as the immigrants who fled regimes ordered to racial or cultural dominance will readily attest. Indeed, they go some way toward laying down objective conditions for inculcating in minority group members a loyalty to the liberal constitution. Still, libertarianism finds itself severely constrained in this respect; for its neutrality regarding final ends requires it to remain aloof from the struggle for survival among cultural communities and thus to leave to their fate minority cultures vulnerable to assimilationist pressures. For libertarian public reason, cultural ways of life are subjective individual choices, the support or protection of which by government must fragment public reason into sectarian rule. It is unfair that liberty be restrained for the particular benefit of a group of like-minded individuals or that some be forced to subsidize the life-style choices of others. Because libertarian public reason is impartial toward these choices, cultural communities must be viewed as private associations toward whose ends

[6] John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971) at 65–72.

government must assume a posture of benign indifference, allowing them to flourish or wither as their adherents choose.[7]

Describing the indifference as benign, however, leaves an incomplete picture for reasons thoroughly discussed by others.[8] We have to distinguish, as Carens reminds us, between libertarianism as a pure conception of public reason and the diverse national histories and cultures in which that conception is particularized.[9] There are different ways (for example, parliamentary and congressional ways, the way of parliamentary sovereignty and the way of judicial review) of specifying the libertarian constitution, and there are still more ways of realizing these models in the language and manners of everyday life. Libertarian indifference is not benign, first of all, because it means allowing the myriad, subtle forces by which the language and manners of large majorities tend to overwhelm those of minorities to have their way. Furthermore, governments that rule under the libertarian conception of public reason cannot be neutral as between the dispositions and attitudes needed to sustain that conception's rule and those of cultural communities inimical to it. Educating the citizen of a libertarian state may erode certain habits of mind of cultural communities together with the customs nurtured by them; and if libertarianism is perceived as itself a particular ethos in relation to those communities, this process will appear assimilationist. Libertarian indifference is not benign, finally, because, when taken as the constitution's fundamental theory, libertarianism acquiesces in the conscious assimilationist policies of dominant cultural groups. This is so because its rationale for protecting the fundamental freedoms against ordinary regulation — that their exercise can be conceived without the necessity of conceiving unconsented-to impingements on others' liberty — applies to belief but not to action living out belief. Action falls into general liberty, whose rationally structured regulation by the state needs no special justification.[10] For this reason, libertarianism has nothing to say against government's facially neutral insensitivity toward minority cultures in, for example, requiring Sikhs and Jews to conform to the dress codes of the police and military, in forbidding (as part of a general narcotics law) the use of peyote in a tribal religious rite,[11]

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7 This posture was, according to Nathan Glazer, part of the American pattern of ethnic disestablishment crystallized in the Civil Rights Act and Voting Rights Act of the 1960s and displaced by the affirmative action programs of the 1970s; see N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (New York: Basic Books, 1975) at 25–32.

8 See *e.g. Multicultural Citizenship*, *supra* note 2 at 110ff.

9 Carens, *supra* note 3 at 9–11.

10 See *Oregon v. Smith*, 494 U.S. 872 (1990).

11 *Ibid*.

or in making full citizenship for aboriginals conditional on their abandoning traditional ways and identities, leaving it for them to choose. None of these policies attempts to coerce the inward conscience or to curb freedom of speech or association, and so none violates the libertarian constitution. Because libertarian public reason (taken as fundamental) acquiesces in attempts to submerge cultural particularity, the individual Sikh, Jew, Cree, *etc.* must see in that self-proclaimed public reason a foreign power allied to the power of the dominant culture.

Egalitarian public reason is much more accommodating to cultural communities (and therefore much more inspiring of loyalty in its culturally diverse subjects), but for reasons that have little to do with their intrinsic worth. By egalitarian public reason I mean the model of liberal justice depicted in the theoretical systems of Rawls and Dworkin and whose implications for liberalism's interaction with cultures have been explored in the pioneering work of Kymlicka.[12] So understood, egalitarianism's principal contribution to the reconciliation story is to make the individual's moral autonomy — including self-authorship and self-rule — rather than mere formal liberty the end of public power. The egalitarian right to self-rule is a right to equal participation in the rule-making and adjudicative functions of government; that of self-authorship is a right to the conditions and opportunities for living a life shaped in accordance with self-endorsed ends. The right of self-authorship entails enhanced, albeit still indirect, support of cultural communities, because it is a right against not only legal but also private discrimination; and it is a right against discrimination based not only on ascriptive characteristics but also on group affiliation and on creed. Thus, the costs of cultural membership to one's life-ambitions are greatly reduced. Moreover, in dissolving — again for reasons of self-authorship — the dichotomy between belief and action, the egalitarian protection for freedom of conscience now requires exemptions from general laws on the basis of conscientious conviction where this can be done without frustrating public goals. So Sikhs can wear their turbans in the police force, Mennonites can educate their children at home, and First Nations can become Canadians without ceasing to be First Nations thanks to the egalitarian principle of neutral concern for self-authorship.[13] Most importantly, however, egalitarian

[12] *Multicultural Citizenship*, *supra* note 2.

[13] See *Yoder v. Wisconsin*, 406 U.S. 205 (1972). Brian Barry denies that exemptions for conscientious belief are required by egalitarian justice, but that is because he places preferences and convictions "in the same boat" and regards the latter as a form of expensive taste. See *Culture and Equality*, *supra* note 1 at 36, 40. If the fundamental egalitarian principle is that there is a public duty of equal concern for leading autonomous lives, then

liberalism is committed to equalizing everyone's chances of leading a self-authored life and so to providing everyone with the necessary means of doing so. Eventually, egalitarian thought comes to realize that cultural communities are as necessary to self-authorship as a guaranteed basic income, health care, and the fundamental freedoms, because they provide moral frameworks ordered to final ends from which autonomous individuals can choose their moral identities and without which they would be at a loss to do so.[14] With this discovery, egalitarianism has found a public reason for actively supporting vulnerable cultural communities through a variety of means (which will vary depending on whether the community is indigenous or immigrant) and for limiting the liberty and property rights of others in order to do so. Conversely, cultural communities have a much reinforced reason for submitting to the liberal order as to that which respects their internal integrity and supports their continued existence.

As important as these advances are to the reconciliation story, however, they leave much unaccomplished. Egalitarianism recognizes cultural communities for its own individualistic reasons. It is the right to the full and free exercise of moral conscience that generates exemptions from general laws as well as rights to public resources and (for indigenous groups) self-government for the support of communities of belief considered as "context[s] of choice."[15] This focus, however, places severe limits on the extent to which liberal public reason can defer to the internal norms and practices of these communities and thus on the extent to which cultural communities can reciprocally defer to liberal public reason as the support of such practices. We can identify three specific difficulties.

First, because the moral autonomy of the individual is the fundamental norm of the egalitarian constitution, the latter will not permit governments to enact laws whose purpose is to instruct citizens in the well-ordered integration of human goods into a self-sufficient life. By a self-sufficient life I mean a life

exemptions for conscientious belief are required by equal concern, not (as Barry thinks) violations of it. That laws must be general in application presupposes that all choices reflect preferences, accommodations to which unfairly limit the liberty of others. But this view belongs to libertarianism, not to egalitarian liberalism. People may be expected to renounce preferences; but if self-authorship is the end of law, they cannot be expected to renounce profoundly held beliefs.

14 Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989) c. 8 [*Liberalism, Community, and Culture*]; see also *Multicultural Citizenship, supra* note 2 at 82–93; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 71–72.

15 *Liberalism, Community, and Culture, ibid.* at 166.

lacking in nothing of what is needed for the enjoyment of individual dignity. So, for example, egalitarianism has no theoretical resources for limiting conscientious expression that treats race or culture as self-sufficient communities and that, for the sake of preserving them against real or imagined enemies, promotes hatred toward other races or cultures. In particular, egalitarianism is hamstrung in a case like *R.. v. Keegstra*,[16] where, in the name of neutral concern for self-authorship, egalitarianism will uphold the freedom of anti-Semitic speech, for it knows no public good by which the freedom to express subjective conceptions of the good can be limited.[17] No doubt, egalitarianism can support restrictions on general liberty to support contexts of moral choice; but it cannot justify restrictions on some individuals' freedom of conscientious expression for the benefit of others', for this freedom is its fundamental common end. Thus, if libertarianism acquiesces in public policies of cultural assimilation, egalitarianism condones racist and xenophobic propaganda by private individuals and groups voicing their conceptions of the good. "Condones" is not too strong a word here. "Tolerates" is too weak, for one can only tolerate that of which one disapproves, and egalitarianism has no resources in public reason with which to disapprove of privately held non-egalitarian beliefs or their expression. No doubt, egalitarian public reason requires the individual with egalitarian *beliefs* to tolerate the non-egalitarian beliefs and speech of racists, just as it requires the racist to tolerate the non-violent expression of egalitarian beliefs. Because, however, egalitarian public reason is neutral toward beliefs, its state can itself be neither tolerant nor intolerant of the racist beliefs of private individuals or groups. Insofar as the egalitarian state considers racist beliefs to be on a par with egalitarian ones, it may be said to condone them as a valid scheme of ends for individuals.

Second, because egalitarian public reason supports cultural communities only as arrays of options from which to choose life-plans, it ultimately fails to justify public support for any particular community unless preserving that community would be in everyone's interest. If all that is needed is a context for choice, then this can be provided by fostering a rich and varied public culture; it does not require the support of endangered parochial ones. Realistically, of course, most people are not culturally mobile in a way that would make this a sensible strategy. But this is either a superficial and contingent fact about individual psychology or a deep, ontological one about the essential embeddedness of agency in a cultural tradition. If it is the former, then egalitarian support for vulnerable communities is itself superficially contingent on the persistence of a

[16] [1990] 3 S.C.R. 697.

[17] Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996) at 214–26.

human dependence that the increasing homogenization of culture may very well remove; if the latter, then the individual's cultural immobility undercuts the egalitarian picture of the individual as a sovereign chooser of his or her moral identity who needs culture only in the way that someone dining out needs a menu.[18]

Will Kymlicka has a rejoinder to the latter criticism. He argues that moral agents are indeed deeply bound to their cultures, but not in a way that contradicts the liberal egalitarian conception of the autonomous person. This is so because agents are deeply bound only to the culture's structure — to its language and history—but not, as communitarians hold, to the particular content or character of its beliefs.[19] The content can always be made an object of self-distancing reflection and criticism and so is always subject to revision. However, even were this dichotomy between structure and content tenable (and I shall argue in a moment that it is not), it seems implausible that agents should be deeply connected to the thinnest layer of their culture and superficially connected to the thickest. Even if one rejects a view of language as a mere instrument brought externally to the thoughts it communicates, it seems nonetheless true that language is the formal part of a cultural ethos, the medium by which thoughts are shaped into communicable ideas and transmitted from one generation to the next. Someone who is still able to speak the language of his culture but who is otherwise alienated from its traditions is in no different a position with respect to the culture than someone who has learned a foreign language. Such a person cannot be said to be deeply connected to his own culture. On the contrary, he is precisely someone who is ripe for assimilation to the dominant context of choice.

Third, because egalitarianism presupposes atomism (that is, assumes the fixed reality of the self-supporting self, of the self who owes its worth to nothing beyond its own person), it too must treat particular cultural beliefs and practices as contingent and revisable individual choices it would be unfair to subsidize publicly. This is why it must distinguish between the historically contingent content of a culture and its abstract structure — given, according to Kymlicka, by its language and history; and this is why it must confine its support to the cultural structure, leaving the content to evolve in whatever way it does, while at the same time reserving authority to criticize non-egalitarian cultural practices in light of the principle of equal concern for self-authorship that justifies support

[18] In *Multicultural Citizenship*, *supra* note 2, Kymlicka canvasses all sorts of reasons, both psychological and deep, for cultural immobility, content if there is *any* reason that will tie his argument down to the support of particular cultures; see 84–93.

[19] *Ibid*.

for the structure as a context of choice. This means, however, that egalitarianism cannot defer to or support the content of any framework of cultural ends, even if the culture recognizes the creative freedom of its members to elaborate it and so has an internal source of self-examination, criticism, and evolution. Egalitarianism will thus demand that cultural contents defer to its norms without any reciprocal deference to the internal practices of genuine forms of ethical life.[20] But this inequality of respect means that cultural communities must see the authority of the liberal-egalitarian constitution as the external imposition of an alien power.

The dichotomy between cultural structure and content (or "character") produces further difficulties. That dichotomy, after all, is simply an artefact of the egalitarian's need to abstract from particular choices in order to reach public ground; it does not correspond to the distinction between what is truly essential and what is truly accidental about a culture. Some cultural groups are defined by a substantive idea or practice, others by a language. Jews speak many different languages but form a unified religious group because they believe in the unity of God who revealed Himself on Mount Sinai. Christians would not be Christians if they did not believe in and worship the divinity of Jesus. By contrast, Quebecois culture survived the "quiet revolution" because its unity was constituted principally by a common language and by a collective memory of origins. Thus, protecting structure rather than content means protecting cultures whose unifying cement happens to be a language rather than an idea; and it means discriminating against cultures whose history is nothing but the historical unfolding of an idea, while favouring those whose common heritage is something else (for example, a common memory of conquest). Moreover, in the rare cases where a repressive internal practice (such as the denial of freedom of religion) is essential to the culture's structural survival, egalitarianism finds itself paralysed by a choice between two wrongs: cutting off the culture's life-support, thus breaching a public duty to protect cultural membership, or supporting the practice, thereby abetting the violation of some members' rights under the liberal constitution. Kymlicka seeks an escape from this dissonance by claiming that the problem arises, not for ideal theory, but for one that must deal with situations of partial compliance with liberal-egalitarian norms in a non-ideal world, where the harms of intervention and non-intervention can be weighed in the particular case.[21] But this is unconvincing. The problem of dissonance arises in practice because ideal theory has set the stage for it by abstracting structure from content and conferring a right to the former irrespective of the latter. This in turn comes

[20] This is defined below.

[21] *Liberalism, Community, and Culture, supra* note 14 at 198–200.

from treating cultural membership as a right of self-authoring individuals to a context of choice rather than as a right of situated individuals to the substance of their essential worth. If the public duty were to protect only authentic instances of ethical life — that is, living cultures that value the free interpretation of their devotees — the conflict would never arise. Cultures that survive only by repression have no claim to recognition, for their members do not freely certify them as their good.

Accordingly, while the libertarian and egalitarian constitutions are part of the reconciliation story, they are not the whole story. Let us now see how the narrative is advanced when we view cultural communities as examples of ethical life. By ethical life I mean a certain form or structure immanent in living communities, a form we may describe as the mutual recognition of the common and the particular such that each gains reality through the other's deference to it. Thus, a community exemplifies the form of ethical life if the individual's free commitment to a common way of life as to the ground of his or her worth is met by the community's deference to individual autonomy as to the vehicle of its vibrant actualization.[22] I shall distinguish between two types of ethical life. In one, the common life is an ethos or custom, whose authority participants accept without demanding that the ethos be open to understanding; I'll call this type of ethical life living ethos or the cultural community. In the other, the common life is governed by a public reason accessible to rational insight, and I'll call this type the political community.

III. CULTURE AS AN INTRINSIC GOOD

At the egalitarian standpoint cultures are simply life-plan menus from which agents who are complete prior to cultural membership choose their life-orienting values. This picture does violence to the devotee's experience of his culture as something of which he is a vessel and from whose realization through him he derives personal significance. At the standpoint of ethical life, cultures come into view in the way they appeared to Herder and Hegel: as structures of mutual recognition wherein individuals submit to an ethos for the sake of the personal worth they receive by virtue of the ethos's reciprocal deference to individual agency for the sake of its existence and vitality.[23] By culture I mean the shared

[22] Here I adopt both concept and terminology from Hegel; see G.W.F. Hegel, *Philosophy of Right*, trans. by T.M. Knox (Oxford: Oxford University Press, 1967) at paras. 142–56.

[23] Hegel, *ibid.* at paras. 146–47; F.M. Barnard, ed. & trans., *J.G. Herder on Social and Political Culture* (Cambridge: Cambridge University Press, 1969) at 313 [*Herder on Social and Political Culture*].

ways, speech, wisdom, memory, and self-interpretation (through histories, literature, song, dance, art, *etc.*) of families that are united in a firm disposition to live by and perpetuate those ways, to transmit the wisdom to the next generation, and to interpret in their daily lives the customs and traditions held in collective memory. Families that are united in this way form a people. Peoples may be indigenous to a territory or immigrant offshoots of a people autochthonous elsewhere. In the former case, they are called nations, in the latter case, ethnic groups. The difference between nations and ethnic groups, while historically relevant to the kinds of policies each has demanded from governments under liberal constitutions, is of no consequence to the strength of their threshold claim to support.[24] As stable grounds of individual worth, both indigenous and transplanted cultures are equally good in their own right, quite apart from their value as conditions for leading a self-authored life. That is to say, they are intrinsic goods. As such, they no longer stand outside liberal public reason, drawing whatever indirect support the libertarian and egalitarian constitutions may give them through their protecting freedom of choice or through their redressing inequalities in the conditions of self-authorship. Rather, cultures are now fit objects of public concern by liberal governments who rule under a conception of public reason concerned with all relationships in which

[24] Indigenous groups typically claim, language, education, and self-government rights, while ethnic groups, whose members are usually more dispersed and have no unique historical connection with the territory they now inhabit, have generally been content with accommodations falling short of self-government. Of course, nothing about this need be fixed in stone, as Sujit Choudhry argues in "National Minorities and Ethnic Immigrants: Liberalism's Political Sociology" (2002) 10 J. Political Philosophy 54. Kymlicka's theory privileges indigenous cultures which, as "societal cultures" rooted in institutional practices and encompassing a full range of human activities, are the contexts of choice he says are necessary to freedom. See *Multicultural Citizenship*, *supra* note 2 at 76–80. But as contexts of individual *worth*, indigenous and ethnic cultures are equally valuable. For an argument that social facts specific to indigenous difference (prior occupancy, prior sovereignty, and treaty formation) justify a unique constitutional relationship between aboriginal people and the state, see Macklem, *supra* note 14 at c. 3–6. Macklem's argument quite reasonably presupposes an empirical-historical framework within which white European settlers come into contact with an indigenous population for which the settler culture is an alien imposition. By contrast, this essay's argument tries to place the good of cultural difference within an overarching framework of the self-sufficient political community that both grounds and rationally completes the good of culture and that thus need no longer appear alien to those who live by a cultural ethos, even if that ethos is aboriginal and the carriers of other parts of the framework happen to be white; see *infra* note 57. Whether this framework can still justify a special constitutional status for indigenous peoples as a matter of principle (as distinct from pragmatic accommodation given special circumstances) is a question I do not consider here.

claims to individual worth are validated. Accordingly, they attract liberal concern whether or not they are in danger of disappearing.

If liberal governments have a duty of concern for cultures, then cultures have, in a manner of speaking, correlative rights to concern. The idea, however, that cultures can have rights is unintelligible to many liberal writers. Brian Barry, for example, asserts that "[c]ultures are simply not the kind of entity to which rights can properly be ascribed."[25] Only individual persons are right-bearers, for only individuals can have interests it would be wrong for others to harm or fail to promote. Even were it conceded, moreover, that membership in a cultural community were an important ingredient of individual well-being, it would not follow (some argue) that communities could claim a legal right to concern, for the good of cultural membership might be better promoted through the liberty and anti-discrimination rights enjoyed by individuals.[26] Others worry that attributing rights to groups would mean eroding the rights of individuals in relation to the group, both that of insiders and outsiders. If cultural groups have rights to the public support and accommodation of their differences, does it not follow that the freedom of outsiders must now be restricted for the particular interests of others or that insiders must lose the protections vis-à-vis group rulers that they otherwise enjoy under the liberal constitution?

The last-mentioned concern is the focus of much of the remainder of this essay. I will suggest how the rights of cultural groups can be integrated with libertarian and egalitarian rights within a political constitution whose authority non-egalitarian cultural groups can recognize. The antipathy toward group rights expressed in the first and second-mentioned objections (that the group as such has no independent interest a right could protect and that any individual interest in group membership can be protected by individual rights) is based on a misunderstanding of the claim to these rights. The claim is not that the group as some reified abstraction is a right-bearer; it is that the individual worth-claim that is validated in cultural life is a fit object for public recognition by a liberal state whose end is the dignity of the individual. Thus, the being for whose sake the right is protected is still the individual, but the individual is now considered, not as a universal person (as he still is in other aspects of life), but as someone for whom membership in a particular cultural group is intrinsically good because a source of realized dignity. This good is inadequately protected by individual

[25] Barry, *supra* note 1 at 67. See also *Liberalism, Culture, and Community*, *supra* note 14 at 241–42.

[26] See Michael Hartney, "Confusions Concerning Collective Rights" (1991) 4 Can. J. L. & Jur. 293 at 301–307.

rights, however, because cultures are worth-conferring only insofar as they are taken as ontological ends requiring individual agents for their realization; and protecting them only through individual rights, as if they were goods wholly servient to individuals, already denies their status as ontological ends.[27] That said, however, the claim that cultural membership carries rights that governments ought to respect is not so different a claim from that on which libertarian and egalitarian rights rest. The libertarian constitution does not recognize as rights all claims to final worth by the individual; it does not, for example, recognize any claim to lordship over slaves. Rather, it recognizes only those claims to worth that are capable of being recognized by an equal self. That is to say, it recognizes claims to worth validated within a relationship of mutual recognition. Now, if the liberal constitution recognizes the rights emergent from relationships of mutual recognition between putatively self-supporting agents, then *a fortiori* it should recognize the validated worth claims emergent from relationships in which individuals are intentionally embedded. And one such relationship is that between the agent and the cultural ways with which he or she identifies. When the right of cultures is seen in this light — as the right of individuals to the preservation of the cultural basis of their worth — it is the exclusive focus on isolated persons as right-bearers that becomes unintelligible. Why should rights attach only to individual agents who view themselves as uprooted from relations of mutual recognition?

A. Race, Culture, and Political Community

We can sharpen the sense in which the term culture is used in this essay by demarcating its borders with neighbouring concepts, so to speak. First, culture is distinguished from race. Because a culture is normally transmitted by the family from one generation to the next, it bears some connection to the race, but that connection is ultimately contingent. We can say that race is to culture what the abstract sexual union is to love, marriage, and the family. If a sexual union

[27] As does protecting them with collective rights on the theory that collective interests are individual interests in goods having the special features of public or shared goods; see Leslie Green, "Two Views of Collective Rights" (1991) 4 Can. J. L. & Jur. 315; Denise Reaume, "Individuals, Groups, and Rights to Public Goods" (1988) 38 U.T.L.J. 1. Here rights are ascribed to collectivities for reasons that fail to capture the sense in which cultural communities are worth-conferring and not simply good in an indeterminate sense. Cultural communities are indeed shared goods, but that is not a sufficient reason to place liberal governments under a duty to promote them. Team sport is also a shared good. Nor is the importance of the interest in the shared good a sufficient reason. Friendship is a shared good important to well-being, but few would think that governments are compelled to foster friendships of all kinds.

between two human individuals brings to appearance the biological kind, then a chain of such unions brings to life the race (a species of the kind), which materializes in the common physical features of its members. Moreover, just as the biological kind treats the individual as insignificant, so too does the race. As a member of the race, the individual comes to no special worth, because the race requires nothing of the individual other than that he or she blindly produce offspring through abstract sexual unions. The race does not need to be recognized by the individual in order to exist, and so the individual is unimportant to the race. This is why racial purity is not a constitutional good for liberalism and why it would be an unconstitutional use of power to restrict liberty for its sake, as anti-miscegenation laws do, or to define membership in a politically recognized group exclusively by descent, as the Federal Republic of Germany does. Culture, by contrast, requires commitment for its survival and vitality, and so it is a source of worth for the individual devotee. As such, it, but not the race, can be said to be an ethical end of the individual. This is why Herder argued that cultures and nations form the really salient divisions of the human genus, whereas races tend to be vanishing things. "Complexions run into each other," he wrote, whereas a nation forms a distinct community united by language and culture.[28] Because recognized commitment to a way of life rather than biological descent defines cultural membership, race comes to have an epiphenomenal significance as a marker or sign of an ethical connection that others must demonstrate more palpably—through a conversion rite, for instance, or simply by adopting the culture's language and manners. True, a race is often the principal carrier of a culture, but cultures can survive intermarriages and immigration, just as marriages can survive the cooling of sexual passion.

If culture is distinguished at its lower border from race, it is distinguished at its upper border from the political community. If culture were the self-sufficient community, if it contained all that is needed for the validation of individual worth, then the political community would be nothing but the nation organized under a central authority for the purpose of protecting and promoting the nation's culture. Political authority would thus be servient to the nation, and every nation would be entitled to political sovereignty. Nationalism is the view that culture is the self-sufficient community.[29] It is, however, a mistaken view. Culture is not self-sufficient because, claiming authority as custom, it fails to satisfy the autonomous personality who needs to see in what it accepts as normatively valid the specification of some rational principle. From our standpoint, culture is an intrinsic good because it instantiates the mutual recognition structure of ethical

[28] *Herder on Social and Political Culture*, *supra* note 23 at 284.

[29] As it was for Herder; see *ibid.* at 324.

life, and so it is one among many spheres in which individual worth is validated. For the individual immersed in a culture, however, culture claims authority as ethos—as that which is simply given irrespective of content and thus irrespective of its connection with any principle. Thus, while culture affords the individual a feeling of personal significance and is part of what a life of dignity requires, the free mind incipient in culture cannot rest content with it. This means that the political community is not coextensive with the cultural community or with the nation. The political community is the self-sufficient community encompassing all that is needed for a life of individual dignity, including the content of rights and entitlements unfolded from the libertarian and egalitarian conceptions of public reason, and political authority is the agent of this inclusive life. The cultural community is only one aspect thereof. Political communities that encompass a plurality of cultural communities (multicultural polities) under a conception of public reason that protects individual rights, promotes the conditions for equal self-authorship, and fosters common goods, may thus rightly claim to be better exemplars of the liberal constitutional state than nation-states, in which public reason is tainted by ethnic interests. I shall call the public reason organizing the self-sufficient community the inclusive conception.

B. Hate Speech

Under the egalitarian constitution taken alone, the Canadian Supreme Court's upholding the law under which James Keegstra was convicted for teaching his anti-Semitic beliefs to his pupils appears as a betrayal of liberal principle in the kind of case that puts a liberal's integrity to the test. Not so from the standpoint of the inclusive conception. From the vantage-point that sees liberal goods in social structures conferring individual worth, laws regulating the expression of hate exactly parallel laws regulating pornography. Their purpose, it turns out, is not to prevent offence or indirect physical harm to others; nor is it to protect the self-respect of minority group members. To these ends, the right of self-authorship through conscientious expression (falling short of incitement to crime) has no reason to bow, for no one may claim protection for his self-expression at the expense of the rights-respecting self-expression of others. Rather their purpose is to instruct citizens in the self-sufficient life within bounds consistent with the right of self-authorship. Just as obscenity laws teach the integration of sex into love and moral commitment, so do laws against promoting hatred toward groups teach the integration of racial into cultural identity and the integration of cultural identity into citizenship in a political community within which all cultural examples of ethical life are valued. Thus, Justice Dickson came closest to the mark when he said that Canada's hate speech law constituted a reasonable limit to free expression because the fostering of respect among cultural communities is a goal to which the right of free

expression must defer. He did not say why it must defer, but we can perhaps supply the missing argument.

The egalitarian principle of neutral concern for self-authorship is not the fundamental principle of the liberal constitution. Rather, the principle of neutral concern is part of a larger story about reconciling public authority with individual moral autonomy so that each can submit for validation to acceptance by the other without self-loss. The egalitarian principle contributes to that story by imposing on government a duty of concern for the conditions of self-authorship that allows public authority to be constructively self-imposed by free and equal citizens. The performance of that duty produces the legal framework of the equal opportunity state that forms part of the objective conditions for inspiring real (not just constructive) loyalty toward public authority as to that which shows equal concern for everyone's accomplishing his or her life-goals. But also part of the reconciliation story are the social structures — marriages, families, nations — that individuals spontaneously form in quest of a stable basis of worth; for these are common goods in the private sphere that public authority can nurture without fragmentation, and this concern will in turn allow private bodies to defer to public authority without loss to their internal autonomy. So the public authority has an interest in fostering these goods. It has an interest in encouraging the complex integration of individual striving into worth-confirming social structures that will make possible the ultimate reconciliation of public authority and individual autonomy in the self-sufficient political community.

Now, when faced with this larger picture, the claims of self-authorship can no longer be advanced abstractly or in isolation. These claims now properly defer to what is needed for the fulfilment of the reconciliation narrative, for the right of autonomy is first solidly established within it. And part of what is needed are laws that show individuals the way to a public life lacking in nothing of what is needed for the enjoyment of their dignity. It is good for individuals that their racial identities be integrated into cultural ones and that their cultural identities be integrated into political citizenship. However, this path cannot be imposed on the individual, or it would not be a path toward reconciling authority and autonomy. Here laws must guide rather than coerce, for they must leave room for the individual's spontaneous endorsement of the self-sufficient community as his good.

The Canadian law on hate propaganda does this by creating several defences to a charge of promoting hatred toward an identifiable group.[30] First, the law leaves private conversation alone; it is concerned only with statements that communicate a public teaching contrary to the public teaching of the self-sufficient community. Second, it does not punish the communication of any statement that is true. This is not because the dissemination of true facts is of earth-shaking importance but because, if the statement is true, then the speaker very likely knew it to be true; and if he spoke what he knew to be true, the law cannot consistently with respect for self-authorship punish him for his self-expression. Third, even if the statements were false, the law will not punish the speaker if he spoke on a matter of public interest believing on reasonable grounds that his statements were true. If reasonable grounds are lacking, then he was either lying when he spoke, or willfully deceiving himself, or his speech did not proceed from the reflection that self-authorship requires. In any case, the law does not impose its teaching on a conscientious dissident. Viewed as punishing only lying, willfully blind, or unreflective purveyors of hate, the law teaches its lesson against abstract racial or cultural self-identification without violating any genuine right of self-authorship.

C. External Protections

Finely tuned laws prohibiting hate speech are one way in which governments legitimately promote the good intrinsic to culture by restricting the freedom of non-members. Kymlicka calls measures of this kind external protections, which he distinguishes from the internal restrictions that self-governing cultural communities might impose on their own members for the sake of cultural self-preservation. This distinction is helpful, and I will adopt it. Kymlicka, however, treats external restrictions as permissible provided that they rectify cultural disadvantages and internal restrictions as impermissible.[31] This dichotomy is too blunt, and so I will introduce further distinctions. Specifically, I will distinguish between external protections limiting libertarian rights to mobility, acquisition, and commercial speech, which are permissible, and those limiting egalitarian rights to self-authorship and self-rule, which are not; and I will distinguish between internal restrictions that are impermissible simply and those owed a duty of respect but not a duty of support. Here I deal with external protections against non-member individuals and consider what else governments may and may not do by way of protecting cultural communities through restricting the

[30] *Criminal Code*, R.S.C. 1985, c. C-46, s. 319(3).

[31] *Multicultural Citizenship*, *supra* note 2 at c. 8.

freedom and opportunities of non-members. In the next section I deal with the limits of permissible accommodation of internal group practices.

Some external protections diminish the liberty of non-members without infringing their rights to liberty. Court decisions recognizing native land claims based on aboriginal title are of this kind; they simply recognize rights it would be wrong to invade. Other protections, however, limit liberty or opportunity, not in accordance with property or equal liberty, but just for the purpose of protecting the cultural practice or identity of a particular group. For example, a law might limit the liberty of motorists to drive through an orthodox Jewish neighbourhood on the Sabbath so as not to disturb prayers.[32] A language law might limit the liberty to advertise one's wares or conduct one's business in the language of one's choice to the extent necessary to preserve the public presence of an endangered language in a province governed by the minority in a federation that speaks it;[33] or it might prevent access by children of immigrants to public schools conducted in a continentally dominant language so as to immerse them in the language of the locally dominant culture. Further, a law might prohibit non-aboriginals from acquiring property on an aboriginal reserve in order to preserve the land base for native self-government; or from taking up residence on a reserve in order to ensure that aboriginals constitute a local majority of voters; or from voting or holding office if they marry band members and live on the reserve. Finally, public universities and professional schools may reject well-qualified non-aboriginal applicants in favour of less qualified aboriginal ones in order to provide strong leadership for aboriginal communities. Kymlicka justifies all such measures as necessary to equalize the cultural conditions for leading self-authored lives, but some can be justified in a way that respects cultures as intrinsic goods, while others cannot be justified at all.

The good in culture is qualified to override libertarian rights of mobility, acquisition, and speech (for example, commercial speech) that does not express a conception of the good life. This is so because, like these rights, cultures validate individual worth, but they do so as intentional structures of mutual recognition conferring solid worth, whereas libertarian rights emerge from implicit relations of mutual recognition between self-supporting agents whose worth then depends for its recognition, first, on self-interested strangers claiming authority to determine boundaries for themselves, and then on legally

[32] *Lior Horev, et al. v. Minister of Transportation, et al.*, reproduced in Lorraine Weinrib & Tsvi Kahana, eds., *Global Constitutionalism* (Toronto: University of Toronto Faculty of Law, 1999) at 114.

[33] *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712.

untrammelled sovereigns.[34] As examples of ethical life, cultures do better at what libertarian rights purport to do on their own, namely, realize the essential worth of individuals. Obviously, however, this justification for a cultural override of liberty rights implies a limitation. These rights can be legitimately overridden only for the sake of preserving cultures that are genuine examples of ethical life — that respect their members as free interpreters of the culture. Thus, it would be constitutionally wrong to limit anyone's liberty for the sake of preserving a culture that was internally repressive — say, the cult of a religious sect whose members are manipulated by a charismatic leader or a culture in which dissent from orthodoxy is punished. Such cultures are not certified as good by free members and so have no valid claim to public support.

Further, even if a way of life is worth preserving, limitations on libertarian rights can go no further than is necessary to protect it. That is, even though living cultures are better validators of individual worth than libertarian rights taken alone, the good in culture must still respect those rights, because cultures are not self-sufficient communities. As regimes of an indeterminate ethos, cultures do not respect morally autonomous agents. Libertarian rights too are part of a political life that is complete in dignity; for, when coupled with the egalitarian entitlements that complement them, they embody the final worth of autonomous agents and so lay down objective conditions for the reconciliation of political obligation and individual autonomy within a self-sufficient ethical life. So liberty rights maintain their force even in deferring to the good in culture. In positive constitutional law, the mutual deference of constitutional goods and libertarian rights is reflected in the doctrine of minimal impairment. Thus, in *Ford v. Quebec*,[35] the Supreme Court of Canada struck down Quebec's commercial sign law because, in banning all languages other than French, it went further than was necessary to protect the public presence of the French language in Quebec; and in *Lior Horev v. Minister of Transportation*,[36] the Israeli Supreme Court fashioned a solution to the conflict between secular motorists and the orthodox Jews of Bar Ilan Street by prohibiting traffic only during the hours of Sabbath prayer. What appears on the surface as a pragmatic balancing of interests is really an intuitive grasp of the interconnected system of elements making up the self-sufficient political community.

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[34] For the despotic outcome of libertarian constitutionalism, see I. Kant, *The Metaphysics of Morals*, trans. by M. Gregor (Cambridge: Cambridge University Press, 1991) at 125: "The legislative authority can belong only to the united will of the people. For since all Right is to proceed from it, it *cannot* do anyone wrong by its law."

[35] *Supra* note 33.

[36] *Supra* note 32.

If, however, libertarian rights of mobility, acquisition, and commercial speech yield to the good in culture, egalitarian rights of self-authorship and self-rule (provided they are consistent with the self-sufficient life as a whole, as hate speech is not) do not. This is so because the political community differs from the cultural community precisely in being a form of ethical life that the morally autonomous individual, who is already incipiently recognized in culture but whose development is arrested there, will freely endorse as sufficient for its dignity. Because cultural communities (insofar as they are good) themselves value free interpretive agency but (as resting on the authority of ethos) make no room for the free-thinking self, the conditions of self-authorship and self-rule are higher in the order of constitutional goods than given ways of life. They stand to culture as the self-sufficient community stands to partial communities or as the fully developed ethical life stands to embryonic ethical life. This means that it is unconstitutional under an inclusive conception of public reason to deny voting rights to non-aboriginal residents of a reserve (though it would be permissible to deny them residency), or to subordinate the freedom of religious conscience (in the matter of dress, for example) to the cultural identity of the majority, or to use public education and naturalization law to inculcate a particular cultural ethos (though it would be permissible to provide public education to the self-sufficient life only in the majority language), or to institute (even temporarily) reverse discrimination policies favouring aboriginal applicants, though other forms of affirmative action are not only permissible but required. Cultures are good, but these ways of protecting them are not. Indeed, they are incoherent. For if cultures are protected at the expense of self-authorship and self-government rights, then they are also protected at the expense of the complete ethical life within which they appear as constituent goods worthy of even-handed public support. Such protections now appear as one-sided assertions of ethos against "liberalism," where ethos must appear as illiberal and so as having no claim to support from the liberal state.

IV. ACCOMMODATION AND ITS LIMITS

Fostering the common good in cultures not only requires protecting vulnerable ways of life from the potentially destructive consequences of non-adherents' untrammelled liberty; it also requires accommodating their distinctiveness, whether vulnerable or not, in the process of governing under a public conception of justice. Once cultures are seen as grounds of individual worth embodying a liberal good, policies aimed at assimilating them to the culture of the majority or that have assimilation as their probable effect are unconstitutional under the inclusive conception of public reason. Such policies tend to destroy the good of culture for some in order to enhance it for others. They remove for a minority, while strengthening for the majority, one of the

stable grounds of individual dignity. It is not that assimilationist policies violate a norm of aloof neutrality toward cultural contents, as would be the case if cultural membership were simply a life-style choice or even a primary good. It is rather that, because cultural membership is an intrinsic liberal good, such policies now violate a positive duty on government of even-handed support. Multicultural accommodation is now a constitutional necessity.[37]

Naturally, no single method of accommodation is uniquely mandated. Accommodation of differences may take different forms depending on whether the culture is carried by an aboriginal people with an historical claim to a territory, or by one of several co-original national or religious groups, or by the descendants of an immigrant population. Where a culture is actualized by a native people with aboriginal title to land (and that wishes to be part of a larger political community), public accommodation of its distinctiveness will take the form of deference to the territorial jurisdiction of the traditional self-governing bodies of that people, including the courts that interpret the nation's ethos; where a culture is carried by one of several co-original peoples, it will usually take the form of a federal structure of government giving that people its own regional government (if the group is concentrated in a geographic area) or jurisdictional autonomy (if it is geographically dispersed) with power over matters affecting the preservation of its culture; and where the culture is borne by an ethnic group descended from immigrants, accommodation will typically involve exemptions from general laws and public subsidies of cultural activities.[38] Thus, the duty to accommodate may itself be adjusted to the contingencies of a political community's history and circumstances.

A. Reconciling Accommodation with Legitimate Constraint: The Alternatives So Far

The difficult problem raised by the duty to accommodate cultural difference can be formulated thus: what are the proper limits of accommodation under a liberal constitution, and how can these limits be imposed on parochial cultures without dissolving public reason into Western liberal ethos? As Shachar and others have pointed out, accommodating cultural difference can, if not constrained in some way, expose members of the culture — particularly women — to practices that violate their agency rights under the libertarian constitution

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[37] Thus, s. 27 of the *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, directs judges to interpret the *Charter* so as to preserve and enhance the multicultural heritage of Canadians.

[38] See *e.g. Yoder v. Wisconsin*, *supra* note 13.

and their citizenship rights under the egalitarian constitution. We will see examples of this in a moment. Yet constraining these internal practices must be justified in a way that can win the assent of those who view all living cultures as intrinsically and equally good, or else the constraints will appear as the external impositions of an alien culture. What we want to avoid is a situation where constraints on internal practices in the name of liberty and autonomy appear to the members of traditional cultures as reflecting the values of an individualistic and autonomy-loving culture imposed on cultures for which autonomy is less important than belonging. Each of the constituent conceptions of liberal public reason (libertarian, egalitarian, and communitarian) has its own way of dealing with this problem, and each is in its own way inadequate.

For libertarianism, the possibility of illiberal cultural practices is an argument against accommodation *per se* and for supporting cultural communities only indirectly through protecting the equal right of all agents to the freedom of religion and association. In that way, it is said, the liberal state lends support to cultures that can win adherents to its ways without abandoning their members to abusive or discriminatory internal practices or to oppressive group hierarchies.[39] There is, of course, an assumption implicit in this view that the dying out of a culture reflects its lack of value for individuals and that there is, therefore, no more point to supporting a moribund culture than there is to propping up an insolvent firm. This assumption is cousin to the view that goods the market won't support because they are not widely desired are not goods at all; but it is more naïve, for it insensitively ignores the pressures to assimilate placed on people who value their culture both by official policy and by the career demands faced by individuals seeking to live out their view of the good. There is, moreover, yet another parallel between libertarianism's economic and cultural policies of laissez-faire. Just as the former abandons the economically weak to their capitalist lords, so does the latter leave vulnerable members of cultures to the power hierarchies within them insofar as they choose not to renounce a deep source of personal significance in favour of the rights of denaturalized "man". That is to say, leaving cultures to a wholly autonomous sphere of private choice means the state's forgoing any leverage with which to promote changes in what goes on within them.[40]

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[39] For a version of this argument from a "moderate communitarian," see Allen E. Buchanan, "Assessing the Communitarian Critique of Liberalism" (1989) 99 Ethics 852 at 862–63.

[40] Shachar adduces the example of the *agunah* or "anchored wife" in Jewish law, who may be kept from remarrying by a husband who arbitrarily refuses to grant a bill of divorce. Where cultures are not integrated into the public domain, unofficial law of this kind is shielded from scrutiny; see *Multicultural Jurisdictions*, *supra* note 4 at 57–60.

Beyond these problems, however, the libertarian posture toward cultural diversity exposes the liberal state to powerful critiques of its legitimacy from two directions. First, non-accommodation makes liberalism (insofar as it is identified with libertarianism) acquiescent in both the intentional and natural assimilation of cultural minorities into the culture of the majority and so makes liberal public reason an unwitting ally of the dominant ethos. Requiring a Jew or Muslim to close his shop on the Lord's Day violates no libertarian right of *inward* belief or freedom of association; nor does requiring an Amish youth to attend high school until age sixteen. Second, libertarian non-accommodation makes liberal public reason look like liberal ethos. This is so because, in viewing traditional ways of life as subjective individual choices, libertarianism can protect individuals against the rights violations of their own cultures only by asserting the rights of atomistic agents against those who see their agency as embedded in cultural ways of life. Thus, libertarianism's constraints cannot appear legitimate to those for whom culture is an intrinsic good.

Nor, as we have seen, can those of egalitarian liberalism. In contrast to libertarianism, egalitarian liberalism accommodates cultural difference for the sake of equalizing opportunities for leading self-authored lives. Yet, because it shares the atomistic premises of libertarianism, egalitarianism too sees traditional ways of life as subjective choices it would be unfair to subsidize publicly. Thus, egalitarianism accommodates only something called the cultural structure viewed as a context of choice; it defers to no determinate set of practices or way of life.[41] Nonetheless, it expects these ways of life to defer to it. Egalitarianism holds all cultural practices answerable to the norm of equal self-authorship that justifies support for the cultural structure. Thus, while external protections that equalize opportunities for self-authorship across cultures are permissible, restrictions of self-authorship within cultures are not. In this way, egalitarianism reconciles a duty to accommodate with strong constraints on internal practices, but it does not reconcile constraint with legitimacy. For it too demands that the viewpoint for which agency is embedded in intrinsically good ways of life unilaterally yield to that for which individuals are sovereign choosers of their ends and cultures only instruments of choice. As a consequence, the enforcement of egalitarian constraints against self-governing cultural communities appears as the interference of an individualistic liberal culture into the internal affairs of a non-individualistic one. Since this interference cannot be justified on neutral grounds, egalitarianism ends up with constraints that are strong in theory and non-existent in practice. Kymlicka, for

[41] In *Multicultural Citizenship*, *supra* note 2 at 76, the term cultural structure becomes "societal culture," which involves a common language and common institutions.

example, insists on liberalism's normative authority to call illiberal internal practices wrong but counsels against the practical enforcement (through judicial review) of liberal norms against cultures that violate the rights of their members. This, he says, would be analogous to one sovereign state's interfering in the internal affairs of another.[42]

Communitarianism, by contrast, reconciles accommodation with legitimate constraints, but the constraints are weak. The communitarian constitution views each living culture as an ethical life in which individual agents recognize the authority of an ethos that reciprocally recognizes the free interpretive agency of individuals. Insofar as they conform to this structure, living cultures are certified as good by free agents, and their goodness commands respect. The corollary of this, however, is that cultures command respect only insofar as they are confirmed as good by free agents. Thus, cultures that coerce belief or that impose severe burdens on the freedom to leave the group may be interfered with in the name of public reason conceived as the universal form of ethical life. Such interferences are legitimate, and can appear so to the perspective that regards all cultures as equally and intrinsically good, because they seek to constrain group practices by a norm internal to the goodness of culture itself. Respect is shown cultures that are freely respected by their members and withheld from those that are not. Yet these constraints are fairly weak. As long as members are free to leave the group, practices that violate the egalitarian principle (say, by subordinating women to their husbands or by denying them an equal opportunity to pursue satisfying careers or the right to vote in self-governing bodies) or that deviate from the ways in which sexuality is integrated into stable relationships of mutual respect (for example, polygamous practices) are as valuable in the sight of public reason as egalitarian practices. Proscribing them for the sake of equality is interfering in the name, not of public reason, but of liberal ethos. Thus, each living ethos commands the respect of public reason and the tolerance of cultures whose ways are different.[43]

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[42] *Ibid.* at 158–72. Barry, by contrast, would enforce liberal egalitarian norms on the theory that liberalism is internally universalistic; see *supra* note 1 at 138. But he offers no legitimation argument for enforcing liberal universalism that members of traditional cultures could accept. Indeed, he seems quite unconcerned by the legitimacy problem, resting content with asserting liberal egalitarian criteria of legitimacy (viz. neutral respect for conceptions of the good) against opposing conceptions (and then excommunicating as liberals those whose liberal sentiments make them uncomfortable about imposing a particularistic conception of legitimacy). See generally at 131–54.

[43] For representative statements see Chandran Kukathas, "Cultural Toleration," in Ian Shapiro & Will Kymlicka, eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997) 69; and Michael McDonald, "Should Communities Have Rights? Reflections on

The foregoing survey of theoretical models seeking to harmonize respect for cultural diversity with the authority of public norms reveals an obvious lacuna. Missing is an approach that would reconcile the duty to accommodate cultural difference with strong constraints on internal practices that can be accepted as legitimate from the standpoint that regards all living cultures as intrinsically and equally good (and that can therefore be enforced through judicial review). I do not say "that can be accepted as legitimate from the internal point of view of each culture." As we saw, such a criterion for the legitimacy of constraint is unreasonably demanding, for it makes the subjective point of view of each culture the arbiter of what is to count as a valid constraint on its practices. This would not be a reasonable test for the legitimacy of constraints on individual conduct, nor is it one for cultures. Such a test makes sense only from a position of cultural relativism, which, since it recognizes no external moral restraints on nations, has nothing to say against wars of cultural aggression and imperialism. That cultures are inherently worthy of respect is a proposition that flows, not from cultural relativism, but from a conception of public reason according to which all living cultures are instrinsically and equally good. Strong constraints on internal practices are legitimate if they could be assented to by those who take this philosophic position.

The rest of this essay seeks to supply the missing alternative. Before we begin, however, we need a rough map of the terrain. In general, the phenomena we are concerned with are cultural practices that violate the agency and citizenship rights that members enjoy under the liberal constitution. The question for discussion is whether and how the norms of that constitution may legitimately be applied to such practices so as to circumscribe a duty to accommodate cultural differences. But what cultural practices come into conflict with what liberal norms?

B. Culture vs. Liberalism: A Taxonomy

We can distinguish at least three types of collision between cultural practices and liberal constitutional norms. One type involves practices that coerce the individual's allegiance or involvement, either by punishing the expression of heterodox beliefs or by commanding demonstrations of loyalty or by direct

Liberal Individualism" (1991) 4 Can. J. L. & Jur. 217.

violations of bodily integrity. Cases of compulsory flag-saluting[44] illustrate this type, as does the British Columbia case of *Thomas v. Norris.*[45] Thomas, a member of the Coast Salish Nation living off the reserve, was abducted, battered, and wrongfully confined for four days by several other members of his band as part of a ritual initiation into a traditional tribal dance. During his confinement, Thomas was deprived of all nourishment but water, and was repeatedly prodded, bitten, and whipped by his captors, all with a view to inducing a "vision experience" from which, according to tradition, would issue his "song". Thomas, who at no time consented to the initiation, sued the defendants for assault, battery, and false imprisonment. The defendants claimed that the initiation ceremony was an ancient practice integral to native life and that it therefore fell within the aboriginal rights recognized by section 35(1) of Canada's *Constitution Act, 1982*.[46] The court disagreed, saying that, even had an ancestral practice been proved, no custom involving "force, assault, injury, and confinement" could be an aboriginal right under the constitution.

Another type of collision involves cultural practices that violate a member's equality rights under the liberal constitution—rights to equal concern for self-authorship and self-rule. The case of *Santa Clara Pueblo v. Martinez*[47] is an example of this type. There, Ms. Martinez sought an injunction against the enforcement of a tribal ordinance denying membership in the tribe, together with the residence and inheritance rights that membership entailed, to children of female members who marry outside the tribe. No such burdens on intermarriage applied to male members. Martinez argued that the ordinance violated her right under the *Indian Civil Rights Act*, which applied to Indian self-government, to the equal protection of the laws. The United States Supreme Court ruled against her, arguing that, in the *Indian Civil Rights Act*, Congress had modified constitutional protections for the individual Indian in deference to tribal self-government and cultural autonomy, leaving federal courts with jurisdiction only

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[44] See *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), where the U.S. Supreme Court upheld in the name of the "Nation's fellowship" public school rules mandating flag-saluting against a freedom of religion challenge by a Jehovah's Witness. Justice Frankfurter wrote: "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization" (at 596). The Court reversed itself in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[45] [1992] 2 C.N.L.R. 139 (B.C. S.C.).

[46] See *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[47] 436 U.S. 49 (1978).

in cases of arbitrary arrest and imprisonment. The determination of tribal membership, the court said, was a matter central to cultural self-definition and survival; hence it was a matter best reserved to the tribes themselves, which had been left extensive powers to govern themselves according to their own traditions. The court did not consider whether, if the *Indian Civil Rights Act* did indeed dilute Bill of Rights protections in the case of Indian self-government, Congress had the constitutional authority to do this. It simply took for granted that Indian tribes, as "quasi-sovereign nations", were immune from constitutional constraints except insofar as Congress chose to modify that immunity—a doctrine that, in the guise of respect for Indian autonomy, actually re-enacts their subjugation.

A counterpoint to the *Martinez* case is *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.[48] There, non-resident members of the Batchewana band challenged a section of the Canadian Indian Act that conferred band voting rights exclusively on band members resident on the reserve. Off-reserve members constituted a majority of the band and consisted largely of women who had been reinstated as members after *Martinez*-type legislation was declared to be in violation of the International Covenant on Civil and Political Rights.[49] The Federal Court of Appeal found a violation of non-resident members' equality rights under the *Charter*, but, anticipating that there might be aboriginal rights based on ancient practice to discriminate among band members in the matter of voting privileges, it refused to invalidate the offending section generally, preferring a remedy that would apply only to the Batchewana band. Thus, the Court of Appeal was prepared to countenance the adjustment to ancient band practice of *Charter* equality rights with respect to self-rule. The Supreme Court, however, thought otherwise. Without saying whether it would ever entertain the idea of a band exemption from the *Charter*'s equality rights, it struck out the offending provision generally and suspended its ruling so that the federal government and Indian bands might consult on new electoral arrangements that would recognize the (not necessarily equal) voting rights of non-residents. In this way, the Court fashioned a remedy that, by encouraging negotiations within the range of options approved by the *Charter*, tended to obviate the need for aboriginal claims to exemptions from the *Charter*'s equality guarantees, at least with regard to voting.

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[48] [1999] 2 S.C.R. 203.

[49] *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 No. 40 (A/36/40) at 166 (1981).

Another contrast to *Martinez* is *Dayton Christian Schools v. Ohio Civil Rights Commission*.[50] There, a teacher at a school requiring its faculty and parents to be "born again" Christians was told that her contract would not be renewed after she had become pregnant because of the school's belief that a mother with preschool age children should stay at home. She complained of sex discrimination to the Ohio Civil Rights Commission, which informed the school it could avoid legal action only by reinstating the complainant. The school brought an injunction against the Commission's proceedings, arguing that the Ohio *Civil Rights Act* prohibiting sex discrimination in employment violated its parents' and faculty's right to the free exercise of religion. The Court of Appeals agreed, but held that the state's interest in protecting individuals from sex discrimination was sufficiently compelling to justify the infringement. Nevertheless, the court ruled against reinstating the teacher, saying that this was an unnecessarily burdensome restriction of free exercise. The state's interest could be achieved less invasively by withdrawing tax exemptions and public services from a school that refused to comply with its laws promoting equal opportunity. Of course, the difference between *Dayton* and *Martinez* is that the latter was a case involving aboriginal self-government, whereas *Dayton* concerns a culture unprotected by powers of local governmental autonomy. We shall have to consider, however, whether that should make a difference to the jurisdiction of equality norms.

A third type of collision concerns cultural practices that violate liberal norms relating to the family. In particular, cultures may practise unconventional forms of marriage or engage in child-rearing practices (*e.g.* female circumcision or severe corporal discipline) harmful to the child's well-being and to its development as an independent moral agent. Some members of the Mormon Church, for instance, believe that polygamy is a divinely enjoined duty, breach of which is attended by eternal punishment. In *Reynolds v. U.S.*,[51] the accused, a Mormon who had been convicted under a Utah law that punished polygamy by up to five years in jail, argued that his constitutional right to the free exercise of religion entitled him to an exemption from the law. The Supreme Court disagreed, invoking the libertarian distinction between belief and action. Congress, the court said, was deprived by the First Amendment of all power over opinion, "but was left free to reach actions which were in violation of social duties or subversive of good order."[52] Polygamy is a practice of the latter sort, the court argued, because it is based on a "patriarchal principle" that has

[50] 766 F.2d 932 (1985).
[51] 98 U.S. 145 (1878).
[52] *Ibid*. at 164.

despotism as its natural political consequence. Polygamy is a feature of "Asiatic and of African people" and "odious among the northern and western nations of Europe." [53]

Of course, such explicitly ethnocentric arguments are odious to egalitarian liberals, for whom consensual polygamy is a life-style option that neutral respect for self-authorship must permit. Carens, for example, wonders why liberal democracies should prohibit polygamy at all given their commitment to the principle "that adults should normally be able to enter into whatever contracts or personal relationships they choose."[54] Yet laws prohibiting polygamy can be defended under a liberal constitution as encouraging the integration of sexuality into relationships of mutual recognition conferring special worth on individuals. Requisite to objective confirmation of worth is that the commitment of each spouse be equal and reciprocal. If one spouse takes the other as an exclusive end, but the other remains free to take other spouses, then the first is not preserved as an end in devotion to the other; he or she becomes a means to the other's honour but receives no special honour in return. But then the servient spouse loses his or her qualification to give the dominant one the satisfying confirmation that can come only from an honoured end. If both are free to take other spouses, then there is an equality, to be sure, but one of non-recognition; again, no one receives validation for his or her special worth. Since these relationships fail to generate objective reality for worth-claims, they cannot receive the public authority's imprimatur as generating valid obligations.[55] Thus only monogamy is civil marriage. Going through a form of marriage when one is already married debases the good of marriage (in the way that a counterfeit university degree debases the real one); hence it is properly proscribed under a penalty. The question, however, is whether the libidinal path to monogamy may be imposed coercively on communities of belief for which it is a path to damnation or whether such communities are entitled to an exemption.

The contest between ethos and liberalism also provides a new angle on *Yoder v. Wisconsin*,[56] already alluded to as a case illustrating egalitarianism's

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[53] *Ibid*. at 166.

[54] Carens, *supra* note 3 at 155.

[55] Thus, in *Hyde v. Hyde and Woodmansee* (1866), 1 P. & D. 130, an English court refused to recognize a marriage between polygamy-practising Mormons in Utah because, the women not standing "upon the same level with the man under whose protection they live," the court "would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence" (at 134, 135).

[56] *Supra* note 13.

expansion of the libertarian right to freedom of religion to include the freedom of conscientious action. In *Yoder*, an Amish sect claimed a constitutional right to an exemption from a state law requiring children to attend school until age sixteen because their religion teaches withdrawal from the values of the secular-capitalist world. Under the egalitarian constitution, the concern was whether Amish children schooled at home would be given an equal opportunity to succeed in fulfilling their life-ambitions, and the verdict was that an Amish education is well suited to that end. In the present context, however, the issue is whether an Amish child educated in a culturally sheltered environment will be raised to a consciousness of free agency so that, if he or she decides as a young adult to embrace the Amish way of life, he or she will have done so freely. Here, in other words, the concern is with brainwashing.

C. Accommodation Under the Inclusive Conception

The argument for reconciling constitutional accommodation of cultural diversity with strong but legitimate constraints on cultural practices is sensitive to the various types of collision we have surveyed. So let us deal with them one by one.

Practices that, like the Coast Salish rite in *Thomas*, fail to respect the free agency of adult members are disqualified as practices to which a duty to accommodate is owed. This is so, not because a libertarian norm condemns them, but because a norm internal to the goodness of culture does so. Cultures are intrinsically and equally good insofar as they are valued as grounds of individual worth by free agents who are reciprocally valued as vehicles of the culture's flourishing. That is to say, they are intrinsically good insofar as they exemplify the form of ethical life. Practices that coerce agents, punish dissent, and impose heavy burdens on the freedom to leave are not integral to cultures that exemplify this form, whether or not they are empirically integral to any particular culture. On the contrary, these practices are incongruous with the form of reciprocity in virtue of which cultures are freely certified as good by insiders and therefore worthy of respect by outsiders. Hence they are arbitrary exercises of power from the viewpoint of such cultures themselves and from the viewpoint for which all such cultures are equally good. It is not, as the court in *Thomas* concluded, that the right inhering in such practices is overridden by something weightier. It is that, regardless of their antiquity, no right inheres in such practices, because there is not the form of good in them that attracts a duty to accommodate. Thus, whatever other rights individuals possess under the liberal constitution meet no resistance in such practices. And the same could be said by a judge of a tribal court.

What of cultural practices that respect the free agency of members but fail to respect their claims to the things needed for equal self-authorship and self-rule? For egalitarian liberalism, such practices are owed no deference, for they are revisable choices in conflict with the principle of equal self-authorship that justifies support for language and heritage. In theory, therefore, the egalitarian principle meets no resistance from them, no matter how long-standing they are, though enforcement of the principle is, as we have seen, another question. Under the inclusive conception, however, the approach is more nuanced. Non-egalitarian practices are owed a duty of respect but not a duty of support. Respect is owed because these practices may cohere within a cultural ethos certified as good by free agents. Not all freely endorsed cultures, after all, value equal autonomy; in many, hierarchies are happily embraced by those whose opportunities are restricted. To the extent that non-egalitarian practices form part of a freely valued ethos, they evince the form of ethical life; hence they are liberal goods. That respect is owed, however, does not necessarily mean that non-egalitarian cultural practices set up insurmountable barriers to the intervention of egalitarian norms. It can also mean that their entitlement to respect is defeasible only by norms theoretically qualified to override it and only if the means chosen limit the right as little as possible. The question, therefore, is whether the egalitarian principle enjoining governments to equalize conditions for self-authorship and self-rule is qualified to override the duty to respect the good in free cultures. I'll return to this.

The duty to respect is not quite a duty to accommodate. A duty to accommodate includes a duty to support, promote, and foster, but this duty is not owed non-egalitarian cultures. This is so, not because egalitarian liberalism condemns their sexist practices, but because an ethical life sufficient for individual dignity encompasses cultures that are not self-sufficient, is concerned about its citizens who are members of the culture, and owes them a duty to encourage these cultures to reform themselves internally. Such a duty is inconsistent with a duty to support. Moreover, this judgment on non-egalitarian cultures is one that can be accepted from the standpoint of the agency-respecting culture itself. Cultures are good because and insofar as they are grounds of individual worth making room for individual agency. They are, however, insufficient grounds, because, while themselves acknowledging the need for individual endorsement, they make no room for the individual's *reflective* endorsement, because they claim authority simply as indeterminate ethos. They thus contain a potential that they themselves do not fulfill on their own. Like cultures, the political community is an ethical life in which citizens value the community as that which values their free thought and activity for the sake of its own actualization. But it is an ethical life whose goodness is now confirmed by morally independent and reflective agents because in it ethos has been replaced

by a public reason that is indwelling in all its constituent spheres: in living cultures, in the mutual respect of self-supporting property-owners, in the constructive self-legislation of ideal citizens, and finally in the actual loyalty of morally autonomous agents to the political community as to the self-sufficient basis of their dignity. Accordingly, non-egalitarian cultures are answerable to the judgment of the self-sufficient community not as to that of a foreign ethos but as to that of a life in which a potential encoded within them has fully developed and in which their claim to respect and support is itself vindicated.[57]

That the political community owes both a duty to respect non-egalitarian (but agency-respecting) cultures and a duty of concern for its citizen-members has the consequence that, in the case of these cultures, the duty to accommodate becomes a duty to educate. This duty cannot vary as between cultures that are carried by self-governing native peoples and those borne by groups with no territory to govern, for the duty is owed all citizens equally. How the duty is discharged, however, will no doubt vary along this dimension. Withholding public funding and services that are afforded other communities, as recommended by the court in *Dayton Christian Schools*,[58] is a way of instructing non-autochthonous groups, whereas negotiation with community leaders on self-government arrangements is appropriate for native groups. The twin shoals to be avoided, however, are those represented by the approaches of the Ohio Civil Rights Commission in *Dayton*, on the one hand, and of the U.S. Supreme Court in *Martinez*,[59] on the other. The coercive imposition of egalitarian norms when less intrusive means of effectuating them are available fails to respect the

[57] Native people claim that their right of self-government is "inherent" rather than conferred by grant from the government of the settler population. By this they intend an historical claim to the effect that aboriginal people governed themselves before Europeans arrived and never relinquished their self-governing autonomy. This historical claim can be accepted without accepting the philosophical claim that aboriginal self-government is self-sufficient or self-standing. If the cultural community is not a self-sufficient life, then the governing agency of that culture is not a self-standing government. If the cultural community is embedded in the political life sufficient for dignity, then its self-government too is a constituent part of that larger life. Native self-government is no doubt inherent with respect to the government of Europeans. But government under a political life sufficient for individual dignity is no longer the government of Europeans. It is government under a conception of public reason that native communities can accept as the basis of their own claim to respect for cultural autonomy. The right to native self-government is philosophically embedded in that conception. Hence it is constrained by other requirements of the self-sufficient life.

[58] *Supra* note 50.

[59] *Supra* note 47.

intrinsic good in free cultures as well as their own capacities for internal reform and evolution. It thus makes liberal public reason look like atomistic liberal ethos. Paradoxically, the same result is achieved by the opposite approach taken in *Martinez*. By contemptuously treating self-governing aboriginal communities as lying outside the public reason of the constitution, the court in *Martinez* ensured that any legislative modification of that status would repeat the conquest by Europeans.

Suppose, however, that another case like *Corbiere*[60] arises, only under different circumstances. Negotiations for electoral reform have failed with an Indian band that can demonstrate an aboriginal right based on ancestral practice to discriminate against non-residents or against women in voting. The band asserts this right as a shield against the intervention of the egalitarian norms of the liberal constitution. Such a case poses a head-on collision between the egalitarian principle and the duty to respect the good in free cultures. The resolution of the conflict, however, is already apparent. The egalitarian principle prevails, not because only cultural structures are owed respect, but because the right to self-rule is qualified to override the duty to respect the good in cultural practices. This is so because the right to self-rule belongs to a self-sufficient ethical life that can be endorsed as good by morally autonomous agents, whereas the good in ethos is a constituent part of that life, insufficient by itself for individual dignity. Ethos yields to equal autonomy, not as to a foreign and atomistic ethos, but as to the public ethical life in which the nascent autonomy of tradition-bound agents has fully matured and in which respect for ethos is securely established as one component of a life sufficient for dignity. Respect is shown both in the kind of justification required for an egalitarian override and in the constraints on the means permitted to implement it. The justification must be acceptable to someone for whom cultures are intrinsically good and not just instrumentally valuable for choosing personal life plans; while specific egalitarian reforms must (if possible) be negotiated rather than imposed and must tread as lightly as possible on long-standing cultural practices.

Finally, let us consider the limits on the duty to accommodate cultural practices relating to the family and how these might be justified consistently with public reason. I will deal specifically with the question of polygamy and with the child-rearing issue raised in *Yoder*.

Free cultures that practise polygamy are owed respect. However, the good in monogamous marriage is qualified to override the duty to respect a polygamous

[60] *Supra* note 48.

culture, because polygamy is contrary to the form of ethical life — the mutual and symmetrical recognition as ends of self and other — whose immanence in a culture is what entitles it to respect in the first place, while monogamy is an example of that form. Polygamous cultures are thus held only to a standard internal to the goodness of culture itself, by which standard polygamy is revealed as incongruous with any ethos whose adherents are equally valued interpreters thereof — that is, with any ethos endorsed as good by free members. Since this standard can be accepted by someone for whom all living cultures are equally good, the liberal depreciation of polygamy is now freed of the taint of ethnocentrism. Nevertheless, the right reposing in a free and dynamic cultural community demands that the instructive purpose of laws supporting monogamy be pursued with the least invasive means. This general directive might issue in two prescriptions, one fairly uncontroversial, the other more problematic.

Withholding public recognition from polygamous unions while exempting from punishment those for whom polygamy is a matter of religious conscience seems a sensible way of reconciling the instructive function of marriage law with respect for cultural diversity. Another way is to recognize *de facto* monogamous unions even if they were solemnized under a religious law that permits polygamy but to withold recognition from all unions subsequent to the first. According to our argument, the latter course would not be open, for marriage vows between persons whose understanding is that one or both is (are) free to take other spouses do not engender the validated worth-claims from which mutual obligations flow. So, not even potentially polygamous arrangements ought to be civilly recognized.[61]

An argument parallel to the one justifying monogamy to diverse cultures can be made regarding the rearing of children. The raising of children to moral independence is not a demand imposed by a liberal ethos of the atomistic individual. It is a parental duty going with the right each partner enjoys to the other's support; for the marital union in which the special worth of each is recognized is, as Hegel saw, embodied in the child, whose potential for agency is what makes it an especially fitting emblem of the intellectual aspect of the marriage bond. To develop this potential is to perfect the union in which the

[61] English law now recognizes foreign marriages that are potentially polygamous in inception but that cease to be potentially polygamous by virtue of the English domicile of the husband. See *Hussain v. Hussain*, [1982] 3 All E.R. 369. This would seem to be a permissible variation, since in taking up domicile in a country that recognizes no marriage involving a person who is already married, the couple may be assumed to have undertaken the reciprocal commitment that was initially lacking.

reciprocal rights and obligations of the partners crystallize. Thus the parental duty to raise children to freedom flows from the same form of ethical life in marriage as underlies a free culture's right to respect. This duty is violated by practices, such as clitoridectomy and child-beating, that inflict permanent harm on children or that jeopardize their development toward moral independence. Because these practices close marriages to their end as worth-conferring relationships, they are inconsistent with the form of ethical life in marriage in virtue of which the lush variety of marriage and child-rearing customs compatible with this form are owed respect and support. Again, however, a self-reproducing culture's right to respect sets up a rule of minimal impairment of the culture's traditions. Certain types of female circumcision are harmlessly symbolic and so are mild forms of corporal discipline.[62] Customs not in themselves harmful to children need not be proscribed simply because they are remnants of those that are. Moreover, in *Yoder*,[63] the Amish community was asking for an exemption from only the last two years of mandatory schooling; their children were in the hands of the public school system until age fourteen — plenty of time, one would think, to make their choice of baptism into the faith a free one.[64] Thus, even from the present perspective, the decision to uphold their free exercise claim seems sound.

V. ACCOMMODATION AND DISESTABLISHMENT

Under the libertarian and egalitarian constitutions taken alone, the liberal norm against the establishment of religion includes (besides an anti-theocratic, anti-coercive, and anti-preferential treatment principle) a neutrality principle enjoining government from endorsing the choice of religious belief over non-belief. This follows from the libertarian aloofness toward what it regards as subjective conceptions of happiness and from the egalitarian duty of even-handed concern for self-authored lives regardless of final ends, which it too takes to be subjective.[65] Thus, school prayers are forbidden even if voluntary and non-denominational, and aid to parochial schools is permitted only in the context of aid to education generally. Direct assistance to religious communities is out of the question, as is deference to the jurisdictional autonomy of religious courts in matters (such as family law) crucial to defining group membership.

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62 See Carens, *supra* note 3 at 145–53.

63 *Supra* note 13.

64 As Shachar observes; see *supra* note 4 at 98.

65 For a discussion of how a norm of even-handedness might structure a liberal policy toward cultures, see Carens, *supra* note 3 at 8–14 and passim.

If truly an essential feature of liberalism, a principle of neutrality respecting belief and non-belief would put a severe crimp in a public duty to recognize and support cultural communities, for many of these communities are governed by a religious ethos.[66] How could the United States accommodate the self-government of the Pueblo Indians, whose governmental traditions are theocratic? How could India recognize the jurisdictional autonomy in certain matters of Muslim courts, which apply the law of the Qur'an? How could Israel delegate jurisdiction in matters pertaining to marriage and divorce to Jewish, Muslim, Christian, and Druze religious courts? Egalitarian liberalism avoids this problem with its distinction between cultural structure (which is supportable) and cultural character (which is not), but having spent much effort in debunking this dichotomy, we can hardly take refuge in it. Conceivably, we could simply collapse religion into cultural ethos, thus levelling the distinction between belief and non-belief, and leave religion as it sees itself — as a relationship to what is truly universal — outside the public domain. But to the non-believer, this will appear as a smuggling of religion into the state under a false cloak of neutral concern for culture; while from the believer's point of view, it will mean the failure to integrate religious communities as such into public reason, whose constraints on their practices will then appear as those of a secular and ungodly ethos.

But how to integrate them? The public duty to support cultural communities was justified on the basis that culture is an intrinsic and hence common good, part of a life sufficient for dignity. But the disagreement between believers and non-believers suggests that there is no common good in religion but only a particular conception of humanity's ultimate good, whose endorsement by the liberal state must fragment its public character. Accordingly, we need an argument showing why the anti-establishment norm of the liberal constitution ultimately does not include a neutrality principle prohibiting state support or accommodation of religion.

If the only public thing were the freedom to choose or the freedom reflectively to form and revise a conception of the good, then the specific choice of religious belief over that of non-belief would certainly be a private matter. The state's support of belief would then be an "entanglement" with the particular its universality could not survive. No doubt the state could sponsor a civil religion instilling the virtues supportive of a constitution ordered to respect for choice irrespective of the good chosen; but if public reason is choice or self-authorship, the state cannot associate itself with, or appear to endorse, any

[66] See Shachar, *supra* note 4 at c. 4.

conception of man's final end, including any conception of man's supernatural end. That is to say, it cannot associate itself with religious *faith*.

We know, however, that these conceptions of public reason are not exhaustive. Each has proved unstable when taken as the fundamental principle of constitutional order — has turned in its constitutional realization into an "authority" legally untrammelled by a duty to respect the independence of the subject.[67] Nevertheless, they have not been cast aside. Rather, they are now constituent elements of an inclusive conception — instances of mutual recognition between self and other — in which that conception is confirmed as the ground of valid worth-claims through the spontaneous worth-seeking activity of the individual. They are thus chapters in a larger story — a story about preparing objective conditions for the mutual recognition of Law and Law's subjects, where those who rule in Law's name respect the worth-conferring relationships spontaneously formed by individuals, and where individuals recognize the authority of the political community as the self-sufficient ground of their inviolable worth.

Clearly, a state founded on *that* conception of public reason has nothing to fear from involvement with religion. Religions, after all, are cultures of a special kind. As *ethoi* reproduced by individual agents who submit to them without demanding their transparency to insight, they have the form of all cultures; and so their communities of belief, while grounds of individual dignity, are not self-sufficient for dignity. In their content, however, they themselves contain imaginative visions of the self-sufficient community and of the ultimate reconciliation of the idea of the universal with the singular individual. This gives the state a double reason for incorporating them. Like all cultural examples of ethical life, they are grounds of individual worth and so part of a life sufficient for dignity; but, in addition, as cultures themselves ordered to a vision of the self-sufficient community, they can, to the extent that their practices are not contrary to other parts of the constitution, contribute to educating citizens to the virtues needed to sustain that community — to the virtues connected with the obligations of spouse, parent, member of a cultural community, property-owner, job-holder, and citizen. Conversely, in recognizing religious communities for that purpose, the state makes possible their reciprocal recognition of the liberal state as ordered to a goal kindred to their own and so worthy of their allegiance. This makes liberal constraints on their practices seem less like the foreign

[67] The argument for this claim lies outside the scope of this essay; I make it in a book in progress.

impositions of a secular humanism and more like a model for spontaneous internal reforms.

Provided that support for the pedagogical services of religion is bestowed even-handedly to communities of all the major world-religions, none of the reasons for a religious neutrality principle apply to this sort of involvement. The neutrality principle is the anti-preferential treatment principle applied to the dispute between belief and non-belief. Here, however, the state does not favour the choice of belief over that of non-belief. It does not say that the religious way of life is nobler or more choiceworthy than a secular humanist way of life. Indeed, the state can be indifferent as to whether a citizen integrates himself into the institutions of the self-sufficient life guided by philosophy, by religion, or simply by the model of good parents and teachers, though it knows that philosophy is not for everyone, and especially not for children. In providing even-handed support to religious schools and communities, in adopting school prayers and non-denominational religious symbols (such as "in God we trust" or the reference to "the supremacy of God" in the preamble to the Canadian Constitution), the liberal state does not endorse religion over irreligion or encourage people to become religious; rather, it enlists the services, and encourages the allegiance, of those who are religious in promoting an end the non-believer can also embrace.

It may be objected, however, that the foregoing argument justifies at most state financial assistance to religious schools and organizations; it does not justify delegating (where there are historical reasons for doing so) jurisdictional autonomy to religious courts in matters crucial to group identity, for such a delegation, if it does not engage the reason for a neutrality principle, certainly seems to run afoul of the anti-theocratic principle. For it means state recognition and incorporation of a law whose authority is said to rest on a divine revelation.

However, this argument ignores the reason for an anti-theocratic principle. The liberal constitution includes such a principle, not because it is atheistic or even agnostic, but because a constitution ordered to an end given by a supernatural revelation, excluding as it does the self-rule of the free mind, necessarily becomes the despotism of those who interpret the revelation. Theocracy and constitutionalism are thus antithetical terms. However, the constitution ordered to the inclusive conception is open to the understanding of the free mind. That constitution makes room for the local autonomy of autochthonous cultures manifesting the form of ethical life; and it subjects that autonomy to constraint and oversight by courts applying the whole of liberal constitutional law, including the law of liberty and the law of equality, so that those who interpret the local ethos cannot exercise a despotic power. Under the

conditions of such a supervision, and assuming there are parallel civil institutions around marriage and divorce so that no one is forced to submit to the jurisdiction of religious law, does it matter whether those who voluntarily do submit believe that the law originated in a supernatural revelation or whether it has simply existed time out of mind? Would it matter to their validity if some people believed that the law against murder and theft originated on Mount Sinai?

VI. EPILOGUE

I have argued that it is possible to reconcile a political duty to accommodate and promote cultural traditions with other, more familiar, liberal commitments. No doubt others have made arguments to a similar effect. What is perhaps different about this argument, however, is that it seeks to explain a liberal duty to recognize cultures without presupposing atomism, by which I mean the view that individual agents owe their worth to nothing beyond their own persons. The advantage of this feature becomes plain once we remember that theorizing a duty entails theorizing the conditions of that duty and that benefits thus come with reciprocal obligations. These obligations must be justified to those upon whom they fall, in this case to members of cultural communities. Such people are by definition not atomists, however, for a cultural devotee is precisely someone who derives personal significance from vivifying and transmitting a tradition; and because they are not atomists, cultural devotees are not members of a hypothetical cosmopolis either. Such people will therefore object to the imposition of obligations presupposing an atomistic ontology, obligations whose abstract universalism they will decry in the name of cultural pluralism and equality. By contrast, they will (this is a conceptual rather than a predictive "will") more readily accept an argument based on the idea of the self-sufficient community, for this idea completes and comprehends the idea of a living ethos, under whose banner cultural pluralists march against liberal cosmopolitans. Accordingly, a non-atomistic liberal argument for a duty to recognize cultures will be able to justify strong constraints on cultural practices acceptable to those for whom individual agency first gains its importance within communal frameworks. Such an argument will thus also be able to legitimate the practical enforcement of those constraints through, for example, judicial supervision of the self-governing bodies of cultural communities. It is, of course, a further question whether the argument from the self-sufficient community could ultimately be accepted by a liberal atomist. But that is a question for another day.

PROPHYLACTIC USE OF FORCE IN INTERNATIONAL LAW: THE ILLEGITIMACY OF CANADA'S PARTICIPATION IN "COALITIONS OF THE WILLING" WITHOUT UNITED NATIONS AUTHORIZATION AND PARLIAMENTARY SANCTION

Acacia Mgbeoji*

The author examines the legitimacy of Canada's participation in acts of non-defensive aggression in light of Canada's international obligations and international law. He contends that in the domestic terrain, constitutional conventions, practices, and applicable laws as factors that shape Canada's decisions to participate in international conflicts, must also be critically reconsidered.

L'auteur examine le caractère légitime de la participation du Canada dans les actes d'agression non défensifs dans le contexte des obligations internationales du Canada et du droit international. Il prétend qu'il est aussi très important de tenir compte du terrain national, des conventions constitutionnelles, des pratiques et lois applicables qui sont autant de facteurs qui façonnent les décisions du Canada en ce qui concerne sa participation aux conflits internationaux.

I. INTRODUCTION

In the Cold War aftermath, with the apparent willingness of states or groups of states to use force unconstrained by the United Nations *Charter*[1] in purported attempts to remove "threats to international peace,"[2] the question has arisen as

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1 *Charter of the United Nations*, 26 June 1945, Can. T.S., 1945, No. 7 [*Charter*].

2 C.G. Fenwick, "When Is There a Threat to Peace?" (1967) 61 Am. J. Int'l L. 753. The problem with a juridical application of the concept of "threat to international peace" is that it is essentially a political concept and if it must be deployed judiciously and judicially, a multilateral framework or institution is indispensable. In the words of Professor Henkin, "threat to peace" is not capable of legal definition. It is an imprecise political concept and thus requires a multilateral framework for its articulation. See Louis Henkin,

to what Canada's role should be. These non-defensive actions have often been justified on the grounds of alleged imminent danger to regional stability,[3] or the ostensible need to restore or create democracies,[4] or to alleviate alleged humanitarian crises.[5] What is often characteristic about these recent cases of non-defensive use of force by groups of states is the absence of prior authorization by the United Nations Security Council.[6]

Many states or groups of states constituting themselves into arbiters of global morality, world peace, and democratic values have frequently used or threatened to use force in imposing their visions of good governance[7] and humanitarianism on an increasingly skeptical and violent world. The overriding purpose of international law on the use of force, particularly as articulated in the post–U.N.

"Conceptualizing Violence: Present and Future Developments in International Law" (1997) 36 Alta. L. Rev. 571.

3 Emmanuel Ofuatey-Kodjoe, "Regional Organizations and The Resolution of Internal Conflicts: The ECOWAS Intervention in Liberia" (1994) 12 Int'l Peacekeeping 1; Margaret Vogts, ed., *Liberian Crisis and ECOMOG: A Bold Attempt at Peacekeeping* (Lagos: Gabumo Publishing, 1992); Georg Nolte, "Restoring Peace By Regional Action: International Law Aspects of The Liberian Conflict" (1993) 53:3 Heidelberg J. Intal L. 663; Alhaji M.S. Bah, "AACS and Regional Peacekeeping: Unraveling the Political Cleavages" (2000) 15:3 Intal Insights 61.

4 Thomas M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 Am. J. Intal L. 46; Michael Reisman, "Humanitarian Intervention and Fledging Democracies" (1995) 18 Fordham Intal L.J. 794; Stephen Schnably, "The Santiago Commitment As a Call To Democracy: Evaluating the OAS Role in Haiti, Peru, and Guatemala" (1994) 25 U. Miami Inter-Am. L. Rev. 393; Karsten Nowrot & W. Shabacker, "The Use of Force to Restore Democracy: International Legal Implications of the AACS Intervention in Sierra Leone" (1998) 14 Am. U. Intal L. Rev. 321, Malvina Halberstam, "The Copenhagen Document: Intervention in Support of Democracy" (1993) 34 Harv. Intal L.J. 163.

5 Antonio Cassese, "*Ex Iniuria Ius Oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in The World Community?" (1999) 10 E.J.I.L. 23.

6 Rudiger Wolfrum, "The Contributions of Regional Arrangements and Agencies to The Maintenance of International Peace and Security: Possibilities and Limitations" (1993) 53:3 Heidelberg J. Intal L. 576. A related problem is the increasing inclination of the U.N. Security Council to franchise out the authorization to states or groups of states. See John Quigley, "The 'Privatization' of Security Council Enforcement Action: A Threat to Multilateralism" (1996) 17 Mich. J. Intal L. 249; Richard Falk, "The Haiti Intervention: A Dangerous World Order Precedent for the United Nations" (1995) 36 Harv. Intal L.J. 341.

7 Oscar Schachter, "The Legality of Pro-Democratic Invasion" (1984) 78 Am. J. Int'l L. 645; Pierre-Marie Dupuy, "The Place and Role of Unilateralism in Contemporary International Law" (2000) 11 E.J.I.L. 19.

Charter regime, is to commit states to use force only as a last resort after the failure or exhaustion of diplomatic and other pacific means of conflict resolution.[8] Hence, it is a fundamental principle of contemporary legal and political order that, save the narrow confines of the right to self-defence (collectively or individually), force may only be used under the authority and supervision of the Security Council. Given that most of the examples of non-defensive use of force by states in recent times have been motivated by the narrow self-interests of powerful states,[9] or groups of states, the emerging practice of coalitions of states enthusiastic to use force outside the constraints of the U.N. *Charter* would condemn established norms on the use of force[10] to irrelevance.[11] In addition, it is a phenomenon which discomfits the global legal order, particularly in a "violent world"[12] grappling with new forms of threats to peace such as international terrorism.

Recently, Iraq has become the focus of an assemblage of states willing and ready to use force in a purported war on terrorism and in their determination to disarm that country of its "weapons of mass destruction."[13] Laudable as this objective would appear, the newly formed habit of ready embrace of military force by groups of states or the so-called "coalitions of the willing"[14] acting outside the restraining and deliberative institutions of contemporary global order

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8 Joel Larus, ed., *From Collective Security to Preventive Diplomacy* (New York: John Wiley & Sons, 1965).

9 Robert Kagan, "Multilateralism, American Style" *Washington Post* (13 September 2002) A39.

10 Vera Gowland-Debras, *Collective Responses to Illegal Acts in International Law* (Dordrecht: Martinus-Nijhoff, 1990).

11 H. Freudenschub, "Article 39 of The UN Charter Revisited: Threats to The Peace and The Recent Practice of The UN Security Council" (1993) 46 Aus. J. Pub. & Intal L. 1.

12 Richard Falk, *Legal Order in a Violent World* (Princeton: Princeton University Press, 1968); Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 E.J.I.L. 1; Mark Weisburd, *Use of Force: The Practice of States Since World War 2* (Pennsylvania: 1997); Antonio Cassese, ed., *The Current Legal Regulation On The Use of Force* (Hingham: Kluwer, 1986).

13 *Iraq's Weapons of Mass Destruction: The Assessment of The British Government*, online: <www.official-documents.co.uk/document/reps/iraq/iraqdossier.pdf>.

14 President George Bush has repeatedly threatened that if Iraq fails to disarm, the U.S. will lead a "coalition of the willing" to disarm Saddam Hussein of Iraq. See John King, "Bush: Join 'Coalition of Willing'" CNN Reports (20 November 2002). For an analysis of this issue see Niels Blokker, "Is the Authorization Authorised? Powers and Practice of the UN Security Council to Authorize Use of Force by 'Coalitions of the Able and Willing'" (2000) 11 E.J.I.L. 541.

probably marks the beginnings of a "demolition of world order"[15] as presently constituted. Agreed that the modern world faces new forms of threats to international peace, for example, free-lance terrorists operating from failed states, it is very doubtful whether a destruction of the existing world legal order without provisions for a replacement is the answer to the threat of free-lance terrorists and outlaw states. International law is not static, and thus there is little doubt that the messianic militarism immanent in such seemingly humanitarian[16] or pro-democratic justifications for unilateral use of force by states outside the confines of the U.N. *Charter* is not the proper way to address contemporary global disorder.

In this article, I examine the role which Canada should play in the attempts by the so-called coalition of the willing to disarm Iraq by force without express and unambiguous U.N. authorization. I argue that Canada should critically evaluate both domestic and international procedures regulating non-defensive use of force in international relations. In shaping my argument, I contend that in the domestic terrain, constitutional conventions, practices, and applicable laws as factors that shape Canada's decisions to participate in international conflicts, must be critically reconsidered. This position is espoused because an important element in the emerging practice of non-defensive use of force and its implications for the global order is the domestic political process which shapes or influences individual state participation in extra-legal use of force. Consequently, I examine the interrelationship between Canadian democratic conventions and international law on use of force. Particular attention is paid to the opinion gaining ground in several quarters that the Security Council is of doubtful legitimacy and overly politicized by the cynical and expedient interests of veto-carrying members.

For purposes of clarity and ease of analysis, this article is divided into five parts. Part 2 briefly reviews and summarizes the Iraqi problem. In Part 3, I

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[15] Noam Chomsky, "The Demolition of World Order" *Harper's Magazine* (June 1999) 1517; B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (London: Sage Publications, 1993); Michael Reisman, "Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention" (2000) 11 E.J.I.L. 3.

[16] John Currie, "NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law?" (1999) 37 Can. Y.B. Intal L. 469; S.G. Simon, "The Contemporary Legality of Unilateral Humanitarian Intervention" (1993) 24 Cal. W. Intal L.J. 117; I. Brownlie, "Thoughts of Kind-Hearted Gunmen" in R.B. Lillich, ed., *Humanitarian Intervention and the United Nations* (Charlottesville: University of Virginia Press, 1973) at 139.

introduce the concept of just war as it applies to Iraq. Part 4 is the central part of the article and examines the development of Canadian law and political practices on use of force in international relations. For purposes of convenience, the analysis in Part 4 is in two themes. The first theme deals with Crown prerogative in matters of foreign relations and the impact of legislative and judicial developments on this difficult issue of law. The second theme extends the arguments beyond the legal doctrine of Crown prerogative and examines the legitimizing function of parliamentary involvement in decisions pertaining to the deployment of Canadian personnel to areas of international conflict. In Part 5, I divide the history of Canadian parliamentary involvement in matters of war into epochs, namely; the colonial era and Canada's position during the war of 1914–1918, independent Canada and the war of 1939–1945, the Korean conflict and the U.N. *Charter*, the first Gulf war of 1991, and finally, the contemporary efforts by the so-called coalition of the willing against Iraq.

With respect to the pre–U.N. *Charter* era, I argue that Canada's domestic and international policy reflected the progressive ideals of those committed to outlawing war and promoted constraints on the ability of states to use force in non-defensive circumstances. More importantly, domestic Canadian parliamentary practices in the pre–U.N. *Charter* era evinced a cautious approach to the use of force or participation by Canada in international conflicts. Thus, the emergence of the United Nations, empowered to secure global peace and security, could be seen as an affirmation of Canadian skepticism towards belligerency and recourse to arms in settling conflicts.[17]

Regarding the U.N. *Charter* era, this watershed in the development of international law on use of force impacted Canadian domestic normative order on participation in acts of belligerency. Ultimately, Canada's original fidelity to the tenets of the U.N. *Charter* earned it a reputation as an honest broker.[18] However, in the aftermath of Cold War politics, Canada's membership in the North Atlantic Treaty Organization (NATO)[19] and geographical proximity to and special relationship with the United States of America, places it in an awkward position on matters related to use of force. In navigating this treacherous and intricate situation, I argue that if Canada's multilateralist traditions and commitments to the U.N. *Charter* are to have meaning, parliamentary and public

[17] R. St. MacDonald, "The Relationship Between International and Domestic Law in Canada" in R. St. MacDonald, Gerald L. Morris & Douglas M. Johnson, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974).

[18] Gibran Van Ert, *Using International Law In Canadian Courts* (The Hague: Klewer, 2002).

[19] *North Atlantic Treaty*, 4 April 1949, 34 U.N.T.S. 243.

participation in decisions on when, how, and where Canada participates in non-defensive armed conflicts are indispensable. Ultimately, Canada has to abide by principle rather than expediency. However, with a chronically weak opposition in Parliament and a palpable democratic deficit, it would seem that the legitimacy of Cabinet decisions in matters such as the Iraqi crisis are open to question.

II. IRAQ, THE CONCEPT OF JUST WAR, AND COALITIONS OF THE WILLING

On 2 August 1990, Iraq invaded and purportedly annexed Kuwait.[20] The Security Council met and decided pursuant to Resolutions 660[21] and 661 (1990) of August 1990, that Iraq was in violation of international law. Consequently, it demanded the immediate and unconditional withdrawal of Iraq from Kuwait. Following Iraq's refusal to withdraw, the Security Council passed Resolution 678 (1990) of 29 November 1990,[22] authorizing member states to use all necessary means to expel Iraq from Kuwait.

Iraq refused to comply and was forcefully expelled from Kuwait by an alliance of states including Canada. As part of the settlement of the Gulf War, Iraq was required to destroy its programs on weapons of mass destruction made up of nuclear, biological, and chemical weapons. After series of United Nations' supervised efforts to disarm Iraq, it became evident that Iraq had not fully, accurately, finally and completely disclosed all aspects of its programs to develop weapons of mass destruction and ballistic missiles with a range greater than 150 kilometers. Following disagreements between Iraq and U.N. inspectors, Iraq expelled the United Nations' inspectors in 1998. The weapons inspections program was to remain in the doldrums for nearly four years.

However, following the terrorist attacks of 11 September 2001, the United States declared a "war on terror" and in his "State of the Union" address in 2002, U.S. President George Bush characterized the Iraqi government with Iran and North Korea as members of what he termed "an axis of evil." Thereafter, the

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[20] Historically, Iraq and Kuwait were originally part of the Ottoman Empire. And prior to the rise of the Ottoman Empire itself, and "the Arab conquest of the seventh century, Iraq had been the site of a number of civilizations, including the Sumerian, Babylonian and Assyrian, with Baghdad the capital and centre of arts and learning." See L.C. Green, "Iraq, the U.N. and the Law" (1991) 29 Alta. L. Rev. 560.

[21] (1990) 29 I.L.M. 1323.

[22] S.C. Res. 678, reprinted in (1990) 29 I.L.M. 1565.

U.S. pressured the U.N. to ensure that Iraq was made to comply with its obligations under numerous Security Council resolutions. The United States also threatened to unilaterally disarm Iraq if it felt that the U.N. was unwilling to do so. After a series of threats by the United States, on 17 September 2002, Iraq accepted another round of U.N. inspections.[23] Consequently, on 8 November 2002, the Security Council passed another resolution affirming Iraq's obligations under relevant resolutions and asked Iraq to comply with a stricter inspection regime, failing which the U.N. would visit it with severe consequences. In the face of the global divide as to whether states may use force to disarm Iraq if it failed to disarm voluntarily, the question has arisen as to the legitimacy of the threats by the so-called "coalition of the willing" and more particularly whether Canada may legitimately participate in such use of force against Iraq if the coalition attacks Iraq without explicit U.N. authorization and supervision.

The Iraqi situation presents the problematic question of the U.N.'s role in the global rule of law[24] in an age where immense force is concentrated in one superpower, the United States. What is remarkable in the contemporary relationship between powerful and regional bodies and the Security Council is the disturbing trend in which states or regional groups unilaterally decide, when, how, and where "threats to global peace" have materialized and upon making such determinations by themselves, they proceed to impose on themselves the duty of removing such perceived threats to international peace and security. In many instances, particularly with respect to Iraq, ambiguous U.N. authorization has been twisted and submitted to tortuous interpretations to yield unintended results.[25] While some of these crisis situations and the decisions to resort to the use of force have become subjects of ratification or acquiescence by the Security Council, it seems obvious that the emerging trend of unilateral use of force by "coalitions of the willing" poses severe challenges to traditional and recognized constraints of domestic and international law on the use of force by states.

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[23] "Russia and China Welcome Iraq Offer," online: <www.cnn.com>; Terence Neilan, "Iraq Says Move on Inspectors Removes Reasons for Attack" *New York Times* (17 September 2002) 1; Jeff Sallot & Miro Cernetig, "Iraq Confrontation: Ottawa Greets Baghdad's Offer Cautiously" *Globe & Mail* (17 September 2002) A1.

[24] Richard Falk, "The United Nations and the Rule of Law" (1994) 4 Transnat'l L. & Contemp. Probs. 611; Frederic Kirgis, "The Security Council's First Fifty Years" (1995) 89 Am. J. Intal L. 506.

[25] A prime example is the so-called "no-fly" zones in southern and northern Iraq. See Alain Boileau, "To The Suburbs of Baghdad: Clinton's Extension of the Southern Iraqi No-Fly Zone" (1997) 3 J. Intal & Comp. L. 875; "France Say U.S. Raid Exceeded UN Resolutions" *San Diego Union Tribune* (21 January 1993) A1.

More importantly, in situations where the motives for such unilateralist actions are barely camouflaged self-interest, or are at best unclear and unconvincing to the global community, there is ample reason for a calm appraisal of the processes of domestic authorization of Canada's participation in such unilateralist forays. Given that the presumption of international law is that violence should be avoided unless necessary in given situations, and must be used sparingly and with proper authorization, a national regime which potentially gives ample power to the Prime Minister to place Canada in conflicts must be avoided.

For Canada, significant issues of law, democracy, and policy are raised by this emerging trend. For example, under what circumstances, if any, may Canada legitimately deploy troops and equipment to conflicts that have no direct implication for Canadian peace, security, and territorial integrity? Should Canada engage in "enforcement actions" which are not authorized by the Security Council? In the face of skepticism in some quarters that the U.S.–led desire for a "regime change"[26] in Iraq is not truly motivated by a distaste for tyranny[27] or a profound humanitarian impulse for Iraqis, or to rid Iraq of weapons of mass destruction, but is instead a desire to "unshackle oil in Iraq"[28] and gain geo-political advantage in the region, it is necessary to determine whether the proposed military action by the coalition of the willing is just.

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[26] "Powell: Regime Change The Best Way to Disarm Iraq" *Reuters* (25 September 2002), online: Reuters <reuters.com>. According to U.S. Secretary of State Colin Powell, "regime change is the best way to ensure that Iraq disarmed."

[27] If democracy and good governance were the basis of American relations, several of its close allies in the Gulf region and elsewhere would fail the test. None of Saudi Arabia, Kuwait, Egypt, Pakistan or several other "allies" of the U.S. are models of democracy. Most of the governments in the industrializing world regarded by America as "allies" torture, kill, and maim political opponents just as Saddam Hussein reputedly does in Iraq. Virtually all the charges leveled against Iraq would apply with equal force to Pakistan. Yet, there has been no call for a "regime change" in those countries. Remarkably, U.S. reasons for deposing President Saddam Hussein have shifted from his alleged links with al-Qaeda to his obsession with weapons of mass destruction. See Molly Ivins, "Bush Moves Iraq Goalposts All Over Field" *Fort Worth Star Telegram* (22 September 2002) 25.

[28] Dan Morgan & David Ottaway, "War Could Unshackle Oil in Iraq" *Washington Post* (15 September 2002) A1. According to this report, "American and foreign oil companies have already begun maneuvering for a stake in [Iraq]'s huge proven reserves of 112 billion barrels of crude oil, the largest in the world outside Saudi Arabia." *Ibid*.

III. THE CONCEPT OF JUST WAR, COALITION OF THE WILLING, AND IRAQ

In his *Summa Theologica*, Thomas Aquinas postulated that:

> [F]or a war to be just three conditions are necessary. First, the authority of the ruler in whose competence it lies to declare war…secondly, there is a required a just cause: that is those who are attacked for some offence merit such punishment. St. Augustine says,[29] "Those wars are generally defined as just which avenge some wrong, when a nation or a state is to be punished for having failed to make amends for the wrong done, or to restore what has been taken unjustly." Thirdly, there is required the right intention on the part of the belligerents: either of achieving some good object or of avoiding some evil…[However], it can happen that even when war is declared by legitimate authority and there is just cause, it is, nevertheless, made unjust through evil intention. St. Augustine says, "the desire to hurt, the cruelty of vendetta, the stern and implacable spirit, arrogance in victory, the thirst for power, and all that is similar, all these are justly condemned in war."[30]

It is noteworthy that the postulations of Thomas Aquinas and St. Augustine influenced early international law which ultimately imposed the constraining structure and processes of contemporary international law on the use of force.[31] In other words, international law on the use of force is deliberately calibrated to constrain, rather than encourage, the use of force by states. Hence, if the postulations of Thomas Aquinas and St. Augustine are to be used as some form of guidance in measuring existing obligations regarding use of force by states, Canada and indeed the world at large would have serious doubts about the U.S.–led "coalition of the willing."[32]

Although the elimination of weapons of mass destruction is an admirable objective, the hypocrisy behind the project to remove and destroy weapons of mass destruction in Iraq leaves much to be desired. It is significant that the Iraqi appetite for weapons of mass destruction was whetted, abetted, and condoned

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29 *Contra Fastum*, c. 420 A.D., Bk. LXXXIII.

30 Thomas Aquinas, *Aquinas: Selected Political Writings*, trans. by J.G. Dawson (Oxford: Basil Blackwell, 1948) at 159. Suarez and Bellarmin added as a fourth condition the *debitus modus*, that is, the war must be fought with the right means.

31 Jutta Brunnee, "International Law is Meant to Constrain" *National Post* (23 October 2002) A22.

32 Julia Preston, "Bush Garners Little Support at U.N. For an Attack on Iraq" *New York Times* (17 October 2002) A1.

principally by the U.S.[33] In addition to this appalling policy of hypocrisy, the U.S. determination to rid the world of weapons of mass destruction is not even-handed. If justice is about treating like cases alike, it seems unjust that other states with atrocious human rights records and an appetite for nasty weapons have not been treated like Iraq. When the U.S. posture on states similar to Iraq is juxtaposed, the inconsistency becomes indefensible and an insult to common sense. For example, states such as North Korea, Israel, Pakistan, and India are known to have sought to acquire or have already acquired and stockpiled weapons of mass destruction but have not been threatened with unilateral military action by the "coalition of the willing."[34] It would therefore seem that in relation to the tests of just war, the U.S.–led "coalition of the willing" is, in the words of Senator Robert Byrd of the U.S. Senate, a "product of presidential hubris."[35] In effect, the martial disposition of the coalition of the willing is a display of might rather than the vindication of international law and justice.[36]

Further, some commentators have wondered why the forceful removal of President Saddam Hussein is more important now than it was in previous years. As Nicholas Kristoff has argued, "there is no evidence that invading Iraq is any more urgent today than it was in, say, 2000."[37] Allegations that Iraq has links to

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[33] Iraq is known to possess chemical and biological weapons which ironically it obtained with the help and collusion of institutions and corporations in the United Kingdom, United States, Germany, *etc*. According to a recent report, "between 1985 and 1988, the non-profit American Type Culture Collection made 11 shipments to Iraq that included a "'witches' brew of pathogens" including anthrax, botulinum toxin and gangrene. All shipments were government approved." See Paul Wyden, "Will The US Reap What it Has Sown? Byrd Asks" *West Virginia Gazette* (27 September 2002) 4; Robert Novak, "A Little U.S.-Iraqi History" CNN (9 September 2002). See also, Christopher Dickey & Evan Thomas, "How the US Helped Create Saddam Hussein" *Newsweek* (23 September 2002) 7. According to this report, "the history of America's relations with Saddam is one of the sorrier tales in American foreign policy…It is hard to believe that, during most of the 1980s, America knowingly permitted the Iraqi Atomic Energy Commission to import bacterial cultures that might be used to build biological weapons. But it happened. Through years of tacit and overt support, the West helped create the Saddam of today, giving him time to build deadly arsenals and dominate his people. American officials have known that Saddam was a psychopath ever since he became the country's de facto ruler in the early 1970s." *Ibid.*

[34] Maureen Dowd, "Why? Because We Can" *New York Times* (29 September 2002) 29.

[35] Senator Robert Byrd, "Rush To War Ignores U.S. Constitution" Speech on the Floor of Congress (3 October 2002).

[36] Robert Kagan, "Power and Weakness" (2002) 113 Policy Rev. 3.

[37] Nicholas Kristoff, "The Guns of September" *New York Times* (14 September 2002) A27; Dana Priest & Joby Warrick, "Observers: Evidence For War Lacking" *Washington Post* (13 September 2002) A30. According to Priest and Warrick, "the White House document

al-Qaeda remain unsubstantiated.[38] There have been attempts to explain this on the grounds of alleged Iraqi links to the terrorist acts of 11 September 2001. Yet, no evidence or proof has been tendered to prove such links. Indeed, the Taliban regime in Afghanistan was known to have been created and sustained by the Pakistani government. The Taliban regime sheltered Osama bin-Laden's al-Qaeda group. Yet Pakistan is an "ally" of U.S. in the war on terrorism.[39] In addition, there are doubts about whether proponents of unilateral military action against Iraq have any clear program of action to deal with the aftermath of removing the tyrannical regime of Saddam Hussein.[40] More worrisome is the perception, fuelled by recent undiplomatic remarks by President Bush, that the desire for a regime change in Iraq is predicated on personal vendetta. According to the U.S. President, Saddam Hussein is "the guy that tried to kill my dad."[41]

Furthermore, there is a school of thought which believes that recent emphasis on regime change in Iraq by the Bush Administration is a diversion from the pressing issues of domestic governance in the United States. Speaking for this school, Paul Krugman argued in a recent op-ed piece in the *New York Times* that,

> in the end, 19th century imperialism was a diversion. It is hard not to suspect that the Bush doctrine is also a diversion—a diversion from the real issues of dysfunctional

released on September 12 contains little new information showing that Hussein is producing new weapons of mass destruction of has joined with terrorists to threaten the United States or its interests abroad." In the words of Anthony Cordesman, a Middle East expert who has participated in many major studies of Iraq's capabilities, the White House report was a "glorified press release that doesn't come close to the information the U.S. government made available on Soviet military power when we were trying to explain the Cold War." *Ibid*. See also Alan Freeman, "Iraq Dossier Gets Cool Reception" *Globe & Mail* (25 September 2002).

38 Calvin Woodward, "U.S. Sources Hedging on Iraq Facts" *Yahoo News* (27 September 2002). The "intelligence report" or dossier given by the British government on Iraqi "weapons of mass destruction" was recently found to contain plagiarized documents in the public domain. See Glenn Frankel, "Blair Acknowledges Flaws in Iraqi Dossier: Britain Took Some Material that Powell Cited at U.N. from 12-year-old Academic Papers" *Washington Post* (8 February 2003) A15.

39 There are new reports that terrorists group operating in Pakistan have mounted a resurgent wave of activities. See John Lancaster & Kamran Khan, "Extremist Groups Renew Activity in Pakistan—Support of Kashmir Militants is at Odds with War on Terrorism" *Washington Post* (8 February 2003) A1.

40 Thomas Friedman, "Iraq, Upside Down" *New York Times* (18 September 2002) A31.

41 Ron Hutcheson, "Saddam Tried To Kill My Dad, Bush Tells Texans" *Salt Lake Tribune* (28 September 2002) 1.

> security agencies, a sinking economy, a devastated budget and a tattered relationship with our allies.[42]

Finally, on this point, there are considerable scholarly doubts regarding the legality of claims to a "forcible enforcement of the inspection regime."[43] This is largely because the original Security Council Resolution, 1154, regarding the weapons inspection regime did not authorize unilateral use of force. Indeed, later resolutions on the same subject matter did not provide for the use of force to compel disarmament. Moreover, scholarly opinion on the legality of implied authorizations of the use of force is opposed to the idea that ambiguous Security Council resolutions should be construed liberally to justify unilateral use of force. A fundamental objective of the U.N. *Charter* is to "save succeeding generations from the scourge of war,"[44] so resolutions of the U.N. should be read in a manner consistent with this objective. In sum, any unilateral use of force against Iraq by the "coalition of the willing" will fail the tests for just war.[45]

IV. CROWN PREROGATIVE AND JUDICIAL REVIEW OF CANADA'S PARTICIPATION IN INTERNATIONAL CONFLICTS

Originally, the position of the common law was that the royal prerogative was immune from judicial review.[46] In Canada, the right to declare war is a prerogative of the Crown.[47] Dicey describes prerogative as the "residue of discretionary or arbitrary authority, which at any given time is left in the hands of the crown."[48] The term "Crown" in the juridical sense refers in a collective sense to all the persons and institutions of the state who lawfully act in the name of the Queen. In other words, the word "Crown" is synonymous with the less grandiose term "government." However, judicial deference to Crown prerogative has yielded to a regime of measured judicial review.[49] Hence, in modern times, the prerogative of the Crown is not a boundless power. As Professor Hogg has pointed out, "the prerogative of the Crown is a branch of the common law,

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42 Paul Krugman, "White Man's Burden" *New York Times* (24 September 2002) A27.

43 Jules Lobel & Michael Ratner, *infra* note 142.

44 *Charter*, *supra* note 1, Preamble.

45 David Stout, "Kennedy Urges Restraint in Confrontation With Iraq" *New York Times* (27 September 2002).

46 *China Navigation Co. v. Attorney-General*, [1932] 2 K.B. 197 (C.A.).

47 Patrick Monahan, *Constitutional Law* (Concord: Irwin Law, 1997) at 62.

48 Dicey, *Law of the Constitution*, 10th ed. (London: Macmillan, 1965) at 424.

49 *Chandler v. D.P.P.* (1962), [1964] A.C. 763 at 810 (H.L.), Devlin L.J. [*Chandler*].

because it is the decisions of the courts which have determined its existence and extent."[50]

Although the scope and extent of the Crown prerogative has been somewhat limited by the courts[51] and by some statutory provisions,[52] there seems to be an unresolved question as to whether the Crown's prerogative to declare war and make peace on behalf of the state is in modern times subject to judicial review. In the celebrated *GCHQ* case,[53] the House of Lords, per Roskill L.J., placed the "defence of the realm" among those categories which "at present advised I do not think could properly be made the subject of judicial review."[54] Clearly, in England the law is settled that matters of foreign policy including decisions by the Crown on participation in acts of belligerency are not justiciable.[55] Indeed, the British government is not even legally obliged to give reasons for its decisions on such matters that pertain to foreign policy[56] and the courts in England do not have the authority to rule on the true meaning and effects of obligations applying only at the level of international law.[57]

It would seem that the position in Canada is somewhat unclear.[58] Legislative developments such as the *National Defence Act*[59] and the *War Measures Act* (when it was still in effect),[60] which encroach on Crown prerogative in matters regarding defence of the realm, have potentially extended the reach of judicial

50 Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1997) at 12–14.

51 *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 [*Operation Dismantle*].

52 For example, under s. 32(1) of the *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, Cabinet decisions are reviewable. See Gerald La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983) 61 Can. Bar Rev. 19.

53 *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 (H.L.) [*GCHQ*].

54 *Ibid.* at 418.

55 *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*, [1989] Q.B. 811 (C.A.); *Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.C.A. Civ. 1598.

56 *Stefan v. General Medical Council*, [1999] 1 W.L.R. 1293 (P.C.).

57 *R. v. Lyons*, [2002] H.L.J. 44 (QL).

58 Gibran Van Ert, *supra* note 18 at 93.

59 *National Defence Act*, R.S.C. 1985, c. N-4.

60 *The War Measures Act*, R.S.C. 1985, c. W-2. For a judicial interpretation of the act see *R. v. Gray*, [1918] 57 S.C.R. 150. The act was in effect until 1988 when it was repealed by the *Emergencies Act*, S.C. 1988, c. 29 [*Emergencies Act*]. See Hogg, *supra* note 50 at 17–22.

review.[61] It is now settled law in Canada that where an exercise of Crown prerogative breaches written laws, the courts will not shirk from the duty of reviewing the Crown prerogative in issue. Canadian courts in *Air Canada v. British Columbia*,[62] *Schmidt v. The Queen*,[63] *United States of America v. Cotroni*,[64] and *United States of America v. Burns*,[65] have displayed an unmistakable willingness to subject Crown prerogative to judicial review, particularly where rights protected by written laws are alleged to have been violated by the exercise of Crown prerogative.

However, none of the cases mentioned above deals squarely with the justiciability[66] of executive decisions on Canadian participation in use of force in international relations. To the best of my knowledge, the only case which may be of some relevance is the Supreme Court decision in *Operation Dismantle v. The Queen*.[67] The appellants alleged that the decision of the federal Cabinet to allow the United States to test cruise missiles in Canadian airspace violated their rights as enshrined in s. 7 of the *Charter of Rights and Freedoms*.[68] The majority of the Court dismissed the action on the grounds that the alleged increased threat of nuclear war supposedly inherent in the tests was predicated on speculative hypothesis. However, the Court was clear that foreign policy decisions of the government made by the Cabinet are justiciable where such decisions are alleged to infringe the rights of Canadians or persons resident in Canada.

The reasoning of the Court is somewhat difficult to follow. The plurality of the Court indicated that judicial restraint from review of such decisions is premised on the theory that proof of facts in support of justiciability of such claims would be almost impossible. In the words of the majority of the Court:

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61 As Professor Monahan observes, "the courts have held that where a prerogative power has been regulated or defined by statute, the statute in effect displaces the prerogative and the Crown must act on the basis of the statutorily defined power." Monahan, *supra* note 47 at 63. See *A.G. v. De Keyser's Hotel Ltd*., [1920] A.C. 508 (H.L.). Monahan, *ibid*. Given that the provisions of the *Emergencies Act* relate to issues of domestic integrity, security and territorial integrity of Canada, I will avoid further analysis of this legislation and its possible implications for the subject under analysis.

62 [1986] 2 S.C.R. 539.

63 [1987] 1 S.C.R. 500.

64 [1989] 1 S.C.R. 1469.

65 [2001] 1 S.C.R. 283.

66 In the United States, the issue of justiciability of "political" questions is often vexed. See *Coleman v. Miller*, 307 U.S. 433 (1939).

67 *Operation Dismantle*, *supra* note 51.

68 *Ibid*.

> [S]ince the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise [missiles] and the results that the appellants allege could never be proven.[69]

These comments reflect the view of Lord Radcliffe in *Chandler v. D.P.P.*[70] regarding the ability of the courts to review the complex host of factors which come into play when a parliamentary cabinet decides on participation in international conflicts. However, Wilson J. anchored her decision on the propriety of judicial review rather than the fictional inability of the courts to review such Cabinet decisions. In her words:

> [I]f we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.[71]

It would therefore seem that a Cabinet decision placing Canada in a state of international conflict is not justiciable *per se*, but may be judicially scrutinized where there is evidence to support the claim that the Cabinet decision has infringed the rights of Canadians in circumstances that are not demonstrably justifiable in a free and democratic society. In sum, the Crown prerogative on matters of war remains intact, albeit with some modicum of judicial inroads.

Be that as it may, assuming there is no explicit authority in support of judicial review of Crown's prerogative to place Canada in active belligerency or to engage in enforcement actions authorized by the U.N., Crown prerogative in such matters is politically constrained by parliamentary practices and democratic norms. Although these practices do not have the juridical character of customary law as their equivalents in international law, they embody accepted codes of conduct impacting on the legitimacy of such decisions. Consequently, Crown prerogative, at least in the political sphere, is not a blank cheque. Theoretically, democracy and parliamentary practices are designed to curb executive rascality and impetuosity, particularly in matters as grave as the use of force in international relations.

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69 *Ibid*. at 452.

70 *Chandler*, *supra* note 49.

71 *Operation Dismantle*, *supra* note 51 at 472.

The absence of explicit constitutional constraints on the Crown prerogative to declare war is derived from Canada's constitutional heritage (inherited from British constitutional conventions) whereby "political leaders could be trusted to exercise power in a restrained and responsible fashion."[72] The reverse could be said to be the case in the U.S. where laws are designed to curb executive propensity for war.[73] In the U.S., it is arguable that the separation of powers is stricter and thus the courts are institutionally leery of second-guessing the competence of Congress to declare war and make peace.[74]

The trusting relationship in Canada is probably reciprocal and is ostensibly founded on the Kantian notion that a parliamentary regime with the restraints of democratic and responsible governance would be less likely to use force in international relations unless there are clear, justifiable and compelling circumstances to warrant such momentous decisions. The theory is that only an irresponsible government would disregard informed public opinion or parliamentary participation when formulating decisions regarding deployment of Canadians to war. If such a government were to be so reckless, there would probably be a heavy political price to pay for such folly.

However, with mounting evidence of increased power in the hands of the Canadian Prime Minister[75] *vis-à-vis* an impotent and fractious opposition in the Canadian political system, it is doubtful whether Canada's imprudent trust in executive good faith on such an extraordinary matter as the use of force in international relations is not unduly naive and long overdue for a rethink.

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[72] Monahan, *supra* note 47 at 17.

[73] Louis Henkin, "Is There a 'Political Question' Doctrine?" (1976) 85 Yale L.J. 597.

[74] Martin Redish, "Abstention, Separation of Powers, and The Limits of the Judicial Function" (1984) 94 Yale L.J. 71; Fritz Scharpf, "Judicial Review and The Political Question: A Functional Analysis" (1966) 75 Yale L.J. 517; Melville Weston, "Political Questions" (1925) 38 Harv. L. Rev. 296. The issue of justiciability of the so-called "political questions" other than war has met with mixed results in the United States. See *e.g. Baker v. Carr*, 369 U.S. 186 (1962). The presence of clear constitutional restraints on executive forays into belligerency has not necessarily stopped the government of the United States from participating in wars without express Congressional declaration of war. America last declared war in the Second World War but has since engaged in conflicts as in Vietnam.

[75] Some commentators have made legitimate observations to the effect that Canada is witnessing an increase of power in the hands of the Prime Minister and a "decay of Parliament." See Wes Pue, "The Chretien Legacy" *Parkland Post* (4 December 2001) 1. At a recent public function at the University of British Columbia, the Member of Parliament for Vancouver-Quadra, Stephen Owen, argued that caucus discussions are open, animated, and effective.

Although the decision to use force in international relations may in some circumstances become a potential subject of judicial review, the importance of popular participation in parliamentary debates on issues of when, how, and where Canada uses force in international relations seems to be in the realm of political legitimacy rather than juridical validity. Needless to say, to ensure that Canada is not needlessly plunged into conflicts, a crucial factor is a vibrant, responsive, and alert Parliament. It therefore follows that in examining the probative value to be attached to the processes which yield Canada's decisions to play a role in international conflicts, regard must be had to certain factors including the quality of the debate in Parliament, the power of the caucus, the potency of the opposition parties, and the extent to which members of the public appreciate the nature of sacrifices which belligerency inevitably imposes on the state. It is now apposite to evaluate the normative significance of Canadian parliamentary practices regarding the use of force in international relations since 1914 to the present date.

V. INTERNATIONAL CONFLICTS, CANADIAN POLITICAL PRACTICES, AND IMPLICATIONS FOR GLOBAL LEGAL AND SECURITY ORDER

A. Canada and the War of 1914–1918

In 1914, Canada was a colony of the United Kingdom. This historical factor heavily influenced the political legitimacy of the circumstances in which Canada participated in that war.[76] It is therefore not surprising that the political processes preceding Canadian participation in the war of 1914–1918 seemed to be a poor rehash of parliamentary developments and events in the U.K. Accordingly, like other British colonies, Canada joined the war on 4 August 1914, the same day as the U.K. It is significant that the colonial government in Canada took certain steps to legitimize, at least in the court of public opinion, Canada's participation in that war.

First, on 4 August 1914, the Canadian government "issued an order in council indicating that Canada was at war with Germany."[77] What is interesting here is that although Parliament was not sitting at the time when war broke out between Great Britain and Germany, Parliament was reconvened on 18 August 1914. It was on that day that after hearing the Governor General's speech in the Senate,

[76] Michel Rossignol, "International Conflicts: Parliament, The National Defence Act, and the Decision to Participate" (Ottawa: Canada Communication Group, 1992).

[77] *Ibid.* at 3.

the Canadian government issued an order-in-council proclaiming that Canada was at war and created war-related measures.[78] Second, the decision to go to war was debated in Parliament and in a normative sense, it is correct to say that there was popular input to the government's ultimate decision to join the conflict on the side of Great Britain. It would therefore seem that these measures conferred legitimacy on Canada's participation in the war of 1914–1918.

Shortly after the war of 1914–1918, there was a heightened global movement towards arbitration of disputes and possibly the outlawing of war.[79] Greater emphasis was placed on the former, and thus a decision as to whether to engage in war was to be predicated on a failure of honest and serious attempts at pacific settlement of disputes. This understanding was reflected in the Pact of the League of Nations. The significant aspect of the normative thrust of the League of Nations was that war was forbidden if the conflict had not been first submitted to arbitral jurisdiction and judicial settlement or to the examination of the Council created by the League.[80] On the whole, it may be argued that the "legal principles of the League of Nations were extended in the direction of outlawing war."[81] It is equally interesting that the United States of America was one of the greatest proponents of constraining the legal abilities of states to wage war, particularly wars of aggression.[82] Thus, the *Protocol of Geneva* of 1923 and the *Pact of Locarno* represented attempts by some states during this era to constrain states from resorting to war. These agreements did not, however, prevent the Graeco–Bulgarian conflict but they influenced the Kellogg–Briand Pact of 27 August 1928, which outlawed all aggressive wars.[83]

Canada was a signatory to the Kellogg–Briand Pact. In addition to the juridical milestone created by the Pact, its moral import was no less significant. It criminalized states which engaged in aggressive warfare and disallowed war

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78 House of Commons, *Debates* (19 August 1914).

79 For an account of this epochal development in international law, see Hans Wehberg, *The Outlawry of War* (Washington: Carnegie Endowment, 1951).

80 Article 12(1), *League of Nations*, 225 Can. T.S. 188 (1919); Wehberg, *ibid.* at 9.

81 Wehberg, *ibid*. at 14.

82 The high noon of U.S. efforts in this regard is undoubtedly the Kellogg–Briand Pact for world peace. This pact arose from the exchange of notes between United States Secretary of State Kellogg and his French counterpart Monsieur Briand. See (1928) 22 Am. J. Intal L. 356.

83 See also Peter Karsten & Richard Nunt, eds., *Unilateral Force in International Relations* (New York: Garland, 1972); Christine Chinkin, "The State That Acts Alone: Bully, Good Samaritan or Iconoclast" (2000) 11 E.J.I.L. 31; Allan Gerson, "Multilateralism à la Carte: The Consequences of 'Pick and Pay' Approaches" (2000) 11 E.J.I.L. 61.

as a means of national policy. Implicit in this normative shift is that war is permissible if undertaken as part of an international sanction against a recalcitrant state. However, the decision as to whether or not a war of sanction was necessary was solely within the competence of the international community. Given the presumptions of the Kellogg–Briand Pact against war, such decisions were to be undertaken with the greatest solemnity and due process both at the domestic and international levels.[84]

B. Canada and the War of 1939–1945

It was under the legal climate detailed above that Canada and the rest of the world faced the challenges of the Second World War.[85] By 1939, when the Second World War broke out, Canada was an independent state. However, formal political independence from Great Britain hardly severed or diminished existing economic, cultural and diplomatic ties between Great Britain and Canada. It was therefore natural that Canada would have strong sympathies with Great Britain when the latter declared war on Germany on 3 September 1939 after Germany had invaded Poland on 1 September 1939. It is hardly debatable that Canada's preference to join the war a few days after Great Britain was calculated to create the impression that Canada was an independent political entity and no longer tied to Great Britain.[86] Consequently, Canada allowed ten days to elapse before jumping into the fray.

What is significant for the purposes of my analysis in this article is the domestic political process which culminated in the exercise of Crown prerogative to declare war on Germany. A few facts are crucial in my analysis. First, when the war started in Europe, Parliament was not in session. Indeed, Parliament was not scheduled to resume before 2 October 1939, but owing to the emergency, Parliament was summoned on 7 September 1939. Great Britain had already been at war with Germany since 3 September 1939. After the Governor General read the Speech from the Throne, parliamentary debates on the war were held from 8–10 September 1939.[87] Both chambers of Parliament debated and approved the motion for a formal declaration of war on Germany.[88] What is very

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84 Luigi Sturzo, *The International Community and the Right of War* (New York: Furtig, 1970).

85 C.P. Stacey, *Arms, Men and Governments: The War Policies of Canada, 1939-1945* (Ottawa: Queen's Printer, 1970).

86 J.L. Granatstein, *Canada's War: The Politics of the Mackenzie King Government, 1939-1945* (Toronto: Oxford University Press, 1975) [*Canada's War*].

87 House of Commons, *Debates* (9 September 1939).

88 House of Commons, *Debates* (11 September 1939).

significant here is that parliamentary debate preceded the order-in-council declaring war. This procedure was also followed when war was declared on Italy in 1940.[89] It is thus correct to assert that from 1939 to 1940, Canada followed a pattern of debate in Parliament before using force in its international relations.

However, this pattern of parliamentary debate prior to Canadian engagement in armed conflicts was broken in the course of a subsequent increase of belligerent states in that conflict and Canada's use of force against Japan, Hungary, Romania, and Finland — countries which had aligned with Germany in the Second World War. With particular reference to Japan, Parliament had been adjourned since 14 November 1941 and was not scheduled to resume sitting until 21 January 1942. In the interval, on 7 December 1941, Japan bombed Pearl Harbour. Although there was a special sitting of the two chambers, it was not for the purposes of debating any war resolution on Japan but to hear an "address to the Canadian Parliament by the British Prime Minister, Winston Churchill."[90] Parliament resumed sitting on the date scheduled, 21 January 1942, and discussed a proclamation of war on Japan dated 8 December 1941. The proclamation purported that Canada had been at war with Japan as of 7 December 1941. For the first time in Canadian constitutional history, the country was engaged in conflict without prior parliamentary debate and approval.[91]

Similar proclamations which had been back-dated to 7 December 1941 were made with respect to Hungary, Romania and Finland, who all had joined the axis coalition. This untidy procedure was justified by Prime Minister Mackenzie King with the argument that belligerency with Hungary, Romania, and Finland were "all part of the same war."[92] Remarkably, records of parliamentary debates on this issue support the position of the Prime Minister as none of the opposition parties questioned the normative import of the precedent set by Prime Minister Mackenzie King. Given that there were subsequent ratifications of the declarations of war against Germany's allies, there is little doubt that the declarations of war on these allies of Japan and Germany would have been quickly approved if they had been tabled before Parliament prior to the actual engagement of hostilities.

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89 House of Commons, *Debates* (10 June 1940).

90 Rossignol, *supra* note 76 at 5.

91 House of Commons, *Debates* (21 January 1942).

92 C.P. Stacey, *Canada and the Age of Conflict: 1921–1948*, v. 2 (Toronto: University of Toronto Press, 1981) at 320.

As Rossignol observes, "Canadian public opinion accepted that Canada had no choice but to maintain its war effort against the continued aggression of Germany, Japan, and Italy and their allies."[93] Even the pacifist Cooperative Commonwealth Federation (CCF) party which had maintained its opposition to Canadian participation in the war yielded ground on this issue. Speaking for the CCF party in Parliament on 10 June 1940, M.J. Coldwell observed that "this war is none of our seeking; it is thrust upon us. And we have no option it seems to me, but to accept the challenge and to go forward to ultimate victory."[94] However, some Canadians, particularly Professor Frank Scott, were appalled at the government's politics in respect of prior parliamentary debate and approval of Canada's use of force in international relations. In a letter to Prime Minister Mackenzie King in 1939, Scott complained that "a group of individuals took so many steps to place Canada in a state of active belligerency before Parliament met … you very greatly limited Canadian freedom of action to decide what course to follow."[95]

In reply to Scott's quarrels with the politics of Canadian participation in some aspects of the war without prior parliamentary approval, some commentators like Michel Rossignol have argued that Scott probably misread Canadian public opinion on the issue. According to Rossignol,

> While Professor Scott thought that Parliament had been ignored, other Canadians would have been angered by any government delay in rallying to Britain's side as soon as war broke out. In other words, there were opposing views on the importance of Parliament's role in the process. The government, by insisting on reconvening Parliament before actually declaring war, had asserted Parliament's importance in the political process, and this was generally accepted by Canadians.[96]

It seems that Rossignol has misconceived the kernel of Scott's argument. Scott's grouse is with the procedure rather than presumptions about whether the public would have ultimately approved Canada's use of force. In any event, the Canadian public owe no gratitude to the government for tabling such weighty issues for parliamentary discussion. The decision to use force in international relations is the most important decision and given that it is the public that bears the financial and emotional costs of such decisions, the government is obliged to engage with public input. Second, although the Canadian government, acting under extreme emergency, may place Canada in an active state of belligerency

93 Rossignol, *supra* note 76 at 6.
94 House of Commons, *Debates* (10 June 1940) at 653.
95 *Canada's War*, *supra* note 86 at 10.
96 Rossignol, *supra* note 76 at 7.

without prior parliamentary approval, there is doubt whether Canada's wars against Finland, Japan, Romania, and Hungary fell into this category. If Parliament had the time and patience to sit down and listen to Prime Minister Churchill, what stopped it from engaging in the more important task of debating Canada's proposed wars against Finland, Romania, and Hungary? More importantly, Rossignol's arguments seem to ignore the symbolic value of parliamentary participation in such momentous decisions as the use of force by the state. Even if the outcome of such parliamentary process is a foregone conclusion, due process and legitimate governance require fidelity to such conventions.

Apart from public participation in the deliberations on use of force by Canada in its foreign relations, the significant aspect of an insistence on conventions and symbolic deliberation is that it validates the undoubted centrality of Parliament in the political-cum-legal process whereby Canada uses force in its international relations. However, this obligation must be balanced with the need to maintain executive flexibility in times of great emergency. The Cabinet can make certain decisions, especially those of a military nature where speed and security are factors, before consulting Parliament. Surely, it cannot be argued that Canadian troops in the trenches of Europe, shot at by enemy troops, should not act in self-defence merely because Parliament in Ottawa had not yet debated and approved an extension of the conflict to those new enemy states.

C. The U.N. *Charter*, Canada and the Korean Crisis

The end of the Second World War ushered in a new era of international norms, particularly on the threat or use of force in international relations. Only two exceptions were created by the *Charter of the United Nations* permitting the use of force by states, namely, actions in self-defence and enforcement actions authorized by the Security Council. Canada is a member of the United Nations and a signatory to the *Charter* and is therefore bound by the provisions of it. On self-defence, article 51 of the *Charter*[97] provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any

[97] *Charter*, *supra* note 1 at art. 51.

> time such action as it deems necessary in order to maintain or restore international peace and security.[98]

Article 51 thus preserves the rights of states under customary international law to act in self-defence whether individually or collectively.[99] Although there are two parallel regimes on self-defence, the U.N. *Charter* has the fundamental objective of substituting state unilateral actions with a deliberative international machinery. In effect, article 51 provisions must be read within the context of the *Charter*'s objective to curtail the relatively liberal regime of self-defence under customary international law. This argument is supported by the fact that having regard to the prevailing circumstances under which the *Charter* was negotiated, drawn, and agreed to by member states and its *raison d'être*, there is a discernible disposition against the use of force by states in their dealings with one another. Indeed, article 2(4) of the *Charter* expressly reinforces this teleological disposition.[100]

Furthermore, articles 25 and 28 of the *Charter* confirm this view as both provisions seek to confer a monopoly of the use of force in international law on the Security Council. In other words, the object of the *Charter* is to constrain states in their ability to have recourse to force in the resolution of disputes.[101] International law does not recognize anticipatory self-defence, or the doctrine of "first strike"[102] recently propounded by President George Bush. The Security Council has never authorized use of force on potential or non-imminent threats of violence. In fact, the International Military Tribunal sitting at Nuremberg emphatically rejected Germany's argument that they were compelled to attack Norway in order to prevent an Allied invasion. Defensive use of force is therefore only permissible on the occurrence of an armed attack.[103]

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98 *Ibid*.

99 C.M.H. Waldock, "The Regulation Of The Use Of Force By Individual States In International Law," in *General Course On Public International Law* (1952) 166:2 Hague Recueil des Cours 451 at 451; *The Nicaragua Case*, [1986] I.C.J.R. 14.

100 W.C. Greig, "Self Defense and the Security Council: What Does Article 51 Require?" (1991) 40 I.C.L.Q. 366.

101 Phillip Jessup, *A Modern Law Of Nations* (New York: Macmillan, 1948) at 166; Ruth Wedgwood, "Unilateral Action in the UN System" (2000) 11 E.J.I.L. 349.

102 "The National Security Strategy of the United States" (20 September 2002). This document is to be sent to the U.S. Congress as a declaration of the Administration's policy. See David Sanger, "Bush Outlines Doctrine of Striking Foes First" *New York Times* (20 September 2002) A1.

103 Article 3, paragraph (g) of the "Definition of Aggression" annexed to General Assembly Resolution 3314 XXIX defines "armed attack" as, in addition to sending regular forces across an international border, "[T]he sending by or on behalf of a state of armed bands,

The second category of permissible use of force in resolving international disputes is enforcement actions authorized by the Security Council. Although the Security Council, for unjustifiable reasons, failed to act or was tardy in responding to crises in Rwanda,[104] Zaire, Sierra Leone, Liberia, and Kosovo,[105] there is no doubt that it is the only international organ vested with the responsibility of determining the existence of threats to international peace and removing them through the mechanism of chapter 7 of the U.N. *Charter*. This juridical and political fact derives from the principle of taking "effective collective measures for the prevention and removal of threats to the peace."[106]

Although the phrase "threat to international peace" is not defined in the *Charter*, the only organ in the world capable of making that determination as provided in chapter 5 of the U.N. *Charter* is the Security Council. As provided in article 39 of the *Charter*: "[T]he Security *Council shall determine the existence of any threat to the peace*, breach of the peace, or act of aggression and shall make recommendations or *decide what measures shall be taken* in accordance with Articles 41 and 42, to maintain or *restore* international peace and security."[107]

The *Charter* also makes provisions for the mechanism by which such crucial functions may be exercised. While article 7 of the *Charter* establishes the Security Council, articles 23 and 24 state the responsibility of the Council. Article 24 provides that the members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." The power to maintain international peace is not to be exercised capriciously. Article 24(2) thus provides that "in discharging those duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations."[108] To reinforce the supremacy of the Security Council in the maintenance of international peace, the determination of what constitutes a threat to international

groups, irregulars, or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to" armed attack if carried out by regular forces.

104 Peter Rosenblum, "Irrational Exuberance: The Clinton Administration In Africa" (2002) 101:655, Current History 195 at 201.

105 Assessment of the Special Representative of the SG, Report SG UN Doc. S/25402 (12 March 1993).

106 *Ibid*. See also Vera Gowland-Debas, "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance" (2000) 11 E.J.I.L. 361.

107 *Charter*, *supra* note 1 at art. 39 [emphasis added].

108 *Ibid*. at art. 24(1).

peace and security is the sole responsibility of the Council. In removing threats to international peace by enforcement actions, the Security Council may utilize the services of regional organizations. As provided in article 53, "[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."[109] From the foregoing, it is clear that no enforcement action may be taken by any organization or state without the authority of the Security Council. To assess the legitimacy of Canada's participation in "enforcement actions," two levels of analysis are required. The first is to determine whether the enforcement action in question has been authorized by the Security Council and the second is whether the domestic processes leading to Canadian participation in such enforcement actions are legitimate. In determining the first, it is imperative to define enforcement actions.[110]

The editors of the *European Commentary on the Charter of the United Nations* have argued that by virtue of the *travaux préparatoires* of the *Charter*, all measures under chapter 8 of the *Charter*, without exception, are enforcement measures. A different school of thought defines enforcement actions as the use of military force and mandatory sanctions excluding purely defensive actions.[111] It would seem that enforcement actions relate to those actions (excluding defensive acts) which ultimately require military coercion or force for their effect.[112]

Further, in examining the legitimacy of Canada's participation in enforcement actions after the entry into effect of the U.N. *Charter*, it has to be borne in mind that the long ideological struggle between the defunct "Soviet

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[109] *Charter*, *supra* note 1 at art. 53 [emphasis added].

[110] Bruno Simma, *et al.*, eds., *The Charter Of The United Nations: A Commentary* (London: Oxford University Press, 1994) at 565.

[111] Michael Akehurst, "Enforcement Action By Regional Agencies With Special Reference To The Organization of American States" (1967) 7 Brit. Y.B. Intal L. 175.

[112] In 1960, there was an unsuccessful attempt by President Trujillo of the Dominican Republic to assassinate President Betancourt of Venezuela. The member states of the OAS acting under arts. 6 and 8 of the Rio Treaty agreed to impose sanctions on the Dominican Republic and a break of diplomatic relations with it. At the Security Council, the Soviet Delegate argued that the OAS action amounted to an enforcement action requiring the prior authorization of the Security Council. UN Doc.s/4491 (9 September 1960). Compare with the Cuban Quarantine of 1962, U.S. Dept. of State, (1962) Bulletin xlvii at 15; UN Doc S/PV.992-8 (1962).

Union and the United States [and their respective allies] defined much of each nation's view of the legality of threatening or using military force in international relations."[113] In the wake of the end of the Cold War, it follows that interpretations of legitimate use of force would contain less ideological rhetoric than before. Another factor which has an impact on the legitimacy of Canada's participation in enforcement actions is her membership in certain military organizations, such as NATO. The cumulative impact of these momentous factors is that Canada's reputation as an honest broker is often strained. An evaluation of Canada's role in the Korean Crisis and the Gulf War helps to understand the difficulty Canada often faces in walking the tight-rope.

On 25 June 1950, North Korea invaded South Korea. Due to the propitious absence of the Soviet representative on the Security Council, the Council passed a resolution authorizing member states of the U.N. to assist South Korea in dealing with North Korean aggression and to restore peace on the Korean peninsula. The Security Council resolution was brought to the attention of Parliament by the Secretary of State for External Affairs, Lester B. Pearson. In the course of parliamentary debates on the nature of Canada's participation in the Korean conflict, Prime Minister St. Laurent strongly argued that

> any participation by Canada in carrying out [the Security Council Resolution]—and I wish to emphasize this strongly—would not be participation in war against any state. It would be our part in *collective police action under the control and authority of the United Nations* for the purpose of restoring peace to the area where an aggression has occurred *as determined under the Charter of the United Nations by the Security Council*, which decision has been accepted by us.[114]

From the foregoing, it is clear that both the Prime Minister and Parliament were clear that if Canada were to participate in the operation in the Korean peninsula, it was doing so as part of the collective police action under the auspices of the Security Council rather than as a belligerent act orchestrated by a group of states acting outside the authority of the Security Council. More importantly, there was a definite commitment on the part of the Prime Minister to submit the question of Canada's participation in the enforcement action to parliamentary debate. According to Prime Minister St. Laurent, "If the situation in Korea or elsewhere, after prorogation [of Parliament], should deteriorate and action by Canada beyond that which I have indicated should be considered, Parliament will

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[113] Rein Mullerson & David Scheffer, "Legal Regulation of The Use of Force," in L. Damrosch, G. Danilenko & R. Mullerson, eds., *Beyond Confrontation: International Law for the Post-Cold War Era* (Boulder: Westview Press, 1995) at 93.

[114] House of Commons, *Debates* (30 June 1950) at 4459 [emphasis added].

immediately be summoned to give the new situation consideration."[115] Although Parliament did not "pass a motion specifically dealing with Canadian participation in U.N. police action in Korea,"[116] the desirability of Canadian participation in the enforcement action was raised in Parliament on 26 and 30 June 1950, and on 29 August 1950. Clearly, notwithstanding the added layer of the U.N. regime to the law on use of force by states, the Canadian political process made room for debate on whether Canada ought to participate in the Korean conflict. It is equally arguable, as already pointed out by Rossignol, that by passing the *Defence Appropriation Act*[117] (which was tied to the expenses in the Korean conflict), Parliament impliedly authorized Canada's participation in U.N. enforcement action against North Korea.[118] Although the legality of U.N. action in Korea or the U.N. condonation of the action is a matter of debate in some circles,[119] it is arguable that the Korean conflict established the principle that Canada can be involved in a collective police action against a state as authorized by the U.N. without such military action being construed as unlawful.

As already noted, two major contributions by the U.N. *Charter* to the jurisprudence of international law on the threat or use of force are (1) the collective use of force to deal with threats to peace and aggression, and (2) the renunciation of the use of force by governments and its replacement with the peaceful resolution of disputes.[120] These two tenets require that states accept the limits imposed by law, even when their instincts and self-interests suggest otherwise.[121] These principles further elevate multilateralism to an end in itself, not a mere tactic to be used or dumped at the whim of national interests.[122] It would amount to a restatement of the obvious to say that the Canadian attitude to the threat or the use of force has been heavily influenced by these two pillars of international law. Through a tradition of domestic debate prior to or immediately after the use of force, Canada has deferred to the authority of the

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115 *Ibid*.

116 Rossignol, *supra* note 76 at 8.

117 *Defence Appropriation Act, 1950*, S.C. 1950–51, c. 5.

118 House of Commons, *Debates* (8 September 1950) at 495.

119 According to some scholars such as Hans Arnold, the activities in Korea were not a U.N. war but a war of Western states condoned by the UN. See Hans Arnold, "The Gulf Crisis and The United Nations" (1991) 42 Aussenpolitik 68.

120 Advisory Opinion, "Legality of the Threat or Use of Nuclear Weapons" (1996) I.C.J.R. 1.

121 But see Madeleine Albright, "The United States and the United Nations: Confrontation or Consensus?" (1995) 61 Vital Speeches of the Day 354, arguing that multilateralism is a means, not an end.

122 Lobel & Ratner, *infra* note 142.

Security Council as the ultimate supervisor and executor in matters related to non-defensive use or threat of use of force in international relations.[123]

However, certain circumstances and developments such as Cold War politics, Canadian proximity to the U.S., plus Canadian membership in NATO often combine to stretch Canadian reluctance to act only within the strict letters of the U.N. *Charter* on matters regarding unilateral or non-defensive use of force.[124] It can hardly be doubted that Canada's other obligations to members of NATO have impacted and will continue to impact on Canadian responses to military threats or the temptation to use force outside the regime of the United Nations.[125] Regardless of the seductions of power, Canada should refuse to participate in any non-defensive military operation by NATO or the so-called coalition of the willing where such military operations are unauthorized by the Security Council.

D. The Gulf War, Canada, and the Legitimacy of the Security Council

For many decades, the Korean conflict remained the solitary instance wherein the U.N. authorized or at least condoned a collective police action against a belligerent state. Therefore, when on 2 August 1990, Iraqi tanks rolled into Kuwait and Iraq purportedly annexed it, there was global apprehension that Iraq had put the U.N. machinery to a severe test. As indicated in the preceding pages, the U.N. responded by asking Iraq to withdraw from Kuwait. Following Iraq's refusal to withdraw, sanctions were imposed and the Security Council ultimately authorized member-states to assist Kuwait in repulsing the Iraqi aggression. The sanctions imposed on Iraq required military forces for their implementation and Canada, a leading proponent of support for enforcement actions, did not have any problems with the resolutions on Iraq.

Given that the enforcement action to remove Iraq from Kuwait (and no more) was sanctioned by the U.N., there was no need for a declaration of war against Iraq. But there was need for a parliamentary debate of the issues. In addition, it

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[123] As Rossignol has argued, "Canada has always strongly supported the United Nations and championed collective action to ensure international peace." Rossignol, *supra* note 76 at 13.

[124] For a fuller discussion of this issue, see *The New NATO and the Evolution of Peacekeeping: Implications for Canada*, Report of the Senate Standing Committee on Foreign Affairs, Seventh Report (April 2000).

[125] There is no problem under the U.N. Charter with NATO members undertaking non-Article 5 operations in respect of self-defence. There is a problem when NATO engages in military operations of a non-defensive character. Only the U.N. Security Council has the authority to permit such actions.

was within the powers of the Governor-in-Council, without recalling Parliament, to authorize other actions taken by Canada in pursuance of the resolutions made by the Security Council. Moreover, since 1992, the *United Nations Act*[126] and *Special Economic Measures Act*[127] made it easier for Parliament to adopt and enforce emergency[128] measures without being recalled. The determination of whether or not an emergency exists is the responsibility of Parliament. The troubling question here is whether these two legislative provisions have avoided domestic parliamentary debate and Canadian public participation in military activities.

In my view, even when such military measures have been authorized by the Security Council, it would be desirable that the Canadian populace have a place in the debates leading to the deployment of Canadian personnel to zones of international conflict. These concerns arise because it is becoming increasingly obvious that decisions of the Security Council on use of force may reflect narrow geo-political-cum-economic interests of powerful veto-bearing members of the Council rather than entrenched global interests or Canadian values. In other words, aside from the undoubted legal powers of the Security Council to authorize enforcement actions, Canada should play a progressive role on the issue of global legitimate governance, particularly with respect to the Security Council.[129]

In the aftermath of the terrorist attacks on the United States on 11 September 2001 and the emergence of new forms of threats to international peace and security, the institutional and juridical capacity of the Security Council to terminate wars, eliminate threats to peace, and institute a regime of global governance has been seriously questioned. This situation is further complicated by an increasingly uni-polar world determined to exploit multilateralism in cynical ways. As multilateralism shrinks to a unilateralist display of economic and military might, Canada is placed in the invidious position of adhering to the letter and spirit of the U.N. *Charter* while taking extreme care to ensure that it

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126 *United Nations Act*, R.S.C. 1985, c. U-2.

127 *Special Economic Measures Act*, S.C. 1992, c. 17.

128 The *Act* defines emergency as "war, invasion, riot, or insurrection, real or apprehended."

129 For readings on the issue of global legitimate governance, see Inis Claude, "Collective Legitimation as a Political Function of the United Nations" (1966) 20 Intal Organization 367; D.D. Caron, "Governance and Collective Legitimation in the New World Order" (1993) 6 Hague Y.B. Intal L. 29. See especially Thomas Franck, *The Power of Legitimacy Amongst Nations* (New York: Oxford University Press, 1990).

does not jeopardize its enormous economic, cultural, and security ties with the U.S.

E. Canada, Coalitions of the Willing and Global Legal Order

Perhaps no other international issue has exposed the Canadian quandary about this matter than the current determination by the U.S. to assemble a "coalition of the willing" against Iraq. In the circumstances, the seductions of expediency may trump a principled rejection of any unilateralist non-defensive action by any such coalition of the willing against Iraq. As indicated earlier, the *realpolitik* of the Security Council is that the five permanent members of the Council do not always act in the best interests of humanity. Sometimes, they are propelled by national self-interest. In determining what role Canada should play in the case of Iraq, it must be acknowledged that the Iraqi crisis is difficult but not imponderable. Saddam Hussein, the "butcher of Baghdad" is a well-known psychopath and a murderous thug. His pathological disdain for the rule of law and his love for raw cruelty are well-known, and have been notorious since 1979. However, the Canadian response to the Iraqi crisis should not lose sight of the hypocrisy and double standards in its current revulsion over Hussein.[130] These pragmatic considerations ought to be fully ventilated in Parliament and in public forums to enable Canadians to appreciate the nuances of the issues and to offer informed input regarding Canada's role in any contemplated enforcement actions.

First, those who today insist that there must be a "regime change" in Iraq and vow that Iraq's weapons of mass destruction must be destroyed, were the same institutions and persons who helped create and sustain the monstrosity which Iraq has become.[131] Hussein was encouraged and appeased by his current

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[130] Thomas Franck, "Of Gnats and Camels: Is there a Double Standard at the United Nations?" (1984) 78 Am. J. Intal L. 811.

[131] It is remarkable that twenty years ago, precisely on 20 December 1983, U.S. Secretary of Defence Donald Rumsfeld was in Baghdad as an envoy of President Reagan. At that time, Secretary Rumsfeld said he was happy to be in Baghdad and was delighted to convey President Reagan's greetings to President Saddam Hussein. Again, at the material time, it was known in intelligence and diplomatic circles that President Hussein was trying to build nuclear weapons and acquire other weapons of mass destruction such as biological and chemical weapons. The Israel government had already bombed Iraq's nuclear reactor at Osirak. Yet, the Reagan administration, fearing that the clerics of Tehran would overrun Middle Eastern oilfields, supported or at least condoned Iraq's quest for illegal weapons. In addition to providing generous supplies of arms, the United States knowingly permitted the Iraqi Atomic Energy Commission to import bacterial cultures that might be used to produce

enemies while he murdered and destroyed and broke a series of international norms on weapons of mass destruction. Clearly, but for his misadventure in Kuwait, the Security Council members, especially the U.S., would have continued to turn a blind eye to the egregious crimes of the Iraqi regime.[132]

These tragic incidents which summarize the cynicism, double standards, and perhaps illegitimacy of the Security Council[133] in relation to global politics and economics compel Canada to be skeptical about assumptions that every dubious claim to enforcement action ostensibly authorized by the Security Council or promoted by an indignant "coalition of the willing" is *ipso facto* a higher calling to maintain global peace. As Professor Michael Reisman aptly pointed out, international law is subjected to ridicule when ruthless and self-serving powerful states embrace "the butchers of Tiananmen and the butcher of Hama so that the United Nations can repel the butcher of Baghdad."[134] The litany of unprincipled, cynical, and expedient exploitation of circumstances by powerful states requires a critical appraisal of Canada's role in the global legal and security order. As rightly pointed out by Professor Obiora Okafor, the greatest threat to global stability and peace is not in "the failure to invade [Iraq] but in the hedonistic conception of the function of law in the global systems."[135]

From the foregoing, it seems clear that although Canada is obliged to comply with Security Council resolutions authorizing enforcement actions, it should also strive to scrutinize the motives and intentions of the permanent members of the Security Council lest it sheepishly follow the Council in lending credibility to an illegitimate use of force. It is hardly debatable that the best way to ensure legitimate participation in U.N. enforcement actions is to subject any decision

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biological weapons. The United States turned a blind eye as Iraq's appetite for weapons of mass destruction increased. Indeed, members of the United Nations Security Council kept quiet while President Saddam Hussein gassed his own citizens and used chemical weapons during the Iran-Iraq war.

132 The legitimacy of the Security Council is a matter of serious concern to many. See B. Weston, "Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy" (1991) 85 Am. J. Intal L. 516.

133 But see R. Wolfrum, "The Security Council: Its Authority and Legitimacy" (1993) 87 A.S.I.L. Proceedings 316; D.D. Caron, "Strengthening the Collective Authority of the Security Council" (1993) 87 A.S.I.L. Proceedings 303; Bardo Fassbender, "Quis Judicabit? The Security Council, Its Powers and Its Legal Control" (2000) 11 E.J.I.L. 219.

134 W.M. Reisman, "Some Lessons From Iraq: International Law and Democratic Politics" (1991) 16 Yale J. Intal L. 203 at 208.

135 Obiora Chinedu Okafor, "The Global Process of Legitimation and the Legitimacy of Global Governance" (1997) 14 Arizona J. Intal Comp. L. 250 at 115.

to send Canadian troops to any international conflicts, particularly those thickly enmeshed in power politics and the economic self-interests of members of the Security Council, to rigorous parliamentary and public debate. Even where such decisions have been debated in Parliament, Canada must constantly review and assess the fairness and legitimacy of Security Council resolutions on the use of force. Circumstances change and it would be naive to expect that U.N. resolutions apparently authorizing the use of force in a particular set of circumstances would remain just and legitimate under a changed set of circumstances. If Canada is to promote the cause of legitimate global governance and the termination of wars,[136] it must remain vigilant and cautious.

Canadian vigilance cannot be guaranteed unless Parliament is a potent and vibrant institution for the articulation of public concerns and interests. In this context, the chronic impotence of both the ruling party caucus and opposition parties in Parliament give reason for concern. As Professor Wes Pue recently pointed out, Canadian democracy is increasingly becoming dysfunctional. With an electoral system designed to distort voter preferences, the development of *de facto* one-party government, the ascendancy of the Prime Minister and massive concentration of power in one person's control, and the decline of Parliament and caucus,[137] an effective parliamentary role in the decision to engage in U.N. enforcement actions is practically non-existent. A reappraisal of these shortcomings in Canadian democracy would not only reinforce the rights of the public through their elected representatives to have their input considered, but would also afford a needed measure of legitimacy and responsiveness in how and when Canada may engage in enforcement actions.[138]

VI. CONCLUSION

This article has argued that Canadian democratic practices as evidenced in both pre–U.N. *Charter* and post–U.N. *Charter* regimes support the view that Canada cannot lawfully participate in unilateral military actions outside the scope of U.N. authorization. Canadian political-cum-legal custom seems to suggest that Canada has hardly participated in an international conflict without parliamentary debate, approval and/or ratification. In other words, Canadian

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[136] Brian Orend, "Terminating Wars and Establishing Global Governance" (1999) 12 Can. J. L. & Jur. 253.

[137] W. Wesley Pue, "Bad Government: There Are No Friendly Dictators, Even in Canada" (2002) 10 Literary Rev. Can. 14.

[138] Sheldon Alberts, "Let House Debate Role in Iraq War: Liberal MP's" *National Post* (15 January 2003) A1.

participation in international conflicts, particularly those multilateral interventions authorized by the Security Council, is often a function of parliamentary approval. The question raised by this practice or convention is whether it is a legal obligation on the part of the government.[139] The short answer is that it is primarily a political obligation with implications for governmental legitimacy.

These questions are significant because Parliament has a role in "approving the process of placing military personnel on active service."[140] More importantly, Parliament has an undeniable role in reviewing the government's decision concerning Canadian participation in the use of force in international relations. Therefore, the question of Canadian participation cannot be a function of executive discretion. The current case of Iraq gives cause for a sober reappraisal of the need to re-institute public and parliamentary debate in the Canadian polity before Canada participates in military actions or even continues to participate in military actions at the instigation of powerful states with illegitimate or narrow interests to serve.[141]

Furthermore, I have argued that even in the face of Security Council authorization, Canadian participation in use of force ought to be equally grounded in domestic parliamentary justification. *A fortiori*, Canada may not lawfully participate in "coalitions of the willing" where such coalitions operate outside the prior authorization of the Security Council and are inconsistent with informed public opinion. More importantly, in cases where a purported U.N. authorization on collective enforcement is ambiguous and potentially liable to be construed in such a way as to facilitate and encourage the use of force, Canada ought to adopt an approach which construes international law as a constraint on the use of force rather than a facilitator or catalyst for militaristic responses.[142] Authorizing resolutions may be deliberately ambiguous because they are often the product of compromises. The least expansive construction should be placed on such authorizations if the *Charter*'s presumptions against resorting to armed conflicts are to be maintained. In a global legal and security order gradually moving away from the norms of non-use of military force to the evolution of new norms on the collective use of force, Canada is well placed to

139 Jim McNulty, "Liberals Owe Canadians Debate on Iraq" *The Province* (18 September 2002) A14.

140 Rossignol, *supra* note 76 at 15.

141 Pavel Felgenhauer, "Is Putin Ready to Bargain?" *Moscow Times* (12 September 2002) 9.

142 Jules Lobel & Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and The Iraqi Inspection Regime" (1999) 93 Am. J. Intal L. 124.

make significant contributions. An important component of this evolution is an articulate and potent Parliament representing informed Canadians. In the absence of any evidence that Iraq is about to attack a state, the battle-cry by the "coalition of the willing" premised on a "first-strike" doctrine is a perversion of international law which Canada must resist through proper multilateral channels.

THE TRANSITION TO CONSTITUTIONAL DEMOCRACY: JUDGING THE SUPREME COURT ON GAY RIGHTS

Bruce M. Hicks*

The idea that Canada was transformed into a "constitutional democracy" in 1982 is widely believed by the public, yet rarely examined in academic literature. This article identifies what it calls a "theory of constitutional democracy" and then applies it to a test case, the Supreme Court of Canada's decisions on the equality claims of lesbians and gay men. It concludes that if the public expected such a transition, it has yet to be made.

Le public croit généralement que le Canada fut transformé en démocratie constitutionnelle en 1982, mais cette idée a rarement été discutée dans la littérature académique. Cet article détermine « une théorie de démocratie constitutionnelle » puis l'applique à un cas type, notamment les décisions de la Cour suprême du Canada relativement aux revendications d'égalité des lesbiennes et homosexuels. Il conclut en disant que si le public s'attendait à une telle transition, elle doit encore avoir lieu.

I. INTRODUCTION

The claim that "Canada became a constitutional democracy in 1982" has been so widely used by politicians and the media since 1982 that it now has an almost normative dimension. Even such places as the official website of the Courts of Nova Scotia now unreservedly state that "Canada was transformed from a parliamentary democracy to a Constitutional democracy with the passing of our *Charter of Rights and Freedoms*."[1]

Furthermore, the decision to move to this new constitutional arrangement was not an easy one. Several decades of heated, and at times divisive, debate, legal challenges and even appeals to the British Parliament and the international community preceded the adoption of the *Constitution Act, 1982*.

In spite of such an identifiable and tumultuous transition point and in spite of the widespread use of this label in public discourse, there has been very little discussion of "constitutional democracy" in Canada's academic circles since

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1 The Courts of Nova Scotia, *The Courts and the Charter of Rights and Freedoms* (Halifax: Crown Copyright, 2001).

1982. The few scholars who specifically refer to a transition to constitutional democracy use the expression to identify a moment in time, more so than to identify any operating principles that might have changed or to examine the details of that transition.[2] In fact, the few who use this label appear to be only using it to respond to the widespread public usage of the terminology.

That is not to suggest that there has not been discussion about the impact of the *Constitution Act, 1982*, and about the implications of having a constitutionally entrenched *Charter of Rights and Freedoms*. Quite the opposite. There has been a virtual flooding of the journals with allegations of "*Charter* politics"[3] and questions about the appropriateness of judicial decisions, particularly with respect to equality rights. But there has been surprisingly little scholarly work on "constitutional democracy" *per se* written post-1982, and almost no work has been done on evaluating whether or not the transition has been successfully accomplished.

Yet if this terminology is so popular, and if the public is so convinced that such a change took place, is it not incumbent on academics to examine the assumptions underlying "constitutional democracy" and to evaluate whether or not the "transformation" has been effectively made? Why then is this noticeably missing from the literature?

One of the reasons for this is that political theory is normative, and broad normative theories do not easily lend themselves to the testing of arguments, and thus to sustaining scholarly momentum. A debate that began in the 1960s about the relative merits of institutional design can hardly be expected to continue to generate the same intensity half a century later (especially when, for many, a conclusion has long since definitively and irrevocably been reached).

Mark Sproule-Jones of McMaster University wrote a harsh criticism of Canadian political science two decades ago. He suggested that it was dominated by a blind devotion to the Westminster model.[4] A decade after him, Michael Atkinson of McMaster University and Paul Thomas of the University of

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[2] See *e.g.* Lorraine 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.

[3] Led by R. Knopff & F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992).

[4] Mark Sproule-Jones, "The Enduring Colony? Political Institutions and Political Science in Canada" (1984) 14 Publius 1 at 93 ["The Enduring Colony"].

Manitoba pointed out that there still was an "academic infatuation"[5] with the Westminster model permeating most of the literature. And, most recently, Jonathan Malloy of Carleton University has criticised Canadian political science for its obsession with what he calls the "responsible government approach."[6] They all point out that Canadian political scientists routinely fall back on a defensive application of normative assumptions about past traditions and an idealized model of responsible parliamentary government.

When one starts with normative assumptions about how responsible government is supposed to work and combine these with the idea that "power resides somewhere,"[7] the post-1982 research will naturally become focussed on whether the *Charter* has resulted in a power shift to the judiciary and whether this shift undermines the role of Parliament.

The flaw here does not lie simply in the use of normative assumptions. Political theory is normative and the application of theory in order to reach normative conclusions on specific questions (such as whether or not Canada has successfully made the transition to constitutional democracy) can be a valid approach. The more serious flaw lies in what assumptions are being used.

If the public perception is that Canada's political paradigm changed in 1982, then the assumptions being applied cannot be rooted *solely* in a theory of responsible parliamentary government.[8] Given its public resonance, this article suggests that a "theory of constitutional democracy" should also be identified and applied.

Victor Ostrom has argued that works such as *The Federalist Papers*, as well as the writings of Tocqueville, are nothing short of a "revolution in political

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5 Michael Atkinson & Paul Thomas, "Studying the Canadian Parliament" (1993) 18:3 Legislative Stud. Q. 423

6 Jonathan Malloy, "The 'Responsible Government Approach' and its Effect on Canadian Legislative Studies" (2002) 5 Parliamentary Perspectives 1 at 1.

7 "The Enduring Colony," *supra* note 4.

8 In the wake of the adoption of the *Constitution Act, 1982*, Alan Cairns suggested that the new constitutional system had to be viewed as having not one, but three pillars: federalism, responsible parliamentary government and the *Canadian Charter of Rights and Freedoms*: Alan Cairns, "The Embedded State: State-Society Relations in Canada" in Banting & Keith, eds., *State and Society: Canada in Comparative Perspective* (Toronto: University of Toronto Press, 1985) 68.

theory."[9] While Ostrom was concerned with identifying a theory of federalism, it seems equally valid to use these writings as a base line to establish a theory of constitutional democracy for Canada. After all, the relative merits of constitutional democracy *vis-à-vis* the British system of responsible parliamentary government was itself the very subject of *The Federalist Papers* and similar works.

The public debate leading up to 1982 was framed for the Canadian people as a question of whether the "American system" was better, particularly its guarantee of fundamental rights enforced by the courts. For example, Canada's leading constitutional expert from the public's perspective at the time, the late Senator Eugene Forsey, frequently and specifically characterized for Canadians the system options as follows:

> Parliamentary responsible government is a wonderfully sensitive, flexible and effective instrument, far more so than the American system. But also it can be a far more dangerous system than the American. In the American system, everybody is hedged around with legal prohibitions, which will be enforced by the Courts. In our system, that is not so.[10]

It makes sense, then, to draw on this American "revolution in political theory" to identify the foundations of constitutional democracy. Of course this is with the caveat that any such theory as it applies to Canada must be filtered through the lens of temporal and societal differences.

Within the theory of constitutional democracy the Supreme Court has clearly identifiable responsibilities. It should be possible, therefore, to determine whether or not Canada has successfully made the transition by determining whether or not the Court has been effectively carrying out its duties and obligations under this system. To do this, this article will apply the theory of constitutional democracy to the Supreme Court of Canada's decisions with respect to one segment of society, gay[11] men and women.

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9 V. Ostrom, *The Meaning of American Federalism* (San Francisco: ICS Press, 1991) at 14.

10 Eugene Forsey, *Freedom and Order* (Toronto: McClelland & Stewart, 1974) at 29 [*Freedom and Order*].

11 This article defines gay as "attracted to a person of the same sex." This term is sometimes used to refer only to males who are attracted to other males. However, for our purposes gay is used as a synonym for the more clinical term "homosexual," which I have chosen not to use because it has been so frequently used in a pejorative sense.

There are several reasons that so-called "gay rights" decisions make the ideal test case. To begin with, the area of the *Charter* that has been the subject of most of the debate in Canada since 1982 has been equality rights. And in this area, the issue of equality for gay people, including prohibition of discrimination and the more recent issue of equal benefits of the law (namely full recognition of same-sex relationships) is particularly "new" in that it had never come before the Court under the old system. It should have been possible, therefore, for the Court to apply the theory of constitutional democracy in all cases involving gay people brought before the Court.

What is more, when the *Charter* was being considered by Parliament in 1981, the issue of its protection for gay people was raised a number of times by legislators.[12] The then Minister of Justice, Jean Chrétien, repeatedly responded: "That would be for the court to decide, [the *Charter*] is open ended."[13] What better way to evaluate the Court's embrace of its responsibilities in the new regime of constitutional democracy than in an area of law that was singled out from the start as being something for the courts to decide?[14]

Furthermore, much has been made by the *Charter*'s critics about how groups and individuals mobilized first to influence the wording of the *Charter* and then, immediately after 1982, to obtain equality through the courts.[15] These are not allegations that can be levelled against the gay community. At the time the *Charter* was being considered, individuals in the gay community were otherwise

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[12] Questions by Svend Robinson, MP, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (Chair: Senator Harry Hays & Serge Joyal, MP) (Ottawa: Queen's Printer for Canada, 1981) 39:17; and at 48:31 (Jim Hawkes).

[13] *Minutes of Hays-Joyal Committee*, 39:17 (Jean Chrétien).

[14] The 1985 Parliamentary committee struck to ensure the federal legislation was in compliance with the *Charter* claimed that gay people were covered by the equality rights provisions: "Equality for All," *Minutes of Proceedings and Evidence of the Sub-Committee on Equality Rights* (Ottawa: Queen's Printer for Canada, 1985), Issue 29 at 138; and the government responded that: "The Department of Justice is of the view that the courts will find that sexual orientation is encompassed by the guarantees in section 15 of the Charter": Department of Justice, *Towards Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Minister of Supply and Services, 1986) at 13.

[15] Troy Q. Riddell & F.L. Morton, "Reasonable Limitations, Distinct Society and the Canada Clause: Interpretive Clauses and the Competition for Constitutional Advantage" (1998) 31 Can. J. Poli. Sci. 467.

occupied, responding to police raids on their establishments and businesses[16] and there was no national gay organization in Canada before or immediately after the adoption of the *Charter*.[17]

All of this combines to leave the question of the equality of gay men and women to be addressed entirely within the framework of constitutional democracy and, as far as the Supreme Court is concerned, in response to law suits brought by individuals forced to incur the enormous cost of litigation.

II. TRANSITION TO CONSTITUTIONAL DEMOCRACY

The late American political philosopher John Rawls is best known for advancing the idea of "original position." He suggested that if a group of men and women came together to form a social contract under a "veil of ignorance" — which is to say they did not know in advance what status they would hold — they would produce a society where (i) individual liberties were maximized for all citizens, and (ii) social inequality was justified only under conditions that would be beneficial for the least fortunate.[18] In other words, they would create a constitution that guarantees "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination,"[19] while at the same time permitting "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups."[20] There was no "veil of ignorance" that caused Canada to move to a system of constitutional democracy. Canadians have the benefit of being able to claim to have arrived at an egalitarian Constitution from "actual" position.

Senator Forsey and others have repeatedly pointed out that the system of government in place in 1982 had been adopted in 1867 by "*deliberate choice.*"[21]

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16 Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking 1971-1995* (Toronto: University of Toronto Press, 1999) at 68.

17 *Ibid*. at 83.

18 John Rawls, *Theory of Justice* (London: Oxford University Press, 1973).

19 *Canadian Charter of Rights and Freedoms*, s. 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

20 *Ibid*., s. 15(2).

21 *Freedom and Order*, *supra* note 10 at 21 [emphasis in original]. The *British North America Act, 1867*, was written entirely by the Fathers of Confederation with the exception of two clauses which were added by Britain: the choice of the name "Dominion" over "Kingdom" of Canada and s. 26 which allowed for additional Senators to be appointed so as to break a deadlock between the two chambers of Parliament. Eugene Forsey, *Notes on the Ryan*

It should be noted that under this system, referenda and other mass participation mechanisms are "antithetical to the nature of the beast."[22] The only public participation takes place by way of consultation mechanisms of the parliamentary government: the Government through royal commissions and Parliament through House of Commons and Senate committee hearings. There were no shortage of these in the years that led up to the *Constitution Act, 1982*.[23] Just from the period when the federal government under then Prime Minister Lester B. Pearson outlined its agenda for system change,[24] until proclamation of the Constitution, there was (at the federal level alone) the Molgat–MacGuigan Joint Senate and House of Commons Committee on the Constitution of the twenty-eighth Parliament of Canada, the Lamontagne–MacGuigan Joint Committee of the thirtieth Parliament, the Pepin–Roberts Royal Commission[25] and the Hays–Joyal Joint Committee of the thirty-second Parliament. Public consultations on a constitution, not to mention federal-provincial negotiations, seemed to be the number one Canadian pastime for almost two decades.

Right from the outset, the government made clear that the cornerstone of system change would be a "Charter of Rights" since "Canadians are not afforded any guarantees of fundamental rights which (a) limit governmental power *and* (b) possess a large measure of permanence because of the requirement that it be amended not by ordinary legislative process but only by the more rigorous means of constitutional amendment."[26] While this initiative came from the federal government, many Canadians quickly embraced this document and took it as their own.[27] What is more, these individuals and groups are widely credited, by friend and foe alike, with shaping the wording of virtually every clause in the

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Proposals, 'A New Canadian Federation': Part I (Ottawa: Library of Parliament, 1980) [unpublished].

22 Jennifer Smith, "Responsible Government and Democracy" in F. Leslie Seidle & Louis Massicotte, eds., *Taking Stock of 150 Years of Responsible Government in Canada* (Ottawa: Canadian Study of Parliament Group, 1998) at 20.

23 See Peter H. Russell, *Constitutional Odyssey: Can Canadians Become A Sovereign People?* (Toronto: University of Toronto Press, 1993).

24 Government of Canada, *Federalism for the Future: A statement of Policy by the Government of Canada* (Ottawa: The Constitutional Conference, 5–7 February 1968).

25 "Task Force on Canadian Unity" (1979).

26 Minister of Justice, *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968) at 13.

27 Alan Cairns, "The Politics of Constitutional Conservatism," in Keith Banting & Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) 153.

final *Canadian Charter of Rights and Freedoms.*[28] The Hays–Joyal hearings of 1981 alone took more than 175 hours and involved 300 witnesses, 100 groups, four provincial premiers and scores of written submissions and presentations from individual Canadians.[29]

On 28 September 1991, the Supreme Court of Canada defined the rules of the game more clearly, ruling not only on the law but on the conventions and the spirit of the federal system.[30] While the system of government in place at the time could be changed legally by the federal Parliament proceeding as planned, the high court ruled that for it to have moral weight as a constitution — in essence, for it to be a genuine social contract — it would require a substantial level of consent from among the provincial governments.

In the end, the *Constitution Act, 1982*, was agreed to by every provincial government in Canada, except the Government of Quebec. Clearly this met the level of "substantial," but it has nevertheless resulted in the claim that Prime Minister Pierre Trudeau "imposed a new constitution on Canada and Quebec, without the latter's consent and in defiance of the will of the National Assembly and the Government of Quebec."[31] For his part, Trudeau has repeatedly pointed out that the Quebec government at the time was committed to Quebec's independence and, since he could never have obtained their consent, the seventy of the seventy-five MPs elected to represent Quebec in the Canadian Parliament who voted for the Constitution should be seen as representing the genuine interests of Quebec voters.[32] While both claims are suspect because of their obvious partisanship, they both enjoy validity in that each is laying claim to a level of representation within the existing system of responsible parliamentary government.

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[28] See Alexandra Dobrowolsky, *The Politics of Pragmatism: Women, Representation and Constitutionalism in Canada* (Oxford: Oxford University Press, 1999); Janet L. Hiebert, "The Evolution of the Limitations Clause" (1990) 28 Osgoode Hall L.J. 103; and Jean Chrétien, *Minutes of the Hays-Joyal Committee*, Issue 36.

[29] Jean Chrétien, *Minutes of the Hays-Joyal Committee* at 36:10

[30] *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

[31] Guy LaForest, *Trudeau and the End of a Canadian Dream* (Montreal: McGill–Queen's University Press, 1995) at 35; for a critique of this thesis see Max Nemni, "Canada in Crisis and the Destructive Power of Myth" (1992) 99 Queen's Quarterly 226.

[32] Pierre Trudeau, "Lucien Bouchard, illusionist: Pierre Trudeau accuses Lucien Bouchard of betraying the people of Quebec and distorting political history during the referendum campaign" *Montreal Gazette* (3 February 1996) B3.

A Gallup poll at the beginning of the process had shown that Quebeckers were as supportive as the rest of Canadians for the details of the constitutional package, including a constitutionally entrenched charter of rights.[33] A Sorecom poll, taken seven months after agreement was reached, reported that the majority of Quebecers "believe that Premier René Lévesque should have signed"[34] the accord and in a Gallup poll, one month after that, only 16 percent of Quebecers said they felt the Constitution was not a good thing for Canada in the long run.[35] It seems evident that the citizens of Quebec were willing supporters of the system change.

Because of the rules set down by the Supreme Court, the Government of Canada was only obliged to convince the Canadian Parliament plus between one and ten provincial governments in order "to switch from Parliamentary democracy to Constitutional democracy, and to consciously give the courts responsibility for protecting minorities and rights."[36] The fact that the *Constitution Act, 1982* enjoyed enormous popular support across Canada and within Quebec and that so many individuals and groups had contributed to the drafting of this document, while reinforcing its legitimacy, is not requisite for system change given that the earlier system had itself been a freely entered into social contract. As a result, the Supreme Court of Canada was forced to inform the Quebec government: "The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable."[37]

What is also significant is that so many provincial governments who had for so long opposed the federal government's constitutional initiative with respect

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[33] 91 percent National, 96 percent Atlantic, 83 percent Quebec, 93 percent Ontario, 95 percent Prairies and 95 percent B.C. of Canadians agreed "that the Constitution guarantee basic human rights to all Canadians": "Most Agree on Basic Principles for Reform of the Constitution" *The Gallup Report* (6 August 1980) 2.

[34] Robert Sheppard, "Both Governments Losing Favor in Quebec" *Globe & Mail* (5 May 1982) A8.

[35] 49 percent of Quebecers felt it was a good thing, compared to 62 percent Atlantic, 65 percent Ontario, 53 percent Prairies and 50 percent B.C., making a total of 57 percent National: "Majority Think Constitution Will be Good for Canada" *The Gallup Poll* (19 June 1982) 2.

[36] Reg Alcock (Liberal MP), discussant on "Do Interest Groups Detract from Representative Institutions" for *Canada Today: A Democratic Audit* (Ottawa: Canadian Study of Parliament Group, 30 November 2001) [unpublished].

[37] *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793 at 806.

to a *Charter*[38] were so willing to give their consent so as to avoid fighting a referendum on this issue among the voters.[39] This is nothing short of *democratic will* being expressed within the old system of responsible parliamentary government. To characterize it as anything else would be, as Alexander Hamilton would say, "to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."[40] If that were true, it would itself be a compelling argument for Canada switching to constitutional democracy.

III. DEBATE OVER THE *CHARTER*

Since 1982 there has been a growth industry in academic debate surrounding the *Charter*. Miriam Smith of Carleton University has likened this debate to the one that took place in the 1930s over the decisions of the Judicial Committee of the Privy Council, the only difference being that "the attacks now come from the right, when they used to come from the left."[41] Some of this is simply a "continuation of political battles by scholarly means,"[42] including the pre-1982 debate over system change. And some has been even more off topic, driven as it is by the various authors' objections to various judicial outcomes.

Nevertheless, buried within this debate are some of the concepts that underlie the theory of constitutional democracy. As such, a brief review of this debate is not only instructive but illustrates that it, in turn, could be informed by the approach advocated in this article.

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38 Paul Wieler, "The Evolution of the Charter: A View from the Outside," in Joseph Weiler & Robin Elliot, eds., *Litigating the Values of a Nation* (Toronto: Carswell, 1982) 49 at 56.

39 Roy Romanow, John Whyte & Howard Leeson, *Canada...Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell, 1982).

40 Alexander Hamilton, "No.78" in Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor, 1999) 435 [*The Federalist Papers*].

41 Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science" (2002) 35 Can. J. Poli. Sci. 6. In his study of the Supreme Court, Ian Bushnell chronicles a long history of Court-bashing in Canada, with the first wave of attacks against the Supreme Court of Canada coming only three years after its inception. See Ian Bushnell, *The Captive Court* (Montreal: McGill–Queen's University Press, 1992).

42 Miriam Smith, "Partisanship as Political Science: A Reply to Rainer Knopff and F.L. Morton" (2002) 35 Can. J. Poli. Sci. 48.

One of the central themes of this debate is the claim that there has been a power shift from Parliament to the judiciary. It has been suggested that this is the paradox of liberal constitutionalism in Canada, placing a Constitution over Parliament and then giving primary responsibility for interpreting that document to only one of the institutions in which power resides.[43] Judicial review of legislation then inevitably causes this migration of power since it allows one of the institutions to displace the constitutional rules that govern the use of that power and, in so doing, gain supremacy over the other political institution(s), or so the argument goes.

One of the flaws with this argument is that judicial review has always existed in Canada and, unlike England, Canada has always had a written document that was beyond the reach of Parliament. As Justice Rosalie Abella has pointed out, "[s]ince 1867, Canada has lived with the concept that the legislature, although supreme, is itself subject to the constitution. This was particularly true with respect to the authority of respective legislatures according to the division of powers."[44]

In fact, former Chief Justice Brian Dickson has argued that the judicial review of legislation being done now is, in practical terms, no different than that which was being done prior to 1982, except that governments are now being asked to live up to their responsibilities under a *Charter*.[45] "The conventional answer to these questions is that judicial review is legitimate in a democratic society because of our commitment to the rule of law."[46] The suggestion that Parliament should somehow have equal authority to interpret the *Charter* "challenges conventional understandings of the rule of law which suggest that the legislatures should respect the Court's interpretation of the Constitution."[47]

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43 Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills: Oxford University Press, 2001) [*Judicial Power*].

44 Rosalie Abella, "Public Policy and the Judicial Role" in M. McKenna, ed., *The Canadian and American Constitutions in Comparative Perspective* (Calgary: University of Calgary Press, 1993) 167 at 177.

45 Brian Dickson, "The Canadian Charter of Rights and Freedoms: Dawn of a New Era?" (1994) 2 Rev. Const. Stud. 1.

46 Peter Hogg & Allison Thornton, "The Charter Dialogue between Courts and Legislatures" (1999) 20 Policy Options 19.

47 Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481 at 493 ["Constitutional and Common Law Dialogues"].

But the issue of judicial supremacy for *Charter* critics is not simply balancing jurisdiction and responsibilities between the institutions in which power resides. Their complaint is that the institution interpreting the Constitution is the institution that is not subject to the "ordinary mechanisms of democratic accountability."[48] Judicial finality is inherently flawed, they argue, "when one considers how ill-suited adjudicative institutions are to some of the central policy making tasks."[49] Some even go so far as to allege that the Court has been hijacked through a burgeoning bureaucracy of activist law clerks and through "'flooding the law reviews with favourable articles"[50] by "a full-court press by all the anti-family forces"[51] so that "legal commentators are all singing from the same hymn book."[52] Judicial outcomes (at least in the area of equality), they argue, must be considered inherently flawed because they come from an "undemocratic"[53] Court and not from Parliament.

This idea of judicial supremacy and the characterization of the Court as being undemocratic is at odds with conventional constitutional theory advanced by such ideologically-varied theorists as Robert Bork, Ronald Dworkin and John Hart Ely.[54] It is rooted in "pure majoritarian decision making,"[55] whereas most other definitions of democracy acknowledge that "the fair treatment of individuals and minorities sometimes needs the intervention of the courts."[56]

The late French historian François Furet, an Immortal of the Académie Française speaking in Britain during the bicentennial of the French Revolution, suggested that the greatest triumph of democracy in his generation was the acceptance "that democracy is not the same thing as majority rule, and that in a real democracy liberties and minorities have legal protection in the form of a written constitution that even Parliament cannot change to suit its whim or

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48 *Judicial Power*, *supra* note 43 at 169.

49 R. Knopff & F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992) at 233.

50 F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) at 147 [*Charter Revolution*].

51 Ted Morton as quoted in "Victims at last: homosexuals convince the Supreme Court to include them in the Charter — so what's next?"(1995) 22:26 Alberta Report 33.

52 *Charter Revolution*, *supra* note 50 at 147.

53 *Ibid*. at 149.

54 "Constitutional and Common Law Dialogue," *supra* note 47 at 489.

55 Peter W. Hogg, "The Charter Revolution: Is it Undemocratic?" (2002) 12:1 Constitutional Forum 1 at 8.

56 *Ibid*.

policy."[57] Julius Grey of McGill University has suggested that among the basic qualities that are now recognized as necessary to be considered a democracy, in addition to "respect for fundamental freedoms, human rights and equality even against majority opinion," are "an independent judiciary sheltered from populist pressures and the financial accessibility of the court system to the average man."[58]

Paul Howe and David Northrup of York University have directly put the thesis of a power shift to the judiciary and the issue of the democratic accountability to the Canadian people in a number of quantifiable public opinion research projects. They have repeatedly found that

> in the wake of much criticism of judicial activism from certain quarters, Canadians remain largely content with the balance of power between the different branches of government, continuing to opt for the courts by a two to one margin. Critical invective has not resonated with Canadians who continue to think it legitimate for courts to overrule legislatures when statutes are found to be inconsistent with the Charter.[59]

IV. THEORY OF CONSTITUTIONAL DEMOCRACY

A theory of constitutional democracy first emerged in the writings of eighteenth and early-nineteenth century constitutional and legal philosophers like Thomas Paine, James Madison, Alexander Hamilton and Alexis de Tocqueville, and in documents like France's *Declaration of the Rights of Man*. It is the theory of constitutional democracy that is contained in this body of literature that this article will extract and apply to the Supreme Court of Canada.

What emerges in all these documents is the argument that what establishes democratic legitimacy within a constitutional democracy is not the fact that the legislature is elected by the people, but that the people have entered into a social contract known as the constitution.

This constitution places delegated authority in the hands of several bodies, including an elected legislature. However, the legitimacy for the legislature lies not in the fact that it is elected but in the social contract of the constitution. For

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[57] François Furet as quoted in Ronald Dworkin, "A Bill of Rights for Britain" (1990) 16 ConterBlands 13.

[58] Julius Grey, "What a Modern Democracy Means" *The Gazette (Montreal)* (22 April 2003) A25.

[59] Paul Howe & David Northrup, "Strengthening Canadian Democracy: The Views of Canadians" (2000) 1 Policy Options at 41-42.

the legislature to enact a law that is contrary to the constitution is to break the contract with the people.

As Alexander Hamilton wrote, "there is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid."[60] This principle is enshrined in Canada's Constitution: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of that inconsistency, of no force and effect."[61]

The Supreme Court of Canada has acknowledged four fundamental and organizing principles of the Canadian Constitution: "federalism; democracy; constitutionalism and the rule of law; and respect for minorities."[62] While an examination of organizing principles is informative, it is not entirely in keeping with the theory of constitutional democracy. It is, after all, the harmony or overlap of these fundamental and organizing principles that creates a constitutional democracy.

For example, the idea of "democracy" at the time of *The Federalist Papers* was understood to mean majoritarian rule. Yet modern conceptualizations of democracy, influenced in part by the theory of constitutional democracy, includes limitation on state powers so as to protect minorities within society. Similarly, "constitutionalism" is accepted to be the idea that government can and should be legally limited in its powers. However, in a constitutional democracy powers are limited in two ways: first through governing institutions, and second by placing some issues outside the authority of the democratic process.[63] While the latter came into effect for Canada with the *Charter* in 1982, "federalism" has been a dominant feature of the Canadian system and a very real limit on its government institutions since the *British North America Act*[64] was adopted in 1867. To understand the overarching theory of constitutional democracy, therefore, it is essential that one look at the theory as one of balance and not

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60 Hamilton, "No.78", *The Federalist Papers*, *supra* note 40 at 435.

61 *Constitution Act, 1982*, s. 52(1).

62 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 32 [*Reference re Secession*].

63 Jon Elster & Rune Slagstad, "Introduction," in *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988).

64 In 1982, along with the adoption of the *Constitution Act, 1982*, the *BNA Act, 1867* was renamed the *Constitution Act, 1867*, and placed under the protection of the amending formula.

simply as series of organizing principles. The Supreme Court of Canada appears to have acknowledged this when it wrote: "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[65]

In order to understand this balance, it is instructive to approach the question from the vantage of role and function. In other words, what is the purpose of a constitution in this system of government? Its primary purpose, as far as governance is concerned, is to protect against both the tyranny of the few and the tyranny of the many.

As Alexis de Tocqueville observed, "the power granted to American courts to pronounce on the constitutionality of laws is yet one of the most powerful barriers ever erected against the tyranny of political assemblies."[66] Majoritarians frequently attempt to critique this principle by suggesting it places the judiciary above the legislature. However, as Hamilton pointed out, framing the question in this manner ignores the position that the constitution holds in a constitutional democracy.[67]

In a constitutional democracy, the supremacy of the constitution requires that a judiciary exist to act as an intermediary between the people and the legislature. Not only does this mean that the "interpretation of the laws is the proper and peculiar province of the courts"[68] but that it belongs to the court to ascertain the constitution's "meaning as well as the meaning of any particular act proceeding from the legislative body."[69] To permit the legislature to interpret the constitution would permit legislators to substitute their *will*[70] for that of the people, and since legislators have the power to enact laws this would lead inevitably to the tyranny of elected assemblies.

Toqueville has argued that the requirement of individuals to bring a court challenge in order to review legislation, as opposed to France's system of a Constitutional Court, is another strength of the American system. While he points out that litigation is a dominant aspect of American culture, he finds

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65 *Reference re Secession*, *supra* note 62 at para. 49.

66 Alexis de Tocqueville, *Democracy in America*, J.P. Mayer, ed. (New York: Perennial Classics, 2000) at 103–104 [*Democracy in America*].

67 Hamilton "No.78," *The Federalist Papers*, *supra* note 40 at 436.

68 *Ibid*. at 435.

69 *Ibid*.

70 *Ibid*. [emphasis in original].

litigation a circumscribing influence on judicial power since by "closely linking proceedings against the law with proceedings against a man, there is a guarantee that legislation is not daily exposed to the attack of parties."[71]

If one accepts this principle of court challenges as being a natural restraint on the powers of the court, then the corollary of this is that the court can freely defend individual rights. After all, by the time a legal challenge is brought before the court the injustice has long since been committed and other forms of redress have long since been exhausted.

V. SUPREME COURT DECISIONS ON GAY RIGHTS

Since 1982, there have been only been six Supreme Court decisions that directly involved gay men and women. For ease of consideration, these six decisions will be considered here under the specific areas of the Constitution that they fall within, namely:

a) equality rights (*Egan v. Canada*; *Vriend v. Alberta*; and *M. v. H.*);

b) freedom of expression (*Little Sisters Book & Art Emporium v. Canada*); and

c) freedom of religion (*Trinity Western University v. British Columbia College of Teachers*; and *Chamberlain v. Surrey School District*).

A. Equality Rights

In May 1995, the Supreme Court of Canada had its first opportunity to consider a case involving gay people in *Egan v. Canada*.[72] This case involved a gay couple (Egan and Nesbit) who had cohabitated together for more than forty-five years but were denied the spousal allowance provided to opposite-sex couples under the *Old Age Security Act*. The Court was unanimous in ruling that sexual orientation is an analogous ground that requires section 15 protection.[73]

The Court came to a similar conclusion in April 1998 in *Vriend v. Alberta*,[74] when it read-in sexual orientation as a prohibited ground of discrimination in Alberta's human rights legislation. Vriend was a laboratory co-ordinator at a private religious school in Alberta who was fired, in spite of having received

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71 *Democracy in America*, *supra* note 66 at 103.

72 *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*].

73 *Ibid.* at para. 5, per La Forest J. for the majority.

74 *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*].

positive evaluations, salary increases and promotions for his work performance, after admitting under questioning that he was gay. His complaint had been rejected by the Alberta Human Rights Commission because sexual orientation was not listed as a prohibited ground of discrimination under Alberta's *Individual's Rights Protection Act*.

These two decisions by the Supreme Court are to its credit because, as Hamilton forecast over 200 years ago, enumerating some rights can have the unfortunate side effect of permitting legislatures and governments to limit other rights.[75] In other words, a list of equality rights that included sex but failed to mention sexual orientation could have been used to argue that gay people do not have rights or worse, that it was not the will of the majority that this minority receive protection. This was certainly the crux of the issue in *Vriend*. "The concept of democracy means more than majority rule,"[76] according to Hamilton. "Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial interpretation is warranted to correct a democratic process that has acted improperly."[77]

But recognizing discrimination and protecting a minority against discrimination are, at least in a legal sense, entirely different undertakings. So while a 5–4 majority in *Egan* recognized that denying a gay couple spousal benefits when they reached old age was discrimination, a 5–4 majority also ruled (a different majority) that this discrimination could be justified in a democratic society (section 1). This conclusion was based, in part, on the grounds that the Court should be reluctant to interfere with Parliament's choices when it comes to socio-economic legislation. One member of the majority went so far as to suggest that the prohibition of discrimination against gay people was "of recent origin" and was "generally regarded a novel concept."[78]

In May 1999, the Court was once again asked to deal with a gay couple in *M. v. H.*[79] This case revolved around Ontario's *Family Law* Act which precluded gay couples from applying for spousal benefits following the breakdown of their relationships. In this instance, the Court (8–1) found that the infringement was not justified under section 1 of the *Charter*. It found that the failure to extend the

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75 Hamilton "No. 84," *The Federalist Papers*, *supra* note 40 at 481.

76 *Vriend*, *supra* note 74.

77 Hamilton "No. 84," *The Federalist Papers*, *supra* note 40 at 481.

78 *Egan*, *supra* note 72 at para. 111, per Sopinka J.

79 *M. v. H.*, [1999] 2 S.C.R. 3.

spousal-support provisions to same-sex couples undermined the stated goals of the Act.[80] The Court, however, suspended the remedy for six months to enable the Ontario legislature to devise its own approach to ensuring that the spousal-support scheme conformed to section 15.[81]

While in *M. v. H.* the Court appears to have been willing to go further in protecting the rights of gay people, in both *M. v. H.* and *Egan* the Court was deferential to the legislature. Even in *Vriend*, where the Court was unanimous in finding discrimination, one judge proposed delaying the extension of human rights protection to gay people for one year to "allow the Legislature an opportunity to bring the impugned provisions into line with its constitutional obligations."[82]

In a constitutional democracy it is not sufficient that the judiciary merely acknowledge that discrimination has occurred. Nor can there be "an incremental approach"[83] to protecting minorities' interests. As Hamilton points out, rights are not something that can wait until the majority deigns upon reflection to grant to a minority.

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.[84]

B. Freedom of Expression

The Supreme Court of Canada has been asked to address the issue of the freedom of expression of gay people through a challenge to the *Customs Act* and *Customs Tariff*. In *Little Sisters Book & Art Emporium v. Canada*,[85] it was claimed that books and periodicals imported by gay bookstores in Canada were specifically targeted by Customs officials, and were often seized on the grounds that they were obscene under the *Criminal Code*.

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80 *Ibid*. at para. 4, per Cory J. for the majority.

81 *M. v. H*. *supra* note 79 at para. 145, per Iacobucci J.

82 *Vriend*, *supra* note 74 at para. 201, per Major J.

83 *Egan*, *supra* note 72 at para. 108, per Sopinka J.

84 Hamilton "No.78," *The Federalist Papers*, *supra* note 40 at 437.

85 *Little Sisters Book & Art Emporium v. Canada*, [2000] 2 S.C.R. 1120 [*Little Sisters*].

The Supreme Court found that gay people had, in fact, been targeted and that such targeting was prejudicial and demeaning to their dignity.[86] However, it avoided dealing with the freedom of expression issue by determining that the adverse treatment received by gay people was not "prescribed by law," simply the result of customs officials applying the legislation, including the obscenity definition the Court had set in *R. v. Butler*.[87]

In *Butler*, a unanimous Court had concluded that the prohibition against pornography in the *Criminal Code* contravened freedom of expression, but accepted that it was a reasonable limit pursuant to section 1. The Court based its decision on the belief that pornography can cause harm to society, in general, and to women, in particular. As Sopinka J. wrote for the majority, "I would therefore conclude that the objective of avoiding the harm associated with the dissemination of pornography in this case is sufficiently pressing and substantial to warrant some restriction on full exercise of the right to freedom of expression."[88]

On this issue Dworkin, whom the Court cited as a reference, is informative. He points out that most criminal laws that the community enacts are questions of moral choice, but that they must go further than simply being a condemnation of behaviour. For example, a law against murder is a reflection of not just society's condemnation of that behaviour, but is designed to protect innocent people. "Making consensual adult sodomy a crime, on the other hand, serves no interests that are independent of the moral condemnation."[89] The principle, therefore, is that a criminal law is unconstitutional if it is enacted only to condemn some people morally, and not to protect anyone else's direct interests.

This harm-based principle is reflected in article 4 of the *Declaration of the Rights of Man*: "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law."[90] This principle is also discussed at length by, and largely identified with, John Stuart Mill.[91]

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86 *Ibid*. at para. 123, per Binnie J. for the majority.

87 *R. v. Butler*, [1992] 1 S.C.R. 452 [*Butler*].

88 *Ibid*. at 498, per Sopinka J. for the majority.

89 Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000) at 461.

90 "Declaration of the Rights of Man," in *The Avalon Project at Yale Law School* (New Haven: The Lillian Goldman Law Library, 2002).

91 J.S. Mill, *On Liberty* (Harmondsworth: Penguin, 1982) at 68–69.

Applying this principle to the Supreme Court's analysis in *Butler*, it appears that the Court followed the theoretical underpinnings. However, this conclusion is based on the premise that there is a causal link between pornography and harm. Interestingly, Dworkin has condemned harm-based analysis being applied in this manner, because "no reputable study has concluded that pornography is a significant cause of sexual crime."[92] The Supreme Court of Canada, in rendering *Butler*, was itself forced to acknowledge that a direct link between obscenity and harm to society has not conclusively been established.

Nevertheless, assuming one accepts the Court's position in *Butler*, that there is "sufficient evidence" that depictions of degrading and dehumanizing sex do harm society and adversely affect attitudes towards women, how then does this harm principle extend to the gay community? After all, "pornography is male heterosexual pornography, and its harm is that heterosexual men are likely to mistreat women."[93] And how does applying to the gay community standards set by heterosexual society not constitute moral approbation? Especially when the court stated that "the community standards test is concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate *other* Canadians being exposed to."[94]

So the question remains, was the Court justified in sidestepping this issue and treating the *Little Sisters* case as simply an administrative application of the *Customs Act* and the *Customs Tariff*? One could make the case that the Court acted in the litigants' interest in ruling as it did in *Little Sisters*, and that it did do so within the prescribed dimension of adjudicating that particular dispute.

But as Tocqueville has pointed out, "the American judge is dragged in spite of himself onto the political field. He only pronounces on the law because he has to judge a case, and he cannot refuse to decide the case. The political question he has to decide is linked to the litigants' interests, and to refuse to deal with it would be a denial of justice."[95]

The fact that the issue at bar involved what *sexual* material is acceptable to society and the obvious fact that the gay community is defined by its *sexual*

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92 Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996) at 230.

93 Brenda Cossman, "Feminist Fashion or Morality in Drag?" in Brenda Cossman, *et al.*, eds., *Bad Attitudes on Trial: Pornography, Feminism and the* Butler *Decision* (Toronto: University of Toronto Press, 1997) 128.

94 *Butler*, *supra* note 87 at 478, per Sopinka J.

95 *Democracy in America*, *supra* note 66 at 103.

orientation, the Court's failure to re-address freedom of expression in this instance is probably a denial of justice. It leaves an impression of moral condemnation, particularly in the absence of evidence of harm, an impression not easily repaired. As Madison has pointed out, individuals are at a disadvantage in bringing and sustaining constitutional challenges against the "State to the Supreme Judiciary."[96]

C. Freedom of Religion

In May 2001, the Supreme Court of Canada in a 7–2 majority upheld a British Columbia Appeal Court decision ordering that province's College of Teachers to approve Trinity Western University's teacher training program in *Trinity Western University v. British Columbia College of Teachers.*[97] Trinity Western University is a private religious school, and its training program contains a compulsory code of conduct called a Community Standards contract proscribing "biblically condemned" practices such as "sexual sins including . . . homosexual behaviour."

The Court acknowledged that "the requirement that students and faculty adopt the Community Standards creates unfavourable differential treatment since it would probably prevent homosexual students and faculty from applying."[98] However, the Court went on to suggest that this was a matter of conflict between competing rights: "To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality."[99]

Dealing with the issue from the perspective of an individual being denied employment because of his or her religious beliefs, as opposed to an institution (accredited by the state) promoting discrimination, the Court ruled that public school teachers are entitled to hold sexist, racist or homophobic beliefs as long as they do not act upon those beliefs by engaging in discriminatory conduct while on duty.[100]

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96 James Madison, *The Papers of James Madison*, v. 10 (Chicago: University of Chicago Press, 1977) at 212.

97 *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 [*Trinity Western*].

98 *Ibid.* at para. 34, per Iacobucci and Bastarache JJ. for the majority.

99 *Ibid*. at para. 25.

100 *Ibid.* at para. 37.

The second case where the Court perceived a conflict between equality rights and religious beliefs was *Chamberlain v. Surrey School District*,[101] which was decided in December of 2002, also in a 7–2 decision.

At issue in this case were three books depicting families with same-sex parents. These books were banned by the Surrey School Board because of some parents' religious objections to the morality of same-sex relationships. The Court concluded that the Board "cannot prefer the religious views of some people in its district to the views of other segments of the community. Nor can it appeal to views that deny the equal validity of the lawful lifestyles of some in the school community."[102]

Freedom of religion poses a difficult challenge for identifying and applying a theory of constitutional democracy. To begin with, much of the writing on constitutional democracy is steeped in religion, particularly that advanced by American theorists.

The United States was founded as a Christian nation.[103] It was born in the minds of people who had fled persecution for being members of particular sects of the Christian religion. To further complicate matters, the regime in place in Canada prior to constitutional democracy was also rooted in Christianity.

As François Furet has pointed out, the English revolution of the seventeenth century was a religious revolution that mutated into a political revolution, "with the former laying down the spiritual and moral basis of the latter. The American republic, founded at the end of the following century was born out of an insurrectionist movement that was never cut off from its Christian roots."[104] These are in contrast to France which, in 1789, broke with the Catholic Church which was one of the pillars of the hated *ancien régime.* Not surprisingly, therefore, the French and the Americans had different views on the role of religion in a constitutional democracy.

Article 10 of the *Declaration of the Rights of Man* states: "No one shall be disquieted on account of his opinions, including his religious views, provided

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[101] *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 [*Chamberlain*].

[102] *Ibid*. at para. 25, per McLachlin C.J.C. for the majority.

[103] See *e.g.* David Barton, *Original Intent: The Courts, the Constitution, & Religion* (Aledo: WallBuilder Press, 2002).

[104] François Furet, "Democracy and Utopia" (1998) 9:1 J. Democracy 65 at 70.

their manifestation does not disturb the public order established by law."[105] Thomas Paine took great exception to the French including religion among the "rights of man" stating that "it takes off from the divine dignity of religion, and weakens its operative force upon the mind, to make it a subject of human laws."[106] To Paine, the contract between God and man must be superior to the social contract among men that the Constitution represents.

Like Paine, many of the American scholars believe that religion holds a license on morality, is inherently beneficial to society and requires special protection. Some even suggest that it is in fact the Christian idea of equality that lies at the heart of the modern idea of rights.[107]

There seems to be an erroneous perception that freedom of religion must exist parallel to, and even in conflict with, other rights such as equality. This principle is not inherent in constitutional democracy. Even Paine accepted the principle that in order to protect one's own liberties an individual or organization was duty-bound to protect the rights and freedoms of others since "[w]hatever is my rights as a man, is also the right of another; and it becomes my duty to guarantee, as well as to possess."[108]

While America's founders might object to the French belief that religious views should fall within freedom of opinion, even they argued that freedom of religion was only guaranteed by the breadth and width of the extension of liberty. In spite of their strongly held religious beliefs they argued that "[i]n a free government the security of civil rights must be the same as that for religious rights."[109] The more religious sects, the larger the population and the more diverse the rights and freedoms, the more protection for one's own religious freedom.

In *Trinity Western*, it is hard to see where a student's personal religious beliefs were even at issue. It was the Community Standards contract that was the act of discrimination. By framing the issue as a matter of competing rights, the

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105 "Declaration of the Rights of Man," *supra* note 90 at art. 10.

106 Thomas Paine, "Observations on the Declaration of Rights" in Thomas Edison, ed., *The Works of Thomas Paine* (New York: Thomas Paine National Historical Association, 1925) at 887 ["Observations on the Declaration of Rights"].

107 See *e.g.* Philippe Bénéton, "The Languages of the Rights of Man" (1993) 37 First Things 9.

108 "Observations on the Declaration of Rights," *supra* note 106 at 888.

109 Madison "No. 51," *The Federalist Papers*, *supra* note 40 at 292.

Court permitted the rights of a minority to be infringed in the name of a freedom of religion that clearly is not reflected in the theory of constitutional democracy.

The Supreme Court would appear to have acted more appropriately in *Chamberlain*. However, two things are noteworthy in this case. First, the B.C. Court of Appeal echoed the narrow view of some American scholars that morality finds its basis in Christian ethics, though added that "the extension of this cultural or moral norm beyond its religious origins highlights the distinction between religion and morality."[110] Second, the Supreme Court found that the School Board failed to "act in accordance with the *School Act*";[111] it did not address the constitutional issue.[112]

The *School Act* "makes it clear that the Board does not possess the same degree of autonomy as a legislature or a municipal council. It must act in a strictly secular manner."[113] It is hard to conclude, therefore, that the "secular and non-sectarian principles"[114] so vigorously defended by the Court were an application of the theory of constitutional democracy and not simply an application of the provincial statute.

VI. CONCLUSION

Thomas Jefferson once said that society must be refounded every twenty years to permit each generation to have the opportunity to reshape the constitution according to its own will. Not surprisingly, after one hundred years of parliamentary democracy the Canadian government suggested a fundamental system change.

Canada spent two decades debating the merits and, pursuant to the rules set down by the Supreme Court of Canada and the previous system of government, decided to move to constitutional democracy in 1982. This is not only a system of government that some suggest is more democratic, it is a system that the public continues to overwhelmingly support.

Under this new paradigm, the judiciary was given a specific and important role to play. It was to the courts that the fiduciary responsibility for the

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[110] *Chamberlain v. Surrey School District #36*, 2000 BCCA 519 at para. 14, per Mackenzie J. for the majority.

[111] *Chamberlain*, *supra* note 101 at para. 73, per McLachlin C.J.C.

[112] *Ibid.* at para. 73.

[113] *Ibid*. at para. 28.

[114] *Ibid*. at para. 18.

fundamental laws was assigned. The Supreme Court of Canada was given the job of protecting minorities and, where necessary, of restraining the legislature — of choosing, as Hamilton put it, the intention of the people over the intention of their agents.

However, when the Supreme Court of Canada's six decisions with respect to gay men and women are examined closely, it does not appear that the Court has been performing its duties under the new system.

When looked at simply from a win and lose perspective, the Court appears to have protected the interests of the gay litigants in four out of the six cases. However, in two of these cases where gay people have won, the Court chose not to address the larger constitutional issues. This is in spite of the natural insulation that legislation enjoys under the common law system that Tocqueville commended, the obligations that Hamilton identified as belonging to the court and the obstacles that Madison identified as preventing individuals from challenging legislation through the courts.

To its credit, the Supreme Court did not feel constrained by the list of rights enumerated in the Constitution, a trap Hamilton predicted in *Federalist No. 84*. However, it has done what Hamilton cautioned against in *Federalist No. 78* and opted to wait until the majority deigns, upon reflection, to extend benefits to this minority.

The Court chose to let stand an application of the harm principle that it designed for the heterosexual community, in spite of indications that it was adversely impacting upon freedom of expression, in general, and on gay people, in particular. Without harm all that remains is condemnation of behaviour and, given the subject matter (*sex*) and how this particular community is defined (*sexual* orientation), this is a significant omission.

The Court also chose to see freedom of religion as being in conflict with equality, in spite of the caution of Madison and others in this regard. In fact, in the one instance where the Court chose to apply the principles of tolerance and non-sectarianism with respect to religion, a provincial statute specifically required that standard.

Given the Supreme Court of Canada's incremental approach and repeated deference to the legislature when asked to protect the interest of this particular minority under the new regime, one cannot conclude that Canada has made a successful transition to constitutional democracy.

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SEXUAL ORIENTATION EQUALITY AND RELIGIOUS FREEDOM IN THE PUBLIC SCHOOLS: A COMMENT ON *TRINITY WESTERN UNIVERSITY V. B.C. COLLEGE OF TEACHERS* AND *CHAMBERLAIN V. SURREY SCHOOL BOARD DISTRICT 36*

Richard Moon*

The author examines the development of sexual orientation equality in the Supreme Court of Canada when balanced with issues of freedom of religion. In Trinity Western University *and* Chamberlain*, the Supreme Court attempts to reconcile these competing constitutional interests, and in both cases it adopts an artificially narrow view of sexual orientation equality and an unworkable approach to religious inclusion or neutrality.*

L'auteur examine le développement de l'égalité en matière d'orientation sexuelle à la Cour suprême du Canada par rapport aux questions de liberté de religion. Dans les causes de Trinity Western University et de Chamberlain, la Cour suprême essaie de concilier ces intérêts constitutionnels opposés et, dans les deux cas, elle adopte une opinion artificiellement étroite de l'égalité en matière d'orientation sexuelle et une démarche irréalisable de la neutralité ou inclusion religieuse.

I. INTRODUCTION

In two recent judgments, the Supreme Court of Canada has sought to reconcile the competing claims of sexual orientation equality and religious freedom in the public schools. In the first case, *Trinity Western University v. British Columbia College of Teachers*,[1] the issue was whether the British Columbia College of Teachers acted outside its powers when it refused to accredit the teacher training program of a private evangelical christian university on the grounds that the program taught or affirmed the view that homosexuality is sinful and so did not adequately prepare its graduates to teach in the more diverse public school system. In the more recent case of *Chamberlain v. Surrey*

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1 *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 [*TWU* (S.C.C.)].

School District 36,[2] the issue was whether a local school board acted outside its powers when it refused to approve as teaching materials for the primary grades, three books depicting same-sex parents. In *TWU* the Court held that the decision not to accredit the teacher training program was an unnecessary interference with the religious freedom of the teachers and graduates of the program. The Court found that there was no evidence that the program had or would lead to discriminatory acts against gays and lesbians in the public schools. In *Chamberlain* the Court held that the board acted outside its powers when it excluded the three books because it believed (or responded to the belief of some parents) that same-sex relationships are immoral and should not be affirmed, or even represented, to younger students. In the Court's view, the requirement in the B.C. *School Act*[3] that the public schools operate according to secular principles, precluded the school board from supporting or enforcing a religious/moral view that denies respect or recognition to another group or perspective in the community.

It is not surprising that this collision between sexual orientation equality and religious freedom took place in the public education system. There is an obvious tension between the role of the schools in affirming important public values and the requirement that they be open to different cultural and religious groups and perspectives. This tension is deepened by the claim or right of parents to oversee the upbringing, and more particularly the moral/religious training, of their children. The schools must strike a difficult balance between the affirmation/transmission of important public values and the recognition of religious/moral pluralism.[4] More specifically in *TWU* and *Chamberlain* the schools are required to balance or reconcile the view of certain religious parents/groups that homosexuality is sinful, with the growing public commitment to sexual orientation equality.

In *TWU* and *Chamberlain*, the Supreme Court tries to avoid choosing one right over another or favouring one group over another. The Court wants to affirm sexual orientation equality but also to respect deeply held religious opposition to homosexuality, or to remain neutral on such issues of fundamental value. It can do both only by adopting an artificially narrow view of sexual

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2 *Chamberlain v. School Board District 36 (Surrey)* (2002), 221 D.L.R.(4th) 156 (S.C.C.) [*Chamberlain* (S.C.C.)].

3 *School Act*, R.S.B.C. 1996, c. 412.

4 *Chamberlain* (S.C.C.), *supra* note 2 at para. 23: "The ... public school system is open to all children of all cultures and family backgrounds. All are to be valued and respected."

orientation equality and an implausible approach to religious inclusion or neutrality.

The inconsistency in the demands the Court makes on the schools — to both affirm central community values and to remain "agnostic" on issues of value — is blurred by ambiguities in its understanding of sexual orientation equality and religious inclusion. The Court sometimes writes as if sexual orientation equality requires that the equal value of gay and lesbian relationships be affirmed in the public schools. Yet, at other times, the Court puts forward a narrower conception of the equality right, emphasizing tolerance rather than equal respect, non-interference rather than affirmation. The reconciliation of sexual orientation equality with religious pluralism or inclusion (the requirement that the schools "include" or "respect" all religious belief systems or remain neutral on religious/moral issues) seems to rest on this narrower conception of sexual orientation equality. Yet this narrow conception of the right is unstable. A school is a public institution, a place where the public commitment to the equal value or worth of all persons should be affirmed to children. Moreover, the failure to affirm the value of same-sex relationships, when heterosexual relationships are implicitly and explicitly supported, will be experienced as exclusion.

The Court's conception of religious inclusion is also ambiguous. The Court recognizes that religious faith is central to many citizens and accepts that religious values and concerns are bound to play a role in public decision-making, including decisions about the curriculum. Yet, at the same time, the Court argues that the school curriculum should not enforce or support one set of values over another. More generally, the state should not advance religious values that are inconsistent with the values or concerns of others in the community. For the Court the curriculum is "inclusive" when it is neutral on issues of religious/moral value. Religious "inclusion" or neutrality, on this account, requires that religion be *excluded* from the public sphere and that individuals separate themselves from their religious commitments, when they works as teachers or when, as parents or board members, they make decisions about the operation of the schools. The individual must leave her or his religious values at the doorstep of the school or other public institution. Religion is treated as private or as something that can be confined to the private sphere when necessary to avoid value conflicts.

II. *TRINITY WESTERN UNIVERSITY V. THE B.C. TEACHERS COLLEGE*: LEAVING RELIGION/HOMOPHOBIA IN THE CLOAKROOM

Trinity Western University (TWU) is a private evangelical college located in Langley British Columbia.[5] It was founded by the Evangelical Free Church and the institutional and philosophical connection between the University and the Church remains strong. In 1985 TWU introduced a teacher training program which received the approval of the B.C. Ministry of Education. Students in the program spent four years at TWU. A fifth year of the program, which involved classroom teaching practice, took place under the supervision of Simon Fraser University. Students who successfully completed the approved joint program were certified to teach in the British Columbia public school system.

In 1987 the Government of B.C. established the British Columbia College of Teachers (BCCT) as the governing body of the teaching profession in the province.[6] The BCCT assumed responsibility for, among other things, accrediting teachers and teacher training programs. In 1995 TWU applied to the BCCT for permission to assume full responsibility for its teacher program, including the final year of classroom teaching. The principal reason for this change was to ensure that the full program reflected a "Christian world view."

The accreditation process followed by the BCCT involved several steps. Upon receipt of the TWU application, the BCCT appointed a Program Approval Team (PAT), which proceeded to assess the application. The PAT recommended approval of the TWU program for a five-year interim period, subject to certain conditions related to academic standards and resources. Notably, the PAT also recommended monitoring of the program to ensure that applicants for admission to the TWU program were not rejected because of their "world view." The PAT stated that "[w]hile there is no question of the right of teachers to their religious beliefs, the [BCCT] must assure itself that graduates of a program such as that of Trinity Western can take their places in a public school system and maintain a non-sectarian position in their daily work with children."[7] The Teacher

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5 TWU is a member of the Association of Universities and Colleges of Canada and the Council for Christian Colleges and Universities.

6 The *Teaching Profession Act*, R.S.B.C. 1996, c. 449, established the BCCT as the governing body of the teaching profession in the province.

7 *Trinity Western University v. British Columbia College of Teachers* (1997), 41 B.C.L.R. (3d) 158 at 176 (S.C.) [*TWU* (T.D.)].

Education Programs Committee approved the PAT report but made some minor amendments to the conditions. However, the committee's report and recommendations were rejected by the Council of the BCCT. The Council's decision not to approve the TWU program meant that graduates would not receive automatic accreditation as teachers for the public school system in British Columbia and would instead have to apply individually for certification.[8]

The principal reason given by the BCCT Council for its rejection of the approval recommendation was that the proposed program "follows discriminatory practices which are contrary to the public interest and public policy, which the College (BCCT) must consider under the Teaching Profession Act."[9] The Council was concerned about the "suitability and preparedness of [TWU] graduates to teach in the diverse and complex social environments found in the public school system."[10] In subsequent communications, the BCCT referred specifically to the contract of "Responsibilities of Membership in the Community of Trinity Western University" which teachers were required, and students were expected, to sign.[11] Of particular concern to the BCCT was the obligation assumed by teachers and students to "refrain from practices that are biblically condemned" such as "premarital sex, adultery [and] homosexual behaviour."[12] According to the BCCT, "labeling homosexual behaviour as sinful has the effect of excluding persons whose sexual orientation is gay or lesbian."[13]

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8 The trial judge (*TWU* (T.D.), *ibid*. at 169) describes the implications of certification: "The effect of accreditation, or approval for certification purpose, is every graduate of the approved program is certified by the BCCT. Without this approval, Trinity Western could still run a free-standing education program with a recognized Bachelor of Education degree, but its graduates would have to apply individually for certification by the BCCT."

9 *TWU* (S.C.C.), *supra* note 1 at 786.

10 *TWU* (T.D.), *supra* note 7 at 178.

11 The Preamble of the "Responsibilities of Membership" contract stated that: "Individuals who are invited to become members of this community but cannot with integrity pledge to uphold the application of these standards are advised not to accept the invitation and to seek instead a living-learning situation more acceptable to them." *TWU* (S.C.C.), *supra* note 2 at 794. The Preamble also said: "You might not absolutely agree with the Standards. They might not be consistent with what you believe. However, when you decided to come to TWU, you agreed to accept these responsibilities. If you cannot support and abide by them, then perhaps you should look into UIG (University of Instant Gratification) or AGU (Anything Goes University)." *TWU* (S.C.C.), *ibid*. at 798.

12 *Ibid*. at 795.

13 These arguments were included in an issue of the Council's quarterly newspaper. In this article the Council also said: "The stated object of the College under the *Teaching Profession Act* obliges the Council to be primarily concerned with the integrity and the values of the public school system and the institutions and programs which will prepare

More particularly, the BCCT was concerned that the "world view held by Trinity Western University with reference to homosexual behaviour may have a detrimental effect in the learning environment of public schools."[14] A teacher in the public system must be able "to support all children regardless of race, colour, religion or sexual orientation within a respectful and nonjudgmental relationship."[15] The BCCT argued that because the code of conduct described homosexual behaviour as sinful, it was "entitled to anticipate" that graduates of the program might act in a discriminatory way towards gay and lesbian students.[16] It noted that both the Canadian and B.C. human rights acts prohibit discrimination on the ground of sexual orientation.

TWU applied to the Supreme Court of British Columbia for judicial review of the BCCT decision. Justice Davies accepted that the BCCT, when deciding whether accreditation of the TWU program was in the "public interest," could "consider the pluralistic nature of our society."[17] More specifically the BCCT was "entitled to look at the conduct of TWU graduates under the present program and, if there is inappropriate [discriminatory] conduct, to look to see whether that inappropriate conduct is related to TWU's Community

graduates to teach in the public system. Therefore in reviewing a program application, the College must consider whether the institution offering the program discriminates against persons entitled to protection according to the fundamental values of our society. These values are embedded in the Charter of Rights and in human rights statutes enacted by Parliament and the British Columbia legislature. They represent the public interest referred to in Section 4 of the *Teaching Profession Act*." Both the *Canadian Human Rights Act* and the *B.C. Human Rights Act* prohibit discrimination on the grounds of sexual orientation. The Charter of Rights and the Human Rights Acts express the values which represent the public interest. Labeling homosexual behaviour as sinful has the effect of excluding persons whose sexual orientation is gay or lesbian. The Council believes and is supported by law in the belief that sexual orientation is no more separable from a person than colour. Persons of homosexual orientation, like persons of colour, are entitled to protection and freedom from discrimination under the law." *TWU* (T.D.), *supra* note 7 at 180.

14 *Ibid.* at 181.

15 *Ibid.*

16 *Ibid.* at para. 4. The BCCT argued before the Supreme Court that: "all institutions who wish to train teachers for entry into the public education system must satisfy the BCCT that they will provide an institutional setting that appropriately prepares future teachers for the public school environment, and in particular for the diversity of public school students." *TWU* (S.C.C.), *supra* note 1 at 799–800.

17 *TWU* (T.D.), *supra* note 7 at 188.

Standards."[18] The judge, however, found that the BCCT had acted without any evidence that the TWU Community Standards "have led or could lead to inappropriate conduct by teachers who graduate from TWU."[19] He held that the BCCT could not refuse "to allow a qualified teacher to teach in British Columbia because of a religious belief that homosexual behaviour is a sin."[20] The judge directed the BCCT to grant accreditation to the TWU program. The British Columbia Court of Appeal (Rowles J. dissenting) agreed with the trial judge and upheld the order granting accreditation to the program.[21]

The majority of the Supreme Canada, in a judgment written by Iacobucci and Bastarache JJ., agreed that the decision of the BCCT to deny accreditation to TWU's teaching program should be overturned. A dissenting judgment was written by L'Heureux-Dubé J. Justices Iacobucci and Bastarache held that the BCCT, when deciding whether to grant accreditation, could appropriately consider the discriminatory character of the program and the possibility that graduates of such a program might not be adequately trained to work in the public school environment.[22] However, they agreed with the B.C. Supreme Court and the B.C. Court of Appeal that there was no basis for the BCCT's finding that graduates of the TWU program, who went on to teach in the public schools, would engage in acts of discrimination against gays and lesbians.[23]

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18 *Ibid.* at 190.

19 *Ibid.*

20 *Ibid.* at 188.

21 *TWU v. British Columbia College of Teachers* (1998), 59 B.C.L.R. (3d) 241 (C.A.) [*TWU* (C.A.)].

22 *TWU* (S.C.C.), *supra* note 1 at 800: "It is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of society within which teachers operate and the reason why there is need to respect and promote minority rights."

23 In this comment I have not focused on the Court's discussion of the appropriate standard for review of the BCCT accreditation decision. This discussion anticipates the Court's conclusion that there is no evidence of discrimination by TWU graduates. According to Bastarache and Iaccobucci JJ., the appropriate standard for the review of the BCCT judgment concerning the discriminatory character of the program and the likelihood that graduates of such a program would engage in acts of discrimination as teachers in the public school system was that of "correctness" rather than patent unreasonableness. The determination that the TWU program fosters discriminatory practices, "is a question of law that is concerned with human rights" rather than educational matters and is based on human rights values and principles (*ibid.* at 804). In the Court's view, "[t]he perception of the public regarding the religious beliefs of TWU graduates and the inference that those beliefs will produce an unhealthy school environment have ... very little to do, if anything, with the particular expertise of the members of the BCCT"(*ibid.* at 804). In their view, the expertise

A. Evaluating the Program: Reconciling Freedom of Religion and Equality

For Bastarache and Iacobucci JJ., "[t]he issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system."[24] The majority argues that while the BCCT acted properly in considering whether the TWU program might contribute to discrimination against gays and lesbians in the public schools, the College should also have taken account of the religious freedom rights of the graduates of TWU. The majority observes that the BCCT accreditation decision "places a burden on members of a particular religious group ... preventing them from expressing freely their religious beliefs and associating to put them into practice."[25] The BCCT decision means that TWU must abandon its religiously-based "Community Standards," if it is to run a program that trains teachers for the public school system. Graduates of TWU "are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers."[26] The religious freedom of those attending TWU "is not accommodated if the consequence of its exercise is the denial of the right of full participation in society."[27]

The majority recognizes that freedom of religion is "inherently limited by the rights and freedoms of others" and does not protect religious practices that are harmful, including acts of discrimination against gays and lesbians.[28] However, the majority is also clear that there must be evidence of harm before a limitation on religious freedom will be justified. In the majority's view, the limitation on the religious freedom of the staff and graduates of TWU (the denial of accreditation) was imposed in the absence of any evidence that the program had

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of the BCCT did not "qualify it to interpret the scope of human rights nor to reconcile competing rights"(*ibid.* at 803). This view of discrimination, as an explicit act which can be identified without any special knowledge of the public education system or the learning environment, leads to the Court's ultimate finding that there is no evidence of discrimination.

24 *TWU* (S.C.C.), *ibid.* at 810.

25 *Ibid.* at 812.

26 *Ibid.*

27 *Ibid.* at 814.

28 *Ibid.* at 810, quoting L'Heureux-Dubé J. In *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 at 182.

a detrimental impact on the school system.[29] The majority argues that the TWU Community Standards simply prescribed the conduct of members while attending TWU and so gave no reason to anticipate intolerant behaviour by TWU trained teachers in the public schools. The majority sees nothing in the TWU Community Standards "that indicates that graduates of TWU will not treat homosexuals fairly and respectfully."[30] The signatory simply undertakes not to participate in this form of activity while she or he is a student at TWU. Even if the student does consider homosexuality to be sinful, she or he is required, as a Christian, to treat others, even sinners, with love and respect. Finally, the majority observes that there was no history of discriminatory conduct by TWU graduates. According to the majority, the BCCT had "inferred without any concrete evidence" that the religious views of the TWU students and teachers would limit their consideration of social issues and have a detrimental effect on the learning environment in public schools.[31] The majority concludes that in the absence of any "concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected."[32]

The majority saw no conflict in this case between religious freedom and sexual orientation equality. Once the proper scope of each right is understood, the "potential conflict" between them dissolves.[33] Freedom of religion protects the individual's right to hold religiously-based anti-gay/lesbian views. It does not, however, protect the individual's right to act on those views as a teacher in the public school system. According to the majority, "[t]he freedom to hold beliefs is broader than the freedom to act on them."[34] If a teacher engages in discriminatory conduct, she or he "can be subject to disciplinary proceedings before the BCCT."[35] At the same time, the right of gays and lesbians to be free from discrimination is not violated simply because a teacher holds

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29 *Ibid*. at 811: "While the BCCT says that it is not denying the right of TWU students and faculty to hold particular religious views, it has inferred without any concrete evidence that such views will limit consideration of social issues by TWU graduates and have a detrimental effect on the learning environment in public schools."

30 *Ibid*. at 814.

31 *Ibid*. at 811.

32 *Ibid*. at 814.

33 *Ibid*. at 810: "In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute."

34 *Ibid*. at 814.

35 *Ibid*. at 815.

discriminatory views. It is violated only if a teacher acts on those views in the public school. The majority concludes that because there was no concrete evidence of discrimination on the part of TWU trained teachers, the BCCT had no grounds to deny accreditation to TWU, and interfere with the freedom of TWU instructors and students to hold certain religious beliefs.

B. The Educational Environment

The majority's reconciliation of the religious freedom of TWU graduates and the equality rights of gay and lesbian students rests on the distinction between discriminatory belief and conduct. A teacher may believe that homosexuality is sinful or wrongful and even that gays and lesbians are less worthy or deserving than others; but provided she or he does not act on those views, denying benefits to, or imposing burdens on, particular individuals because of their sexual orientation, he or she does not breach their right to equality. This distinction between belief and conduct is critical in human rights codes, which prohibit discrimination in employment, accommodation and public services, but do not otherwise regulate an individual's beliefs or the decisions she or he makes concerning "private" matters.

However, it is not clear that the belief/action distinction is particularly useful in the public school context, when the belief/action relates to matters within the school curriculum. It is worth noting here that when we speak of the school's curriculum we may be referring simply to ideas and information that are taught explicitly in the classroom.[36] The explicit curriculum may include Roman history, algebra, and the value of racial equality. However the term curriculum may also be used more broadly to include the values that govern interaction between teacher and student or among students — values that form part of the school's general ethos. Public school teachers "teach" basic values, including tolerance for different religious belief systems and respect for the equal worth of all people. As the majority observes: "Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance."[37] But teachers do not simply instruct students in these values. They are role models and counsellors.[38] Because the public values of the

[36] Don Laing helped me to see some of the different ways in which the term curriculum can be used.

[37] *TWU* (S.C.C.), *supra* note 1 at 801.

[38] L'Heureux-Dubé J. in *TWU* (S.C.C.), *ibid*. at 841–42 observes that: "The modern role of the teacher has developed into a multi-faceted one, including counseling as well as educative functions." L'Heureux-Dubé J. quotes from the judgment of La Forest J. in *Ross v. New*

school curriculum (broadly understood) are taught by example and because they must be affirmed in different ways, including support for students who may be the victims of bigotry in the school or in the larger community, a teacher who is not personally committed to these values may not be able to perform her or his role effectively.[39] While we may believe that a teacher who does not accept the truth of evolution or quantum physics can still teach these theories, it is less clear that a teacher who rejects some of the basic values of the civic curriculum can effectively affirm these values in the classroom.

In the case of religious schools, the courts have accepted that a teacher's personal practices are relevant to her or his role within the classroom. Publicly-funded Catholic school boards, for example, may dismiss, or refuse to hire, teachers who are not members of the church or do not adhere to church doctrine. In *Caldwell*,[40] the Supreme Court of Canada held that a Catholic school board's dismissal of a teacher who had married a divorced man, contrary to the teachings of the church, did not breach the ban on employment discrimination in the B.C. *Human Rights Code*. According to McIntyre J., who wrote the Court's judgment:

> Catholic schools are significantly different from other schools mainly because of the doctrinal basis upon which they are established. It is a fundamental tenet of the Church that Christ founded the Church to continue His work of salvation. The Church employs various means to carry out His purpose, one of which is the establishment of its own schools which have as their object the formation of the whole person, including education in the Catholic faith. The relationship of the teacher to the student enables the teacher to form the mind and attitudes of the student and the Church depends not so much on the usual form of academic instruction as on the teachers who, in imitation of Christ, are required to reveal the Christian message in their work and as well in all aspects of their behaviour. The teacher is expected to be an example consistent with the teachings of the Church, and must proclaim the Catholic philosophy by his or her conduct within and without the school.[41]

Brunswick School District No. 15, [1996] 1 S.C.R. 825 at para. 44: "By their conduct teachers as 'medium' must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to 'choose which hat they will wear on what occasion.'"

39 Certainly she or he cannot do so if she or he has publicly indicated his or her opposition to these values. See discussion below.

40 *Caldwell v. St. Thomas Aquinas High School*, [1984] 2 S.C.R. 603 [*Caldwell*].

41 *Caldwell, ibid.* at 608; see also 618: "To carry out the [religious] purposes of the school, full effect must be given this aspect of its nature and teachers are required to observe and comply with the religious standards and to be examples in the manner of their behaviour in the

The existence of TWU, and more specifically its teacher training program, rests on a belief that the values of those who teach are important in the education process. TWU recognizes that its students will learn better to be Christians or Christian school teachers if they are taught in an environment that is fully Christian in its values and practices. This is why TWU requires that all instructors adhere to the code of conduct, which, among other things, forbids "homosexual behaviour." Even if anti-gay/lesbian views are not taught explicitly in the TWU classroom, they form part of the ethos or the implicit curriculum of the school. Moreover, TWU has applied for accreditation so that it can train teachers who will support or model Christian virtues in the public system. While TWU (as it claims) may teach its students that the public school system is secular and not a place for the teaching of religious doctrine, its mission is to send Christian professionals into the larger world: "The mission of Trinity Western University, as an arm of the church, is to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Jesus Christ who glorify God through fulfilling The Great Commission, serving God and people in the various marketplaces of life."[42]

The majority of the Court regards sexual orientation equality as an important public value. Yet they also accept that a teacher may hold anti-gay beliefs as long as she or he does not act on them in the classroom. In the next two sections of this article, I will argue that the majority's distinction between belief and action

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school so that students see in practice the application of the principles of the Church on a daily basis and thereby receive what is called a Catholic education."

[42] *TWU* (S.C.C.), *supra* note 1 at para. 10. In its application for accreditation, *TWU* (C.A.), *supra* note 21 at paras. 31–32, TWU stated:

"All teacher education programs have distinctive philosophical underpinnings. TWU's teacher education program is not unique in that respect. Where TWU's program is distinctive, however, is that one of its aims is that its graduates possess a Christian understanding of educational philosophy, issues and practices. This means that its program intends to prepare teachers who are committed to helping children grow in moral sensitivity and inclination; in love, compassion and tolerance for people and their views; in creativity and intellectual curiosity; and in constructive citizenship. Without imposing their views on their students, TWU's education professors take the position, for instance, that a Christian view of knowledge implies that learning calls for a personal, responsible and creative response to the phenomena of life and culture. TWU's educational program, like those in public universities, is based on a particular worldview perspective. At TWU, that worldview is a Christian one. It includes (but is not limited to) a deep respect for integrity and authenticity."

— its reconciliation of sexual orientation equality and religious pluralism in the schools — rests first on an understanding of sexual-orientation as a private or personal matter and an assumption that sexual orientation "equality" simply requires tolerance of, or non-interference with, gay and lesbian lifestyles or relationships. Second, it rests on a conception of religious inclusion or pluralism in which public institutions, such as the schools, must remain neutral on issues of religious/fundamental value and religious/moral values must be treated as private, as separable from public life. The narrow conceptions of sexual orientation equality and religious inclusion adopted or assumed in the majority judgment are unstable and perhaps unworkable. It is not surprising then that the judgment sometimes suggests a richer or broader understanding of each.

The majority judgment seems to assume that while schools should not "discriminate" against gays and lesbians (discrimination here understood to mean direct acts of exclusion or ridicule), they are not required to affirm the equal value or worth of gay and lesbian relationships. The "civic curriculum" of the public schools requires that students learn tolerance and respect for personal lifestyle choices but not that same-sex relationships are as valuable as opposite-sex relationships. This narrow view of sexual orientation equality is implicit in the majority's confirmation of the lower Court's finding that there was no evidence of discrimination by TWU graduates in the public schools. The majority assumes that in the absence of clear and direct acts of intolerance or exclusion by TWU graduates, the teacher training program should be accredited. In other contexts the courts have adopted a broader conception of sexual orientation discrimination — a conception that rests on the equal value of same-sex relationships.[43]

The reason for the Court's narrower approach to sexual orientation equality in the school context may simply be a reluctance to include within the civic curriculum of the public schools a value that is contested by a significant group of parents. Public schools must balance the public's interest in ensuring that students learn basic civic virtues such as respect and tolerance with the claims of parents to oversee the upbringing of their children. No doubt the Court's reluctance is greater because some of this parental opposition to sexual-orientation equality is religiously based. I will argue, however, that this narrow approach to sexual orientation equality (and the distinction between discrimination and denial of affirmation) is unstable and unworkable in the context of the public schools, something that becomes plainer in the *Chamberlain* case.

[43] See *M. v. H.*, [1999] 2 S.C.R. 3.

The distinction between belief and conduct also rests on the majority's understanding of religious pluralism or inclusion in the public school system. The public school system is meant to be inclusive and to respect (and teach respect for) religious diversity. It is a secular or common space that stands above religious disagreement and includes individuals from diverse faith communities or belief systems. In the majority's view, a substantial part of the community's population cannot be excluded from this "neutral" space because of its religious beliefs.

This understanding of religious freedom and secular inclusion appears to rest on the idea that religious commitment is a private matter, something that the individual teacher can leave at the doorstep or in the cloakroom of the school. Either schools should not take a position on the "value" of gay and lesbian relationships, remaining neutral on issues which are the subject of religious or moral disagreement (by relying on a narrow conception of sexual orientation equality) or they may affirm the value of such relationships, regardless of religious opposition, because religious values (which regard homosexuality as sinful) are "private" and not properly part of public life. On either view — but most clearly on the latter one — the teacher is expected to separate his or her private beliefs from her or his public actions and conform to, and even teach, civic values that are at odds with her or his personal religious beliefs. But, as I will argue, religious beliefs/values cannot be confined to private life. Religious "inclusion" or pluralism should not be seen as requiring the exclusion of religious values from public life. If it is unrealistic to expect a religious adherent to shed her or his spiritual beliefs or values when she or he participates in public life, then a teacher who is opposed on religious grounds to the values of the civic curriculum of the public schools may not be able to perform effectively her or his public role and a teacher training program that affirms values that are inconsistent with the curriculum may not properly prepare teachers for the public schools.

C. Sexual Orientation Discrimination

We might wonder whether the majority would have reached the same conclusion had the explicit philosophy of TWU been racist rather than anti-gay/lesbian.[44] Our belief that racial discrimination is wrong rests on a recognition

[44] The same question is asked by Bruce MacDougall, "A Respectful Distance: Appellate Courts Consider Religious Motivation of Public Figures in Homosexual Equality Discourse — The Cases of *Chamberlain* and *Trinity Western University*" (2002) 35 U.B.C. L. Rev. 511 at 514. See also Robert Wintemute, "Religion vs. Sexual Orientation: A Clash of

that human value does not vary across racial lines and that the members of different racial groups are equally deserving of concern and respect. Race, as a general rule, is a morally irrelevant factor in the public distribution of benefits and burdens. Out of respect for individual privacy and autonomy, the state does not intervene every time an individual makes a decision on racist grounds — for example, when she or he makes decisions about friends. For these and other reasons, the state may also be reluctant to prohibit an individual's expression of racist views. Nevertheless, the prohibition on acts of racial discrimination rests on a public commitment to racial equality — on a belief in the equal value of all persons regardless of their skin colour and a recognition that racism has led to the marginalization of certain members of the community.

Schools play a critical role in creating and maintaining a tolerant, respectful, democratic society. The public school curriculum (broadly understood) includes basic civic values, such as racial equality and religious tolerance. In the classroom, teachers should not simply refrain from racist behaviour. They should affirm the values of racial equality and respect for cultural diversity. This affirmation of racial equality is an important part of the education of the general student population but is also critical to the sense of dignity and community membership of racial minority students. Once we accept that racial equality should be affirmed in all aspects of school life and not simply taught in the classroom as part of a lesson plan (that it is part of the implicit curriculum of the school), then we might question whether it can be taught/affirmed effectively by a racist teacher.

In *TWU* the majority wonders why, if the BCCT thought that certain religious views were incompatible with the teacher's role, it was content simply to deny accreditation to the TWU program and did not consider it necessary to examine all prospective teachers on their religious views or to exclude from the teaching profession the members of any church that regards homosexuality as sinful.[45] Yet

Human Rights" (2002) 1 J. L. & Equality 125.

[45] In *TWU* (S.C.C.), *supra* note 1 at 812 the majority stated that: "TWU's Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools. Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church." The majority also pointed to another apparent inconsistency in the BCCT decision. The Court wondered why discrimination only became a concern when TWU assumed responsibility for the entire training program but was not a problem when the final year of practice teaching was under the supervision of Simon Fraser University. It seemed unlikely that problems of

even if the BCCT believes that an individual who is homophobic or anti-gay /lebian/bisexual or racist cannot properly perform the role of public school teacher, it may have very good reasons not to examine individual teachers, or applicants for teaching positions, on their views about racial or sexual orientation equality or to exclude them based on their membership in a particular church. Neither may be a very efficient way to filter out racist or homophobic teachers. Church members often do not agree with all parts of church doctrine. For example, it appears that a large number of North American Catholics disagree with (and disobey) the Church's doctrine on a variety of issues. But even if the focus is on the individual's beliefs, no individual is entirely free of the taint of prejudice, and so there is no bright line between racist and non-racist thinking or homophobic and non-homophobic attitudes. More importantly, any meaningful probe into the individual's thinking or unconscious attitudes about race or sexual orientation might involve too great an invasion into the personal or private lives of individual teachers.

It is important to remember that the issue in *TWU* was not whether a particular graduate/prospective teacher is a homophobe or anti-gay (or racist *etc.*). Instead it was whether a teacher training program, which is alleged to have anti-gay content, should be accredited.[46] The BCCT denied accreditation to a program that affirmed values that it believed were incompatible with the civic curriculum of B.C. public schools. If the BCCT had been asked to accredit a teacher training program which had a racist element in its curriculum, there could be little doubt that the program would have been denied accreditation and that the courts would have upheld the denial. This would be the outcome, even though not every graduate of the racist program would carry the lesson of racism with them. It hardly needs stating that we should not accredit a program that teaches or affirms values so fundamentally at odds with the basic civic values of the public school system. TWU is an educational institution that wants to train

discrimination in the TWU program could be corrected by this final year. But the answer to this may simply be that the failure to have responded previously to the problem of homophobia does not mean that there was no problem. Public awareness and concern about sexual orientation equality has grown significantly since the initial approval of the TWU program. *Ibid.* at 816.

[46] L'Heureux-Dubé J., in *TWU* (S.C.C.), *ibid.* at 838, observes that: "The BCCT's decision answers a more complex question than that of whether TWU graduates would be intolerant and engage in overt discrimination in public schools. The BCCT accreditation ruling was based, in part, on consideration of whether the discriminatory practices of TWU have the potential to cause deleterious effects on the classroom environment because of graduates' lack of preparedness."

teachers for the public school system but that specifically advocates or supports values that the BCCT believes are incompatible with the civic mission of that system, based on the public commitment to sexual orientation equality expressed in provincial and federal human rights codes.

For the majority the issue is whether graduates of the TWU program engaged in acts of discrimination against gay, lesbian or bisexual students. Since there was no evidence that any graduates had done so, there were no grounds for refusing to accredit the program. Yet once the majority distinguishes between anti-gay/lesbian belief and action (a teacher may hold such beliefs provided she or he does not act on them) it may not matter whether any or even many TWU graduates act in a discriminatory way. If belief and action are separable in this way (public action as wrongful and personal belief as not) then even though TWU may support anti-gay/lesbian views, it is not clear why it should be responsible for any actions taken by its graduates. Similarly it is not clear why the actions of some graduates should be relevant when deciding whether other graduates should receive accreditation.

TWU, of course, argued that it did not teach homophobia: that it simply asked students to make a *personal* commitment not to engage in homosexual behaviour. The majority accepts that the code of conduct was concerned simply with the personal lives of the TWU students and not with how or what graduates should teach in the public school setting.[47] This, however, misses the obvious point that the basis for the ban on homosexuality is that such behaviour is sinful. The implication of labelling an activity as "sinful" is that it is wrong for anyone to engage in it, even if the TWU graduates recognize that as teachers in the public school system they may not be able to teach this message in an explicit way. There was no evidence presented that anti-gay/lesbian views were taught in TWU classrooms as part of the explicit curriculum; but of course such views were almost certainly part of the general ethos (the implicit curriculum) of the institution — the Evangelical Christian learning environment that TWU sought to create.

[47] *Ibid*. at 812: "TWU's Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools." The Introduction to the TWU Community standards recognized that students might not agree with all the rules: "You might not absolutely agree with the Standards. They might not be consistent with what you believe. However, when you decided to come to TWU, you agreed to accept these responsibilities." *Ibid*. at 798.

According to the majority, the evangelical christian view of homosexuality as sin is different from homophobia, or hatred of gays and lesbians, because the Evangelical message is that the person — the sinner — should be loved and respected and that it is simply her or his behaviour that is wrongful. The Christian must show compassion and understanding and must help the sinner to understand that what she or he is doing is wrong and to overcome her or his sinful inclinations. This may provide part of the explanation for the Court's implicit distinction between sexual orientation equality and racial equality. The Evangelical Christian respects the person but opposes his or her behaviour while the racist regards the minority group member as inherently inferior or as the genetic carrier of certain undesirable traits. However, as discussed below, the distinction between individual identity and homosexual behaviour may not be so straightforward.

In *Ross v. New Brunswick School District No. 15*[48] the Supreme Court of Canada decided that an individual who holds racist views, evidenced by her or his words or actions inside or outside the classroom, may be disqualified from serving as a classroom teacher in the public schools. Justice La Forest, for the Court, upheld the decision of an adjudicator appointed under the New Brunswick *Human Rights Code*, which ordered the school board to remove from the classroom a teacher who had expressed racist views in public settings outside the school. The adjudicator had found that the failure of the school board to remove the teacher from the classroom amounted to a breach of the *Code*. The adjudicator ordered the school board to offer Ross a non-teaching position. However, the adjudicator provided that Ross should be dismissed from any non-teaching position with the board if he continued to publish anti-Semitic material. The Supreme Court of Canada held that the adjudicator's order removing Ross from the classroom constituted a restriction on his freedom of expression and freedom of religion rights, but was justified under section 1. However, the Court ruled that the provision in the adjudicator's order, which required the school board to remove Ross from a non-teaching position if he continued to express racist views in public, was not a justified restriction on his *Charter* rights.

In *Ross*, as in *TWU*, there was no evidence that the teacher had engaged in discriminatory behaviour in the classroom. More specifically there was no evidence that the teacher had treated any minority students in his class unfairly or differently from other students, or that he had deviated from the curriculum and taught racist views. However, because Ross had expressed racist opinions at public meetings and in the local media, the general community, including the

[48] [1996] 1 S.C.R. 825 [*Ross*].

students at his school, had come to know of his views. The Court accepted that Ross's public racist statements had "poisoned" the learning environment in the school. It appears that following Ross's public statements some students had expressed racist or anti-Semitic views in the school, although there was no way of knowing whether these students had been inspired or encouraged by Ross's words.

The majority in *TWU* sought to distinguish the *Ross* case, arguing that it involved more than the exclusion of a teacher with racist views:

> we are not in a situation where the Council [BCCT] is dealing with discriminatory *conduct* by a teacher as in *Ross*. The evidence in this case is speculative, involving consideration of the potential future beliefs and conduct of graduates from a teacher education program taught exclusively at TWU. By contrast, in *Ross* the actual *conduct* of the teacher had, on the evidence, poisoned the atmosphere of the school.[49]

But the *Ross* judgment did not rest on a finding of discriminatory conduct or action in the narrow sense discussed and found to be absent in the *TWU* case. Ross had expressed racist views outside the classroom. The school environment was poisoned because impressionable students were aware of their teacher's racist views. Racist words spoken away from the school are described by the Court as "actions" that undermine racial equality in the school. Yet the significance of these "actions" is that they reveal the beliefs of the teacher and raise concerns about her or his ability to support a component of the public school curriculum. Knowledge of Ross's racist beliefs (the "poisoning" of the learning environment) precluded him from serving as a public school teacher because teachers are advocates of, and role models for, the civic values of the school curriculum. If all that was expected of a teacher was that she or he refrain from teaching racist views then it might be possible to separate what she or he said and did in the classroom from what she or he said and did outside, on her or his own time. There are very few jobs from which an individual would be dismissed because she or he (publicly) expressed racist views after work hours (unless contrary to the *Criminal Code*). It is worth noting that while the Court in *Ross* thought that the public expression of racist views by Ross required his removal from the classroom, it did not accept that the expression of these views justified his dismissal from a non-teaching position with the school board. Moreover, there are views that a teacher is *not* permitted to express inside the classroom but is free to express outside. For example, a teacher should not expressly support the Liberal Party or the Communist Party inside the classroom, but she or he is permitted to do so outside. We expect the teacher in the

[49] *TWU* (S.C.C.), *supra* note 1 at 805.

classroom to remain neutral on issues of partisan politics. But in the case of racial equality we expect more than neutrality.

No doubt Ross's exclusion from the classroom rested in part on a recognition that a teacher's racist attitudes are bound to enter the classroom in subtle and difficult to detect ways. However, a teacher must do more than simply refrain from expressing racist views or treating minority students differently from others. A teacher is meant to affirm the value of racial equality. Certainly she or he cannot affirm this value, if her or his expressed views are otherwise. Prior to his views becoming known, Ross might have managed to teach the curriculum — pretended to "affirm" the value of racial equality in *some* situations — without actually believing in it. This became impossible, however, once he spoke publicly and students became aware of his opinions. *Public knowledge* of Ross's racist views (resulting from his public statements) mattered because his support for such views might have legitimized them in the minds of some students and undermined the school's affirmation of racial equality.

The Court treats Ross's statements as a form of racist or discriminatory conduct. Yet such statements only have the force the Court attributes to them — the power to poison the learning environment — because teachers are role models, authority figures and conduits for public values.[50] Through his public statements Ross revealed his opposition to an important value of the civic curriculum and made it impossible for him to affirm or model this value.[51] However, the fundamental or underlying problem in *Ross* was that a teacher held views that were contrary to the civic values of the school's general curriculum. Publicly expressed or not, Ross's racist beliefs compromised his ability to function as a school teacher. Racial equality is a value that must be affirmed in the different dimensions of school life. It seems unlikely that a person who is personally opposed to this value would be capable of such affirmation. Because

[50] *Ross, supra* note 48 at para. 44: "By their conduct, teachers as 'medium' must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to 'choose which hat they will wear on which occasion.'"

[51] In *Caldwell, supra* note 40, the Supreme Court did not interfere with a Catholic School Board's decision to dismiss a teacher who married a divorced man contrary to Catholic teaching. If this act of marrying a divorced man undermined Caldwell's ability to perform her duties, it must be because a teacher is a role model for Catholic doctrine and Caldwell, by her marriage, signaled her non-acceptance of certain parts of this doctrine.

Ross had publicly expressed racist views, the community and the school board learned of his opposition to an important part of the civic curriculum without having to engage in any personal probing.

The majority in *TWU* says that there are no grounds for thinking that TWU graduates will discriminate against gays and lesbians in the classroom. But these graduates have all signed the TWU Community Standards document which describes homosexuality as a sin. Could we not see this act of signing as "conduct" indicating anti-gay/lesbian opinion? Was it so unreasonable for the BCCT to think that individuals who regarded homosexuality as a sin would be unable to affirm in the classroom the value of sexual orientation equality — even if they had not otherwise publicly expressed their views on the issue? Even if a student in the TWU program did not believe that homosexuality was sinful, her or his willingness to sign the contract might be seen as making her or him complicit in a discriminatory practice, as L'Heureux-Dubé J. argues.[52] And once again, the majority seems to forget that the question for the BCCT was not whether a particular graduate of TWU should be granted accreditation to teach in the public school system, but was instead whether the TWU teacher training program should receive accreditation. The BCCT argued that a program such as that offered by TWU, which supported views that it believed were contrary to the civic curriculum of the public schools in B.C., should not be accredited.

The majority tries to argue that *Ross* was a case of (racist) action, or its equivalent, the creation of a poisoned environment, while *TWU* was simply about belief (anti-gay /lesbian). (It describes *TWU* in this way even though there were public indications of anti-gay/lesbian belief that could also be described as conduct.) But applied to a public school teacher, this distinction between belief and conduct is problematic, particularly when the belief relates to a component of the civic curriculum. It seems more likely that the different results reached in *Ross* and *TWU* rest not on the distinction between belief (*TWU*) and action

[52] *TWU* (S.C.C.), *supra* note 1 at 836, per L'Heureux-Dubé J.: "TWU students' beliefs are not the issue here. Indeed, it is impossible to know what individual students believe since, as recognized in the Code, ultimately convictions are a personal matter. Signing the Community Standards contract, by contrast, makes the student or employee complicit in an overt, but not illegal, act of discrimination against homosexuals and bisexuals. With respect, I do not see why my colleagues classify this signature as part of the freedom of belief as opposed to the narrower freedom to act on those beliefs." Public school students might know that their teacher attended Trinity Western University and therefore was likely to regard homosexuality as sinful.

(*Ross*) but rather on differences in the way the majority understands sexual orientation equality and racial equality — at least in the school context.

The majority thinks that the BCCT could refuse accreditation to a teacher or to a teacher training program only if there was evidence of explicit acts of sexual orientation discrimination. There seems to be no expectation on the part of the majority that the equal value of gay and lesbian lifestyles or relationships will be affirmed in the classroom or that teachers when confronted with bigoted words by students about gays and lesbians will contradict those words, or when approached by an individual who is struggling with his or her sexual identity will provide support and reassurance or will direct the student to an individual or group that can offer support. A teacher is simply forbidden to engage in explicit acts of discrimination against gay and lesbian students such as giving them lower marks or ridiculing them in front of others. The TWU program can continue to affirm the view that homosexuality is wrongful or sinful provided it does not graduate teachers who discriminate against gays and lesbians in a clear and identifiable way.

At a deeper level the majority judgment seems to assume that discrimination on grounds of sexual orientation is wrong not because gay and lesbian relationships are as valuable or worthy as opposite-sex relationships but because sexual orientation is a private and personal matter that should not be interfered with by others and should not affect the market or state distribution of benefits or burdens.[53] Whatever an individual may feel about the sexual orientation or private sexual lives of other community members, when she or he is operating in the public sphere she or he must treat others with tolerance and respect.[54]

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[53] A number of authors have distinguished between different levels of public acceptance of "homosexuality" moving from tolerance to equal respect. Bruce MacDougall, "The Celebration of Same Sex Marriage" (2000) 32 Ottawa L. Rev. 235 at 254 describes the limited requirement of non-discrimination by the state: "Though the state and society might not approve of the group and might actually dislike it, the group or members of it, request or demand compassion to prevent the harm arising from being actively discriminated against or condemned. If the discourse generates the compassion requested, the effort is essentially a statement by the state that one ought not to be mean to members of a particular group; whatever their problem, perhaps they cannot help it. Compassion in the form of non-discrimination does not necessarily entail state recognition of the members of the particular group as harmless or equals of the members of the dominant group."

[54] This is the view of Gonthier J. dissenting in *Chamberlain*, *supra* note 2. Bastarache J., who co-wrote the majority judgment in *TWU*, concurred in the *Chamberlain* dissent. Gonthier J. states, at para. 126: "[P]ersons who believe that homosexual behaviour, manifest in the conduct of persons involved in same sex relationships, is immoral or not morally equivalent

While an individual may believe (on religious grounds) that gays and lesbians are immoral or mistaken, she or he is forbidden to act on those beliefs in "public" contexts such as the school classroom. This view of sexual orientation equality considers explicit acts of discrimination against gays and lesbians as wrong, particularly when committed by public officials, but is "agnostic" about the wrongfulness of the "personal" view (or private acts based on the view) that homosexuality is deviant or sinful or immoral. An individual's sexual orientation *and* her or his views about the morality of the sexual orientation of others are both private matters and not the concern of the state, or at least not the concern of the public schools.

The majority in *TWU* appears to adopt a different, or at least a less comprehensive, idea of equality than applies in the case of race. The ban on racial discrimination (the commitment to racial equality) rests on the view that the individual does wrong when she or he engages in acts of racial discrimination in both his or her public and private lives. More deeply it is assumed to be wrong for an individual to hold racist views — to believe that members of certain racial groups are less deserving or less worthy than others. For reasons of privacy and autonomy, it may be inappropriate to regulate private racist behaviour or impossible or too invasive to regulate racist thinking. But private racist behaviour is nonetheless wrong. We accept that the public schools should affirm — should teach — values such as racial equality and that the teacher's (expressed) personal beliefs or values are relevant to the performance of her or his public role. In contrast, the majority seems to assume that the commitment to sexual orientation equality in the schools requires only that the teacher refrain from acting in a discriminatory way towards gay and lesbian students. While the majority seems prepared to ban sexual orientation discrimination from the schools, it has no clear expectation that affirmation of the equal value of gay and lesbian relationships or lifestyles will form part of the public school's civic curriculum.

to heterosexual behaviour, for religious or non-religious reasons, are entitled to hold and express that view. On the other hand, persons who believe that homosexual behaviour is morally equivalent to heterosexual behaviour are also entitled to hold and express that view. Both groups, however, are not entitled to act in a discriminatory manner"; and at para. 127: "Adults in Canadian society who think that homosexual behaviour is immoral can still be staunchly committed to non-discrimination."

D. Identity and Behaviour

One possible explanation for this implicit distinction between racial and sexual orientation equality is that the majority regards sexual orientation as a choice — a personal lifestyle choice — rather than a fixed, immutable, characteristic.[55] If an individual, a gay man for example, could have made a different choice about his sexual orientation, then others may believe that he should have chosen differently — that his choice is mistaken or wrong. Choices are made for reasons and reasons can be evaluated as better/worse, weaker/stronger, right/wrong.

The Evangelical view is that men and women are creatures of God and deserving of love and respect but that when one of these creatures engages in homosexual activity, she or he has made an immoral choice, she or he is behaving in a sinful, inferior, way. The Christian should love and respect the sinful person but help her or him to change her or his behaviour. Indeed, a Christian should help the person to change because she or he loves and respects them. On the other hand, if sexual orientation, like race, is not a choice but is instead immutable, something that is genetically fixed or deeply rooted, something that the individual does not choose and cannot freely revise, it would be unfair to treat his or her sexual expression as immoral. This is the view of the BCCT, "that sexual orientation is no more separable from a person than colour."[56] To the person who sees her or his sexual orientation as part of her or

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[55] In *Chamberlain*, *supra* note 2, Bastarache J. (co-author of the majority judgment in *TWU*) concurred in such a view; at para. 127 Gonthier J. (dissenting, with whom Bastarache J. concurred) appeared to agree with those "persons, religious or not, ...[who] draw[] a line ... between beliefs held about persons and beliefs held about the conduct of persons." See also Wintemute, *supra* note 44 at 135:

"A more theoretical explanation might be that sexual orientation and religion are seen as grounds of discrimination that involve a 'choice of conduct' and are therefore morally relevant; dissenting views in relation to such conduct must be given greater respect. On the other hand, race and sex are seen as grounds of discrimination that do not inherently involve any 'choice of conduct' and are therefore morally neutral; dissenting views are less likely to be tolerated. Thus, religious disapproval of being an LGBT person or being a Mormon might be acceptable, whereas religious disapproval of 'being Black' or 'being female' might not."

[56] *TWU* (S.C.C.), *supra* note 1 at 786. See also the dissenting judgment of Rowles J.A. at the Court of Appeal, *supra* note 21 at para. 230: "[T]he argument ... that Charter values require only tolerance of all people generally and not necessarily support for their conduct or behaviour depends on the acceptance of a distinction between homosexual behaviour and homosexual identity. While I agree that equality requires tolerance and not necessarily active

his identity, as something she or he has discovered within his- or herself, the description of homosexuality as a sin is deeply disrespectful. A gay man may "choose" to refrain from sexual intimacy with same-sex partners but in doing so he will be repressing or denying part of his identity.

The majority says a number of things that suggest some sympathy for the TWU view that the activity (the sin) is separate from the actor (the sinner). It says, for example, that "there is nothing in the TWU Community Standards that indicates that graduates will not treat homosexuals fairly and respectfully." The suggestion is that fair treatment does not require any kind of affirmation of the equal value of gay and lesbian lives or relationships and that it is possible to regard (and describe) homosexuality as fundamentally wrong without disrespecting the gay or lesbian individual. In response to this, L'Heureux-Dubé J. expresses dismay that "the argument has been made that one can separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations."[57]

Yet the lifestyle choice/immutable trait dichotomy is far too crude. Choice and attribute are neither simple, nor mutually exclusive, ways to understand sexual orientation. Individuals may be socialized early on into a particular orientation, which may include bisexuality. Or they may make choices at critical points in their lives in response to significant events — choices that once made are not easily revisited.[58] Even if the individual's orientation has some kind of genetic root, it seems likely that other factors play a role in the realization of a particular orientation. The capacity of humans to reflect upon basic desires and values means that the alteration or adjustment of deep-seated feelings and

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support or encouragement, the kind of tolerance that is required is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people." David M. Brown, "Freedom From or Freedom For? Religion as a Case Study In Defining the Content of Charter Rights" (2000) 33 U.B.C. L. Rev. 551 at 610 regards homosexuality as a position, as something that individuals can favour or oppose. He, therefore, takes issue with the preceding statement of Rowles J.A. In his view: "The danger of this kind of language is that it provides judicial support for governmental action designed to compel only one viewpoint on an issue, leaving little room for conscientious or religious objection in the public forum."

57 *TWU* (S.C.C.), *supra* note 1 at 834.

58 Janet Halley, "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability" (1994) 46 Stanford L. Rev. 503 at 517. See also Carl F. Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada," in Connor Gearty & Adam Tomkins, eds., *Understanding Human Rights* (London: Monsell Publishing, 1996) at 218.

attitudes may not be entirely out of the question. On the other hand, even if we think that sexual orientation is better described as a choice than an attribute, choice is never "radical," without any kind of grounds. The choices we make are shaped or guided by deeply held values, ambitions, and desires of which we are sometimes only partly aware, and which we cannot easily revise or discard. Sexual orientation may not be determined, genetically or otherwise, but it is clearly much more than a superficial, easily revised, preference.

Liberal constitutional theory, on the surface at least, tends to draw a sharp divide between choices and preferences that should be protected as a matter of human liberty, and essential characteristics that should be respected as a matter of human equality. But if sexual orientation can be seen as both a choice and an attribute, or, perhaps more accurately, as neither choice nor attribute but instead as mutable identity (as understood or experienced by the individual as a matter of identity even if not an immutable trait), then it is unclear whether it should be the subject of liberty or equality. The Court's ambiguous treatment of sexual orientation (and as I will suggest later, religious commitment) and more particularly its uncertainty as to whether the schools should affirm the equal value of different sexual orientations, reflects the difficulty it has choosing between these distinct constitutional responses — between liberty and equality. I note that in the earlier judgment of *Egan*, Lamer C.J.C. seemed to regard sexual orientation as a matter of identity but also acknowledged the possibility that it is not immutable. Sexual orientation, he said, is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal cost."[59]

Whether we think the schools should remain "agnostic" about homosexuality or should instead affirm the equal value of gay and lesbian relationships cannot depend simply on our answer to the question of whether sexual orientation is better understood as a personal choice or an immutable characteristic. The right to equality (the principle of equal respect) forbids differential treatment on grounds such as family status, citizenship, and other "characteristics" or conditions that are not immutable. Even gender and racial equality involve more than the exclusion of immutable/irrelevant factors from public decision-making. Clearly it is wrong and a breach of the right to equality when a public official distributes benefits, such as public education, on the basis of skin colour or sex. Human value or worth does not vary across racial or sexual lines. It is irrational, and unfair, to treat someone as less worthy or deserving on these grounds. However, a commitment to racial or sexual equality sometimes involves more than the exclusion of skin colour or sex as explicit grounds for allocating public

[59] *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 5.

benefits and burdens. Individuals who have been discriminated against on the basis of a superficial and morally irrelevant trait such as skin colour or sex may come to live in similar circumstances (*e.g.* in poverty, or in marginalized employment) and/or to identify with one another as members of a common group (and a culture that may reflect their subordination but may also or instead express a sense of common dignity or shared struggle for equality). A commitment to equality is often understood to require respect for, and accommodation of, the circumstances of group members, and even the culture of the group. For example, the failure of the government or a private employer to make any accommodation for the child-care responsibilities of their employees (in promotion or leave policies) is generally seen as a form of gender discrimination. It is gender discrimination not because women must be, or always are, the primary care givers, but because that has been the general practice in our society. Accommodation of this sort ensures that members of the community, who have been excluded or marginalized in different ways in the past, are able to participate more fully in community life and share in its benefits.

While there continues to be significant disagreement in the community about the moral worth of same-sex relationships, it seems clear that homosexuality is not simply a behaviour that an individual may or may not chose to participate in. Nor is it a discrete viewpoint or inclination. It is instead a deeply rooted way of understanding one's association and connection with others. And it cannot be ignored or discarded without significant impact on the individual's sense of self and place in the world. A commitment to sexual orientation equality rests on a belief that gay and lesbian sexual relations are equally valuable ways of expressing love or experiencing connection with others. Moreover, the right to equality is concerned not simply with the exclusion of "irrelevant" criteria in public decision-making but more deeply with preventing or ameliorating the systemic subordination of certain groups within the community. And it seems fairly clear that gays and lesbians have been excluded or marginalized in our community over an extended period of time.

E. Sexual Orientation Equality in the Schools

It may be that the narrow approach to sexual orientation equality (that school teachers must tolerate gays and lesbians but are not required to affirm the equal worth of gay and lesbian relationships) which the majority in *TWU* seems to follow, rests on the particular character of the public schools — their "inclusive" or pluralistic character. The majority suggests that "agnosticism" towards same-sex relationships follows from the liberal commitment to free thought and judgment. According to the majority, potential teachers who hold sexist, racist or homophobic beliefs should not be screened out: "For better or for worse,

tolerance of divergent beliefs is a hallmark of democratic society."[60] But even if the general community must tolerate the existence and expression of a wide range of views, including some that are sexist or racist, it does not follow that such views should be tolerated within the schools or that the schools should be neutral on the issue of racial or sexual equality. The schools do, and should, affirm important public values and virtues.

There is no simple answer to the question of which "views" should remain open to debate within the schools and which should be affirmed and placed beyond contest as part of the civic curriculum. The Court's reluctance to see the affirmation of gay and lesbian relationships as part of the civic curriculum no doubt rests on the mainstream character of homophobic or anti-gay/lesbian attitudes or beliefs. As a practical matter, anti-gay views are still so widely held that the courts may feel some difficulty regarding the affirmation of gay and lesbian lifestyles or identity as a *community* value that should form part of the public school curriculum.[61] The public schools must balance the claim of parents (who have diverse views on issues such as sexual orientation equality) to oversee the upbringing of their children with the claim of the larger community to ensure that children are taught the basic virtues of citizenship, including tolerance and respect.[62] Public school students are developing the skills of autonomous citizens at the same time as they are being socialized into both family and community.

No doubt the majority's reluctance to include the affirmation of same-sex relationships as part of the school curriculum is greater because anti-gay/lesbian views often have a religious basis. The majority may believe that the curriculum should avoid or minimize religious controversy and so adopts a narrow reading of sexual orientation equality, one that avoids a significant confrontation with anti-gay/lesbian religious beliefs. (I note that the majority's frequent equation of

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60 *TWU* (S.C.C.), *supra* note 1 at 815.

61 There are still many parents who fear that their impressionable children may be drawn into homosexuality. I note that this fear of homosexuality rests on a belief that sexual orientation is both a choice — or at least something that children can be influenced to adopt — and a deeply rooted commitment.

62 Eamonn Callen, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Clarendon Press, 1997) describes the dilemma of liberal democratic education: "The need to perpetuate fidelity to liberal democratic institutions and values from one generation to another suggests that there are some inescapably shared educational aims, even if the pursuit of these conflicts with the convictions of some citizens. Yet if repression is to be avoided, the state must give parents substantial latitude to instil in their children whatever religious faith or conceptions of the good they espouse" (at 9). But Callen is clear that a liberal democratic education "will not leave everything as it is" (at 13).

Evangelical and Christian shows a lack of awareness of the growing acceptance of homosexuality by a number of mainstream Protestant churches.[63])

Yet none of this is an adequate response to gay and lesbian students or parents whose intimate relationships are denied affirmation. We should not include in the civic curriculum only those values held by all members of the community. Affirmation of racial equality, for example, is necessary because certain racial groups continue to be treated by some in the community as less worthy and deserving than others and because the social-economic consequences of past discrimination continue to have a negative affect on the position and opportunities of the members of these groups. If homosexuality was simply a viewpoint, a position, an ideological stance (like opposition to euthanasia, or support for public medicare) that was contested by some members of the community then it should not be affirmed in the public schools.[64] But, if gay or lesbian sexual orientation is more deeply rooted and is felt by the individual to be part of her or his personal identity, so that the failure to affirm its equal worth (in relation to heterosexuality) is experienced as a denial of respect, or as exclusion from full community membership, then affirmation is a matter of justice and should occur within the public schools despite significant parental opposition.

F. The Failure of a Narrow Conception of Sexual Orientation Equality

While the Court has adopted a larger understanding of sexual orientation equality in its interpretation of the *Charter* and human rights codes, it seems reluctant to apply this larger conception to the public schools. The majority in *TWU* distinguishes between discriminatory belief and action in the schools (and, as I have argued, implicitly between racial and sexual orientation equality). The basis for this distinction may be nothing more than a pragmatic or cowardly reluctance to make a full commitment to sexual orientation equality in the public schools, when there are still a significant number of parents who see homosexuality as deviant or sinful.

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[63] For example: "In ... particular case[s] it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985": *TWU* (S.C.C.), *supra* note 1 at 814.

[64] See MacDougall, *supra* note 44 at 520, where the author criticizes the efforts of some commentators "to turn equality issues into issues of competing expression" or "into religious/morality debates."

The majority judgment seems to assume that the schools should avoid any exclusion or mistreatment of gay and lesbian students and teachers (explicit acts of discrimination) but need not affirm the equal value of gay and lesbian identities. Yet the distinction between non-discrimination and affirmation is neither clear nor stable.[65] The failure to affirm the equal worth of same-sex relationships, when opposite-sex relationships are constantly affirmed, will be experienced as exclusion. Indeed, it is increasingly clear that the wrong to which equality rights respond is not so much the denial of a benefit, as the message that underlies the denial — the message that some individuals are not full members of the community or are not deserving of equal concern and respect. The implication of the *TWU* case may be that sexual orientation "equality" does not (yet) require the equal affirmation of same-sex relationships in the public schools; that it requires only that the schools avoid manifest acts of exclusion or discrimination against individuals because of how they choose to live their private lives. Yet even the simplest statement of this distinction suggests its instability in practice.

Once the community and the courts come to accept gay and lesbian equality more fully, and come to assume that it should form part of the public school curriculum (broadly understood), it will be obvious that a teacher training program that treats homosexuality as sinful should be denied accreditation.

The Court's approach to sexual orientation equality may be analogous to its approach to religion in the public school system. Schools affirm the value of religious toleration and respect for diversity, but do not take a position on religious truth. They remain "agnostic" on the question of whether there is religious truth or what that truth is. Each one of us has views about religion or religious truth. Some of us may believe with confidence that other religious views are wrong. We may even believe that others are immoral or sinful in holding these views. Yet religious adherence is treated as a private and personal matter — something about which we may disagree and debate but not something that can justify public inclusion or exclusion.

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[65] While those who think that homosexuality is immoral may have reason not to prohibit same-sex relationships, they have no reason to provide equal support for such relationships — or, as a teacher, to avoid any suggestion that homosexuality is wrongful or sinful. At the same time, those who believe that same-sex relationships are equally valuable, have every reason to ensure their public affirmation, even if they do not seek to prohibit the private expression of anti-gay views.

G. The Secular School System

The majority's distinction between belief and action (it is permissible for the teacher to hold anti-gay/lesbian views provided she or he does not act on them) may rest on a reluctance to exclude individuals from public school teaching positions on the basis of their religious beliefs. As the majority states, an individual's "freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society."[66] Because the public school system is meant to stand outside religious controversy and encompass all members of the community, whatever their religious beliefs, it is difficult for the Court to accept that the adherents of widely-held religious views cannot serve as teachers. Instead the Court strikes a balance: the individuals are included (can serve as teachers) but their beliefs are not (cannot be manifested in the classroom). The individual must leave her or his religious beliefs about sexual orientation at the entry to the school and must act in accordance with the tolerance/respect values of the civic curriculum. This response is consistent with the familiar contemporary understanding of public secularism, as the exclusion of religion from public life, or the "privatization" of religious commitment.

But, of course, religion can be confined to private life only if the individual, in this case a public school teacher, is able to separate him- or herself in public life, from her or his spiritual beliefs. If this separation is not possible — if an individual's spiritual beliefs or religious values are more deeply part of who she or he is, guiding his or her actions and responses in all parts of her or his life — then there must be some doubt about her or his ability to teach or affirm values that are antithetical to her or his religious views.

The majority may believe that religious values, or values that are the subject of religious disagreement, are a private matter and should not form part of the public school curriculum. This might account for its narrow approach to sexual orientation equality in the schools — for its assumption that the schools should be "agnostic" on the value of same-sex relationships. Or the majority may believe that even if the school curriculum includes an affirmation of the value of same-sex relationships, a teacher with religiously-based anti-gay/lesbian views can still teach or affirm this value. The teacher's religious views are a private matter and need not affect her or his public behaviour. Either the curriculum, as part of the public sphere, should not reflect a particular moral/religious conception of sexuality or the curriculum includes values that are contrary to a teacher's religious belief, but she or he is able to perform his or her

[66] *TWU* (S.C.C.), *supra* note 1 at 814.

public role regardless of her or his personal beliefs, which are not the state's concern.

Can religion be confined to private life in this way? And can an individual, whose publicly-expressed religious views are at odds with the civic curriculum, effectively perform the role of teacher? I will argue that religious values must be part of public debate and decision-making. It follows then that in public decision-making the (religious) values of some citizens will prevail over the values of others. Religious inclusion or pluralism, on this view, does not require the exclusion of religion from public life. Instead it protects the individual's freedom to draw on her or his religiously-based values when participating in public decision-making, including decisions concerning the civic curriculum of the schools, but also guarantees some accommodation of dissenting religious views in private life and to a lesser extent in public activities such as education.

It is important that minority spiritual communities retain space to practice their faith. This may sometimes require the state to compromise its pursuit of reasonable public purposes, such as maintaining a traditional military uniform or banning knives from school. However, the claim of an individual to serve in a public role, such as a teacher (to be accommodated), even though she or he is opposed on religious grounds to all or part of the mission of the public institution, is far less powerful. If religiously-grounded values are part of public decision-making then it may not be so unjust (and indeed may be necessary) to exclude from the position of public school teacher an individual whose manifested (religious) beliefs are inconsistent with the values the community has decided to include in the public school curriculum. Even more obviously, a teacher training program that affirms values that are inconsistent with the curriculum should not be accredited.

H. Coercion and Inclusion

According to Dickson C.J.C. in *Big M Drug Mart*, religious freedom prohibits coercion in matters of conscience.[67] The *Charter* protects the individual's freedom *to* practice her or his religion and her or his freedom *from* compelled religious practice. At an earlier time when most Canadians adhered to a particular religion, generally some form of Christianity, there was no clear distinction between religious restriction and religious compulsion. However, with the growth of a non-religious or agnostic community, it is possible to speak of freedom *from* religion and freedom *to* religion as independent rights.

[67] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 346 [*Big M Drug Mart*].

Individuals have the right to hold and manifest religious views, but they also have the right not to have religion of any kind imposed upon them.[68]

The state breaches the freedom *to* religion when it restricts minority religious practices on the grounds that they are mistaken or immoral — the wrong way to understand or worship God. It may also breach the freedom *to* religion when its pursuit of an otherwise legitimate public policy has the (unintended) effect of restricting a religious practice. In other words, the freedom not only precludes state action designed to suppress minority religious practices, it also requires that the state compromise its legislative goals in order to accommodate such practices.[69] The state breaches the freedom *from* religion when it compels an individual to engage in a particular form of religious practice. Obvious examples of religious compulsion include a requirement that all individuals recite the Lord's Prayer or kneel when praying.

While state support for a particular religious practice, institution or value, might be seen as consistent with religious freedom understood as "freedom of conscience" (a prohibition on "coercion of the conscience"), the courts have taken a broad view of "coercion." They have held, in a range of cases, that state support for a particular religion, or for religion in general, amounts to religious compulsion (and sometimes restriction) and is therefore contrary to the constitutional right to freedom of religion and conscience.[70] According to the

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[68] *Ibid.* at 347: "Equally protected, and for the same reasons [as religious beliefs], are expressions and manifestations of religious non-beliefs and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion." See also *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

[69] I note that the majority in *TWU* (S.C.C.), *supra* note 2 at 810 (quoting L'Heureux-Dubé J. in *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 at 182), describes the scope of religious freedom is very narrow terms. They say that freedom of religion "is inherently limited by the rights and freedoms of others" and does not protect harmful acts. Does this mean that religiously-inspired action is protected under s. 2(a) only if it is not harmful? If freedom of religion only requires that the state accommodate minority religious practices that are not harmful, then the standard by which we measure harmfulness becomes rather important. Does it mean that the state has no obligation to accommodate religious action that is contrary to the public interest as understood by the legislature?

[70] *Big M Drug Mart*, *supra* note 67 at 336: "If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free ... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit

courts, state preference for a particular religion has a coercive affect on non-adherents, putting pressure on them to give up their faith and/or adopt the state favoured belief system.

The courts' expansive view of coercion is well-illustrated by *Freitag v. Penetanguishene*, a judgment of the Ontario Court of Appeal.[71] In that case, the Court ruled that the practice of saying the Lord's Prayer at the opening of town council meetings violated the religious freedom rights of the non-Christians in attendance. The Court held that this practice was coercive, even though no one was directly required to recite the prayer, and even though many people, including the complainant, chose not to participate.[72] When applied to the practice of saying the Lord's Prayer at the opening of a town council meeting, the term coercion is being stretched very far. The objection to opening the council meeting with a Christian prayer is that it excludes some individuals from full participation in a *public* meeting. It signals to non-Christians that they are not full members of the political community. The Court in *Freitag* seems to recognize this when it describes the practice as "exclusionary." The Court goes on to say that: "[T]he appellant ... feels intimidation when he attends the meeting of his local Town Council. This does not mean that he is so fearful that he does not participate. He does so, but as a citizen who is singled out as being not part of the majority recognized officially in the proceedings."[73]

Non-Christian adults attending the council meeting would not ordinarily experience the prayer as pressure to adopt the Christian faith and reject their own

alternative courses of conduct available to others."

71 (1997), 47 O.R. 301 (C.A.) [*Freitag*]. See also *Reference re Bill 30, an Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148; and *Adler v. Ontario*, [1996] 3 S.C.R. 609, in which the Supreme Court of Canada seemed to assume that in the absence of the constitutional privileges granted to Roman Catholic schools in Ontario in 1867, the provision of public funds to Catholic schools (and not to other religious schools) would be contrary to s. 2(a) of the *Charter*.

72 *Freitag*, *ibid*. at para. 34: "Clearly the nature and potential effect of the coercion are much different for an adult who wishes to attend Town Council meetings than for children who are in the school environment all year with friends and teachers, and are subject to the pressures that those important relationships engender. .... [Nevertheless] [j]ust as children are entitled to attend public school and be free from coercion or pressure to conform to the religious practices of the majority, so everyone is entitled to attend public local council meetings and to enjoy the same freedom."

73 *Freitag*, *ibid*.

belief system.[74]At most the official recitation of the prayer might "encourage" dissenters to conform to dominant practices. But, of course, the state lends symbolic support to a wide range of values or positions and so may often be seen as "encouraging" community members to adopt a particular view or way of life. If religious preference by the state is wrong, it must be because all religions or all religious adherents should be treated equally, or with equal respect, in the public realm.

The shift from coercion to exclusion, as the wrong to which religious freedom responds, can be seen in the number and type of acts which the courts are now prepared to view as either restricting or compelling religion. The wrong that is the focus of freedom *from* religion is now sometimes described as religious *imposition* rather than simply religious *compulsion*, a change in language that signals a potentially significant shift in the scope of the wrong. Whenever the state adopts or affirms particular religious symbols and practices, it may be seen as imposing religion on non-adherents, even though no one is actually required to engage in the practice.

As well, religious restriction occurs not only when the state seeks to prevent an individual from engaging in "incorrect" religious practices. It occurs whenever the state interferes (in a non-trivial way) with the religious practices of some members of the community. Even when the state is pursuing otherwise legitimate legislative goals, it may be required to compromise those goals in order to accommodate minority religious practices.

I. The Justification for Religious Freedom

This shift from coercion to exclusion reflects a change in the underlying justification of the freedom. The western version of the argument for religious freedom or tolerance originated in a context (notably post-Reformation England and colonial America) in which virtually all members of the community adhered to some version of Christianity and more particularly to some form of Protestantism. In his *Letter Concerning Toleration,* John Locke made two related arguments in defence of religious freedom.[75] The first argument was simply that if the state were to use its power to suppress "false" religions and impose what it saw as religious truth, it might mistakenly ban the one true

[74] *Zylberberg v. Sudbury Board of Education* (1988), 52 D.L.R. (4th) 577 (Ont. C.A.). the Ontario Court of Appeal held that prayers in a public school — even if not compulsory — amounted to a form of coercion.

[75] John Locke, *A Letter Concerning Toleration* (New York: Irvington, 1979).

religion. The other argument was that acceptance of God, or the one true path to God, was not something that should, or even could, be coerced. The individual must have the freedom to choose her or his religious course, even if she or he makes the wrong choice, because she or he must come to the truth willingly. Locke did not claim that any form of religious practice, and in particular the practice of a "wrong" religion, is good and valuable. His claim was simply that the truth must be accepted voluntarily, if it is to be meaningful.

This early commitment to religious freedom or tolerance rested on a particular understanding of the nature of religious truth and the conditions necessary for its realization. Religious adherence was a personal commitment based on reasoned judgment. Freedom of religion prohibited state coercion in matters of conscience. It prohibited the state from interfering with the individual's freedom to practice her or his chosen religion and from compelling him or her to engage in any form of religious practice. The freedom was not generally thought to prohibit state support for particular religious practices or even church establishment. However, some early defenders of religious freedom, particularly in colonial America, did argue that the state should not favour or support a particular religion.[76] The truth, they thought, needed no support from secular powers, which were more likely to hinder than help its realization. They believed that the individual was more likely to come to the truth if the state did not participate in the contest between different belief systems.

The early defenders of religious freedom assumed the existence of religious truth (some form of Protestantism) and sought to protect the conditions necessary for the individual and collective realization of that truth. They did not imagine that avoidance of coercion in religious matters, or the even-handed treatment of different denominations, required the exclusion of religion from the public sphere. Even if the state was prohibited from taking sides in denominational disagreements, it could still base public action on the practices and values shared by different Christian groups. It is, of course, important to note that this common ground did not include Jews, Muslims or atheists, who represented a relatively small minority in Canada (and the United States and Britain) at the time. Moreover, this "common ground" was composed of the general practices/beliefs of the dominant Protestant denominations and did not include the "peculiar" beliefs of dissenting denominations.

[76] Mark De Wolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965).

In more recent times, the growth of religious diversity, and of an agnostic community, has resulted in subtle but significant changes in the public understanding of religious freedom. In this modern context, it is assumed that religious freedom cannot be based on a particular conception of religious truth (and the conditions necessary for its realization) or even on the existence of such a truth. A religious (or a non-religious) belief system is important and deserving of respect either because it represents a significant personal commitment or because it has an important connection to the individual's identity.[77] Freedom of religion/conscience is no longer simply about *religious* truth and extends to other deeply-held beliefs.[78] It may no longer even be about the realization of *truth*, religious or otherwise. Respect for individual judgment may rest simply on the value of the person.[79]

However, the growth of religious diversity and agnosticism has contributed to another and perhaps more significant change in our conception of religious freedom. There has been a shift, albeit ambiguous, from individual judgment or choice to individual identity as the principal concern of the freedom. The formal test adopted by the courts (does the state act amount to "coercion of the conscience") suggests a concern with autonomous judgment and the individual realization of truth. Yet the courts' emphasis on inclusion and equal respect in the public sphere seems to rest on a conception of religious commitment as rooted identity rather than simply personal choice or reasoned judgment.

With the growth of agnosticism and secular reason, religious commitment is often viewed as non-rational and meaningful debate between the adherents of different faiths is often assumed to be impossible. If religion is central to the

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[77] Religious adherents sometimes make arguments that seem to rest on this identity-based view of the freedom. When a particular religious practice is restricted by the larger community, the adherent may argue that this restriction is deeply hurtful or insulting to her or him and her or his religious community. The adherent adopts an 'external' view of the wrong because she or he recognizes that she or he cannot make in the public sphere an internal argument that the restricted practice is true or right. Nevertheless, religious values matter to adherents not because they have a preference for them or because they have a deep attachment to them, but because they express divine truth.

[78] At an earlier time, when nearly all individuals were committed to a particular religion and their moral code rested on their religious commitment, the terms "freedom of conscience" and "religious freedom" were used interchangeably. Yet the former term now seems to refer to an alternative, or a supplement, to religious freedom — that is, the freedom to hold moral views that do not rest on religious commitment.

[79] For Locke, *supra* note 75, God had endowed the individual with a conscience — a capacity to reason and judge — which enabled him or her to come to the truth.

individual's sense of self, then the state should not support one belief system over another. According to this view, state preference for a particular religion is disrespectful to the adherents of other faiths. Religion should remain outside the scope of political engagement and decision-making. Religious belief on this view, is different from secular (non-religious) belief systems. Depending on the context it can be seen as either threatening or as marginal and vulnerable. This idea of religion is in tension with the view of many adherents that their commitment to a particular religion is not simply a matter of socialized identity but is based rather on its truth value. Of course, the attempt to insulate religion from politics (and politics from religion) may rest simply on a recognition that religious differences have often led to significant public conflict. It may be, however, that debate between the adherents of different faiths is difficult or irresolvable because religious commitments are so deeply rooted and not always open to personal evaluation or shared reflection.

J. The Privatization of Religion

A commitment to the equal treatment of different religious belief systems, or to the non-imposition of religion, is thought to require the exclusion of religion from the public sphere, and specifically from public debate and decision-making.[80] Politics must be insulated from religion or religious controversy. According to this view, to base public action on *particular* religious grounds is to impose the religious values and practices of some individuals on others or to favour the religious beliefs of some over those of others. The secular or public sphere must stand above religious controversy. At an earlier time, when most members of the community adhered to some form of Christianity, it seemed possible to base public action on common religious ground. The state could avoid supporting controversial religious positions (sectarianism) without excluding all religious values and practices from public life. However, with the growth of religious diversity and agnosticism, this no longer seems possible.

There seems to be no question that the state can support different religious practices or institutions, such as religious schools, provided it does so in an

[80] See *e.g.* Wintemute, *supra* note 44 at para. 30: "Religious arguments must indeed be 'banished from the public square' in the sense that they cannot be the sole or main reason for a public policy decision. Religious individuals are perfectly free and welcome to participate in public decision-making on the condition that they leave their religious arguments at home."

even-handed way and ensures that non-religious alternatives are also supported.[81] However, while the state may chose sometimes to distribute benefits, such as schooling, to a plurality of religious and non-religious groups, other benefits must be provided through a common or public scheme. Certainly this must be the case if there is to be any shared space or common action in the political community. A commitment to religious neutrality or equality seems to require that public institutions/actions be based on non-religious or secular values and concerns. The public schools, for example, should be open to all individuals regardless of their religious beliefs, but this inclusion of individuals seems to require the exclusion of religious content. Religion must be confined to private life and treated as a matter of personal belief rather than public interest. The individual may live in the private sphere, among family and friends, in accordance with her or his religious beliefs and practices, but she or he cannot expect the public sphere/public action, and more particularly the schools, to conform to the tenets of her or his faith.

The assumption that an individual can shed her or his religious beliefs, when she or he acts in the public sphere (the confining of religion to private life) suggests that religious beliefs are simply choices or preferences from which an individual can separate her- or himself. In *TWU*, for example, the individual teacher is included in the public school but her or his religious views are not. These views are private and separable from her or his public life as a school teacher. Yet if we understand religious belief as an individual choice or personal commitment (which can be described as right or wrong or true and false or as simply a preference) and not as a rooted part of the individual's identity, then religion fits uncomfortably within the equality rights model. More generally it is difficult to reconcile this view of religion with its special status. If religion is not in some sense deeply rooted, a part of the individual's identity, why does it deserve special constitutional protection? Why, for example, should government policy be compromised to accommodate the values or practices of religious minorities? Why should the state treat all religions in an even-handed way?[82]

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[81] An important exception to this is the right that certain religious schools have to public support under s. 93 of the *Constitution Act, 1867*. In *Reference re Bill 30, an Act to amend the Education Act (Ontario), supra* note 71, Wilson J. for the Court wrote: "that the rights or privileges protected by s. 93(1) are immune from Charter review."

[82] It is important to note that s. 2(a) of the *Charter* protects freedom of conscience and religion which suggests that religious beliefs do not have greater value than other forms of moral commitment. Yet, despite the hopes of some, the state cannot be neutral on all issues of value.

To the religious adherent, *secularism* (understood as the exclusion of religion from the public sphere) looks like a competing partisan position. It is neither neutral nor inclusive. Many religious adherents believe that the removal of explicitly religious or spiritual elements from the public sphere limits their ability to live their lives according to their deeply held religious values/beliefs. They regard this kind of secularism not as a neutral ground on which different religious and non-religious groups can live within a common political community, sharing public spaces and institutions such as schools, but instead as the ordering of community life in accordance with the non-religious values of some in the community rather than the spiritual values of others. With the growth of religious diversity and agnosticism, religious neutrality in the public sphere seems like an impossibility. What is for some the neutral ground upon which freedom of religion and conscience depends is for others a partisan anti-spiritual perspective, that accepts that the value and purpose of human life can or should be determined without looking to God or to the Bible.

Moreover, religious "neutrality" is only possible if religion can be confined to the private sphere. Yet how can the religious adherent be expected to leave her or his religiously-based values behind when she or he enters the public sphere? Religious beliefs or values have public implications. Most religions have something to say about the proper ends of the individual and the community and about the kinds of activities that should be supported as right or virtuous or prohibited as harmful. When a religious adherent is required to address a public issue, she or he cannot help but draw on her or his spiritual values. She or he may be able to describe her or his values to others in non-religious terms, but her or his understanding of, and commitment to, these values rests on their religious foundation. Even if the values that shape our public life — conceptions of life, of marriage, *etc*. — are framed, even understood, by proponents in non-religious terms, they have a religious history and to those from non-Christian traditions they may look decidedly Christian in character. I note also that if religious values are admitted into public debate only if they have a secular analogue (and can be understood in non-religious terms) then the religious values and practices of Christianity, which have shaped the secular outlook of western society, will have easier access to the public sphere than will minority religious views.

Religious values are bound to play a role in public decision-making.[83] Any attempt to exclude them will be artificial. Yet if religion does have a public role,

[83] In a diverse political community, we must hope that some form of discursive engagement with others is possible and that others hold opinions for reasons that we can understand, even if we do not find their reasons convincing.

then any one of us may find ourselves subject to laws that reflect the religious values of others and are contrary to our own (religiously-based) moral code. If public actions may be based on religious values, it becomes less clear what should count as religious compulsion or imposition. Perhaps the prohibition on religious compulsion/imposition only prevents the state from requiring citizens to act in a particular way because it is the right way to worship or respect God, rather than the right or fair way to act towards others in society. But, of course, for many religious adherents, all religious values/acts are at root about the relationship between the individual and God. And so it may be that we can make judgments about religious imposition/compulsion only from a non-religious perspective or from a particular religious perspective that distinguishes between the spiritual and the secular realms. An act will not amount to religious compulsion/imposition if it can be understood as addressing human concerns (as concerned with human justice or the prevention of harm to humans rather than with divine worship) even if based on religious beliefs.[84] But there is disagreement about what human justice involves or what counts as human harm, and so the distinction between human concerns (addressed by different religions) and religious practices will be unstable.

The freedom *to* religion offers some protection to minority religious communities from coercive state measures. It precludes state action designed to restrict minority practices and it also require the state to compromise legitimate public policies in order to accommodate these practices. However, there are limits to any accommodation and inevitably these limits will be based on the moral/religious views of the dominant community. There is no neutral position from which to decide whether the state's policies (dominant values) should be compromised. To the religious adherent, whose practices have been restricted, the state does wrong when it prevents her or him from doing what her or his religion requires or supports.

K. Religious Inclusion in the Schools

The requirement that public schools be *inclusive*, and respect diversity in the community, cannot mean that they must include (or exclude!) all

[84] In *Big M Drug Mart*, *supra* note 67 at 337, Dickson C.J.C. for the Court, when considering the impact of a federal Sunday closing law, observes that: "Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal." Obviously, the judgment that Sunday retail operation is "moral" and "normal" must be made from a perspective other than that of the Christian who believes that the Sabbath should be honoured.

moral/religious/political positions. Inclusion within the public schools involves a commitment to a conception of equality that is incompatible with (excludes) certain views. The public schools cannot, for example, embrace those views that oppose diversity and deny respect to certain individuals or groups on racial grounds. Simply put, the public schools have a civic mission that reflects a particular religious/moral perspective and is incompatible with other religious/moral perspectives. If the civic mission of the public school includes the affirmation of gay/lesbian equality as well as racial equality, gender equality and democratic governance, the individual who has religious objections cannot argue that the simple affirmation of these values by public institutions breaches her or his religious freedom (although she or he may have a right to exempt her- or himself or her or his children from the public system). If we are committed to teaching values as part of the school curriculum, then the beliefs or values of some will not be included and indeed may be inconsistent with the values that are adopted. As a practical matter, there must be a significant degree of community support for a particular value before it can be included in the curriculum. However, it seems clear that the equal worth of gays and lesbians, a segment of the community that has been discriminated against over the years, should be affirmed in the schools, despite the opposition of some parents. Indeed, as suggested above, the failure to affirm such a value in the schools may itself amount to discrimination.

The issue then becomes whether an individual who holds religiously-based views that are contrary to the civic curriculum of the school (views about race, gender, or sexual orientation) can be an effective teacher. In deciding whether an individual can teach or affirm effectively a value such as sexual orientation equality, it should not matter that her or his opposition to homosexuality is religious in character. If religious views about the just organization of human affairs are not excluded from public debate and decision-making then there may be less reason to make special accommodation for the religious adherent who wants to perform a public function such as school teacher but holds (and has manifested) views contrary to the curriculum. While it is important to maintain some space for minority religious/moral views, ensuring that they are not crushed by the dominant moral/religious perspective, if we believe that the community, through its schools, should affirm equality values, then the accommodation of minority religious views may not go so far as to protect the right of dissenters to work as public school teachers. Dissenting individuals remain free to hold and express their views about homosexuality. But they have no right to serve as public school teachers, if they cannot effectively teach the curriculum. As a community, we would have little difficulty excluding from the teaching profession an individual who publicly indicated her or his religiously-based belief that some “races” are inferior (and as argued above that seems to be

the implication of the *Ross* judgment). Even with such an exclusion we would still describe the school as public and inclusive.

L. The Exclusion of TWU Trained Teachers

If an individual manifests religious views that are contrary to the values of the civic curriculum, then she or he may be excluded from teaching not because her or his views are religious but simply because she or he is unable to affirm, in good faith, the values of the curriculum and because his or her commitment to contrary values may work against the civic mission of the schools. Similarly, the TWU program was denied accreditation by the BCCT not because it teaches religious views but because it affirms anti-gay and lesbian views — because it supports intolerance for a group that should be respected. In the dissenting words of L'Heureux-Dubé J., "[t]he BCCT's concern was with the impact on public school classrooms of a discriminatory practice, whether or not the practice is based on religion was immaterial to their decision." Of course, for the religious adherent there is no distinction here. To exclude the view that homosexuality is a sin is to exclude religious truth. For the adherent, this exclusion is an act of intolerance against her or his religion; but it is a wrong not against her or his identity or liberty, but against divine truth, as she or he understands it.

Once it has been decided that the curriculum should include a particular value (and that may well be a contentious issue), the question is whether an individual who is personally opposed to the included value, and has publicly expressed this opposition, can effectively teach or affirm that value, or whether a teacher training program that affirms a contrary view properly prepares its graduates to teach in the public system. If a commitment to sexual orientation equality requires only that the teacher not engage in explicit acts of discrimination then it may be possible for an individual who believes that homosexuality is wrong, and even says so outside the school, to serve as a teacher and refrain from acts of discrimination within the school. But if we are committed to a richer view of sexual orientation equality and believe that the value of same-sex relationships should be affirmed in the schools, then there may be good reason to deny accreditation to a teacher who holds anti-gay/lesbian views and to a teacher training program that supports such views. It is unrealistic to expect the individual simply to shed her or his beliefs and values when she participates in public life and in particular when she or he serves as a counsellor or role model to children.

III. *CHAMBERLAIN*: AFFIRMATION AND MORAL NEUTRALITY

In *Chamberlain*,[85] a local school board rejected a proposal to include three books depicting same-sex parents, "Belinda's Bouquet," "Asha's Mums," and "One Dad, Two Dads, Brown Dad, Blue Dads," on the list of approved teaching resources for the primary grades.[86] The appellants challenged the board's decision ("the resolution") on two grounds: arguing first, that the Board had acted outside its mandate under the *School Act*[87] of British Columbia and second, that the resolution violated the *Charter*.

Justice Saunders of the B.C. Supreme Court struck down the resolution, holding that it was *ultra vires* the Board's authority.[88] She relied on a section of the province's *School Act* which provided that "[a]ll schools ... must be conducted on strictly secular and non-sectarian principles."[89] In her view, "the term 'secular' exclude[d] religion or religious belief" in the public schools.[90] She further held that a board decision that was "significantly influenced by religious considerations" breached the secularism requirement.[91] In this case "by giving significant weight to personal or parental concern that the books would conflict with religious views, the Board made a decision significantly influenced by religious considerations, contrary to the requirement in s. 76(1) that schools be 'conducted on strictly secular ... principles."[92]

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85 *Chamberlain* (S.C.C.), *supra* note 2.

86 McLachlin C.J.C., in her majority judgment for the Supreme Court in *Chamberlain*, *ibid.* at para. 35, notes that inclusion of these books on the list of approved teaching resources only meant that a teacher could choose to use these books in the classroom. It did not mean "that all teachers were obliged to use them or even that they were strongly encouraged to use them."

87 The Board had also adopted a resolution which stated that resources from gay and lesbian groups were not approved for use in the Surrey School District. This resolution was quashed by the Supreme Court of British Columbia and was not under appeal. But according to McLachlin C.J.C. in *Chamberlain*, *ibid.* at para. 45: "[this resolution] provides the context of what occurred later."

88 *Chamberlain v. School District 36 (Surrey)* (1998), 168 D.L.R. (4th) 222 (B.C.S.C.) [*Chamberlain* (S.C.)].

89 *School Act*, R.S.B.C. 1996, c. 412, s. 76. The Act also stated that "[t]he highest morality must be inculcated, but no religious dogma or creed is to be taught in a school."

90 *Chamberlain* (S.C.), *supra* note 88 at 244.

91 *Ibid.*

92 *Ibid.*

The B.C. Court of Appeal overturned the lower Court's judgment and reinstated the Board's resolution. The Court of Appeal did not accept that the provision of the *School Act*, which required schools to operate in accordance with secular or non-sectarian principles, precluded reliance on religious values in the governance and operation of the public schools. In the Court's opinion, "[m]oral positions must be accorded equal access to the public square without regard to religious influence. A religiously informed conscience should not be accorded any privilege, but neither should it be placed under a disability."[93] According to the Court of Appeal, the secularism requirement "precludes any religious establishment or indoctrination associated with any particular religion in the public schools but [does not] make religious unbelief a condition of participation in the setting of the moral agenda."[94] The Court later suggests that the Board could base its decision on religious concerns only if those concerns can be understood in non-religious terms: "[Public] morality, while it may originate in religious reflection, must stand independently of its origins to maintain the allegiance of the whole society including the plurality of religious adherents and those who are not religious."[95] And so it may be that the Court of Appeal's disagreement with the lower Court is not so deep as first appears. The difference may be simply that the appeal Court accepted that the Board's decision was not based on religious grounds or did not have to be seen as based

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93 *Chamberlain v. School Board District 36 (Surrey)* (2000), 80 B.C.L.R. (3d) 181 (C.A.) [*Chamberlain* (C.A.)]. See also para. 40: "Positions on moral issues should not be differentiated on the basis of their source in a religious or non-religious conscience. The public schools must teach in accordance with the highest morality and the fundamental principles of a truly free society are attributes of the highest morality. That highest morality includes non-discrimination on grounds of sexual orientation. The public schools must positively espouse that moral position and they cannot teach a morality that is inconsistent with it."

94 *Ibid.* at para. 31. It is possible that the Court of Appeal is advocating a position similar to one described earlier in this paper: that it is acceptable to base public policy on religious grounds so long as the policy is concerned with human or secular affairs and does not involve the imposition of specifically spiritual practices. The question becomes then whether it is possible to defend opposition to homosexuality other than on spiritual grounds — other than on the ground that it is disrespectful to God.

95 *Ibid.* at para. 35; see also at para. 33: "In my opinion, 'strictly secular' in the *School Act* can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the position flows out of a conscience that is religiously informed or not. The meaning of strictly secular is thus pluralist or inclusive in the widest sense." This interpretation accords with *Big M*, *supra* note 67, where the fatal flaw in the *Lord's Day Act* was its link to exclusively Christian doctrine rather than morality. It also accords with the distinction between morality and dogma or creed in s. 76(2).

on such grounds. In the appeal Court's view, the Board acted as it did in order to avoid conflict within the local community and to respect the rights of parents to oversee the moral upbringing of their children. In contrast, the lower Court judge viewed the Board's decision, as at root religious, as resting on the religious objections of some Board members and parents to homosexuality.

The primary issue for the Court of Appeal was whether the Board had discriminated against gays and lesbians when it refused to include certain books on the approved list. The Court held that the Board's decision was not discriminatory. It accepted that the Board had refused to approve these books because they were controversial and because they "emphasize[d] one form of alternative family, that involving same-sex parents, over others equally capable of conveying the same general message to the students."[96] Yet this seems like an odd reading of the situation. The Board had refused to include, on the approved list for younger grades, books that depicted same-sex parents in a positive light, even though the existing list includes many books that positively depict opposite-sex parents. This looks like a clear instance of sexual orientation discrimination. Despite the Court's insistence to the contrary, the religious character of the Board's objection (or parents' objections) to the use of these books in the primary grades seemed to contribute to its judgment that the resolutions were reasonable and not discriminatory.

A majority of the Supreme Court of Canada, in a judgment written by McLachlin C.J.C., holds that the school board "acted outside the mandate of the *School Act* ... and [its] own regulation for approval of supplementary material" when it refused to include the books on the list of approved teaching resources.[97] Having reached this conclusion, it was unnecessary for the majority to consider the appellant's second argument that the resolution was contrary to the *Charter*. A concurring judgment was written by LeBel J. and a dissenting judgment was written by Gonthier J., who wrote on behalf of himself and Bastarache J.

Chief Justice McLachlin agrees with the Court of Appeal that religious considerations or concerns cannot be excluded from public decision-making, and more particularly in this case, from the school board's deliberations concerning the curriculum. In her view:

> The Act's insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and

96 *Ibid.* at para. 56.

97 *Chamberlain* (S.C.C.), *supra* note 2 at para. 2.

> indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the boardroom door.[98]

What the "secularism" requirement means, says McLachlin C.J.C., is that "the Board must conduct its deliberations on all matters, including approval of supplementary resources, in a manner that respects the views of all members of the school community."[99] The Board cannot "prefer the religious views of some people in its district to the views of other segments of the community" and it cannot "appeal to views that deny the equal validity of the lawful lifestyles of some in the school community."[100] According to McLachlin C.J.C., the Board has an obligation to foster "tolerance and respect" and to avoid being "dominated by one religious or moral point of view."[101] While the Board "is free to address the religious concerns of parents," it must to do so in a manner "that gives equal recognition and respect to other members of the community."[102] It cannot "use the religious views of one part of the community to exclude from consideration the values of other members of the community."[103] According to McLachlin C.J.C., this approach "ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others."[104] Chief Justice McLachlin finds that the Board in this case had "failed to proceed as required by the secular mandate of the *School Act* by letting the religious views of a certain part of the community trump the need to show equal respect for the values of other members of the community."[105]

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98 *Ibid.* at para.19.

99 *Ibid.* at para. 25.

100 *Ibid.*

101 *Ibid.* at para. 28.

102 *Ibid.* at para. 19. McLachlin C.J.C. continues: This means that "[r]eligious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group."

103 *Ibid.*

104 *Ibid.* at para. 19. The Board was required to "conduct its deliberations on all matters, including the approval of supplementary resources, in a manner that respects the views of all members of the school community" — "that respect[s] a diversity of views" (*ibid.* at para. 28).

105 *Ibid.* at para. 71. It was not acceptable, in a secular school system, to "exclude certain lawful family models simply on the ground that one group of parents finds them morally questionable" (*ibid.* at para 20).

The Board's main argument in support of its refusal to approve the three books was that their use in the classroom "might teach values to children divergent to those taught at home, confusing the children with inconsistent values."[106] A related concern expressed by the Board was that children at the kindergarten level did not yet have "the ability to resolve divergent moral lessons."[107] Chief Justice McLachlin notes that the "cognitive dissonance" argument is based simply on the moral and religious objections of some parents and board members to same-sex relationships. The view of certain parents that homosexuality is immoral is being used to exclude other views about same-sex relationships from the curriculum. According to McLachlin C.J.C., the argument that children should not be exposed to information and ideas with which their parents disagree, "stands in tension with the curriculum's objective of promoting an understanding of all types of families."[108] While McLachlin C.J.C. acknowledges that parental views are important, she holds that they "cannot override the imperative placed on British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference."[109] In acting on the concerns of some parents about the morality of same-sex relationships, the Board failed to take seriously the right of same-sex parents and their children to be equally respected within the public school system.

A. Tolerance of Gay and Lesbian Families

While McLachlin C.J.C. insists that the commitment in the *School Act* to secular education does not preclude the board from relying on religious considerations when making curriculum and other policy decisions, she also says that public support for one moral view over another, or for a moral view that denies the worth or value of another group or perspective, is contrary to the secularism requirement. She recognizes that religious values cannot be wholly

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106 *Ibid.* at para. 52.

107 *Ibid.* at para. 53. As described by McLachlin C.J.C.: "The reasons advanced for [the Board's] position were: that the material was not necessary to achieve the required learning outcomes; that the books were controversial; that objecting parents' views must be respected; that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents; and, that children of this age were too young to learn about same-sex parented families."

108 *Ibid.* at para. 64. McLachlin C.J.C. continues: "The curriculum requires that all children be made aware of the array of family models that exist in our society, and that all be able to discuss their particular family model in the classroom."

109 *Ibid.* at para. 33.

excluded from public life, and in particular from the public schools. Yet, at the same time, she is uncomfortable with the imposition of religious/moral values, which she sees as inconsistent with the inclusive or pluralistic character of the public schools. In setting the curriculum, the Board must act in a way that respects all individuals and perspectives: "[The secularism requirement] simply signals the need for educational decisions and policies, whatever their motivation, to respect the multiplicity of religious and moral views that are held by families in the school community."[110] The Chief Justice might have argued that homosexuality is not simply a contestable viewpoint or a chosen behaviour but is instead an aspect of individual identity and that the schools should neither embrace nor tolerate views that the deny the equal worth of that identity. But that is not the position she takes. Instead she argues that the schools should not favour one moral perspective over another in their teaching but should instead remain neutral on moral/religious issues.[111] Yet this would mean that religion has a role in public life only when it has no bite, only if it does not involve the repudiation of other values or viewpoints.[112]

It is difficult to see how a school board could set a curriculum without committing itself to a particular moral view or set of values. The schools should not, and cannot, be value neutral. They are expected to support or affirm a range of values such as racial equality, religious tolerance and democratic participation.[113] Even widely-held values cannot be affirmed in the schools

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[110] *Ibid*. at para. 59.

[111] The School Superintendent, who provided advice to the School Board on this issue, thought that the books should not be included because of "the contentious and sensitive nature of the topic" (*ibid*. at para. 47). His neutral or non-partisan response was to avoid conflict. Of course this "neutrality" is just an affirmation of the status quo, and as such clearly favours one view or value over another. This approach is less controversial only because preserving the status quo is seen as less conflictual. This fits with the Court of Appeal description of Mr. Chamberlain, the teacher who asked that the books be included on the teaching resource list, as confrontational and, by implication, unreasonable (*Chamberlain* (C.A.), *supra* note 93).

[112] McLachlin C.J.C. suggests that neutrality/pluralism in the schools applies not simply to religious beliefs, but also to non-religious moral beliefs. Yet it may be that the neutralization/exclusion of contentious values or views is directed primarily at religious values or practices. Certainly religious beliefs/values are often seen as a significant threat to pluralism/secularism and a questionable basis for public action.

[113] It is one thing to value or respect "all cultures and family backgrounds" as McLachlin C.J.C. proposes. Religion, however, is not simply a set of cultural practices. *Chamberlain* (S.C.C.), *supra* note 2 at para. 23. Religious adherence involves a commitment to a set of values, about right and wrong, good and evil, truth and falsehood. The schools can show equal

without compromising the moral pluralism or value diversity that McLachlin C.J.C. advocates. No matter how general or widely-held a value may be, there will always be some in the community who are opposed to it on religious or other grounds. The affirmation of any value or set of values must always involve the exclusion or rejection of other values, perspectives, or commitments in the community. Racial equality, for example, is no longer debatable in the schools. It is affirmed as a central community value, even though there still are community members who hold racist views.

Chief Justice McLachlin does not argue that the sexual orientation issue should be excluded entirely from the schools. Instead she believes that the equal value of same-sex relationships should be included in the curriculum without excluding or negating other values and views on the issue. And in this case she seems to believe that the use of "the three books" in the primary grades would not mean the exclusion or contradiction of anti-gay/lesbian views. The schools should seek to include, or at least respect, the full range of community views and values within the curriculum. Yet how can the schools respect or value equally both the view that homosexuality is sinful and the view that same-sex relationships are just as valuable and deserving of respect as other intimate or parenting relationships? While McLachlin C.J.C. thinks that support for anti-gay/lesbian views excludes, or interferes with, the views of gays and lesbians or other community members who are committed to sexual orientation equality (and therefore is not an acceptable basis for action by the school board), she does not seem to recognize that, by the same token, support for sexual orientation equality might exclude, or interfere with, the religious views of other community members.

According to McLachlin C.J.C. the *School Act* requires tolerance:

> [T]he demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we don't ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children

respect for the different religious/moral values in the community only by declining to teach or affirm any values.

> cannot learn this unless they are exposed to views that differ from those they are taught at home.[114]

Tolerance requires only that we respect the right of each individual to make her or his own judgments — that we respect her or his autonomy in matters such as the formation of intimate relations. It does not require that public actors, such as the schools, affirm a particular value or viewpoint.[115] More specifically, it does not require that the schools teach or affirm that same-sex relationships are as valuable as opposite-sex relationships.

But it is not clear that tolerance is all that the majority is demanding of the school board in this case. Despite her frequent references to tolerance and neutrality, McLachlin C.J.C. often says that the schools should respect same-sex parent families as equally valuable and should not simply remain "agnostic" or neutral on the question of whether same-sex relationships are good or moral. Certainly the constitutional commitment to sexual orientation equality would seem to involve more than tolerance by the state towards same-sex relationships. While the term "equal respect" is ambiguous and could refer to respect for autonomous judgment (in intimate matters) or to respect for the actual judgments that the individual makes (the kind of relationship she or he has decided to enter into),[116] the majority decision, requiring the board to extend "equal recognition and respect" to same-sex parented families, appears to rest on the *equal value* of such families and so may be understood as repudiating the religious view that homosexuality is sinful.[117]

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[114] *Ibid.* at para. 66. McLachlin C.J.C. also says, at para. 69: "it is hard to see how the materials will raise questions which would not in any event be raised by the acknowledged existence of same-sex parented families in the K-1 parent population, or in the broader world in which these children live."

[115] Of course tolerance is itself a value, and is not morally neutral. It requires that we respect the liberty of individuals or groups to make their own judgements about what to value and how to live.

[116] The ambiguity can be seen in the following quotation from the majority judgment of McLachlin C.J.C. in *Chamberlain* (S.C.C.), *supra* note 2 at para. 39, when she indicates that the students must learn to deal with diverse views but also to "accept" and "respect" them: "[I]t provides students with the skills and abilities to effectively deal with a wide range of diversity and to accept and value other cultures, races, genders, orientation, and points of view." The Court tries to straddle these views when it talks about "respectful tolerance" (*ibid.* at para. 68).

[117] *Ibid.* at para. 58.

Chief Justice McLachlin sometimes seems to say that the use of the three books in the kindergarten classes would not establish or affirm the equal value of same-sex relationships. These books would simply "expose" children to other perspectives or ways of life.[118] But at the kindergarten level, there is no way to introduce the value of gay and lesbian relationships as simply one view or value among others. Including these stories in the kindergarten curriculum will normalize same-sex relationships and, in effect, affirm their value. Despite what McLachlin C.J.C. says, these books will not encourage "discussion and understanding of all family groups," except in the most limited sense.[119] The dissenting judgment of Gonthier J. makes this point and argues that the "issue" of same-sex relationships should be left to the upper grades, where it can be presented as a legitimate but debatable perspective.

B. Individualized Affirmation

Sometimes McLachlin C.J.C. writes as if inclusion of these stories is not intended to affirm the value of same-sex parent families to the larger community of students, some of whose parents are strongly opposed to same-sex relationships, but is simply to provide affirmation or validation to the children of such families. She stresses the importance of providing "a nurturing and validating learning experience for all children, regardless of the types of families they come from."[120] Chief Justice McLachlin believes that the school board should seek to affirm the personal circumstances of students from non-traditional families without imposing any views or values upon other students in the school community. In her view, the Board breached its duty to approach "the needs of each [of the diverse communities within the school district] with respect and tolerance."[121] The Board gave no consideration "to the needs of children of same-sex parented families and instead based its decision on the views of a

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[118] McLachlin C.J.C., *ibid.* at para. 61, states: "children should be made aware of the diversity of family models that exist in our society."

[119] *Ibid.* at para. 72. McLachlin C.J.C., *ibid.* at para. 23, quoting La Forest J. in *Ross*, *supra* note 48 at para. 42, states: "The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate." This seems to assume that all students are capable of reflection and debate about values. But it also highlights the tension between those values or principles that underpin discussion in the schools (such as equal respect for others) and therefore are not themselves debatable, and those values or issues that are open to discussion and disagreement. We now accept that, in the public schools, racial equality is not a position or perspective that is open to challenge.

[120] *Ibid.* at para. 49.

[121] *Ibid.* at para. 60.

particular group who were opposed to any depiction of same-sex relationships in K-1 school materials."[122]

Yet it is not clear that affirmation can be segregated in this way, either practically or normatively. If the three books are used as teaching resources, then every student in the class will be exposed to them, regardless of her or his family situation or perspective. Chief Justice McLachlin recognizes this but is not troubled by it:

> The number of different family models in the community means that some children will inevitably come from families of which certain parents disapprove. Giving these children an opportunity to discuss their family models may expose other children to some cognitive dissonance. But such dissonance is neither avoidable or noxious. Children encounter it every day in the public school system as members of a diverse student body. They see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parents religious strictures or because of other moral beliefs. They see their classmates wearing clothes with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply part of living in a diverse society. It is also part of growing up. Through such experiences, children come to realize that not all their values are shared by others.[123]

Once again the Court's answer to concerns about "cognitive dissonance" is that the books will do no more than expose students to other perspectives or ways of life.[124] But the use of these books in the classroom is not the same as students simply discovering that some of their classmates have same sex-parents. The books are being used by teachers, and, as the court recognizes in both *Ross* and *TWU*, teachers are authority figures and role models.[125]

More importantly, affirmation is not an individualized process. It is not very affirming to a child from a same-sex parent family, if the teacher says to her or his class that same-sex parent families are fine for those who happen to be in them, but may not be fine for anyone else or if a teacher informs the class that, while some in the community feel this is an acceptable or valuable form of family, others regard it as immoral and that both views are entitled to respect. If what children need is affirmation of the equal value of their family arrangement

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[122] *Ibid.*

[123] *Ibid.* at para. 65.

[124] *Ibid.* at para. 69: "Tolerance is always age-appropriate."

[125] Recall that the learning environment may be poisoned by a teacher who makes racist statements outside the classroom). See *Ross*, *supra* note 48.

then the school must do more than indicate that there are such families and that this may or may not be a good thing. Acceptance or validation cannot be so discrete. We have increasingly come to recognize that our sense of self, of our worth and value, is tied up with the recognition we receive from others. To be meaningful, the acceptance or affirmation of same-sex relationships must involve a public statement or indication that such relationships are normal and equally valuable. If, as a community, we are committed to sexual orientation equality, then we should expect nothing less than this within the public schools.

C. Values in the Schools

If certain community values form part of the school curriculum for kindergarten students, then other values will not be included and some will even be repudiated. If McLachlin C.J.C. is right that sexual orientation equality is a central community value (reflecting the moral/religious views of many in the community), then it should be affirmed in the schools, even in the face of religiously-based opposition from some parents.

Chief Justice McLachlin says that "[r]eligion is an integral aspect of people's lives, and cannot be left at the boardroom door."[126] But elsewhere in her judgment she is ambiguous about the place of religion in public debate and decision-making. She wants to find a place for religion in the public life of the community but avoid religious imposition and the unequal treatment of different religious belief systems by the state. As argued earlier, religious values are bound to play a role in public decision-making, including decisions about the school curriculum. But if school boards make decisions that reflect or support a particular set of values, then they must also reject other values — values that may be part of the religious commitment of some community members. Parents may have to live with the democratic consequence that their values have not been included in the civic curriculum and perhaps even that their children are taught or exposed to views to which they are opposed.[127] A public institution, such as a school, will have a particular character or mission and those who work within the institution must support its values and goals even though these may be incompatible with their personal values and priorities. Teachers, and other individuals performing public roles, may sometimes have to leave their personal values at the doorstep of the school, or other public institution, not because their

[126] *Chamberlain* (S.C.C.), *supra* note 2 at para. 19.

[127] McLachlin C.J.C., *ibid.* at para. 33, states: "Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference."

values are religious, but simply because the values they hold (for religious or other reasons) are inconsistent with the mission of the institution as defined by the school board or other public decision-maker. It may even be, as argued above, that an individual, who is opposed to the values of the civic curriculum, cannot effectively perform the role of teacher.

Justice Gonthier in his dissenting judgment suggests that parental rights rest on a recognition that parents are in the best position to judge what is in the interests of their children. But parents have profoundly different views about religious truth/values. We respect the right of parents to make these decisions for their children, not because they will always make the best or right decision (and it must be better to teach one' s children true rather than false beliefs) or even because they are more likely to be right than the general community, but because we believe that the family is central to social organization and stability. Parents are permitted to take their children out of the public school system if they are uncomfortable with its values (although there is still state regulation of home schooling and private schools). This freedom, however, is not based on some form of moral relativism. It reflects a limited judgment that the family is the best context for the raising of children. A school board may decide for the same reason to delay students' "exposure" to same-sex relationships in the classroom until they are older. Yet once again, if we are truly committed to sexual orientation equality, there is a powerful argument that the equal value of same-sex relationships should be affirmed in the schools at the earliest stage.

Schools should not be neutral on issues of basic value. Their mission must include the transmission of core values such as equality. We simply cannot include (or exclude) all values from the public schools. If, as a political community, we decide that we are committed to sexual orientation equality then this value should be affirmed in the schools. There may be some debate about the best way to do this, and about how to respond to the dissonance younger students may experience when they are taught one thing at school and another at home.

The teaching/affirmation of sexual orientation equality does not interfere with religious freedom. Freedom of religion does not require value neutrality in the public sphere. Religious and other values must be part of public discourse and decision-making. The consequence of this "inclusion" is that the religious and non-religious views/values of some will prevail over those of others in the democratic process. As a political community, we may be reluctant to say that some religious views are wrong, including the view that homosexuality is immoral, because we do not want to be seen as affirming or denying the value or truth of particular religions. But if we are committed to certain values we must

sometimes be prepared to repudiate other views (most obviously those views that deny the equal worth of others) while respecting the liberty of individuals to hold, express, and live their private lives according to, those views.

IV. CONCLUSION

When confronted with the competing claims of sexual orientation equality and religious freedom or inclusion in the public schools, the Supreme Court of Canada, in *TWU* and *Chamberlain*, is unwilling to give "priority" to one right over the other. Instead the Court tries to square the circle, holding that the schools must protect or affirm sexual orientation equality, but also respect religious pluralism and avoid any judgments about the truth or value of different belief systems, including those that regard homosexuality as sinful.

The Court describes the public schools as neutral or "secular," as a place where the different religious/moral views in the community are respected. Yet at the same time, the Court confirms that sexual orientation equality is a fundamental right that should be protected, even affirmed, in the public schools. The Court blurs the tension between these two positions — support for sexual orientation equality and neutrality on issues of religion or fundamental value — by describing sexual orientation equality and religious inclusion in vague or fluid terms. Sometimes the Court seems to say that equal respect for gay and lesbian relationships is a value that should be affirmed in the public schools. At other times, however, the Court seems to take a narrow view of the right, arguing that sexual orientation equality protects individual autonomy in intimate matters, precluding explicit acts of discrimination against gays and lesbians without requiring support for, or affirmation of, same-sex relationships.

Similarly the Court remains ambiguous about what it means for public institutions, such as the schools, to include (or be neutral towards) different religious communities. The Court seems to accept that religious values and concerns must play a role — must be "included" — in public decision-making. Yet at the same time, the Court holds that a public decision-maker, such as the school board, should not rely on the values and practices of a particular faith (or other world view) to exclude or negate the values and practices of others. The Court's desire to ensure that the adherents of minority belief systems are fully "included" in the public school system — the inclusion of individuals — seems to require the exclusion of religious values. Religious values are treated as private or personal and an unacceptable basis for public action.

It is unrealistic to expect the individual to leave her or his religious beliefs or values behind when she or he enters public life. If religious values are part of

public debate and decision-making, then the values of some individuals will lose out — for example, will not be included in the curriculum. If we believe that this is consistent with religious pluralism then we may have less sympathy for the demands of a parent, based on religious belief, that his or her children not be exposed to any affirmation of the value of same-sex relationships, or for the claim of an individual, who is opposed to the conception of human dignity or equality that informs the civic curriculum, to work as a teacher, or for the claim to accreditation of a teacher training program that affirms anti-gay/lesbian views.

Uncertainty about the role of religion in public life is not peculiar to these cases. It runs through contemporary religious freedom doctrine. While the courts wish to minimize direct religious conflict and confrontation in public life, they also recognize that religious commitment has implications for how adherents should live their lives in the larger community and for the kind of society they should work to create. The courts believe that the state should remain neutral on the issue of what is the true faith — that it should not prefer one religion over another. Yet, at the same time, they recognize that the state must organize public life according to certain values. The community must through democratic means choose or prefer some values or principles over others. The courts seek to separate public debate and decision-making about social organization from personal decision-making about religious truth by requiring that the former be framed in non-religious terms that focus on human affairs rather than large questions of spiritual truth. In practice, however, this is a difficult and unclear distinction. At root public decision-making is concerned with issues of fundamental value. The courts will draw difficult and unstable lines as they try to avoid public judgments about religious truth, while organizing collective life according to basic values or principles. In the end, though, they may only be able to blunt the conflict between belief systems (religious and secular) by trying to accommodate minority belief systems within the dominant culture, by attempting to create space for minority religious communities and by seeking common languages and concerns.