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Charter Rights Application Doctrine and the Clash of Constitutionalisms in Canada

by

Thomas Michael Joseph Bateman

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Doctor of Philosophy

Department of Political Science

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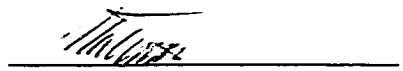

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled *Charter Rights Application Doctrine and the Clash of Constitutionalisms in Canada* submitted by Thomas Michael Joseph Bateman in partial fulfillment of the requirements for the degree of Ph.D.

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Abstract

The argument of this dissertation is that the Supreme Court of Canada's interpretation of the application provisions of the Canadian Charter of Rights and Freedoms can be explained in terms of a clash of constitutionalisms.

The application provisions of the Charter indicate what persons, entities and activities are bound by the terms of the Charter. Liberal constitutionalists argue that charters of rights are intended to limit governments. Charters of rights define those things governments are to refrain from doing. Significant regions of human activity are left untouched by the application of constitutional standards. The traditional distinction between public and private realms is preserved.

Postliberal constitutionalists take issue with what they see as an artificial and incoherent public/private distinction lying beneath liberal constitutionalist premises. While they uphold several liberal constitutionalist principles like the rule of law and judicial review, they do not wish to confine judicial review or constitutional standards of conduct to the state and to state action as they are conventionally understood. So called "private" relations and spheres of life – activities and institutions in civil society – should conform to constitutional norms.

An assessment of the Supreme Court of Canada's Charter application jurisprudence reveals uncertainty and division. The Court has oscillated between a liberal and a postliberal application doctrine. Increasingly, the Court has been willing to infuse the development of the common law with "Charter values." After initially appearing hopelessly divided on the

meaning of "government" for purposes of Charter application, the Court soon arrived at a consensus which defines government broadly. Furthermore, the Court has seemed to adopt a postliberal conception of the nature of the state. In a line of cases involving the equality rights provision of the Charter, the Supreme Court has established that governments can be held accountable for the underinclusive provision of state benefits; state inaction can be as reviewable as positive state action.

If there is a trend to be discerned, it is that postliberal application doctrine has gained in prominence since 1986. But liberal constitutionalist principles appear in various guises in the cases. The clash of constitutionalisms is clearly evident in Charter application jurisprudence.

Acknowledgements

This dissertation emanates from a long interest in constitutional law and politics and civil liberties kindled when I was an undergraduate at the University of Calgary and taking courses with Professor Rainer Knopff and Professor Ted Morton.

Many professors at the University of Alberta, friends, and colleagues have helped me in one way or another with this project. Chief among them is my supervisor, Professor Ian Urquhart, who gave direct, concise, and wise advice throughout. Thanks go to all.

But my greatest thanks go to my wife and our children. Jill has been patient and understanding from the day we decided that I should pursue a Ph.D. No one could be more supportive. Thomas, Susannah, and Elizabeth inspired me in their inimitable ways. I dedicate this dissertation to my family.

Table of Contents

Chapter 1

Introduction

The central argument of this dissertation is that the Supreme Court of Canada's interpretation of the application provisions of the Canadian Charter of Rights and freedoms betrays a fundamental confusion about what a constitution is and what a constitution is for. More specifically, the Court oscillates between two constitutionalisms. One is the more traditional, liberal understanding of the nature and purposes of charters of rights, whose implication for Charter application is that the provisions of the Charter bind governments and their agents. The other is a postliberal constitutionalism of more recent vintage which calls for the application of Charter norms expansively, beyond government as such and to entities and actors in civil society not traditionally understood to be bound by provisions of written bills of rights. Postliberal constitutionalism applies constitutional norms to the "private" realm. The Court began early in the life of the Charter with a traditional approach to Charter application but soon strained, for a variety of reasons, to apply the Charter more broadly. What has developed is a complicated and at times contradictory body of case law, suggesting that the Court is in a quandary about the fundamental constitutional principles guiding the interpretation of the application provisions of the Charter. While some criticisms of the older, liberal constitutionalism have merit, it is far from clear that the newer, more expansive constitutionalism is coherent and constructive.

Charters or bills of rights have traditionally been understood to recognize rights and freedoms of citizens and other persons and groups and accordingly to impose duties on governments to respect those rights. In this way, a charter of rights limits governmental power. Political scientists have devoted a great deal of attention to the place of bills of rights in countries' larger constitutional frameworks and have also paid close attention to the interpretation and impact of substantive provisions of the those documents. They have paid

much less attention, however, to a critical "threshold" issue: what persons and bodies exactly are to be bound by the terms of the constitutional charter? After a moment's thought, it becomes clear that to answer, "government", is to beg a number of questions about the definition and extent of government for purposes of charter application. More profoundly, what is the basis for binding only government by the terms of a charter? What if a constitutional charter is considered not to be a set of limits but rather a set of norms society-wide in relevance and application? To what extent is "the personal the constitutional"?

Why is Charter application doctrine employed in the analysis of the clash of constitutionalisms in the Charter era? Why not choose some other areas of Charter jurisprudence as a device to discern the clash of constitutionalisms? First, Charter application has been little studied, especially by political scientists. A considerable gap in the political science literature on this area of Charter law begs to be filled. Second, though it has largely eluded scholarly attention, Charter application doctrine is nonetheless a significant area of constitutional law and politics, and has great implications for many questions of interest to political scientists. The application provisions as threshold, gatekeeping standards govern the activities and persons receiving Charter scrutiny. Accordingly, any consideration of the scope of Charter rights is incomplete if it does not consider the scope of Charter application.[1] Courts are able to extend their institutional reach and influence not merely by interpreting rights broadly,[2] and by altering procedural matters relating to standing and mootness; they can achieve the same objective by expanding the number and types of persons, activities, and entities subject to those substantive Charter provisions. Charter application doctrine reveals clues about judicial activism and the policy power of courts. While, for example, rates of judicial nullification of statutes, regulations, and instances of state official conduct have

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[1] Excellent studies have been done on other aspects of the scope of judicial review with respect to principles of justiciability. See Sossin's study of the political questions doctrine, ripeness, mootness and standing. Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999).

[2] Not to mention deciding constitutional questions in cases when resort to constitutional issues is not strictly necessary to decide the case, something that the Supreme Court has frequently done.

customarily been used to measure judicial activism, Charter application doctrine adds a second crucial dimension to the matter: courts may be activist not only in what they strike down, but also in what they subject to Charter scrutiny in the first place, regardless of the particular outcome of a dispute before them. As Manfredi notes, "Judicial deference to government policy in specific cases should not be confused with judicial restraint in exercising the political power of judicial review."[3] Whatever the courts decided in specific cases, Charter application doctrine allows the courts to subject more or fewer cases to judicial review. Expansive Charter application doctrine adds up to enhanced judicial power, whatever the courts' activism.

Third, Charter application doctrine offers a window on more basic questions about constitutionalism. It is true that constitutionalist underpinnings can be examined with reference to the jurisprudence built up in other areas of Charter law, for example, equality rights, free speech and expression, freedom of association, and the right to privacy. And indeed, reference will be made throughout to some of these areas of constitutional law. But Charter application doctrine is no less revealing of background constitutionalist assumptions. As will become apparent, the clashing constitutionalisms each have specific, discrete implications for the interpretation of application provisions of the Charter. Close study of the case law on Charter application can reveal much about deeper controversies.

Political scientists in Canada are deeply familiar with the study of the constitution. Indeed, as Canadians' (relatively) intense scrutiny of the 1992 Charlottetown Accord suggests, the study of things constitutional has been at times a popular fixation. A large literature exists on the study of Canadian federalism and particularly the practice of judicial review under the federalism provisions of the Constitution Act, 1867.[4] They are also familiar

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[3] Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland and Stewart, 1993), 38. See also ibid., 212.

[4] See, for example, J.R. Mallory *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954); F.R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977); Alan C. Cairns, "The Judicial Committee and its Critics" *Canadian Journal of Political*

with the tradition of mega-constitutional politics especially in the last forty years in which large questions of federalism, constitutional amendment, the distribution of powers, centralization and decentralization, matching policy with fiscal powers, recognition of distinct status of certain provinces, the redesign of central institutions of Parliament, and the manipulation of national political symbols were rehearsed with mind-numbing frequency.[5] It was in the course of ruminating about a reconfigured Confederation that political scientists began to attend to the entrenchment of a charter of rights into the Canadian constitution.[6]

Since 1982, political scientists have taken great interest in the Charter. The Charter

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Science 4 (1971), 301-45; John Saywell and George Vegh, eds., *Making the Law: The Courts and the Constitution* (Toronto: Copp Clark Pitman, 1991); Andre Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review" *Canadian Journal of Political Science* 26 (1993), 3-30.

[5] For a small sample of this literature, see Keith Banting and Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983); David E. Smith et al , eds., *After Meech Lake: Lessons for the Future* (Saskatoon: Fifth House, 1991); Ronald L. Watts and Douglas M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991); Curtis Cook, ed., *Constitutional Predicament: Canada After the Referendum of 1992* (Montreal and Kingston: McGill-Queen's University Press, 1994); and Peter H. Russell, *Constitutional Odyssey: Can Canadians Become A Sovereign People?* (Toronto: University of Toronto Press, 1992).

[6] Pierre Trudeau was historically the most prominent advocate of an entrenched Charter. He thought such a document would foster respect for basic civil liberties ignored and willfully trampled upon by the Duplessis regime in Quebec in the 1940s and 1950s. See his *Federalism and the French Canadians* (Toronto: Macmillan, 1968). Later Trudeau would see an entrenched charter as a nation-building instrument. Groups like the Canadian Bar Association and other political partisans like Tommy Douglas and John Diefenbaker also supported the principle of a charter of rights. For commentary by political scientists, see Alan C. Cairns and Cynthia Williams, "Constitutionalism, Citizenship, and Society in Canada: An Overview" in Alan Cairns and Cynthia Williams, eds. *Constitutionalism, Citizenship, and Society in Canada*, Studies for the Royal Commission on the Economic Union and Development prospects for Canada, vol 33 (Toronto: University of Toronto Press, 1985), 1-50; Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms" in ibid., 133-182; Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" *Canadian Bar Review* 61 (1983), 30-54.

provoked for many a consideration of Canada's place in relation to the American and British political and constitutional systems, a comparative preoccupation of long standing.[7] Others inquired more generally into the changes the Charter was working in Canadian political culture.[8] For others, the Charter represented an occasion for systematic attention to the courts as political institutions and contributors to the policy process. This has led to questions about the nature of the courts' policy influence and output as well as the relationship between the judiciary and the other branches of government.[9] More generally, scholars assembled studies

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[7] See William McKercher, ed., *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Ontario Economic Council, 1983); Christine Sypnowich, "Rights, Community, and the Charter" *British Journal of Canadian Studies* 6 (1991), 39-59.

[8] See David Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness" *Canadian Journal of Political Science* 22 (1989), 699-716; Philip Bryden, et al, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994); Alan C. Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake* Douglas E. Williams, ed. (Toronto: McClelland and Stewart, 1991); Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen's University Press, 1992); Neil Nevitte and Ian Brodie, "Evaluating the Citizens' Constitution Theory" *Canadian Journal of Political Science* 26 (1993), 235-60; Paul M. Sniderman, et al, *The Clash of Rights: Liberty. Equality, and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1996).

[9] See Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of the Canadian Courts" *Canadian Public Administration* 25 (1982),1-33; Ivan Bernier and Andre Lajoie, eds., *The Supreme Court of Canada as an Instrument of Political Change* Studies for the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 47 (Toronto: University of Toronto Press, 1985); Claire Beckton and A. Wayne MacKay eds., *The Courts and the Charter* Studies for the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 58 (Toronto: University of Toronto Press, 1985); Andrew Heard, "Quebec Courts and the Canadian Charter of Rights" *International Journal of Canadian Studies* 5-6 (1993), 153-66; F.L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms" *Canadian Journal of Political Science* 20 (1987), 31-55; Christopher P. Manfredi, "Adjudication, Policy-Making and the Supreme Court of Canada: Lessons From the Experience of the United States" *Canadian Journal of Political Science* 22 (1989), 313-35; Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough; Nelson Canada, 1992); W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and*

examining the courts' development of jurisprudence in specific areas of Charter interpretation.[10]

Naturally, as the courts have acquired policy-making power in the Charter era, political scientists have begun to look closely at institutional issues like judicial appointment and discipline, judicial independence, and internal decision making processes within courts.[11] Specific studies of the role of the Charter in areas of public policy sprouted and scholars began to ask what this or that particular group or cause gained or lost in Charter litigation.[12] Thus sustained attention is increasingly paid to the relationship between the Charter and

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Political life of Canada (Toronto: Oxford University Press, 1994); Rainer Knopff and F.L.Morton, "Canada's Court Party" in Anthony A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Toronto: Oxford University Press, 1996), 63-87; Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms" *Canadian Journal of Political Science* 30 (1997), 645-62; Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998).

[10] Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal and Kingston: McGill-Queen's University Press, 1996); Manfredi, *Judicial Power and the Charter*; Ian Greene, *The Charter of Rights* (Toronto: Lorimer, 1989); Christopher P. Manfredi, "'Appropriate and Just in the Circumstances': Public Policy and the Enforcement of Rights under the Canadian Charter of Rights and Freedoms" *Canadian Journal of Political Science* 27 (1994), 435-464.

[11] Christopher P. Manfredi, "The Use of United States Decisions by the Supreme Court of Canada Under the Charter of Rights and Freedoms" *Canadian Journal of Political Science* 23 (1990), 499-518; Peter McCormick and Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: Lorimer: 1990); Peter McCormick, *Canada's Courts* (Toronto: Lorimer, 1994); and Greene et al, *Final Appeal.*

[12] See for example Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989); Janine Brodie et al, *The Politics of Abortion* (Toronto: Oxford University Press, 1992); Ian Gentles ed., *A Time to Choose Life: Women, Abortion, and human Rights* (Toronto: Stoddart, 1990); Sherene Rozack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991); Peter McCormick, "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949-1992" *Canadian Journal of Political Science* 26 (1993), 523-540.

broader political and ideological currents.[13] Increasingly, studies appear on the ideological and doctrinal proclivities of particular judges, especially those on the Supreme Court of Canada.[14] When the number of Supreme Court decisions reached three digits, quantitative studies were published, setting out in aggregate terms the Charter's meaning at the hands of judges.[15] And as Charter entrenchment anniversaries have come and gone, commemorative collections of essays have been published.[16]

The ideological and political uses of the Charter have increasingly been examined, but usually from the narrower perspective of whether a Charter decision or set of decisions favours, for example, feminists or the traditional family, business or labour, hatemongers or cultural minority groups, gays or straights. Political scientists have not generally concerned themselves with questions of constitutionalism undergirding Charter interpretation; on this score legal academics are ahead of the game.[17] Nor have political scientists, as suggested

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[13] Richard Sigurdson, "Left- and Right-wing Charterphobia in Canada: A Critique of the Critics" *International Journal of Canadian Studies* 5-6 (1993), 95-115; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* 2nd edition (Toronto: Thompson Educational Publishing, 1994); Knopff and Morton, *Charter Politics*.

[14] Andrew Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal" *Canadian Journal of Political Science* 24 (1991), 289-307; Robert E. Hawkins and Robert Martin, "Democracy, Judging and Bertha Wilson" *McGill Law Journal* 41 (1995), 1-58.

[15] F.L. Morton Peter J. Russell, and Michael Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" *Osgoode Hall Law Journal* 30 (1992), 1-30.

[16] Gérald-A. Beaudoin, ed., *The Charter: Ten Years Later* (Cowansville: Les Éditions Yvon Blais, 1992); David Schneiderman and Kate Sutherland, eds. *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997).

[17] Rainer Knopff's *Human Rights and Social Technology: The New War on Discrimination* (Ottawa: Carleton University Press, 1989) is an exception. Among legal academics, the critical legal theorists have been most prolific. See for example, Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

above, examined Charter application doctrine in any detail. Political scientists have largely assumed that the Charter is about the binding of governments and that different groups sometimes attempt to use the Charter to achieve public policy goals they are unable or unwilling to achieve in other ways. This dissertation attempts to fill a gap in the political science literature, and in so doing attempts to combine the typical approaches of political scientists and legal academics.[18]

The Charter was born a liberal individual rights document, incorporating a set of traditional liberal individual rights including fundamental freedoms of religion and conscience, speech and expression, association, and assembly. It contains also a prodigious set of legal rights triggered for the most part when a person is engaged by the criminal justice process. The Charter also contained some unique features associated with historical Canadian linguistic and ethnic diversity, the particular political interests of then Prime Minister Pierre Trudeau, and the requirement that provincial consent was required to have the document entrenched into the Canadian constitution. Some of these features are non-traditional individual rights like the right to mobility; collective rights exercised by individuals such as the official language provisions; interpretive provisions recognizing the equality of the sexes and the multicultural heritage of Canadians; an expansive equality rights section which combines a commitment to individual rights against discrimination with limited positive rights to benefits of public policies governments have decided to provide as well as an explicit guarantee that some targeted ameliorative programs are not to be considered discriminatory. In any event, as many have remarked, the Charter was intended as a pan-Canadian statement of fundamental rights

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[18] Political scientists, under the influence of legal realism, typically take an "external' approach to constitutional law, discerning its political effects on society and the political process, examining judicial decision making as political decision making. Legal scholars, though often also influenced by legal realism, typically take an "internal" approach, focusing on reasoning in particular cases and the development of legal doctrine. Neither approach by itself captures the reality I am trying to describe. For further discussion of this distinction and an attempt to combine the internal and external approaches, see Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton: Princeton University Press, 1996). Also, Peter H. Russell, "Overcoming Legal Formalism: The Treatment of the Constitution, the Courts, and Judicial Behaviour in Canadian Political Science" *Canadian Journal of Law and Society* 1 (1986), 5-34.

binding federal and provincial governments and elevating a standard of non-territorial individual rights exercisable by Canadians. Trudeau set for the Charter the task of diminishing the status and policy power of provinces in Confederation by entrenching a set of individual rights operative regardless of place of residence.[19]

Ironically, it was at this time – the early 1980s – that the fundamental presuppositions of such an understanding of charters of rights were being subject to trenchant criticism. Trudeau's vision of the Charter was, at bottom, liberal constitutionalist. Yet liberal constitutionalism was losing favour in the academy. It was criticized for being a parsimonious understanding of rights, for failing to see oppression beyond the halls of government, for failing to see that liberty is a positive ability to act and not merely a negative absence of state coercion, and for taking sides in the ideological battle between liberalism on one side and the progressive forces of socialism, feminism, and postmodernism on the other. Even practitioners, more pragmatic in their thinking, saw – either in the text of the Charter or in the prospects for racking up billable hours in Charter litigation – a need to apply the charter beyond liberal constitutionalist limits. Accordingly, the law journals were filled both with suggestions for how the courts should interpret the Charter generously, and with criticisms of the courts when this advice was ignored. The positive form of this critique, to the extent that it can be considered a unified approach to constitutional principles, is in this dissertation called postliberal constitutionalism.

On the question of Charter application doctrine this is especially true. A healthy debate between liberal and postliberal constitutionalists began soon after 1982. Early judicial treatment of the Charter in general and Charter application in particular suggested a liberal constitutionalist orientation. But by the late 1980s when the Charter caseload became heavier and more complex, the courts' application decisions became muddier, borrowing elements of the postliberal constitutionalist critique. The cases reveal a Court often divided on the

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[19] See Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal and Kingston: McGill-Queen's University Press, 1995), chapter 6; Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997).

disposition of instant disputes and oscillating between restrictive and expansive Charter application. At times, when the *ratio decidendi* of a decision bespeaks a limited application doctrine, the Court's *obiter dicta* – fodder for future arguments by both counsel and courts – suggest a more expansive approach. As it stands, Charter application is unclear and confusing. It is unclear and confusing because the Court is unclear and confusing about the constitutionalism properly undergirding the Charter. Thus the clash of constitutionalisms may also be called a crisis of constitutionalism: a document designed for one constitutional program is caught in the throes of a conflict about the very legitimacy of that program. And it is during crises that former contrivances, understandings, abeyances, and unsettled settlements are laid bare. Superficial readings of Charter case law suggest that the Charter applies only to the public realm, leaving swaths of private conduct unaffected.[20] This is too simplistic a view.

This dissertation does not explore the whole body of Supreme Court case law linked to Charter application. The courts have considered the application of the Charter extra-territorially, to persons, entities, and activities with an international dimension. For example, the courts have considered whether Charter standards are exportable to Canadian agents conducting criminal investigation activities in other jurisdictions; whether evidence collected by other countries' state agents is admissible in Canadian proceedings when such evidence would be considered unconstitutionally gathered if collected in Canada; and whether fugitives can be extradited to countries when the foreign country has penal practices contrary to those considered constitutional in this country.[21] A comprehensive study of extraterritorial Charter application and its implications for sovereignty and international comity remains to be written.

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[20] See for example, Stephen Brooks, *Canadian Democracy: An Introduction* 2nd edition (Toronto: Oxford University Press, 1996), 287.

[21] See *Canada v. Schmidt* [1987] 1 S.C.R. 500; *Argentina v. Mellino* [1987] 1 S.C.R. 536; *United States v. Allard* [1987] 1 S.C.R. 564; *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779; *Reference re Ng Extradition* [1991] 2 S.C.R. 858; *Idziak v. Canada (Minister of Justice)* [1992] 3 S.C.R. 63; *R. v. Harrer* [1995] 3 S.C.R. 562; *R. v. Terry* [1996] 2 S.C.R. 207; *Schreiber v. Canada (Attorney General)* [1998] 1 S.C.R. 841; and *R. v. Cook* [1998] 2 S.C.R. 597.

This dissertation does not assert that competing conceptions of constitutionalism have been driving Supreme Court decision making with respect to Charter application doctrine. For this to be case, Supreme Court justices would have to be shown to have well-developed and frequently articulated theories of constitutionalism which they self-consciously apply to cases coming before them. For a clash of constitutionalisms to exist, one would have to show that each justice holds a certain theory and that the Court consistently breaks down into blocs on application cases. The evidence does not support this thesis. As subsequent chapters will show, justices sometimes change sides on the constitutionalism question, contradicting their earlier decisions. They rarely set out in detail their fundamental constitutionalist assumptions. And the nature of the work on the Supreme Court makes deep reflection on basic intellectual issues almost impossible. Instead this dissertation suggests that the rifts on the Court, the changes in position, the strained logic, and the unanswered questions *can be explained in terms of* a clash of constitutionalist conceptions. This dissertation attempts to make sense of a tangled body of Charter jurisprudence.

Chapter two will set out the two clashing constitutionalisms in contemporary constitutional debate. Liberal constitutionalism informs the traditional understanding of the nature and purposes of charters of rights, assigning them the limited task of restraining government in the extent to which it can act on society and coerce individual persons. Liberal constitutionalism rests on pillars of negative rights, the protection of property, the limited state, formal equality before the law, and the institution of judicial review to check intemperate democratic majorities. Liberal constitutionalism embraces what may be called a double privacy principle: first, the constitution is designed to prevent the state from intruding unduly upon the private realm; and second, the constitution itself is designed to bind only government, leaving a realm of human activity free from the application of constitutional norms and standards. Liberal constitutionalism implies limited charter application. Postliberal constitutionalism shares much with its liberal sibling, including a concern for privacy against the intrusive state. But postliberal constitutionalism looks more favourably upon the contemporary state's egalitarian mission and itself prizes a substantive vision of equality at the core of the constitution. This, combined with a postliberal concept of positive rights and

positive liberty, implies an expansive application doctrine according to which courts enforce constitutional norms beyond the traditional bounds of state action. Whereas liberal constitutionalists plead for a double privacy, postliberals argue in reply that true privacy rights are compatible only with extensive – indeed universal – application of constitutional norms.

Chapter three examines the roots of the Charter as well as the debate about its application provisions. It will emerge that the purposes of the Charter and Charter application doctrine became controversial soon after entrenchment and that much of the debate, with only a little shoe-horning, can be understood in terms of the liberal/postliberal clash of constitutionalisms. One sizable group of commentators sets for the application provisions of the Charter a traditional, liberal constitutionalist future in which the Charter would be applied to government and its agencies, not to the private realm. A bevy of commentators on the other side used a battery of arguments, textual and ideological, to suggest a more expansive route than is countenanced by liberal constitutionalism. A review of this academic commentary is important for a couple of reasons. First, it evidences a constitutionalist ferment in the academic community, that the constitution (and in particular, Charter application theory) rested not on intellectual consensus but on considerable division. Second, protagonists in this debate informed – indeed, attempted to influence[22] – high court thinking about Charter application when key cases came up. Landmark decisions like *McKinney v. University of Guelph*[23] cite the academic debate copiously; dozens of articles and books on the state, discrimination, Charter theory, and application doctrine pepper justices' decisions. Justices possessed themselves of a careful familiarity with the clash of constitutionalisms in the Charter-watcher literature. The constitution, in the current vernacular, has been "problematized."

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[22] "Flooding the law reviews" and "influencing the influencers" is common practice in getting courts to adopt particular positions on constitutional issues. See F.L. Morton, "The Charter Revolution and the Court Party" *Osgoode Hall Law Journal* 30 (1992), 627-41. See also Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago; University of Chicago Press, 1998).

[23] [1990] 3 S.C.R. 229.

Chapters four, five, and six delve into the case law and seek to establish that the empirical evidence from Supreme Court decision making in Charter cases supports a liberal/postliberal divide on Charter application doctrine. Clearly the Charter's main application provision is section 32, but section 52 of the Constitution Act, 1982, specifically its reference to "law", also bears on Charter application. The case law reveals two tracks on which the Court has travelled. The first concerns the definition of "law" for purposes of Charter application. While the Court seemed initially to limit Charter application to public, positive law, leaving private law operative between private litigants to development according to its own lights, chapter four argues that in fact Charter norms increasingly pervade the development of the common law, even when private law arises in disputes between private parties. In this manner, the Charter has been applied to what were traditionally considered "private" matters.

Chapter five addresses the definition of "government" for purposes of Charter application. Here the story is complex and confusing, not just because of the complexity of the subject matter but also because of the uncertainty blanketing the Court about interpretive rules and about the disposition of particular cases. If any trend can be discerned, it is that postliberal constitutionalist ideas increasingly influence this dimension of Charter application, tending to push the Court into a position where threshold Charter application considerations recede in importance relative to a contextual balancing of interests when rights are at issue in particular cases. In other words, Charter application doctrine seems to be yielding to rights limitation doctrine, a result one might expect from a postliberal constitutionalism in which constitutional norms apply society-wide.

While sections 32 and 52 function as the main Charter application provisions, the Supreme Court has opened up a whole new vista: section 15 jurisprudence. Here Charter application takes a most interesting turn, relying not so much on the definition of government or law but on potentially sweeping grounds such as unmet state responsibilities, and obligations of the state to act where it has failed to do so – sins of constitutional omission, so to speak. Here the trend seems readily discernible. While the section 15 equality rights provision was generously drafted, instructing courts to go beyond the liberal constitutionalist

concern with formal equality before the law and allowing them to add group characteristics protected from discrimination beyond the enumerated list, the courts have taken equality rights a good deal further than this. Now the only question is whether the courts will impose equality-oriented obligations on governments in the complete absence of evidence of state action. In other words, courts have steadily diminished the importance to be attached to state action as a triggering factor inviting judicial review. They seem perched on the edge of granting section 15 claims based on evidence of social disadvantage itself.

If and when this occurs, then Charter norms will indeed have been applied directly to society and what liberal constitutionalists have called the private realm. The personal will have become the constitutional. Such a result will invite the sorts of questions political scientists have been asking for years: Do the courts possess the institutional capacity to manage the caseloads such an expansive Charter application doctrine will produce? Do they possess the competence and expertise to apply Charter norms in myriad new and complicated circumstances? What effect does postliberal Charter application have on the much-vaunted "Charter dialogue"[24] between the judiciary and the legislature? And on the "rights revolution" and democratic life in Canada? If postliberal constitutionalist trends continue, they will have to be faced squarely.

Until recently, liberal constitutionalism in Canada thrived amid tensions that would have cast liberal constitutionalist ideas into doubt were they uncovered and laid bare. Among these tensions was the tension between law and politics in a legal and intellectual climate increasingly influenced by legal realism. Another was the mutual interpenetration of state and society characteristic of the twentieth century administrative welfare state, a deepening fusion which belied the liberal separation of state and state and society on which the public/private distinction is founded. Yet another tension is the liberal conception of individual liberty, a plastic notion which on one reading implies a limited state, and on another implies a prodigious state bearing some resemblance to an unlimited liability insurance company. Arguably, these tensions have been there almost from the beginning. They have been left in

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[24] Peter Hogg and Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures" *Osgoode Hall Law Journal* 35 (1997), 75-124.

the shadows of political and legal debate, in a form of abeyance, a studied indeterminacy.[25] But the entrenchment of the Charter occasioned the open questioning of these liberal constitutionalist tensions. While postliberal constitutionalist critique has poked at weak spots in the liberal constitutionalist program, it remains to be seen if the positive postliberal program will be the cure for our constitutional ills.

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[25] The term "abeyance" is from Michael Foley, *The Silence of Constitutions: Gaps, abeyances, and political temperament in the maintenance of government* (London: Routledge, 1989). I will return to Foley's theory of abeyances in the concluding chapter.

Chapter 2

The Clash of Constitutionalisms

Introduction

This chapter is concerned with a paradox at the heart of constitutional government in Canada. Constitutional government and constitutionalism bespeak consensus, common understanding, and the operation of known norms which guide and limit political life in a polity. Above the fray of normal politics is an overarching consensus on the meaning and purpose of the constitution.[1] Yet the contemporary period is characterized most accurately as a period of constitutional confusion and continuing debate about all manner of issues touching constitutional government.

There is disagreement about what a constitution is, what are its limits. Scholars differ on the nature and processes of constitutional change, and the extent to which constitutions allow, and should allow, previous generations to bind their descendants. What, in general is the relation between constitutionalism and democracy? Who or what is sovereign? Constitutional interpretation is hotly contested. What is the relationship between text and judicial interpretation? What external guides to interpretation can and should be brought to bear on a constitutional text when it is applied to particular cases? What institutions are responsible for constitutional interpretation? What is the relationship between interpretation and constitutional change and amendment? Can the constitution be amended without recourse to formal amendment procedures? Accordingly, to what extent does "writtenness" inhere in the idea of a constitution? And is the constitution coherent? Does it attempt with greater or lesser degrees of success to set out systematically the rules of the political game, or do

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[1] I will revisit the idea of constitutional consensus in the concluding chapter.

constitutions contain gaps which conceal conflicts in the political order? Such questions go to the heart of political and legal philosophy.

This chapter will address only some of these issues. Specifically it will examine the ideology of liberal constitutionalism and show how this idea has come under fire in the 20th century. The twentieth century challenge to liberal constitutionalism can loosely be described as "postliberal". 'Post-' for the purposes of this chapter is intended to refer to 'beyond' or 'after', not 'anti-'. Postliberal constitutionalism is not ineradicably opposed to liberal constitutionalism; in fact, it exalts and incorporates many of its counterpart's features. Both value individual liberty, the rule of law, judicial review, and the idea of constitutional rights assertable against the state. But postliberal constitutionalism differs from its close relative in one crucial respect, and with important consequences for constitutional interpretation, as the following chapters will suggest. It refuses to see the state as the singular, particular, or major source of oppression, inequality, and unfairness. Accordingly, postliberal constitutionalism seeks to enforce constitutional rights not only against the state but also against institutions and activities within civil society, that realm of human activity not formally part of, controlled, or directed by the state. Postliberal constitutionalism seeks to give constitutional values society-wide significance; constitutional norms as reflected in enforceable rights penetrate into the relations among persons and institutions not traditionally considered to be subject to constitutional review.

Postliberal constitutionalism has not displaced liberal constitutionalism. Both constitutionalisms claim their adherents on and off the bench, and both are evident in scholarly writing as well as judicial decision-making. It is unclear which constitutionalism is the more dominant. It is more appropriate to view the contemporary situation as a clash of two understandings of the nature and purposes of the constitution.[2]

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[2] Though it is beyond the scope of this study, it should be noted that critiques of liberal constitutionalism do not lead ineradicably to the adoption of some postliberal variant. Some thinkers have rejected liberal constitutionalism in favour of a more total, "decisional" state which in their opinion more accurately reflects the nature of politics. Schmitt's decisional state rejects liberal, pluralist politics and favours, instead, national mobilization against the nation's "enemies." See Rune Slagstad, "Liberal Constitutionalism

Jan-Erik Lane has argued that modern constitutions operate in two dimensions, the internal and external.[3] The internal concerns arrangements of institutions inside the governmental apparatus, commonly referred to as the separation of powers. Relations among the legislative, executive, and judicial branches of government have undergone enormous changes and dominate scholarly inquiry, especially by political scientists. The internal dimension concerns the grand presidential and parliamentary categories of constitutional design, as well as the place of the judiciary and judicial review in relation to these branches, a concern historically associated with the United States but now central to debates in Canada and Europe and even Great Britain as it moves toward incorporation of the European Convention on Human Rights.[4]

Lane's external dimension of constitutional government has to do with the relation between state and society and the manner in which the constitution regulates this relationship. Of course, internal constitutional mechanisms have some bearing on the external constitutional dimension. Prior to the ratification of the United States Constitution, the proponents of the new constitution insisted that the separation of powers and the design of internal checks and balances would have salutary consequences for the state's relationship to society. In one of the final installments of *The Federalist Papers,* Alexander Hamilton in fact argues that the internal design of American government will restrain the new central government from undue intrusion into the life of the states and citizens. "The truth is," he argued, "after all the declamations we have heard, that the Constitution is itself, in every

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and its Critics: Carl Schmitt and Max Weber" in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988), 103-29. This chapter will confine itself to the relationship between liberal constitutionalism and its postliberal variant.

[3] Jan-Erik Lane, *Constitutions and Political Theory* (Manchester: Manchester University Press, 1996), 25.

[4] Kate Malleson, "A British Bill of Rights: Incorporating the European Convention on Human Rights" *Choices: Courts and Legislatures* 5 (1999), 21-42.

rational sense, and to every useful purpose, A BILL OF RIGHTS."[5] Notwithstanding this, Lane suggests that bills or charters of human rights typify the external dimension of constitutions. In support of Lane's point, one need only refer to the fate of the Federalist claim cited above. Hamilton's argument did not persuade. To obtain ratification, the new constitution's proponents had to promise to amend the new document immediately after ratification to include a bill of rights.

This chapter is concerned mainly with the clash of constitutionalisms in their external dimensions, what one scholar has called "rights constitutionalism."[6] It will begin with a review of the development of liberal constitutionalism. It will then examine the development of postliberal constitutionalism as a critique of liberal constitutionalism and as an attempt to come to terms with issues and challenges liberal constitutionalism seemed unable or unwilling to meet.

A word about liberalism and constitutionalism as fields of intellectual inquiry is in order. The study of constitutionalism is closely related to the study of liberalism; this is understandable given the rich historical relationship between liberal ideas and the idea of constitutionalism as a mode of government. Many scholars who write in the field of liberal political philosophy also write about constitutionalism in general and liberal constitutionalism in particular. But the scholarly literature on constitutionalism, though it overlaps with the larger literature on political liberalism and liberalism as a moral philosophy, is nonetheless a

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[5] Clinton Rossiter, ed., *The Federalist Papers* [1787-88] (New York: New American Library, 1961) No. 84, 515. Emphasis in original. A contemporary scholar agrees. See Walter Berns, *Taking the Constitution Seriously* (Lanham: Madison Books, 1987). Others agree but for different reasons. The founders considered the unamended constitution to be a bill of rights because it did contain prodigious rights of private property which anti-Federalists sought to limit by the insertion of amendments which amounted to "participation" rights allowing the people to limit the force of those private property rights. William P. Kreml, *The Constitutional Divide: The Private and Public Sectors in American Law* (Columbia: University of South Carolina Press, 1997).

[6] David Schneiderman, "Human Rights, Fundamental Differences? Multiple Charters in a Partnership frame" in Roger Gibbins and Guy Laforest, eds., *Beyond the Impasse: Toward Reconciliation* (Montreal IRPP, 1998), 147-186.

distinct subspecies of it. An excellent example of a study of liberal constitutionalism which self-consciously sets itself apart from the broader study liberal political ideas is T.R.S. Allan's *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*.[7] Allan's inquiry is into the nature of British constitutionalism – whether there is such a thing, and if so, in what substantive principles it consists. He examines case law painstakingly and discerns within the common law tradition the thoroughgoing protection of liberal principles of liberty, equality, and due process. He is clear at the outset of his work that he is interested in discerning the constitutionalist principles emanating from existing institutional practices. His is not a moral inquiry into liberalism in Britain. The study of constitutionalism is part constitutional law and part legal and political thought. It is reducible to neither. Accordingly, the use he makes of liberal thinkers extends only to those thinkers who have contributed to the understanding of constitutionalism and its contribution to liberal regimes. This study is of a similar character. Liberal and postliberal constitutionalism figure prominently; political liberalism as represented in the work of leading political philosophers does not. And while there are undoubtedly connections between liberal/postliberal constitutionalism and liberal ideas more generally, it is beyond the scope of this dissertation to explore them in detail. Liberal and postliberal constitutionalism are defined carefully. It is possible that someone who considers himself or herself a "liberal" may in terms of constitutionalism be a "postliberal."

The Development of Liberal Constitutionalism.

The origins and meaning of constitutionalism have always been controversial.[8] One primary field of disagreement concerns whether a thread of liberal constitutionalist ideas extends to the origins of the Western political tradition or whether a decisive development of constitutionalist thinking took place at one or another point later in the development of

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[7] (Oxford: Clarendon Press, 1993).

[8] Harvey Wheeler, "Constitutionalism" in F.I. Greenstein and N.W. Polsby eds., *Handbook of Political Science* , Vol 5: *Governmental institutions and Processes* (Reading: Addison-Wesley, 1975), 2-5

Western thought. One school looks to Aristotle's *Politics* and in particular its attempt to link law with reason and permanence as the beginning of an unbroken line of thinking that elevates law over interest, virtue, and passion in the design of regimes.

The other school holds that government in the classical understanding is premised either on divine sanction and right or on notions of virtue and community that are simply incompatible with limitation of government power. The difference between good and bad regimes was the difference between those who ruled in the public interest and those who ruled for private advantage. In all cases, the goal of political life was the fostering of virtue, not the enforcement of stable rules according to which citizens' particular purposes could be worked out. According to Charles McIlwain, the ideal government for the Greeks was an unlimited government, for why would one want to limit a government in its capacity to inculcate human virtue? The ideal state depends not on institutional artifice but on the ruler's particular virtue and art.[9] Rulers are given far more freedom for "intelligent management" or "free intelligence"[10] than moderns would consider proper. Further, for the Greeks to refer to government as "constitutional" is nonsensical; every government, even a bad one, is constitutional in the sense that one can describe the whole nature and composition of the regime. Constitution, according to the Greeks, is a descriptive term, not a normative one.[11] Writes one observer: "The modern doctrine [of constitutionalism] appears to be quite different from traditional constitutionalism, but that difference is largely due to a narrowing of the meaning of politics and its place in the social order. Where classical theories saw the state and society as coextensive, modern conceptions distinguish between them. Many of the limits on the modern constitutional state spring directly from the distinction and from our determination to maintain the separation of the social and the private from the political and

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[9] Charles McIlwain, *Constitutionalism Ancient and Modern* (Ithaca: Cornell University Press, 1947), 26-40.

[10] Francis Wormuth *The Origins of Modern Constitutionalism* (New York: Harper Bros, 1949), 16.

[11] McIlwain, *Constitutionalism Ancient and Modern.*

the public."[12]

Although McIlwain distinguishes between the ancient and modern traditions in general, he does see one portentous germ of thought in the ancient period. He places great stock in the thought of Cicero, who held that the pre-existing law of nature governs positive laws enacted by the state. The state, for Cicero, is a bond of law. "There is probably no change in the whole history of political theory," claims McIlwain, "more revolutionary than this, and certainly none so momentous for the future of constitutionalism."[13]

Modern constitutionalism "has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law."[14] Constitutionalism asserts itself against arbitrary, overreaching government, anchoring political life in norms established or eternally existing outside normal political practice. Locke declared that "whatever Form the Common-wealth is under, the Ruling Power ought to govern by *declared* and *received Laws*, and not by extemporary Dictates and undetermined Resolutions."[15] According to Carl Friedrich, constitutionalism is "both the practice of politics according to the 'rules of the game', which

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[12] Gordon J. Schochet, "Introduction: Constitutionalism, Liberalism, and the Study of Politics" in J. Roland Pennock and John W. Chapman, eds., *Constitutionalism* (New York: New York University Press, 1979), 4.

[13] McIlwain, 38. According to Finer, "deep-rooted sentiment of the sanctity of the law" is the *sine qua non* of the Western notion of the constitution as enforceable basic law. S.E. Finer, "Notes toward a History of Constitutions" in Vernon Bogdanor, ed., *Constitutions in Democratic Politics* (Aldershot: Gower, 1988), 24. Berman points to the medieval period for the decisive break. He argues that the modern notion of the rule of law begins with the 11th and 12th century papal revolution of Pope Gregory VII. Here were the antecedents of later constitutionalist development, in particular the notions that law is properly above politics and that both external and internal limitations were imposed on the pope, albeit without effective enforcement mechanisms. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 18, 213-15.

[14] McIlwain, 21-22.

[15] John Locke, *Second Treatise of Government*, in Peter Laslett, ed., *Two Treatises of Government* [1690] (New York: Mentor, 1963), 405.

ensures effective restraints upon governmental and other political action, and the theory – explanation and justification – of this practice."[16] For Lane, it is the "political doctrine that claims that political authority should be bound by institutions that restrain the exercise of power."[17] And for Wheeler, writing more in the behaviouralist tradition, constitutionalism "amounts to the implicit final causes of a social system, the constitutional behaviour that must take place in order for it to function properly."[18] The Supreme Court of Canada had occasion recently to consider afresh fundamental constitutional questions in the context of the Quebec secession debate, and tied constitutionalism to the text of section 52 of the Constitution Act, 1982, which declares in part that "the Constitution of Canada is the supreme law of Canada...." "Simply put," wrote the Court in prosaic terms, "the constitutionalism principle requires that all government action comply with the Constitution."[19]

While there is no unanimity on definitions, scholars agree on some general points. The first is that constitutionalism is explicitly normative and operates as criterion for judging good regimes. A constitutional regime is distinguishable from an unconstitutional regime, though it may be admitted that the "real" constitution may stray far from the "ideal" constitution codified in a fundamental document.

Second, constitutionalism seeks to separate the "rules of the game" from the game itself, insulating those rules to some appreciable extent from the players in their daily courses. In this sense, constitutional doctrines have always sought out higher laws or norms transcending current preferences. Whether the norms are phrased in terms of God's laws, natural law, human contractarian conduct in special conditions like a state of nature or a Rawlsian original position, or the special character of the authors of a constitutional text, the

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[16] Carl Friedrich, "Constitutions and Constitutionalism" in *International Encyclopedia of the Social Sciences* Vol. 3 (New York: Macmillan and Free Press, 1968), 319-20.

[17] Lane, *Constitutions and Political Theory*, 19; also 50-1.

[18] Wheeler, "Constitutionalism", 26.

[19] *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, 258.

point is always to settle upon broadly agreeable norms with authority that extend beyond the preferences of current, "empirical" majorities.[20] Thus constitutional change is a special category of political action, requiring a higher degree of consensus than normal policy change; formal mechanisms are designed to make amendment both difficult and rare. Constitutionalism insists upon a distinction between politics and the constitution, even if this only means that constitutional politics are a form of "high" politics. Constitutional norms are to be lasting, stable, predictable, and known.

Third, constitutionalism assumes and asserts that state and society are not coextensive, that the state is complexly subordinate to the latter. The state is in some fundamental sense an instrumentality with defined, legitimate functions. This separation has historically been understood in terms of natural right and contractarian theories as well as theories of popular sovereignty.

Fourth, constitutionalism has long been associated with the rule of law, the notion that knowable, stable rules with force govern the conduct of persons and government.[21] Law is predictability and stability; it enables people to plan their projects with the expectation that they may be carried out.[22] Law, according to Wormuth, implies generality; the legal force of

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[20] See Richard S. Kay, "American Constitutionalism" in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998), 16-63. Kay argues that current generations can rightfully be bound by past constitutional settlements merely through the passage of time and the accretion of "historical legitimacy." He admits however that historical legitimacy does depend to some extent on the "substantive legitimacy" of the contents of the constitution, suggesting that longevity itself does not transmit legitimacy. See also Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in ibid., 152-193.

[21] "True constitutionalism...has meant government limited by law." Charles McIlwain, *Constitutionalism and the Changing World* (Cambridge: Cambridge University Press, 1939), 282.

[22] In a study of life in contemporary Russia, Richard Rose distinguishes between modern civil life in which people find the relationship between cause and effect in their myriad daily relations with state institutions "calculable", and antimodern conditions in which the relationship is "uncertain." Survey evidence suggests to him that Russian society is uncertain indeed. Richard Rose, "Living in an Antimodern Society: How Russians Cope" *East European Constitutional Review* 8 (Winter/Spring 1999), 68-75.

the state must not be so particular in its application as to single out individual persons or targeted groups. In the particularity of legal sanction is the seed of arbitrariness.[23] On this issue, too, the Supreme Court has spoken on a number of occasions. In *Reference Re: Manitoba Language Rights*, the Supreme Court of Canada considered the effect Manitoba's legal order of a finding that all laws of Manitoba, because they were published in English only, were unconstitutional and thus of no force or effect. "The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power....Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principles of normative order. Law and order are indispensable elements of civilized life."[24]

Historically, of course, the rule of law was an important component in the struggle against political absolutism. Its lasting appeal is that it stands firm against the slide into cruelty. As Shklar puts it, the idea of the rule of law "is not so much to ensure judicial rectitude and public confidence, as to prevent the executive and its many agents from imposing their powers, interests, and persecutive inclinations upon the judiciary."[25] But its normative power does not take constitutionalism the whole distance to limited government. Consider the famous case of *Roncarelli v. Duplessis*[26] in which a private citizen sued the Premier of Quebec for actions undertaken while the Premier was in office. The story is well

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[23] Wormuth, *The Origins of Modern Constitutionalism*, 214.

[24] *Reference Re Manitoba Language Rights* [1985] 1 S.C.R. 721, 748-49. The principle of prospectivity inherent in the rule of law is sometimes honoured in the breach rather than the observance. In the 1970s, the Alberta legislature passed legislation applying retroactively to declare illegal the filing of caveats against the Alberta Government. This nullified a caveat filed by the Lubicon Cree to prevent the development of lands to which they laid claim. Joan Ryan, "Gut a land, Gut a People" *Albertaviews* 2 (1999), 38.

[25] Judith Shklar, "Political Theory and the Rule of Law", in Allan C. Hutchinson and Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987), 5.

[26] [1959] S.C.R. 121.

known. Roncarelli was a Jehovah's Witness in the predominantly Catholic Quebec of the 1940s and operated a licensed restaurant, the revenues from which allowed him to post surety for his co-religionists who were arrested for peddling wares without a license on Montreal streets. His restaurant operation complied with liquor regulations and his posting of surety was also a perfectly legal activity. But the Premier wanted to stem the activities of the Witnesses and sought to stop Roncarelli by ordering that his liquor license be revoked and never again issued. The Supreme Court of Canada found that no legal authority and no reasonable interpretation of the discretion available to government officials supported the revocation of Roncarelli's license. The Premier, declared the Court, had acted in his private capacity, outside of the law, and was accordingly liable in tort for the damages suffered by Roncarelli.

Roncarelli is rightly considered a major civil liberties case in a country otherwise preoccupied with federalism questions. Yet the Court's reliance on the rule of law is profoundly limited in its scope. Whether the Premier was animated by a hatred of Witnesses (and most Catholics would understandably be repulsed by the anti-Catholic rhetoric in Witnesses' pamphlets) or by a concern for a breach of civil order if Witnesses were allowed to excite religious passions without restraint, the government could have passed a law in the Assembly authorizing authorities to take measures to stem the Witnesses' activities. The law could have been phrased generally enough to apply to any activity inciting the population yet specifically enough to catch the promotional activities in which the Witnesses were engaged. If, in other words, the government had fashioned a legal support for its persecution of the Jehovah's Witnesses, and enforced the law with appropriate procedural care, the rule of law would have been of no assistance to civil libertarians in Quebec. It is reasonable to aver that a quest for liberal tolerance was really behind the Supreme Court's invocation of the rule of law. But this is a substantive political position which the principle of the rule of law itself does not explicitly invoke. The protection of a zone of freedom beyond which the law may not pass is a proposition which some substantive liberal philosophy, not the rule of law itself, must

provide.[27]

All of this is to claim that modern constitutionalism is inseparable from liberal ideology and politics. Vincent argues that a constitution is not an addendum to a state but rather part of a particular theory of the state. Constitutional limitations on state power are "intrinsically part of and identifying features of that theory – they are not independent of it. In this sense limitation can be a misleading word.[28] Constitutionalism, meant to be outside of politics, is perhaps better understood as high politics. John Dearlove writes:

> ...the constitution is a force that is almost *outside* politics, operating on it and providing a constraining and enabling context within which high politics occurs, with constitutional theory offering us an explanation that makes sense of (by giving order to) crucial facets of political and institutional life. On the other hand, the constitution is frequently *in* politics since it can be the focal point for fundamental conflicts and is subject to changes as particular interests seek to reshape the rules of the political game (that is, the constitution itself) to their advantage. Put another way, *all* constitutions are political

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[27] David Gray Carlson, "Liberal Philosophy's Troubled Relation to the Rule of Law" *University of Toronto Law Journal* 43 (1997), 257-88. There are dissenters from this view. Theodore Lowi argues that the rule of law has its own integrity and depends on no ideological doctrine for its legitimacy. The rule of law, for Lowi, stands for clear, transparent laws that allow little discretion in enforcement. If governments conformed to the rule of law, they would declare in clear legal, public terms their precise intentions. They would accordingly expose themselves to the ridicule and contempt of citizens when their clearly expressed intentions were malevolent. Thus public opinion, Lowi asserts, can act as a force of decency when government proceeds according to the rule of law. Lowi's point is well taken, but it does not challenge the claim made here. The rule of law for him is a procedural principle allowing the liberal sensibilities of the broader populace to react in liberal terms to illiberal laws. If the populace itself is illiberal, the rule of law is of no assistance. In this way, the rule of law *does* depend on liberal political principles. See Theodore J. Lowi, *The End of the Republican Era* (Norman: University of Oklahoma Press, 1995), 245-59.

[28] Andrew Vincent, *Theories of the State* (Oxford: Blackwell, 1987), 78. The idea of the limited state is liberal in inspiration, not constitutionalist. Constitutionalism, Vincent argues, refers to the "seriousness with which certain rules are taken in relation to everyday legislative activity by the governors of a constitutional state." Ibid., 79.

constitutions.[29]

More explicitly still, constitutionalism and liberalism are "historical and doctrinal twins, the one in charge of order, the other in charge of progress."[30] According to McIlwain, "stripped of all its husks, liberalism is constitutionalism, 'a government of laws and not men,' a common weal of individual rights that neither prince nor magistrate nor assembly has any authority to impair. In a word, liberalism means a common welfare with a constitutional guarantee."[31]

This point need not be belaboured. Liberalism arose historically in opposition to absolute, arbitrary government, and in defence of religious toleration, the protection of property from arbitrary taxation and expropriation, and the assertion of a theory of a popular sovereignty whose function is to limit the scope of state authority. In Locke's classic formulation, the role of the state is to save people from the "inconveniences" of the state of nature in which equal possessors of natural right to life, liberty, and property have difficulty enforcing that right with impartiality and effectiveness. These equal rights holders contract with one another to create society; they contract again to create a political authority vested not with the substantive rights of the people but with the right to protect them by means of impartial administration. The people do not renounce their sovereignty. Instead they enter a trust relationship with political authority, the latter holding authority so long as the people's rights are protected. The trust relationship is dissolved, according to Locke, when the government oversteps its limited function.[32] Locke's theory establishes several points integral to liberal constitutionalism: popular sovereignty and government by consent; the limited state

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[29] John Dearlove, "Bringing the Constitution Back In: Political Science and the State" *Political Studies* 37 (1989), 534.

[30] Ghita Ionescu, "The Theory of Liberal Constitutionalism", in Bogdanor, *Constitutions in Democratic Politics*, 36. On this identification of constitutionalism with liberalism, see also Anthony Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Blackwell, 1984), 72-5.

[31] Charles McIlwain, "The Reconstruction of Liberalism" in McIlwain, *Constitutionalism and the Changing World*, 286.

[32] John Locke, *Second Treatise.*

subordinate to society; and the effective application of natural rights which the state is to respect and enforce, not overstep.[33]

Liberal constitutionalism is concerned with the protection of rights that safeguard the freedom to do what one wills without the undue interference of the state. Traditionally, rights were considered primarily negative: rights define a zone of freedom which the state is not to penetrate by positive action. Summing up the tradition of classical liberal thought, Berlin argues that negative liberty is properly understood in this sense. While there may be good reasons to limit liberty in the name of justice or equality, such limitations are limitations of liberty and nothing else, and for this reason require scrutiny.[34] Equally important is that while people's freedom is limited by many things, the liberal constitution is to devote itself to those limitations imposed by those with the power of the state behind them.[35] Writing in the Canadian context, Peter Russell enunciated the liberal constitutionalist position succinctly when in 1992, reflecting on egalitarians' disappointment with the Charter as an instrument of social transformation, he suggested: "The Charter's aim is to restrain government, to protect the negative freedom of citizens – freedom from the strong arm of the state. The Charter is

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[33] It may seem somewhat quaint to cite Locke in a study of contemporary constitutionalism: a lot of constitutional and political water would seem to have gone under the bridge. However, Locke's constitutionalism is not merely of antiquarian interest. For example, he has recently been enlisted in the cause of Quebec sovereignty. See Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal and Kingston: McGill-Queen's university Press, 1995), especially chapter 2.

[34] Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 122-31. Of course one of the most famous (but in some ways ambiguous) defences of individual negative liberty is John Stuart Mill, *On Liberty* (London: Penguin, 1974).

[35] One of the most extreme proponents of negative freedom is undoubtedly Friedrich A. von Hayek. See his *Constitution of Liberty* (Chicago: University of Chicago Press, 1960). A Burkean position bearing a family resemblance to Hayek's is Alexander M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975.) Bickel distinguishes "contractarian" liberals from Whig liberals, the former insisting on a timeless set of moral-political principles enunciated by courts when they expound the constitution. Bickel favours the "agnosticism" of the Whig version, in which Oliver Wendell Holmes's marketplace metaphor enjoys pride of place in matters of constitutional law and economics.

used to attack legislation and government programs for what they do – not what they fail to do."[36]

From this it may be concluded that liberal constitutionalism seems incompatible with the modern, redistributive welfare state. Indeed, many liberal constitutionalists are also classical liberals critical of the post-New Deal state. But there is no necessary connection between liberal constitutionalism and classical liberalism. It is possible to make a political or moral argument for an interventionist, redistributive state while still adhering to the liberal constitutionalist principle that constitutions bind governments, however large or small they may be, as will be seen in chapter 3.[37]

Liberal constitutionalism is also concerned with the observance of a distinction between public and private realms, constitutional rights marking the limits of state reach into the lives of citizens. Liberals regard the private life as the primary realm of human activity, and as the Lockean framework suggests, the state's legitimate purpose is to respect, not intrude upon, private life. The relegation of certain matters to the private realm of individual choice and variety was historically the means of safeguarding civil peace. Liberal constitutions lower the substantive goals of political life, allowing private individuals to pursue – without fear of obstruction by a stronger coalition with a different view of things – their particular conceptions of the good life. Liberal constitutionalism provides a framework for this depoliticization of civil life.

Liberal arguments for religious toleration are paradigmatic. Locke argued that the salvation of souls is a matter for religion, not the commonwealth. The private coextends with the church, the soul, and the "inward persuasion of the mind", whereas the public coextends

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[36] Peter H. Russell, "The Political Purposes of the Charter: Have They Been Fulfilled? An Agnostic's Report Card" in Philip Bryden et al, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994), 40.

[37] Likewise, many egalitarian liberals may incline toward postliberal constitutionalism – and there are good reasons why this relationship does exist – but, again, there is no necessary connection between the two positions.

with the civil magistrate, the body, and the state's outward coercive power.[38] More generally, liberal constitutions place constitutive limits on politics, and this in two ways:

> Firstly, they guarantee that there are areas of activity and social relationships not directly touched by politics itself, in so far as they fall outside either its scope or its reach. The extent of these protected areas does not here depend on an assessment of their intrinsic worth but on the role that the 'political' is given in determining the good or the just life, and, in more practical terms, on the means put at the political rulers' disposal. Secondly, the definition of the 'political' guarantees that political power is limited in so far as its normal workings are made regular and predictable. These two kinds of de facto limits to politics are closely related – though not identical in their justification – to the negative and normatively self-imposed limitations liberal constitutionalism predicates.[39]

Liberal constitutionalism adheres to what may be called a doctrine of double privacy, a principle most apparent in the realm of constitutional law and which in the context of this dissertation requires particular attention. Privacy operates in two dimensions. First, the constitution itself protects an enforceable right to privacy citizens can assert against the state. Historically, privacy rights have been understood primarily in terms of private property protected against state expropriation or regulation amounting to expropriation. More recently, privacy rights have taken on a more "personal" character, referring to the privacy of one's person (against search and seizure powers of police), communications, and reproductive capacities. But another dimension of privacy has to do with a region of human

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[38] John Locke, *Letter on Toleration* [1689] (Buffalo: Prometheus, 1990). Of course, Locke's wall of separation between church and state was not terribly high. He would not countenance atheism in his liberal regime.

[39] Dario Castiglione, "The Political Theory of the Constitution" *Political Studies* 44 (1990), 423. But note that liberal constitutionalists combine a concern to depoliticize with rights of public participation. "Liberal concern for religious, intellectual, and economic liberty does register a desire to depoliticize certain important areas of life. But classical liberals simultaneously emphasize the importance of public freedoms, such as the right to disagree with governmental decisions, to criticize officials, and to vote in elections and run for office." Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge, MA: Harvard University Press, 1993), 208.

activity which not even the constitution touches. Here privacy is understood in terms of the realm of privacy beyond legitimate judicial inquiry, where constitutional norms have no application. Where the state does not go, neither should the courts or the constitution. So liberal constitutionalism upholds a paradoxical version of privacy in which the principle is asserted not only against the state but also against the courts and the constitution. Double privacy imposes a duty of auto-limitation on courts in their constitutional role. Whatever the merits of a constitutional protection of privacy, that same principle may be defeated, oddly enough, when it is judicially over-enforced. The idea here is that at some point, the judicial enforcement of the constitutional norm of privacy becomes counter-productive, invasive by judicial means of the very realm the privacy principle is meant to protect. The two component privacies at play here are "competing forces" suggesting the limits of constitutional law in upholding the principles of liberal constitutionalism.[40]

A final salient feature of liberal constitutionalism is its legalistic character. Courts have been given pride of place in liberal constitutionalist theory because of its stress on the legal limitation of government. While liberals, as mentioned earlier, have sought internal mechanisms to limit the state's reach into society, to a large extent the law has been used to police the external context of the constitution. This legalistic bias is most acute in the United States whose written constitution subject to judicial review has led many to identify constitutionalism with constitutional law, a view which blinds Americans to major changes in American government achieved without formal amendment of the constitution.[41] In many

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[40] For a brief discussion of this double privacy, see Richard Fader, "Reemergence of the Charter Application Debate: Issues for the Supreme Court in *Eldridge* and *Vriend*" *Dalhousie Journal of Legal Studies* (1997), 221. Liberal constitutionalists are as sensitive to the intrusive character of law enforcement practices as they are of state legislation making those enforcement activities necessary. Bickel writes that "the test of a legal order is its self-executing capacity...." "The limits of law...are the limits of enforcement, and the limits of enforcement are the conditions of a free society; perhaps, indeed, the limit of government altogether." Bickel, *The Morality of Consent*, 112, 106.

[41] Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton: Princeton University Press, 1996). Also, Richard Hodder-Williams, "The Constitution (1787) and Modern American Government" in Bogdanor, *Constitutions in*

respects, liberal constitutionalism's legalistic bias is an outgrowth of liberalism's efforts to depoliticize life, to reduce conflicts to justiciable issues that can be settled to the benefit of all according to neutral rules in a disinterested forum. Legalism is thus an escape from politics, in the same way that liberal societies' stress on economic life and consumer satisfaction diverts competitive urges and ambitious energies from the political arena. Shklar many years ago wrote that "All political issues in America sooner or later become legal cases."[42] With challenges to liberal constitutionalism now dominating the legal academy and peppering the bench, legal cases increasingly become political issues.

Postliberal Constitutionalism

The move from liberal to postliberal constitutionalism has been an easier, less controversial, more fluid process in Canada than in the United States, which is in many respects an archetypal liberal constitutionalist order. The reasons rest in political culture and institutional inheritance. Canadian parliamentarism, combined with a nation-building ethos in the early years, spiced with a healthy dose of patronage politics, has given the Canadian state a different cultural significance among Canadians than what has prevailed in the United States.[43]

Democratic Politics, 73-104.

[42] Judith N. Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964), 210.

[43] W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994); David Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995), 67; Robert Yalden, "Liberalism and Canadian Constitutional Law: Tensions in an Evolving Vision of Liberty" *University of Toronto Faculty of Law Review* 47 (1994), 132-55; Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990); Gad Horowitz, "Conservatism, Liberalism, and Socialism in Canada; An Interpretation" in Hugh G. Thorburn, ed., *Party Politics in Canada* 7th edition (Scarborough: Prentice-Hall, 1996), 146-62; and Gordon T. Stewart, *The Origins of Canadian Politics* (Vancouver: University of British Columbia Press, 1986); and Patrick Macklem, "Constitutional Ideologies" *Ottawa Law Review* 20 (1988), 117-156. The scholarly debate on the origins

Canadian rights consciousness has not historically had the libertarian edge of its American cousin. Robert Yalden argues that liberal constitutionalist ideas in Canada are more Diceyan than Lockean-Federalist in origin, and while Dicey is widely known for his suspicions of the positive, administrative state,[44] Diceyan negative rights are tempered by the legislative autonomy of parliamentary government and are more procedural in character. Others suggest that the existence of the Crown as a continuing, vital organizing principle of government in Canada – providing the executive with a reservoir of discretionary power – "helps to explain the disposition towards activism and innovation that is characteristic of governments in the Canadian political system."[45] Nonetheless, Yalden links liberal constitutionalism to Ivan Rand and the civil liberties tradition in Canadian constitutional law, particularly the mid-century period in which the Supreme Court of Canada struck down Quebec laws restricting the activities of Communists and Jehovah's Witnesses.[46] In a polemical remark made early in the Charter era, Donald Smiley claimed that Canadians will take order over freedom, Hobbes over Locke:

> Canadians are...Hobbesian. In the beginning was government. In the beginning was order, and once order is secured, one can make society more egalitarian, one can have a good deal of freedom, one can have procedures. This is completely contrary to the whole thesis that government exists to protect pre-existing rights.
>
> The notion that there are rights against government is a very foreign idea to the Canadian constitutional system and the Canadian political culture....To

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of Canadian political culture has been vigorous and does not appear to end soon. I do not wish to engage that debate, but simply note that the Canadian state has not been the universal object of suspicion and distrust.

[44] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 10th edition (London: Macmillan Education, 1959), chapter 12.

[45] Smith, *The Invisible Crown*, xi. See also 175-85.

[46] Yalden, "Liberalism and Canadian Constitutional Law.". The assertion of negative constitutional rights of course had to pass through the instrumentality of federalism review, a fact which probably helped blunt the hard edge of negative rights consciousness in this country.

> impose a Charter that one would expect will get embedded into the consciousness of the people, who operate under certain contrary predispositions, will not 'wash.'[47]

The more antagonistic and threatening to fundamental constitutional interests the state is made out to be – especially relative to other institutions – the more the state alone is the target of constitutional rights protections. Conversely, the less tenable the claim that the state is a singular and particular threat to equality, liberty, and fairness relative to other institutions, the less tenable is the singling out of the state for the application of constitutional rights. And the less singular is the state as a threat to fundamental interests, the more circumstantial will be the determination whether the state advances or threatens constitutional interests. In the absence of a mythical distrust of the state, postliberal constitutionalism would find fertile ground in Canada.[48]

Postliberal constitutionalism shares liberal constitutionalism's commitment to the rule of law, its elevation of constitutional rights as instruments of liberty and autonomy, and its confidence in the efficacy and legitimacy of judicial review. But the crucial difference is that postliberal constitutionalism does not limit the application of constitutional norms to the state. It seeks to extend the application of constitutional norms to the state *and* to civil society. In other words, postliberal constitutionalists value privacy as a constitutional principle but reject the liberal constitutionalist double privacy doctrine. Non-state threats to autonomy, equality, and fairness are as consequential as those posed by the state.

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[47] Quoted in William R. McKercher, *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Ontario Economic Council, 1983), 104-5.

[48] One cannot be too categorical, however. Historical complexities must be respected. While the United Kingdom and the United States supported drafts of the UN *Universal Declaration of Human Rights* from the start, for a time Canada was isolated among Western nations in expressing reservations. The evidence seems to be that Canadian politicians balked at the social rights provisions of the document – this despite assurances that the Declaration would have no binding force in domestic law, and despite the fact that a Canadian, John Humphrey, drafted portions of it. William A. Schabas, "Canada and the Adoption of the *Universal Declaration of Human Rights*" *McGill Law Journal* 43 (1998), 403-41.

Postliberal constitutionalists are in some ways more confident of the efficacy of constitutional law than the liberal constitutionalists in so far as they appeal for society-wide diffusion of constitutional norms of liberty, equality, and fairness. Liberal constitutionalism by contrast implies a judicial auto-limitation on the application of constitutional norms. For liberal constitutionalists it is a matter of principle that constitutions limit states and not institutions in civil society; this principle is grounded in the claim that governments as monopolies on the legitimate use of coercion are particular and singular sources of worry. For postliberal constitutionalists, this is strictly an empirical question, and for them the evidence is that non-state actors can commit offences against people's rights as grievously as government. Postliberal constitutionalism thus takes on a more pragmatic, contextual approach to rights, avoiding the more doctrinaire confines of liberal constitutionalism. Government is the target for liberal constitutionalists; government and society are both the targets for postliberal constitutionalists, and not simply because inequality, oppression, and unfairness originate in both quarters but because state and civil society have commingled so much that there is relatively little to distinguish them.

Several factors have fostered the development of postliberal constitutionalism. The first is the plasticity of liberal principles themselves. Liberal individualism, as the history of liberal thought unfolded, became not merely the absence of coercion but the positive capacity to develop one's character. Once this step was taken, liberty could more plausibly be thought to involve some sort of self-realization, and "it became easier for social reformers to speak of 'material obstacles' to individuals realizing themselves. This could be easily translated into the terminology of obstacles to self-help and character formation. In this context, state action to remove material obstacles was often demanded as a contribution to individual self-development and character growth. The individualistic notion moved fluidly into a justification for state action."[49] John Stuart Mill, whose writing can be cited by any libertarian, wrote at the end of *On Liberty* that "A government cannot have too much of the kind of activity which does not impede, but aids and stimulates, individual exertion and

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[49] Andrew Vincent "Classical Liberalism and its Crisis of Identity" *History of Political Thought* 11 (1990), 155.

development....The worth of a State, in the long run, is the worth of the individuals composing it; and a state which postpones the interest of *their* mental expansion and elevation to a little more of administrative skill, of or that semblance of it which practice gives in the details of business; a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficent purposes – will find that with small men no great thing can be accomplished...."[50] Even the *Federalist Papers*, otherwise a central text in the American classical liberal tradition, contains arguments that admit of elastic interpretation. In his discussion of the proposed constitution's judiciary provisions, Hamilton argued for judicial independence and for security of tenure as a means thereto. He argued that financial security is necessary for security of tenure, claiming that "in the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"[51] Such an argument can be deployed not merely in support of judicial independence but indeed for civil freedom in general, and for a generous scheme of social welfare rights. So "freedom from" can slip without much rancour to "freedom to" bringing in train a more active state and more fulsome conceptions of rights.[52]

A second factor struck at the heart of liberal constitutionalism's legalistic bias and at

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[50] Mill, *On Liberty*, 187. Also, L.T. Hobhouse *Liberalism* [1911] (New York: Oxford University Press, 1964).

[51] Rossiter, ed., *The Federalist Papers*, No 79, 472. Emphasis in original.

[52] Some scholars make a distinction between 1) early modern liberalism rooted in the political thought of Hobbes and Locke who work out a liberal political order based on the twin attributes of natural human "nastiness" and equality, and 2) later variants grounded in the thought of Rousseau who denies that people are naturally selfish or nasty, and that proper political engineering can efface humanity's less benign qualities. This latter tradition, then, looks to the state not as a potential vehicle for human nastiness (requiring constitutional limitation) but for human liberation from oppressive and distorting social structures. See Rainer Knopff and F.L. Morton, "Judicial Statesmanship and the Canadian Charter of Rights and Freedoms" in McKercher, ed., *The U.S. Bill of Rights and the Canadian Charter*, 184-200; and the essays contained in Anthony Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional reform, Interpretation, and Theory* (Toronto: Oxford University Press, 1996). See also Rainer Knopff, *Human Rights and Social Technology: The New War on Discrimination* (Ottawa: Carleton University Press, 1989).

the conceptual basis for the separation of powers dividing policy and law, legislature and court. The American legal realist movement called into the question the very separation of law and politics on which liberal constitutionalism was premised. The realists argued that adjudication was neither the mechanical application of law to the facts, nor the discovery of applicable legal principles latent in or implicit in legal precedent; rather, adjudication is fundamentally an act of creative judicial legislation, the articulation of the personal and political preferences of judges in deciding cases. In his terse style, American jurist Oliver Wendell Holmes wrote that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[53] Legal realism drains law of its neutrality and objectivity. Law becomes fundamentally political in character, implicated in social settings and the conditions under which people lived. It loses its external, transcendent quality. No longer "given" in the order of things, law was now consciously considered part of political ordering. The way became open to use the law as an instrument to advance political purposes consciously.[54]

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[53] Oliver Wendell Holmes, "The Path of the Law" in Holmes, *Collected Legal Papers* (New York: Peter Smith, 1952), 173.. In the same essay he criticized the view that the law follows a strict logical regime. "You can give any conclusion a logical form. You can always imply a condition in a contract. Why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinions to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind." Ibid., 181.

[54] For a discussion of legal realism and its effect on legal and constitutional thought, see Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), where she discusses realism in relation to the integration of the legal academy into the broader university community. General accounts of realism are found in David Kairys ed., *The Politics of Law; A Progressive Critique* 3rd edition (New York: Basic Books, 1998); William W. Fisher III, "The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights" in Michael J. Lacey and Knud Haakonssen, eds., *The Culture of Rights: The Bill of Rights in*

While legal realism was an early twentieth-century American intellectual movement, Canadians had a more local acquaintance with realist ideas. As Alan Cairns has shown, analyses of the Judicial Committee of the Privy Council's interpretation of the British North America Act in the early years of Canada's constitutional development followed realist lines. Centralists in the Macdonald tradition claimed that the Judicial Committee had abandoned the text of the Act and the intentions of the Fathers of Confederation in construing sections 91 and 92 in provincialist terms. These were the "fundamentalist", federalist analogues of liberal constitutionalists believing in the separation of law and politics. The "constitutionalists" were the realists, those who understood legal and especially constitutional interpretation to be a more pragmatic, political, and even sociological exercise in reading the times and adjusting the law and the constitution to new conditions. According to the constitutionalists (that is the realists), the Judicial Committee was to be judged on the basis of its political sensitivity and statesmanship, not its legal skill.[55] Realist influences would be more apparent with the advent of the Charter.[56]

A third factor in the development of postliberal constitutionalism was the rise of the

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Philosophy, Politics, and Law, 1971 and 1991 (New York: Woodrow Wilson International Center for Scholar and Cambridge University Press, 1991), 266-365; Carlson, "Liberal Philosophy's Troubled Relation to the Rule of Law"; and Richard F. Devlin, "Mapping Legal Theory" *Alberta Law Review* 32 (1994), 602-21. Legal realism opened up new vistas for political scientists seeking to explain legal change. Many of these studies have become extraordinarily sophisticated, employing statistical techniques. One example is a study by Wahlbeck in which he traces legal change to a combination of factors of which the constraining influence of precedent is only one: judicial attitudes (themselves influenced by the political appointment process); the balance of competition between litigants (influenced by parties' resources, lawyers' relative experience, and amicus support); and the larger political environment. The path of legal development, he argues, "is successfully explained by many facets of the judicial process." Paul J. Wahlbeck, "The Life of the Law: Judicial Politics and Legal Change" *The Journal of Politics* 59 (1997), 778-802.

[55] Alan C. Cairns, "The Judicial Committee and its Critics" *Canadian Journal of Political Science* 4 (1971), 301-45.

[56] Richard Devlin, "The *Charter* and Anglophone Legal Theory" *Review of Constitutional Studies* 4 (1997), 19-79.

welfare state. The American New Deal welfare state, in the opinion of some scholars, amounted to a large-scale (informal) amendment to the United States Constitution.[57] Roberto Unger considers the development of the welfare state to be a critical element in the transition from liberal to postliberal society. The welfare state represents the "overt intervention of government into areas previously regarded as beyond the proper reach of state action."[58] Its effect on law has been to encourage: more open-ended, general clauses in legislation; the development of quasi-judicial, policy-making administrative and regulatory agencies insulated as much as possible from judicial review; a more purposive, policy-oriented style of legal reasoning; and a conception of legitimacy framed on terms of the "welfare consequences" of decisions—in general, a form of legal decision-making that "approaches that of commonplace political or economic argument."[59] A necessary implication of the rise of the welfare state was also "the gradual approximation of state and society", a corporatist tendency defying the liberal separation of the two spheres.[60]

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[57] See for example, Griffin, *American Constitutionalism*. The rise of the regulatory state has been called the "commissional revolution." Harry K. Girvetz, *The Evolution of Liberalism* (London: Collier, 1950).

[58] Roberto Mangabeira Unger, *Law and Modern Society: Towards a Criticism of Social Theory* (New York: Free Press, 1976), 193.

[59] Ibid., 193-199.

[60] Ibid. For a recent Canadian reflection on this development, see Alan C. Cairns, "The Embedded State: State-Society Relations in Canada" in Keith Banting, ed., *State and Society: Canada in Comparative Perspective* Vol. 31 of Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986), 53-86. He writes: "The traditional state-society dichotomy invites us to view these two spheres as separate, overlapping of course, and somewhat interdependent, but still capable of being viewed essentially as distinguishable systems with distinctive principles of organization, and as transmitting their own appropriate incentives to the key actors whose activities they encompass and regulate. In the earlier history of liberal democratic states, this view had considerable plausibility. In the contemporary world, however, such a perspective subtly but seriously misleads, for it implicitly postulates a separateness that no longer exists, and thus gives inadequate recognition to the new state-society fusion of the last half-century."Ibid., 55. This theme runs through much of Cairns's work. See his "The Governments and Societies of

The fourth factor influencing the rise of postliberal constitutionalism is feminist theory, specifically its critique of the public-private distinction. This critique is as emblematic of feminist thought as is the slogan, "The personal is the political." There are of course, many versions of the critique, and the critique itself has become more sophisticated over time as cruder versions have themselves been criticized. But the outlines are clear. The public/private distinction is held in feminist thought to be a polarity overlapping other polarities and reinforcing the subordination of women in patriarchal liberal societies. The private is the domestic realm of the family, the reproductive sphere, the "natural" sphere to which women are consigned by virtue of their biologically determined reproductive capacity. The public sphere, variously defined as the economy or as the political realm of citizenship, is men's domain. This is the realm of culture, equality, and freedom, while the domestic realm – also, it happens, headed by men – is the realm of nature, hierarchy, domination, and the reproduction of the social and economic order. While the family is indeed constructed by law and political effort, and is necessary for the continuation of liberal politics and economics, once in place and acting as a normative institution, it can be considered "private" and thus beyond the purview of political struggle and reform.[61]

Canadian Federalism" in Douglas E. Williams, ed, *Constitution, Government and Society in Canada: Selected Essays by Alan C. Cairns* (Toronto: McClelland and Stewart, 1988), 141-70; and his "The Past and Future of the Canadian Administrative State" in Douglas E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change: Selected Essays by Alan C. Cairns* (Toronto: McClelland and Stewart, 1995), 62-96.

It should be noted that the development of the Canadian welfare state, like so many things, was understood in terms of federalism: were state welfare functions a federal or provincial jurisdiction? The Judicial Committee of the Privy Council consistently struck down Bennett's "New Deal" claiming that social welfare matters were a provincial jurisdiction and the federal residual power was restricted to "emergencies." Formal constitutional amendments were secured to give the federal government at least some authority to institute welfare state programs; it used its spending power for many others – what one observer calls "constitutional pragmatism.". See W.H. McConnell, "Canadian Constitutionalism: A Comparative Perspective" *Contemporary Law* (1992), 484-511.

[61] The classic essay on the subject is Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy" in Stanley I. Benn and Gerald Gaus, eds., *Public and Private in Social Life* (New York: St. Martin's Press, 1983), 281-303. See also Jean L. Cohen,

Given this analysis, it follows that a central feminist concern is to demystify the public-private distinction, expose the roots of the formerly "private" as a political and social "construction", and politicize the private realm. Though feminists disagree on strategy, one major implication of this critique has been to seek transformative, feminist-inspired political change by urging the application of constitutional equality standards to social relations. Feminist legal action involves a critique of classical liberal constitutionalist state action doctrine and of the principle of formal equality implicit in received versions of the rule of law.[62]

The postliberal critique of liberal constitutionalism attacks the latter's conception of the givenness of society and its assumption that law is a neutral standard to regulate more or less autonomous social forces. Liberal constitutionalism shrouds what in fact are political premises favouring certain social actors and overlooking the needs of others. It masks its preferences by declaring certain means of redress either practically impossible or illegitimate – violations of the proper role of government, the observance of the state-society distinction, the integrity of laws as general, prospective standards. With the mask now torn off by the factors described above, postliberal constitutionalism adopts a more frankly political perspective on the role of state and law in social life.

Not all postliberals confine their views to constitutionalist concerns. One of legal

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"Rethinking Privacy: Autonomy, Identity, and the Abortion Controversy" in Jeff Weintraub and Krishan Kumar, eds., *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago: University of Chicago Press, 1997), 133-65.

[62] Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" *Osgoode Hall Law Journal* 25 (1987), 485-554; Mary Eberts, "Sex and Equality Rights" in Anne Bayefsky and Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell: 1985), 183-230; Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989); Sherene Rozack, *Canadian Feminism and the Law* (Toronto: Second Story, 1991); and Women's Legal education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996)

realism's progeny is the critical legal studies movement which favours some version of radical communitarian democracy as an alternative to rule-governed political life.[63] Others draw a distinction between "thick" and "thin" versions of the rule of law. The thick version embraces the whole panoply of classical liberal principles in a constitutionalist framework, while the more preferable, thinner version incorporates procedural norms to structure but not hamstring democratic life.[64] Part of this debate concerns the relationship between democracy and constitutionalism – whether constitutional democracy is an oxymoron, and accordingly whether constitutional principles subtracting certain matters from political contestation frustrate the aims of certain groups which cannot avail themselves of the resources which constitutional provisions are designed to protect from the reach of the state.[65]

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[63] Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986). Critical legal scholar Mark Tushnet asks himself a rhetorical question: "how would you decide the X case? To which he responds: "My answer, in brief, is to make an explicitly political judgement: which result is, in the circumstances now existing, likely to advance the cause of socialism? Having decided that, I would write an opinion in some currently favored version of Grand Theory." Mark Tushnet, "The Dilemmas of Liberal Constitutionalism: *Ohio State Law Journal* 42 (1981), 424.

Legal realism hss influenced the free market liberal constitutionalist school in peculiar ways. While Hayek married laissez-faire liberal economic to a traditional understanding of legal reasoning, some of his intellectual descendants, chiefly Richard Posner, assert that judicial decision making, if not guided by classical economic principles, would be largely discretionary -- a distinctively un-Hayekian concession to the realists. See William E. Scheuerman, "The Rule of Law at Century's End" *Political Theory* 25 (1997), 740-760.

[64] Allan C. Hutchinson and Patrick Monahan, "Democracy and the Rule of Law" in Hutchinson and Monahan, eds., *The Rule of Law, Ideal or Ideology*, 97-123. Compare, however, Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995). His favoured postliberal political configuration is "dialogic democracy." "A genuine commitment to an unadulterated democratic practice will represent the most powerful institutional alternative to the liberal society of rights-talk." Ibid., 188. One can legitimately ask how even a thin version of the rule of law can be squared with this formulation of radical democracy.

[65] One way to reconcile this is to say that democratic government implies the sorts of constraints that constitutionalism favours; in other words, democracy properly embodies internal limitations and does not need external constitutional restraint. This is

This chapter is concerned with postliberal *constitutionalist* ideas, however, not with postliberalism in general.[66] Postliberal constitutionalism does contain tensions which authors reconcile with lesser or greater degrees of success. Chief among these tensions is the conflict between the state as guarantor of liberties and the state as a threat to them. Consider one of the major figures in Canadian constitutionalism, Frank Scott, whose work and writing has spanned not only the campaign for the civil ("negative") rights of Canadians in Quebec in the 1940s and 1950s, but also embodied an abiding conviction that public law must equal private power, a central postliberal tenet. He upheld liberty from government. But private decisions, he also argued, "affect human rights just as easily as public laws, and much more frequently."[67] Accordingly, he insisted equally upon liberty through government.[68]

It must be stressed that though postliberal constitutionalism seems particularly amenable to an egalitarian political agenda, there is no necessary connection between the two. Constitutional equality rights provisions are particularly powerful when applied to private decision making because decisions made in this realm make myriad distinctions among classes of persons and because many of these decisions may be exposed on examination to be based

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one reading of the Supreme Court's opinion in the *Secession Reference*. See also Richard Vernon, "Liberals, Democrats, and the Agenda of Politics" *Political Studies* 46 (1998), 295-308.

[66] An example of postliberalism in a non-constitutional application would see liberal democracy less as a political mechanism and more as a moral order. "Liberal democracy, from this Deweyan viewpoint...is a way of individual life. Liberal democratic politics are strong and healthy only when a whole society is pervaded by the spirit of democracy – in the family, in the school, in business and industry, and in religious institutions as well as in political institutions. The moral meaning of democracy is found in reconstructing all institutions so they become instruments of human growth and liberation." Steven C. Rockefeller, "Comment" in Charles Taylor, *Multiculturalism and the 'Politics of Recognition'* ed. Amy Gutmann (Princeton: Princeton University Press, 1992), 91.

[67] Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977), 359.

[68] Tensions in Scott's thought are briefly noted by Michael Oliver, "Foreword" *McGill Law Journal* 42 (1997), 3-8.

on (mere) preference rather than defensible principle. In the Canadian case, section 15 Charter equality rights claims are potently allied with postliberal constitutionalist premises, as later chapters make clear. But postliberal constitutionalism is not egalitarian in principle. It is not hard to imagine private infringements of free speech rights or rights to due process. An employer may forbid its employees from posting notices in the workplace, raising freedom of expression concerns. A private university may have a procedurally flawed tenure review process, raising questins of procedural fairness. Postliberal constitutionalist principles amply support claims on these non-egalitarian grounds. Indeed, postliberal constitutionalism can serve a right-wing political agenda, as will be seen in chapter 5.

The themes in this chapter may be explored further by way of an examination of a much discussed theory of the American constitution. Cass Sunstein's *The Partial Constitution*[69] offers one of the most trenchant arguments for a new approach to constitutionalism, preserving many aspects of liberal constitutionalism but also moving beyond them in ways that touch several themes in this dissertation. It is worth devoting particular attention to Sunstein's book, because one of the main dimensions of his work regards the public-private distinction and the concept of state action, issues that have vexed the Canadian courts in their development of Charter application doctrine. Some of the differences between liberal and postliberal constitutionalism are illuminated in his study.

Sunstein attempts to enunciate "new foundations of law in the modern state" – a "post-New Deal constitutionalism"[70] – which differ substantially from dominant liberal tenets. These are necessary not least because of legal realism's politicization of the law. This politicization has smashed liberal constitutionalism's reliance on "existing distributions" as the key "baseline" for determining the justice and constitutionality of governmental intervention in the economy and private life. Liberal neutrality has been premised on "status quo neutrality" but the realist insight is that law is not some ethereal presence hovering over self-equilibrating rhythms of social life, serving as the standard for scrutinizing governmental

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[69] (Cambridge, MA: Harvard University Press, 1993).

[70] Ibid., 156.

interventions. There are "no prelegal givens."[71] Law is deeply implicated in the creation of existing distributions. To use the law as the standard to judge governmental alteration of the status quo is merely to veto any alteration thereof. This has been the classical liberal use of law: to resist the redistributional role of government. If the law is the product of social and political forces, there is no point in using it to judge their legitimacy. We must, Sunstein argues, reject the status quo of existing distributions as the baseline for constitutional adjudication.[72]

While some would reject all baselines as arbitrary, Sunstein suggests this would be tantamount to abandoning constitutionalism. This he does not want to do. Instead he offers the concept of deliberative democracy, or liberal republicanism, as the new constitutional standard or baseline on the basis of which existing distributions should be judged. He favours a "republic of reasons," the classical republican ideal which he thinks the founders of the American Constitution supported and embedded in the constitutional documents of the founding. The republic of reasons submits all existing distributions to scrutiny, and asks their defenders to defend them using public-regarding, supportable justifications. Equal treatment is the presumptive standard; departures from this are legitimate if they are defensible. The republic of reasons requires that distributional issues be considered on their merits and not disposed of by reference to procedural diversions like "state action doctrine," "unconstitutional conditions doctrine," or the distinction between positive and negative

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[71] Ibid., 64.

[72] Sunstein's position is part of a larger critique of classical liberalism's ideology of laissez-faire, specifically the view that the free market is a spontaneous order guiding and channeling human conduct *in the absence of* political engineering. In a trenchant critique of this view, John Gray argues that, contrary to Americans' most persistent beliefs, the "free market" requires a big, coercive, active state. "American government has never observed a rule of non-interference in economic life. The foundations of American prosperity were laid behind the walls of high tariffs. Federal and state government were active in building railways and highways. The West was opened with an arsenal of government subsidies." John Gray, *False Dawn: The Delusions of Global Capitalism* (London: Granta, 1998), 104-5. See also, ibid., 5, 7-21, 23-34, 200-13. See also Patrick J. Buchanan, *The Great Betrayal* (Boston: Little, Brown & Co., 1998) for the same argument put to social conservative, nationalist ends.

rights.[73] Post–realist, postliberal constitutional theory seeks neutrality in deliberation and the giving of publicly-supportable reasons. This is what the *im*partial constitution should be about.

This is to be contrasted with the liberal notion of neutrality, which in the 20th century came in two versions. Sunstein contrasts constitutional impartiality with liberalism's principle of "naked preference". The purpose of liberal society is to register individuals' naked preferences, regardless of how they are formed and regardless of their distributional consequences. The laissez-faire market is the classical mechanism for registering naked preferences, and liberal constitutionalist courts scrutinize with care "artificial" alterations of the market's allocations. With the coming of the 20th century welfare state – what Sunstein calls the "New Deal" – the unfettered market could no longer register preferences. Realist jurists like Oliver Wendell Holmes saw the regulatory writing on the wall and deferred to legislative encroachments on matters formerly subject to private contract. But Sunstein argues that in his blanket deference to legislatures Holmes actually retained the liberal conception of the state as registrar of naked preferences. Holmes merely saw public policy as the allocation of preference achieved by the *political* market – that is, the operation of interest-group pluralism within government.

Whether it is the economic market or the political market, liberal naked preferences stand in the way of the republic of reasons. The republic of reasons requires strict judicial scrutiny of existing distributions, whether these are produced by the market or by the interest

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[73] "According to the conventional wisdom," Sunstein suggests, "the Constitution is a charter of negative guarantees – rights against government interference – and positive or affirmative rights are exceptional or nonexistent. Government may not intrude on private rights, but there is no claim on government if it has simply failed to act....It is peculiar, however, to say that the Constitution does not guarantee affirmative rights. The takings clause protects private property, and in so doing it protects against repeals, partial or total, of the trespass laws. When a state eliminates the law of trespass, it is removing its 'affirmative' protection of property rights; but its action is not for that reason constitutionally acceptable. The right to private property is fully positive in the sense that it depends on government for its existence....Without the law, there can be no protection against trespass and in this sense no private property as we understand it." Sunstein, *The Partial Constitution*, 69-70.

group-dominated welfare state. But the liberal republican constitutional state is not interested in the mere registration of preferences; it is interested in the free formation of preferences. One of the standard liberal conceits is that preferences are somehow "given" in the order of things. In fact, Sunstein argues, preferences are subject to all sorts of forces, including the oppressive conditions in which people live. "Endowment effects" operate to make people value what they have, not what they might have. This produces a bias in favour of the status quo, of existing distributions.[74] Thus Sunstein's postliberal constitutionalism is concerned to elevate citizens to a new level of freedom, to extend the constitution's concern to those conditions which affect preference-formation.[75]

Another pillar of liberal legalism that still casts a long shadow over constitutional law is the common law concept of compensatory justice which requires that measurable harm be experienced by identifiable parties, and which requires that those parties be returned to the status quo ante after liability has been assigned. Compensatory justice has influenced Fourteenth Amendment discrimination law by requiring courts to find intentional discrimination before granting remedies or upholding ameliorative state policies like affirmative action programs. Compensatory justice has likewise limited the regulatory power of the state in protecting the environment by controlling those substances and activities which have a *probability* of harming unidentifiable others.

In place of compensatory justice Sunstein offers two principles of justice: risk

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[74] Ibid., chapter 6.

[75] Canadian scholars and jurists have affirmed Sunstein's distinction between constitutional partiality and impartiality. Supreme Court Justice Claire L'Heureux-Dubé has criticized traditional judges for basing their decision making on "a partial reality" of white, male traditional stereotypes. See Claire L'Heureux-Dubé, "Making a Difference: The Pursuit of a Compassionate Justice" *UBC Law Review* 31 (1997), 1-15. For her and for many others, partiality is not merely bias but incompleteness, the failure to take account of a more comprehensive reality in decision making, specifically women's reality. See also Bertha Wilson, "Will Women Judges Really Make a Difference?" *Osgoode Hall Law Journal* 28 (1990), 507-22; and Elizabeth Halka, "Madam Justice Bertha Wilson: A 'Different Voice' on the Supreme Court of Canada" *Alberta Law Review* 35 (1996), 242-65.

management, which would allow courts to apply policies which seek to regulate activities not fitting the restrictive definitions posed by the concept of compensatory justice; and the "anticaste principle" – or, "opposition to caste" – which allows courts to focus not on the compensation of victims for past discriminatory conduct, but rather on "the elimination, in places large and small, of something in the nature of a caste system."[76] This last principle is most relevant for the purposes of this dissertation. "The motivating idea," he argues, " behind an anticaste principle is that differences that are irrelevant from the moral point of view ought not without good reason to be turned, by social and legal structures, into social disadvantages....The question for decision is not whether there is a difference [between one group and another] – often there certainly is – but whether the legal and social treatment of that difference can be adequately justified."[77] What this would mean in practice, among other things, is that if a government policy distributed benefits to some groups and not others, the excluded groups have a live claim to those benefits, and the government would have to offer persuasive reasons for their exclusion. It would no longer be open to government simply to argue that state benefits are "privileges" or "subsidies" to which no one – either the beneficiaries or the excluded groups – is entitled. References to privilege and subsidy merely recall status quo neutrality, which for Sunstein does not exist.

Sunstein is less than clear on the question of state action and the degree to which the post-New Deal constitution applies to "private" conduct. At one point he states the American courts' "state action doctrine" is a "cornerstone" of American constitutionalism because it is the "product of an understanding that the Constitution is directed to acts of government rather than to acts of private individuals...Private individuals and organizations are permitted to act freely...Private institutions may discriminate, or fire Democrats, or hire only Christians, so far as the Constitution is concerned."[78] At another point he argues that state action debates are largely a red herring. The real issue, he contends, is that courts are reluctant to find state

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[76] Ibid., 338.

[77] Ibid., 339.

[78] Ibid., 71-2.

action in cases in which existing distributions are being altered. In other words, state action doctrine has historically been the servant of status quo neutrality.[79]

Sunstein applauds the U.S. Supreme Court for ruling in *Shelley v. Kraemer*[80] that judicial enforcement of a racially restrictive voluntary contract was a violation of the Fourteenth Amendment. The finding that the common law of contract is reviewable is consistent, he says, with the New Deal's "denaturalization of the common law" -- the exposure of the common law as a "conspicuous set of social choices."[81] *Shelley* was a very easy case to decide, he says. Judicial enforcement is state action. "The Constitution does not govern private conduct. But when the state enforces a racially restrictive covenant, of course it is acting. When the trespass law is used to evict someone from private property, the state is involved."[82]

Compare the above to the following passage in which he discusses the extent to which the "free market" may abridge free speech. Liberal constitutionalists hold that only the state can violate free speech rights. Sunstein begs to differ, but does not want to be misunderstood:

> I have suggested that legal rules lie behind private behavior, and it will be tempting to think that this suggestion does dissolve the state action requirement. If private exclusion of speech is made possible by law, does not it [sic] turn out that the First Amendment invalidates private behavior after all? Is not all private therefore state action? The answer is that it is not. A private university, expelling students for (say) racist speech, is not a state actor. The trespass law, which helps the expulsion to be effective, is indeed state action. The distinction matters a great deal. The trespass law, invoked in this context, is a content-neutral regulation of speech; the state allows use of the trespass law quite independently of the content of the speech. This form

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[79] Ibid., 72.

[80] 334 U.S. 1 (1948).

[81] Ibid., 54-7.

[82] Ibid., 160. "The lesson of the attack on status quo neutrality is emphatically not that there is no line between public and private and private action, or that private action is constitutionally restricted. The lesson is that the law of contract, tort, and property is just that – law. It should be assessed in the same way in which other law is assessed." Ibid., 159.

> of regulation does not violate the First Amendment.....By contrast, the behavior of the university is content-based and if engaged in by a public official, it would indeed violate the First Amendment.[83]

How is it that a private university can use the common law and the courts to expel a student without constitutional stricture, but another private individual cannot use the common law of contract and judicial enforcement to establish a restrictive covenant? In *Shelley's* circumstances, was not judicial enforcement content-neutral?

A settled point is that judicial enforcement triggers constitutional review. Thus the courts, though independent in terms of the constitutional doctrine of the rule of law, are nonetheless part of the state for purpose of state action doctrine. But Sunstein adds another layer of ambiguity to his analysis by denying that involvement of state officials will always trigger constitutional review. There is a trivial sense in which this position is sound. If Jane invites white-skinned Bob to dinner in her home, and uses a racially discriminatory criterion in her invitation whose purpose and effect is to exclude black-skinned Dave, state officials are involved in the oblique sense that the building in which the dinner is held was built according to state-mandated specifications, the electricity used to bake the casserole is provided either by a publicly owned or regulated corporation, the food prepared is government-inspected, and the house in which the dinner is served is protected by patrolling police officers.

Is this degree of state involvement direct enough to trigger constitutional attention? One test of state action, he suggests, "could depend on whether government employees are involved in the acts at issue. But that would be too broad. State officials enforce contracts and protect property every day, and their willingness to do so is an important backdrop for daily interactions....If the background involvement of officials is sufficient to produce 'state action', the whole category would be impossibly broad. The actual or potential involvement of state officials in the enforcement of private contract, tort, and property law does not subject all private arrangements to constitutional constraints."[84] So if Dave launched a court action

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[83] Ibid., 205.

[84] Ibid., 72.

against Jane claiming discrimination, he would fail. And if he launched an action against the government for its (rather remote) complicity in the discriminatory conduct, he would presumably fail again.

Sunstein seems to resist the logic of his own argument here. Is his position not made consistent if he would apply constitutional norms to Dave's suit against Jane? Whether Dave would win of course, would be a question of rights limitation, but can Sunstein foreclose the question by limiting constitutional application? One wonders if Sunstein can limit the application of constitutional norms to social life in such a simple way. After all, his anti-caste principle is intended not to correct only legal disadvantages, but also "social" disadvantages whose connection to legal constraints may be attenuated. The constitutional advancement of principles of substantive equality are hard to limit on premises of legal realism.

The application of constitutional standards to society becomes a difficult matter for postliberal constitutionalism. While postliberals criticize liberal constitutionalism for failing to apply constitutional standards broadly enough, their particular difficulty is in keeping the constitution from application to all manner of human activity, a problem particularly acute for a doctrine resting on the post-realist assumption that everything is political. Sunstein chides orthodox interpreters for their subordination of state action doctrine to status quo neutrality. But he is left scrambling to assure his readers that post-New Deal constitutionalism still respects a distinction between public and private realms, that constitutional standards will not apply writ large, that there is still a distinction between state and society. Is his insistence tenable? "Background" involvement of state officials does not trigger constitutional application; judicial enforcement of private legal matters does. What if, in the dinner example, Dave came to the house during dinner and demanded an invitation, prompting the host to have the police remove him from the property? Is this state official involvement direct enough to trigger constitutional review? If the object of postliberal constitutionalism is to root out castes, many of whose most tenacious strongholds are socially embedded (even in – or especially in! – small acts like an invitation to dinner), what value is there in the republic of reasons in protecting such vicious discrimination?

Conclusion

The term constitutionalism connotes consensus because constitutions "constitute" a people and provide the common undergirding framework that shapes and supports political life. As such constitutionalism is at one remove from daily political struggle.

Recent developments go some distance in debunking this view. One scholar describes a constitution merely as a "site for discursive struggle."[85] Liberal and postliberal constitutionalism are as Jacob and Esau, closely related, born into the same tradition, living in discursive contention for the inheritance of the kingdom. This chapter has attempted to set out what the two constitutionalisms share and what they dispute in each other. Their differences are especially great in respect to the degree to which constitutional standards ought to apply to social life beyond traditional governmental institutions and activities.

There is no question that postliberal constitutionalists have identified some weaknesses in liberal constitutionalism. For some time these weaknesses were papered over, ignored not because with ignorance the problems might go away, but because, one suspects, the consequences of opening Pandora's box would have consequences we might not foresee or control. It is also true that liberalism is not in the habit of defending itself, and that the terms of contemporary intellectual debate and justification make it hard to resist critiques of liberalism.[86] All of which is not to say that the positive program of the postliberal critique is itself beyond criticism.

As the next chapter makes clear, the clash of liberal and postliberal constitutionalism

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[85] Richard Devlin, "Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson" *Queen's Law Journal* 22 (1997), 101. See also Andrew Petter and Allan C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" *UBC Law Review* 23 (1989), 531-48; Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995), 72-3.

[86] On this point see Anthony Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Basil Blackwell, 1984), chapter 1; John Gray *Post-liberalism: Studies in Political Thought* (London: Routledge, 1993); John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London: Routledge, 1995).

has been at the heart of Canadian Charter of Rights debates almost from the beginning.

Chapter 3

The Clash of Constitutionalisms and the Canadian Charter

Introduction

Canadian constitutional thought and practice has until recently been dominated by federalism, the accommodation of two founding peoples, and the adjustment of intergovernmental fiscal relations. Canadians are all too familiar with the "mega constitutional politics" associated with Canada's relations with Great Britain, central institutional reform, the alteration of the division of powers, the entrenchment of a third order of aboriginal government – in general, the adjustment of intergovernmental and state-society relations.[1] Federalism has been the tallest and stoutest pillar of the Canadian constitution. Parliamentarism constitutes another pillar of the constitution but, in the opinion of one of its keenest students, threatens to become, with Bagehot's monarchy, merely a dignified part of the constitution and worth the same scholarly attention as the monarchy.[2] The least that can be said is that parliamentarism does not lend itself to speculation about bills of rights.[3] The Charter, despite the recency of

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[1] The phrase "mega constitutional politics" is associated with Peter H. Russell, *Constitutional Odyssey: Can the Canadians Be a Sovereign People?* (Toronto: University of Toronto Press, 1992), 74-6.

[2] J.R Mallory, in a remark recorded in the proceedings of a seminar entitled "Year 7: A Review of the McGrath Committee Report on the Reform of the House of Commons" (Ottawa: Canadian Study of Parliament Group, 1992), 45. On the relative unimportance of Parliament see also Donald Savoie, *Governing from the Centre: The Concentration of Political Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

[3] "There was no mention whatsoever of [a bill of rights] in the Confederation Debates. An 'entrenched' bill of rights was simply not a part of a governmental tradition

its entrenchment in 1982, has unquestionably become the third pillar of the Canadian constitution and rivals federalism in the importance it has acquired and the attention it has attracted. References to the "two founding genders" now compete with the more traditional contests between or among founding peoples.[4]

But the Charter's prominence is due not just to its popularity;[5] it is also due to the constitutional turmoils in which it has played a central part. A central paradox of the patriation of the constitution – of which the Charter's entrenchment was the centrepiece – is undoubtedly that an initiative designed to dissipate tensions and produce unity and harmony in fact helped to stimulate dissensus and controversy. This controversy is evident in many spheres of political and constitutional life in Canada, including public squabbles between high court justices, and parliamentary questions about the use or non-use of the notwithstanding clause to reverse controversial Charter rulings. This chapter will suggest that the Charter is controversial in the sense that constitutional scholars have been divided, since the time of the Charter's entrenchment, over its place in Canadian constitutionalism. It expands on the contention by others that in this country and in others, "there is no generally held consensus

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which had at its heart the supremacy of parliament and the symbolic unity of the Crown." William R. McKercher, "The United States Bill of Rights: Implications for Canada" in William R. McKercher, ed., *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Ontario Economic Council, 1983), 11. Also, Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClelland & Stewart, 1997), 227.

[4] Lynn Smith, "Have the Equality Rights Made Any Difference?" in Philip Bryden, et al, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994), 72.

[5] On the popularity of the Charter among Canadians, see, for example, Paul M. Sniderman, et al, *The Clash of Rights: Liberty, Equality, Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1996), chapter 6. And Ian Urquhart has found similar results for Albertans. In fact, his study matches the Sniderman et al study in that general public support for the Charter becomes popular ambivalence when specific Charter issues are raised. Ian Urquhart, "Infertile Soil? Sowing the Charter in Alberta" in David Schneiderman and Kate Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997), 34-57.

on the nature of constitutions."[6] The clash of constitutionalisms set out in the previous chapter is evident in understandings of the purposes and meaning of the Charter. In particular, liberal and postliberal constitutionalists differ on that aspect of the clash of constitutionalisms with which this study is most directly concerned: Charter application doctrine.

The Charter and the Clash of Constitutionalisms

While there is always a risk of distortion and unwarranted simplification in reducing the complexity of intellectual opinion to ideal types, it is possible to glean from the literature on Charter commentary liberal and postliberal interpretations of the Charter's meaning and purpose.

If the Charter can be traced to the intellectual and political efforts of one man, that man must be Pierre Elliott Trudeau.[7] The story of Trudeau's political formation has been told many times – sometimes by Trudeau himself in rather shameless coffee table picture books – and need not be revisited. Suffice it to say that Trudeau as a young, perfectly bilingual Quebecker in Duplessis's Quebec, developed a liberal sensibility whose principal, lifelong expression is an aversion to what he considered the defensive, insular, anti-modern nationalism which married political authoritarianism to the Catholic hierarchy. For Trudeau, the joint historical appearance of Quebec nationalism and civil rights violations like the persecution of Communists and the Jehovah's Witness, and the harassment of unionized workers, was more than accidental. Nationalism is passion, emotion, and tribalism, whereas liberalism and its constitutionalist counterpart, federalism, are reason in its political

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[6] Richard Fader, "Reemergence of the Charter Application Debate: Issues for the Supreme Court in *Eldridge* and *Vriend*" *Dalhousie Journal of Legal Studies* (1997), 204.

[7] Ian Greene states that the three primary reasons why the Charter became a reality are Pierre Trudeau; the federal government's nation-building strategy of which bilingualism, multiculturalism, patriation of the constitution, and the Charter were major components; and the timid judicial construction of the Canadian Bill of Rights of 1960. Trudeau figures centrally in two of three of these causes. Ian Greene, *The Charter of Rights* (Toronto: Lorimer, 1989), 61.

application.[8] However much a centralizing bully he was in his practical political life, Trudeau's theory of federalism is firmly in the American checks-and-balances camp: federalism is about counterweights, the fragmentation of power, the preservation of freedom, not about the realization of collective identities. These latter, in Trudeau's mind, are facts to be managed, not values to be fostered and realized.

Trudeau's writings bespeak a liberalism stressing the primacy of the individual person. "For humanity," he suggested, "progress is the slow journey towards personal freedom....[T]he very purpose of a collective system is better to ensure personal freedom."[9] Similarly, in a manifesto entitled "*Pour une politique fonctionelle*" – translated as "An Appeal to Realism in Politics" – published in *Cité Libre,* Trudeau, one of its co-signatories, proclaimed: "In the present context of Canadian politics, it is necessary above all else to reaffirm the importance of the individual, without regard to ethnic, geographic or religious accidents. The cornerstone of the social and political order must be the attributes men hold in common, not those that differentiate them. An order of priorities in political and social matters that is founded upon the individual as an individual, is totally incompatible with an order of priorities based upon race, religion, or nationality."[10] This statement of principle lacks some of the maturity Trudeau subsequently acquired as an elected politician to negotiate the push and pull of the politics of federalism and non-territorial identities. The Charter he finally negotiated in 1981, as will be seen below, is no uncomplicated liberal constitutionalist document. The statement, nonetheless, describes his basic constitutional orientation.

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[8] "It is now becoming obvious that federalism has all along been a product of reason in politics. It was born of a decision by pragmatic politicians to face the facts as they are, particularly the fact of the heterogeneity of the world's population. It is an attempt to find a rational compromise between the divergent interest-groups which history has thrown together; but it is a compromise based on the will of the people." Pierre Elliott Trudeau, *Federalism and the French-Canadians* (Toronto: Macmillan, 1968), 195.

[9] Ibid., 209.

[10] "An Appeal for Realism in Politics" in H.D. Forbes, ed., *Canadian Political Thought* (Toronto: Oxford University Press, 1987), 338.

Trudeau's pluralist or "polyethnic" liberalism[11] contained an anti-nationalism that led him not only to the editorship of *Cité Libre,* federal politics, and an obsession with Quebec nationalism; it led him to advocate from an early stage in his public life the entrenchment of a charter of rights into the Canadian constitution, a charter of an essentially liberal constitutionalist pedigree that would limit government power over the individual.[12] In an essay reflecting on his life in politics, Trudeau argued that "the very adoption of a constitutional charter is in keeping with the purest liberalism according to which all members of a civil society enjoy certain fundamental, inalienable rights and cannot be deprived of them by any collectivity (state or government) or on behalf of any collectivity (nation, ethnic group, religious group, or other)....It follows that only the individual is the possessor of rights. "A collectivity," he wrote, faintly echoing Locke, "can exercise those rights it has received by delegation from its members; it holds them in trust, so to speak, and on certain conditions."[13] Trudeau's constitutionalism is liberal, and he saw the Charter as a clear expression of this liberal constitutionalism.

In one of the more spectacular paradoxes of Trudeau's career, his liberal, anti-Quebec nationalism led him to a Charter-based pan-Canadian nationalism. He hoped to foster this not only by entrenching a rights document of high symbolic value, but by providing that charter with legal authority to be interpreted ultimately by the Supreme Court of Canada, a central institution controlled in large part by the federal government, whose decisions would have a homogenizing, standardizing effect on areas of provincial jurisdiction. In one constitutional swoop, Trudeau could assert the Charter against both Quebec nationalism and petty English-

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[11] See H. D. Forbes, "Trudeau's Moral Vision" in Anthony Peacock ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Toronto: Oxford University Press, 1996), 17-39, for a discussion of Trudeau's pluralist liberalism.

[12] See Trudeau's 1967 address to the Canadian Bar Association, reprinted as ""A Constitutional Declaration of Rights", in *Federalism and the French-Canadians*, 52-60.

[13] Pierre Elliott Trudeau, "The Values of a Just Society" in Thomas S. Axworthy and Pierre Elliott Trudeau, eds., *Towards a Just Society: The Trudeau Years* (Toronto: Viking, 1990), 363-4.

Canadian provincialism – a feat of liberal nationalist constitutional engineering which if successful would be truly revolutionary.[14]

Trudeau's constitutional thought and action is not the only evidence of liberal constitutionalist reflection on the Charter. Early in the life of the Charter, commentators weighed in with assessments of the Charter's meaning and purpose. Katherine Swinton bluntly states that "the obvious purpose of a charter of rights and fundamental freedoms is to constrain legislative action." The Canadian Charter resides in this tradition; it does not impose positive obligations upon governments to act. Instead, she argues, the Charter's purpose "is to restrain government action, not to generate legislative action...."[15] Similarly, Gerard LaForest, who would later be appointed to the Supreme Court, suggested that "The authors of our system of parliamentary democracy were actuated by a philosophy of individual freedom, a philosophy that continues to inform our fundamental political institutions. The courts...interpret statutes so as to ensure that individual freedoms or private rights of property are not arbitrarily restricted or abridged. In doing this the courts exercise what is in essence a constitutional function."[16]

David Beatty's liberal constitutionalism is second to none in its clarity and

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[14] Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms" in Alan Cairns and Cynthia Williams, eds., *Constitutionalism, Citizenship, and Society in Canada* Vol. 33 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), 133-82; Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal and Kingston: McGill-Queen's University Press, 1995); Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997); and Claude Couture, *Paddling with the Current: Pierre Elliott Trudeau, Étienne Parent, Liberalism, and Nationalism in Canada* (Edmonton: University of Alberta Press, 1998).

[15] Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms (ss. 30, 31, 32)" in Walter Tarnopolsky and Gérald-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982), 45-7.

[16] Gerard LaForest, "The Canadian Charter of Rights and Freedoms: An Overview" *Canadian Bar Review* 61 (1983), 20.

intransigence. Rights, in Beatty's view, are claims asserted against the state. The state's proclivity is to engage in "overkill", to "go too far" - in short, to trench excessively on rights in the pursuit of what are usually legitimate democratic objectives. The whole language of constitutional law in Beatty's understanding is liberal constitutionalist in inspiration.[17]

For Beatty, the beauty of the Charter is not merely that it contains a set of rights people can assert against the state in a disinterested judicial forum. It is that the Charter provides a mechanism by which limitations on rights must be justified to a court by the party whose policy is being impugned by a Charter challenger. Only a naive observer would suggest that rights are absolute. Rights are often expressed as absolutes but, in fact, they conflict with one another, and so they must be limited by one another. Further, provisions in the constitutional text are vague, general proclamations, frustratingly silent about the meaning of rights in hard cases. Aware of these and other difficulties associated with constitutional interpretation, Beatty argues that the Canadian Charter asks courts not so much to interpret particular provisions but rather to require governments to *justify* any limitations they place on people's exercise of their rights. He looks with particular approval upon the Supreme Court's 1986 decision in *R. v. Oakes.*[18]

David Edwin Oakes was caught by police in possession of a small quantity of a prohibited drug. Possession was a crime under the *Narcotic Control Act.* But the Act went further. It provided that a person who is proven beyond a reasonable doubt to be in possession of a prohibited drug will also be considered to be in possession for the purpose of trafficking in that drug, a more serious offence carrying a more serious punishment. The provision reflected Parliament's concern to stem the traffic in banned drugs. The provision itself hardly seemed fair. An accused was presumed to be trafficking on the basis of having

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[17] David Beatty's theory of constitutional review is set out in *Talking Heads and the Supremes: The Canadian Production of the Constitutional Review* (Toronto: Carswell, 1990); and *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995). For an extended critique of the latter work see Thomas M.J. Bateman, "The Empire (of Law) Strikes Back: A Review of *Constitutional Law in Theory and Practice" Review of Constitutional Studies* 3 (1996), 330-49.

[18] *R. v. Oakes* [1986] 1 S.C.R. 103.

been found in possession only. This ran against fundamental principles of the criminal law, that the innocent shall not be punished, and that one should be presumed innocent until proven guilty. Section 11(d) of the Charter protects just these principles. The offending provision of the *Narcotic Control Act* gave accused persons an out. It provided that, once convicted of possession, if the accused can prove on a balance of probabilities that he or she was not in possession for the purpose of trafficking, he or she will be acquitted of the more serious offence.

For the Supreme Court, allowing Oakes to prove that he was innocent was no help. This meant that an accused could submit to the court evidence questioning the trafficking charge and raise a reasonable doubt as to his guilt, yet fail to introduce enough evidence to establish his innocence on a balance of probabilities. In the end, the accused would be convicted of trafficking even though there was a reasonable doubt as to his guilt. In Oakes' case, the Court found that the reverse onus provision violated his section 11(d) right to be presumed innocent until proven guilty. But the case did not end there, for the Charter begins with the following provision:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Now the Court had to consider whether the government's infringement or limitation of the right set out in section 11(d) was nonetheless reasonable within the terms of section 1. Section 1 allows a government to justify a law which limits a Charter right. For liberals, this is a crucial element in Charter jurisprudence. Governments often act in the public interest, for example by fighting the illegal drug trade. But they can easily go too far, trampling the rights of accused persons. The public is no help in this event, since it is frightened by crime and is encouraged by the media to assume that if someone is arrested on a charge, that person must be guilty.

The Court in *Oakes* held that section 1 requires governments to show that a law

serves a legitimate purpose and that the legislative means it chooses to attain that purpose are tailored as narrowly as possible to that end. Rights may be limited but only to the smallest degree consistent with attaining a legitimate public purpose. The state may only use "the least drastic means." In this case, the government went too far in presuming someone in possession if narcotics is in possession for the purpose of trafficking. If the government had drafted a law that stipulated that possession of a certain amount of illegal drugs carries a presumption of possession for the purpose of trafficking, the law might have been "saved" under section 1.

For Beatty, *Oakes* is all that the Charter should be about in the protection of individual liberty. He argues that all the work of constitutional review is really done in section 1 analysis, not in the interpretation of rights set out elsewhere in the Charter:

> Justification, not interpretation, [is] the leitmotif of constitutional review. Rather than empowering individuals and governments to do various things, the rules of constitutional law actually impose limits on how those (politicians and government officials) who are entrusted with the powers of the state can behave....[T]he rules of constitutional law are directed to the politicians and their agents, and they speak about the duties and obligations (to act rationally and consistently) they owe to the people whose lives they control.[19]

If the Charter is about governments justifying their conduct before courts, how do governments justify themselves? What criteria can they use? What standard do they have to meet? Liberals argue that it should be difficult, though not impossible, for government to justify infringements of rights. To do so, governments cannot cite administrative inconvenience, extra costs, or other utilitarian considerations. Rights may be limited by rights and other constitutional values undergirding a free and democratic society; they must not be limited in favour of expedients. In this sense, the Charter for liberals is an internally consistent document and the limitation of rights is framed in the same terms as the protection of rights. In Beatty's view, two principles of constitutional law - the principles of "proportionality" and "rationality" -- though not explicit in the Charter or any country's constitutional texts, are

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[19] Beatty, *Constitutional Law in Theory and Practice*, 17.

inherent in the concept of constitutional review and are truly universal in application.[20] In a repudiation of more contemporary critiques of liberal separations of law and politics, he insists that these two principles uphold the rule of law. And: "If judges are not governed by rules of law – if the rule of law has no definite, determinate meaning that can distinguish laws that are structurally valid from those that are not – judicial review should have no place in a society that claims a liberal-democratic pedigree."[21]

Other liberal constitutionalists take a complementary view of the Charter and its role in checking government excess. For Lorraine Eisenstat Weinrib, section 1 both protects rights and limits them. Rights limitations are justified in terms of the advancement of other rights made possible by this limitation.[22] For example, while an accused has the right to a fair trial under the Charter, this does not mean that he shall have full, unfettered access to confidential medical records of the complainant in a sexual assault case. His Charter rights are limited by the complainant's legitimate interest in privacy, a consideration advanced by a fundamental Charter value of individual dignity.[23]

Weinrib considers the section 33 override provision of the Charter a constitutional embarrassment. This provision allows governments to pass laws and have them operate notwithstanding the application of ss. 2 and 7-15 of the Charter (the fundamental freedoms, legal rights, and equality rights provisions) for renewable five-year periods. Section 33 was inserted into the Charter by the federal government to attract enough provincial support to achieve entrenchment. It in principle allows a majoritarian institution, the legislature, to

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[20] The details of Beatty's two rules of constitutional law need not detain us. Suffice it to say that the Supreme Court's *Oakes* test, and Bertha Wilson's fidelity to it across the spectrum of cases decided by the Court, is, according to Beatty, as close an approximation to the rules as one is likely to find.

[21] Beatty, *Constitutional Law in Theory and Practice*, 15.

[22] Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" *Supreme Court Law Review* 10 (1988), 469-513.

[23] See the Supreme Court's decision in *Seaboyer v. The Queen* [1991] 2 S.C.R. 577 where this example is given detailed attention.

exempt its laws from the application of the Charter. In this event, crass utilitarian and populist – that is, illiberal – considerations could trample citizen rights.

However, there is a liberal argument for the existence of section 33. The section, Weinrib argues, has the twin advantages of being the ideal mechanism for limiting rights in favour of "political", utilitarian purposes, and of being very difficult to use. Since governments have the power under section 33 to exempt legislation from the Charter, thesection1 reasonable limits clause should be kept from advancing these same "political," expedient purposes. In a proper, liberal constitutional division of labour, the mere presence (not to say use) of section 33 frees courts to usesection1 analysis to limit rights only in terms of other constitutional rights and values protected elsewhere in the Charter.[24] In other words, for liberals there are good reasons and bad reasons for limiting rights. The good reasons have to do with limiting rights to allow other rights to be exercised. The bad reasons include limiting rights because governments find it administratively convenient to do so, because crowds of "law and order" supporters want to hang accused persons without giving them fair trials, because group claims should trump individual rights claims, or because to recognize a right would cost too much money. If a government wants to limit a right for a bad reason, it can invoke section 33 and take its chances in the electoral arena. If it gives bad reasons for limiting rights under section 1, then courts should be prepared to reject such claims.

This serves liberal purposes for a Charter. For liberals, rights are paramount; they should not be limited by "political" considerations. Indeed, they are not the subject of political bargaining. This is why rights are justiciable in courts of law; independent institutions are separate from the political realm, and their officers speak a non-political language and decide cases using non-political criteria. Law is not politics by other means. It is a human activity of another order, a self-contained activity responsive to the appeal of principle, not of power.

The distinction between the public and private is addressed directly by John D. Whyte, whose liberal constitutionalism seems to be derived not from classical liberal premises but from a recognition of a communitarian strain in Canadian political culture. At the heart of

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[24] Weinrib, "The Supreme Court of Canada and Section One of the *Charter*."

Canadian politics, he suggests, are two conceptions of the state: one is the liberal version in which autonomous individuals each pursue the good life in a legal order protecting their rights to do so; and the other is the organic model which places primary value on community, belonging, and the nurturing of mutual responsibility. In the perfect liberal state, Whyte argues, we would want Charter values to permeate "as much private personal interaction as possible. The values of personal freedom and equal respect which governments must honour should also be honoured within one's home, church, union, tribe, school, or other form of corporate existence. The ideals of non-partisan treatment, maintenance of political voice, equal access to benefits, and right to participate in choices which affect one's interests are not less desirable when one is acting within, and being acted upon by, group, tribe, or corporation than when one is being affected by, or affecting, government."[25] But such a universalized application of liberal principles – such a postliberal conception of rights application – would drown competing communitarian values. As he puts it, "it is likely that it is a part of our legal and political order that persons can trade for benefit at least some of their freedoms, even those freedoms which have been expressly acknowledged in the Constitution. It may also be part of our constitutional order that persons can seek to pursue their interests or their visions of the good life through joining communities the values of which are at odds with the values of freedom and tolerance found in the Constitution."[26] Whyte's position is that the public realm shall be governed by liberal principles reflected in the Charter, and the private realm will be the realm of community and other non-liberal attachments. We need a theory, he says, "which precludes the Charter's application in essentially private conduct and arrangements...." The legal system "at least theoretically, is implicated in all that we do, but if the Charter rights are to prevail everywhere, many valuable aspects of private arrangements will be lost."[27]

The above observers consider the Charter to be amenable to a liberal constitutionalist

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[25] John D. Whyte, "Is the Private Sector Affected by the Charter?" in Lynn Smith, et al, eds., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter Inc., 1986), 175.

[26] Ibid., 173-4.

[27] Ibid., 179.

construction. To their number may be added those scholars on the critical left who, for reasons of their own, also consider the Charter to be Canada's step into liberalism. These scholars see in the Charter an Americanization of Canadian constitutional culture, an adoption of an individualistic, pro-big business constitutional Trojan Horse whose purpose and effect is to assert the claims of the influential against those public policies rooted in a more egalitarian, "progressive" theory of the Canadian state. For this group, the Charter's liberal constitutionalist tenor is of course what they think is wrong with it; but this is evidence, at the least, that there is a liberal constitutionalism in this country to be attacked by its opponents.[28]

Another group of liberal constitutionalists, led by scholars like Christopher Manfredi, Rainer Knopff, F.L. Morton, and to a lesser extent Peter Russell, concerned about the fragility of liberal constitutionalist culture in this country, note that while the Charter may be a liberal document at its core, it is indeterminate enough – given the vague wording used in any constitutional instrument and the exigencies of late twentieth-century conceptions of judicial review – to be hijacked for purposes having little to do with liberal constitutionalism. This group recognizes that the Charter combines liberal principles with other group-oriented protections. Whatever the historical bases of the Charter's recognition of a variety of collective rights and non-territorial identities, this group holds, the Charter itself was the product of shrewd interest group politics. Different interest group elites sought to entrench their status claims in the constitution, providing a foothold for future policy claims to be asserted through Charter litigation that they may be unable to achieve through conventional parliamentary channels. The federal government abetted this process. Early in the political

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[28] The major texts from this school of thought are Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* second edition, (Toronto: Thompson Educational Publishing, 1994); Alan C. Hutchinson, *Waiting for Coraf: A Critique of law and Politics* (Toronto: university of Toronto Press, 1995). Also, Robert Martin, "The Charter and the Crisis in Canada" in David E. Smith, et al, eds., *After Meech Lake: Lessons for the Future* (Saskatoon: Fifth House, 1991), 121-38. A somewhat less categorical critique of the Charter as a thoroughgoing liberal constitutionalist project is Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997). Bakan argues that Charter review may at times avail "progressive" forces of some gains, but that these are relatively few given the dominant liberal thrust of the Charter and the socio-economic composition of the judiciary.

process leading to patriation, it had only two provincial government allies in a scheme whose purpose was to diminish the autonomy of the provinces in Confederation. Seeking support of its "People's Package", the federal government aligned itself and the Charter with the aspirations of the non-territorial groups, accommodating their demands in exchange for much-needed political support in the battle with the "Gang of Eight" opposing provinces. In brief, the federal government inserted a battery of collective rights and recognitions to achieve its goals in a mega-constitutional exercise of territorial and non-territorial interest group politics.

The deployment of constitutional resources for Trudeau's pan-Canadian, liberal-nationalist ends is a departure from liberal constitutionalist principles, making the Charter very much a "politically indigenous document", says Manfredi. But one should not, he cautions, interpret the collective rights provisions solely as an indicator of some organic Canadian communitarianism. The Charter is merely the product of liberal interest group politics raised to a constitutional level whose main effect will be to redirect the pursuit of political interests away from the conventional institutions of government to the courts via constitutional litigation.[29] Such a constitutionalization of interest-group politics, in his view, is a form of liberal politics generating what Manfredi calls an "anti-liberal constitutionalism."[30]

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[29] This is a view characteristic of political scientists. See Christopher C. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland and Stewart, 1993); J.R. Mallory, "The Continuing Evolution of Canadian Constitutionalism" in Cairns and Williams, eds., *Constitutionalism, Citizenship, and Society in Canada*, 51-98; Cynthia Williams, "The Changing Nature of Citizen Rights" in ibid., 99-132; Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" *Canadian Bar Review* 61 (1983), 30-54; and Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson, 1992).

[30] Christopher C. Manfredi, "On the Virtues of a Limited Constitution: Why Canadians Were Right to Reject the Charlottetown Accord" in Peacock, ed., *Rethinking the Constitution*, 40. As he puts it, "post-Charter constitutional politics has become a struggle to acquire constitutional resources, maximize their value, and mobilize them to redistribute political power. Constitutional politics is thus best understood as a competitive game of institutional design in which the principal goal is to establish and modify the framework of formal procedural and substantive rules in a manner that favours one set of policies rather than another." Ibid., 50. For a theoretical elaboration of this view of constitutional politics, see Ian Brodie, "The Market for Political Status" *Comparative*

Liberal constitutionalists do not attribute much significance to the peculiarly Canadian provisions of the Charter. They stress instead its liberal individualist core, its universalism. Others insist that one cannot ignore these national particularities in constitutional design. As Cairns has argued, "Charters of Rights are nation-specific. They are blends of universal values and local adaptations."[31] The Canadian Charter contains provisions not present in a classical liberal template. The catalogue of Canadian exceptionalisms is well-known: mobility rights, language rights, minority language education rights, interpretive clauses safeguarding aboriginal rights, denominational school rights, multicultural heritage, and sexual equality. Some make much of this. They argue that these provisions make the Charter a uniquely Canadian document, giving effect to communitarian principles and a positive orientation to the state embedded in Canadian political culture.[32] The least that can be said is that the Charter is a "generous, eclectic document", a "Janus-faced" presentation of "both liberal individualism and the constitutionalization of the linguistic, ethnic, racial, cultural and sexual identities of Canadians."[33]

These provisions, as well as the significance commentators attach to them, push

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Politics 28 (1996), 253-271.

[31] Alan C. Cairns, "Reflections on the Political Purposes of the Charter" in Gérald-A Beaudoin, ed., *The Charter: Ten Years Later* (Lés Editions Yvon Blais Inc., 1992), 177.

[32] One of the clearest statements of this position is David Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness" *Canadian Journal of Political Science* 22 (1989), 699-716. He argues that the Charter contains "community rights" which allow communities to be exempt from other rights set out in the Charter. This, he suggests, markedly distinguishes the Canadian Charter from the American Bill of Rights.

[33] Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen's University Press, 1992), 78. In like manner, Kent Roach suggests that the Charter "is not a simplistic document. It is not particularly American nor does it mandate a minimal state....It is wrong to conclude that the Charter gives those claiming rights an unambiguous trump over the public interest and competing social values." Kent Roach, "The Role of Litigation and the Charter in Interest Advocacy: in F. Leslie Seidle, ed., *Equity and Community: The Charter, Interest Advocacy and Representation* (Montreal: IRPP, 1993), 169.

interpretations of the Charter in a postliberal constitutionalist direction. And indeed there is a wealth of evidence to suggest that the liberal constitutionalist interpretation of the Charter was not the only, or perhaps even the dominant, intellectual understanding of its meaning and purpose in the early period. Other extant interpretations rooted in a postliberal constitutionalist orientation suggest that the Charter is not only, or even largely, about the limitation of government, but about the safeguarding of certain values or principles of public life reaching beyond traditional liberal conceptions. They suggest that the Charter is to have a role in regulating the exercise of private power in the name of egalitarian, anti-discriminatory goals, and the Charter places positive obligations on government to act to fulfill these larger purposes.

A postliberal constitutionalist argument of particular clarity was made by the former Senior Director, Legal and Governmental Affairs, of the Canadian Bar Association in 1992 – an association not known historically for its innovative views of law and the constitution. Terence Wade argued that while the American Bill of Rights is very much the product of its 18th century environment, phrased in terms of limitation of government power, to say that the Canadian Charter is primarily a constraint upon legislative power is "bizarre." Rather, "The language of the Charter is the language of empowerment, of promotion of a particular vision of Canadian identity. It is not the language of constraint and limitation."[34] Wade's concern was that the courts are imposing a liberal, American constitutional interpretive framework on an indigenous, distinctive Canadian text.

Echoing this view is Patrick Monahan who dismisses sterile liberal views of the Charter. For him the Charter is very much embedded in Canadian political culture and ought to be about the extension of democratic participation and the safeguarding of community in its contribution to individual identity. Rather than incorporate American-style property protections against state encroachment, he suggests, "there was actually more concern that the Charter would not "frustrate state efforts to expand freedom and pursue the cause of social justice....there is no necessary tension between the state and freedom....*The overriding*

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[34] Terence Wade, "Parliament and the Charter," in Beaudoin, ed., *The Charter: Ten Years Later*, 131-2.

goal of the Charter was to regulate and to structure the way in which state power could be used, rather than to define the boundary between the public and the private."[35] According to Leon Trakman, "the Charter's purpose is not to reduce public life to its lowest common denominator, to one typecast order of public and private life. Social and political groups are simply too vast to be fixed in either an all-encompassing State, or an all-consuming civil society. They are too complex to be associated with one conception of the political good to the exclusion of all others."[36] "The Charter," he argues, "is not the individual's handmaiden, available at her beck and call. It is a key towards remedying the abuse of private and public power. It addresses the interests of State, corporation, labour union and individual alike."[37] Fader argues that several conceptions of liberty have been at play in Canadian constitutional discourse, a pluralism liberal constitutionalism denies at the cost of distorting the Canadian reality.[38]

A common theme in postliberal constitutionalist commentary on the Charter is the attack on a fundamental liberal constitutionalist tenet: that the state, as the primary threat to human liberty and dignity, is the target of constitutional constraint. Postliberals reject this in favour of a notion that constitutional standards of rights should follow and limit power wherever it is manifested, in the private or public realms. Liberal constitutionalism, the critics suggest, is falsely premised on a pre-political realm of natural rights defining the parameters of individual liberty. This is incorrect on two counts. First, postliberals draw on their legal realist inheritance to deny that there is a pre-political set of rights. Individuals are radically situated by historical and cultural context. Individual political identity is fundamentally inseparable from its environment. Second, they discern that the state is not the primary threat

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[35] Patrick Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Toronto: Carswell, 1987), 109. Emphasis added.

[36] Leon E. Trakman, *Reasoning with the Charter* (Toronto: Butterworths, 1991), 134.

[37] Ibid., 141.

[38] Fader, "Reemergence of the Charter Application Debate," 218-26.

to individual rights or autonomy. As one observer puts it, "in our day, the most grievous and most frequent abuses of civil liberties occur in the exercise of private power."[39] According to de Montigny, "the main threat to the enjoyment and exercise of civil liberties in modern occidental societies does not stem from government and its agents, but increasingly from the various sources of private power."[40] "The harsh fist of the political despot," says Hutchinson in his typically polemical style, "has been replaced by the smiling face of the corporate executive."[41] While the Charter on liberal constitutionalist grounds can be used to invalidate the Combines Investigation Act, it cannot be used to curtail the combine.[42] In some ways the position taken by Devlin on the nature of power is consummately postliberal in its refusal to declare categorically that any source of power is essentially malignant. "Power," he writes, "both public and private, is politically ambiguous. Judgements about its exercise need to be made in context, free from the ideological imbalance built into a public/private dichotomy."[43]

In this analysis the postliberals echo a social democratic political analysis, but with an important difference. Social democrats historically were reluctant to have recourse to the courts for the advancement of a progressive social and economic agenda. Courts, they averred, are champions of classical liberal economic principles of property and freedom of contract. Majoritarian institutions, whose members were elected by an increasing number of enfranchised citizens, are the better means to social democratic ends. Contemporary legal

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[39] R.A. MacDonald, "Postscript and Prelude – The Jurisprudence of the Charter: Eight Theses" *Supreme Court Law Review* 4 (1982), 347. See also Allan C. Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" *University of Toronto Law Journal* 38 (1988), 278-92.

[40] Yves de Montigny, "Section 32 and Equality Rights" in Anne Bayefsky and Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985), 575.

[41] Allan C. Hutchinson, *Waiting for Coraf*, 132.

[42] Hutchinson and Petter, "The Liberal Lie of the Charter," 292.

[43] Richard Devlin, "Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson" *Queen's Law Journal* 22 (1997), 110.

scholars on the left like Michael Mandel, Allan Hutchinson, and Rob Martin make much the same argument, as did politicians like Allan Blakeney during and after the patriation debate. Postliberal constitutionalists however, are not as reticent as their social democratic cousins about the courts as vehicles of social change. They concede that liberal constitutionalism impedes the social democratic cause pursued by means of constitutional litigation, but also insist that legislatures are not unambiguously preferable to other forums for the pursuit of progressive political change. They want to revise liberal constitutionalism, not abandon the judicial avenue for progressive change. De Montigny concedes that constitutionalism in its essence "is a doctrine which places limits upon the state in its relationships with individuals that are subject to its authority." But this view is based on premises of negative freedom and the idea of the state as singular oppressor. If other sources of power are oppressive and a danger to the exercise of rights, then it follows that *"we must revise our basic doctrines accordingly* and compel these powerful organizations and individuals to observe the constitution."[44] As Slattery argues, a truly Canadian view of the Charter is that it lays down "certain principles that are fundamental to our idea of Canadian society, and that operate as standards for the conduct of private persons and public bodies alike. This conception is not rooted in any particular antagonism to governments. It assumes that actions threatening the basic values of a society are as likely to proceed from private persons as from government. It sees no great danger in subjecting the laws governing private relations to limited judicial scrutiny."[45] The postliberal ambition is not to abandon the Charter but adapt it and the principles of constitutional review to a new constitutionalism.

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[44] De Montigny, "Section 32 and Equality Rights," 579. Emphasis added.

[45] Brian Slattery, "Charter of Rights and Freedoms -- Does it Bind Private Persons?" *Canadian Bar Review* 63 (1985), 161.

Charter Application and the Clash of Constitutionalisms.

A major impetus for the entrenchment of the Charter in 1982 was the generally perceived inadequacy of the 1960 Canadian Bill of Rights as an instrument for the protection of rights and freedoms.[46] The courts were almost universally timid in applying the Bill to invalidate statutes. There were many reasons for this but primary among them was the Bill's dubious status relative to normal legislation. The Bill, of course, was itself an Act of Parliament, and it contained no clear instruction to the courts to strike down legislation found inconsistent with its terms. With one exception, the Bill was never applied to strike down a legislative provision. To leave no doubt about the changes to the Canadian constitutional order that were to be posed by the Charter's entrenchment, the federal government inserted a supremacy clause into the Constitution Act, 1982 (of which the Charter is a part), which declares in part that "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."[47] Now the courts have clear guidance as to the exercise of judicial review.[48]

Since the 1960s Pierre Trudeau advocated an entrenched charter and as Prime Minister led several attempts to gain provincial consent for a constitutional amendment to achieve this. Some early versions of a new charter of rights contained anti-discrimination clauses that would prohibit discrimination in private matters that would render provincial

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[46] This was especially glaring in light of the Warren Court's galloping activism south of the border. James G. Snell and Frederick Vaughn, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985), 226.

[47] Section 52 (1) of Constitution Act, 1982, schedule B of Canada Act 1982 U.K., 1982, c. 11.

[48] A question raised bysection52 which the Court would have some trouble answering, as a subsequent chapter will demonstrate, is what definition should be applied to the word "law" in that provision.

human rights legislation obsolete.[49] This early example of postliberal constitutionalist reform failed, however, and was not resurrected, even when opposition politicians in Parliament wanted similar provisions inserted into the Charter in 1980-81. The weight of evidence is that the legislators' intentions for the Charter's application were liberal constitutionalist.

The first charter application provision did not appear in a draft charter until 1980, when the federal government tabled for debate in Parliament its proposed resolution for constitutional amendment. The draft charter contained the following provision:

> *Application of Charter*
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> **29.** (1) This Charter applies
> (a) to the parliament and government of Canada *and to all matters within the authority of Parliament* including all matters relating to the Yukon Territory and Northwest Territories; and
> (b) to the legislature and government of each province *and to all matters within the authority of the legislature* of each province.[50]

The italicized phrases were radical in their implications. Given the constitutional doctrine of parliamentary sovereignty, limited in Canada only by the division of powers, parliament in each jurisdiction was supreme over all affairs and could theoretically legislate in respect to any matter. All human affairs were potentially "within the authority of" each legislative body. Accordingly, if the charter was to apply to all matters "within the authority of" each legislative body, then both public and private affairs would be subject to the new charter's standards. The "private" would become the "constitutional." Romanow, Whyte, and Leeson explore the implications of this provision and what was done about it:

> This was a dramatic addition. It made the charter applicable not only to

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[49] Roy Romanow, John Whyte, and Howard Leeson, *Canada...Notwithstanding: The Making of the Constitution, 1976-1982* (Toronto: Carswell/Methuen, 1984), 228-9.

[50] Government of Canada, *The Canadian Constitution, 1980: Proposed Resolution Respecting the Constitution of Canada* (Ottawa: Publications Canada, 1980). Emphasis added.

> governmental action but, by stating that all matters within the legislative jurisdiction of Parliament or the provinces were also subject to the terms of the charter, it gave the charter control over all private conduct. Since all the things that private citizens do are within the legislative jurisdiction of one level of government or another, *the wording of the new application section turned the charter not only into a constitutional document which restrained government, but a constitutional set of norms relating to the whole of social activity within the country. This was a radical transformation of the nature of the Charter*. Although this problem was repeatedly brought to the attention of federal officials by the provinces, it was not raised at the hearings of the joint Parliamentary Committee. As a result the version of the charter which was reported back to Parliament contained this clause. It was not until the constitutional accord was reached in 5 November 1981 that the problem was dealt with. At a lawyers' drafting session that took place long into the night following the signing of the accord by first ministers, the wording of the application section was changed so that the charter again reached government action.[51]

The changes made to section 29 now appear in section 32 of the Charter. The relevant portions of the provision now read:

> *Application of Charter*
>
> 32. (1) This Charter applies
> (a) to the Parliament and government of Canada *in respect of all matters within the authority of Parliament....*
> (b) to the legislature and government of each province *in respect of all matters within the authority of the legislature of each province.*[52]

In addition to federal-provincial disputes over the wording of the application provision, minutes of proceedings and evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada indicate an intention on the part of the federal government to limit the Charter's application to government. Consider the

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[51] Romanow et al, *Canada...Notwithstanding*, 249-50. Emphasis added. See also Peter Hogg, "Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in Tarnopolsky and Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary*, 2-24.

[52] Emphasis added.

following (slightly confusing) passage in which then Deputy Minister of Justice Roger Tassé discusses the meaning of "law' in the proposed section 1 limitation clause: "In effect when you look at the meaning of law...in this context it could mean an Act of Parliament, for example, and we did not want it to be restricted to an Act of Parliament [because] we wanted also to cover rules of the common law."[53] But when asked whether the Charter would apply to the common law of contract, he replied:

> ...we do not see these rights or these prescriptions of the Charter to have application in terms of a relationship between individuals. We see them as applying in terms of a relationship between the state and individuals, so I am not sure that in terms of contract laws, unless we are looking at the situation where in fact we are talking of contracts passed between the state, the government, and that might offend a constitutional limitation on some of these rights, then the Charter might be called upon for assistance but if we are just looking at in effect relationships, contractual relationships between individuals, I do not see how the Charter itself could be called upon to assist in resolution of conflicts that may arise.[54]

Another official was asked whether the Charter's equality rights standards would apply to methods of risk assessment practiced by insurance companies. He replied that "...the insurance industry in seeking the premium rates for insurance or for pensions and so on are not doing that pursuant to laws which tell them that they must do it that way. They are engaged in making private contracts between themselves and people who are seeking insurance or pension coverage....Our Charter does not...address itself to discrimination in what one might call the private sector."[55] Several academic commentators agree with this

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[53] Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence* 38 (January 15,1981), 49.

[54] Ibid., 50. It bears repeating that this comment was made in relation to the text of the application provision *before* it was changed from its 1980 version to its present form.

[55] *Minutes of Proceedings and Evidence*, 49 (January 30, 1981), 47.

liberal constitutionalist interpretation of Charter application doctrine.[56]

Whatever the evidence of legislative intent for the applications of the Charter, critics of liberal constitutionalism had other plans for sections 32 and 52. They find the orthodox reading of section 32 narrow, stale, and restrictive. A variety of textual arguments are deployed to diminish the importance of the legislative history of the Charter application provisions. Many of these arguments begin from the contradiction that seems to exist between section 32 and section 52. While section 32 can be construed to exempt private conduct – that is, relationships between or among private individuals or entities – from Charter application, section 52 declares that the Charter applies to all law, which presumably includes private law developed and enforced by courts which governs private relations.[57] While liberals wish to resolve the tension in favour of section 32, postliberals lean toward section 52. The postliberal constitutionalist position is that the Charter applies to private relations because the courts, as enforcers of the common law, are part of the state, and indeed are set up by statute – thereby bringing them within the ambit of section 32 – and because section 52 encompasses private law in any event. Postliberals insist that the distinction between statute and the common law

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[56] See Katherine Swinton, "Application of the Canadian Charter"; Hogg, "Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in Tarnopolsky and Beaudoin, eds., *The Canadian Charter or Rights and Freedoms: Commentary*, 2-24; A. Anne McClellan and Bruce Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" *Alberta Law Review* 24 (1986), 361-75; and Peter Hogg, *Constitutional Law of Canada* second edition (Toronto: Carswell, 1992), 836-50. Hogg's position changed somewhat between 1982 and 1992. Initially he invoked "the traditional purpose of a constitution, which is to establish, empower, and regulate the institutions of government, rather than the relationships between private individuals or organizations" (7) to dismiss interpretations of section 32 that would expand its scope to catch the private realm. In 1992 however, he dropped this reference to traditional constitutionalism, instead relying on the more pragmatic argument that while the constitution is restricted to the regulation of government, leaving the private realm beyond constitutional reach, the boundaries of that private realm "are marked, not by an a priori definition of what is 'private,' but by the absence of statutory or other governmental intervention."(849)

[57] Edward P. Belobaba, "The Charter of Rights and Private Litigation: The Dilemma of *Dolphin Delivery*" in Neil R. Finkelstein and Brian Macleod Rogers, ed., *Charter Issues in Civil Cases* (Toronto: Carswell, 1988), 29-46.

is simply immaterial to Charter application.[58]

Dale Gibson has used structural arguments to encourage an expansive reading of section 32. He looks to the absence of the word "only" in section 32, making section 32 apply to matters in addition to those "in respect of the authority of" governments and legislatures. He claims that the real purpose of section 32 is not to limit the Charter's application to government but to make clear that the provinces and federal government are bound by the Charter – to correct a deficiency of the 1960 Bill of Rights – and to make clear that the Crown is bound by the constitution. He notes also that other provisions of the Charter speak to "everyone", which on a plain reading includes persons beyond those in a state-to-individual relation. The law is permissive as well as prohibitive; anything the law does not proscribe it permits. Acts not proscribed by law are permitted by it and accordingly subject to the Charter.[59]

The most far-reaching argument for total Charter application is offered by Yves de Montigny in the context of the section 15 equality rights provision. De Montigny's argument is that section 15 bespeaks a departure from the formal equality rights framework by stressing a more substantive definition of equality. De Montigny rejects liberal constitutionalist distinctions between public and private spheres, as well as between state action and inaction. For him, the state is implicated in private affairs, if not by actively shaping them, then by acquiescing in arrangements and conditions produced by structures of enforcement the state supports. State policy has had to save liberalism from itself, for example by limiting freedom of contract so that it would not produce its antithesis – contracts of slavery. With these

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[58] Morris Manning, *Rights, Freedoms, and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto; Emond-Montgomery, 1983), 50, 119–20; Slattery, "Charter of Rights and Freedoms – Does it Bind Private Persons?"

[59] Dale Gibson, "The Charter of Rights and the Private Sector" *Manitoba Law Journal* 12 (1982-83), 213-219; and Gibson, "Distinguishing the Governors From the Governed: The Meaning of 'Government' Under Section 32(1) of the Charter" *Manitoba Law Journal* 13 (1983), 505-22. See also Michael R. Doody, "Freedom of the Press, the Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege" *Canadian Bar Review* 61 (1983), 124-50.

interventions, the state is no neutral observer of distributions of resources but either an active participant or their more passive guarantor. "Contractual liberty – as is the case of any liberty – exists in a state because the state does not restrict it; neutrality in this respect, is impossible....Inaction of the state only means recognition and enforcement of a right to discriminate...state passivity in practice [means] delegation to private parties of the right to discriminate"[60] Liberal constitutionalism's limitation of Charter application, de Montigny claims, rests on a distinction between public and private spheres "dictated by principles of political philosophy long discredited in Western democracies." "What on the surface may look like [state] non-involvement is, in reality an active choice amongst competing values, such as economic efficiency or some form of liberty at the expense of equality."[61]

The tide of political thought and the decisive victory of the principle of equality over contractual liberty in Western democracies means that section 15 of the Charter should not be limited to state action. De Montigny holds that equality rights should apply to "private conduct," to "interpersonal relations" where rights violations occur at least as frequently as they do in the governmental sphere. He recommends nothing less than the short circuiting of the threshold section 32 analysis in judicial consideration of Charter claims. This amounts to a constitutionalization of private relations. In this sense de Montigny travels the same path as Sunstein, whose theory of constitutional law holds that the courts should use the constitution to establish and enforce a new distributional baseline of equality, a task which requires the courts to apply constitutional norms to society to redress social disadvantages whether or not these were created or fostered by the state.

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[60] De Montigny, Section 32 and Equality Rights," 589.

[61] Ibid., 594.

Conclusion

De Montigny's position may be extreme but as subsequent chapters will make clear, it is not far from reality. Legislatures have passed human rights legislation which applies anti-discrimination standards on various realms of "private activity." Applying the Charter to human rights legislation in effect constitutionalizes private relations covered by that legislation. De Montigny's ends are substantially achieved even without recourse to his bold analysis.[62] It is true nonetheless that De Montigny's analysis takes little account of structural features of the Charter that direct its application to government. Section 1, sections 3-5, the legal rights provision, the language and education provision, are all clearly directed to government.

De Montigny does not discuss how "private" actors are to go about justifying infringements of rights under section 1. Would the *Oakes* test, which his essay predates, suffice? The courts have adopted something of a sliding scale for section 1 analysis. When the state is the "singular antagonist" whose power is arrayed in full coercive force against the individual person, the courts have favoured a stringent section 1 test, making it difficult for the state to justify infringements of rights. When the state in other circumstances – typically, in matters relating to social legislation – attempts to balance the competing claims of different social groups, the courts have favoured a looser, more deferential section 1 test.[63] What type of test would apply to private individuals required to justify to the courts their infringements of rights? Are individuals "singular antagonists" analogous to governments? Or do corporations, unions, churches, and other large bureaucratic organizations fill that role? From the perspective of a Charter rights claimant, could not another individual be as singular an antagonist as a large organization? And in a competitive market, can a corporation be at all

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[62] It is of course true that constitutionalization of the private realms through the instrumentality of human rights legislation is limited by the areas of human activity the legislation purports to cover. Courts have not yet invalidated restrictive enumerations of activities to which human rights legislation applies.

[63] See *Irwin Toy v. Quebec* [1989] 1 S.C.R. 927.

considered a singular antagonist? States assert a monopoly on the legitimate use of coercion; can corporations as "private governments" be understood in the same way?

These are questions postliberal constitutionalists have not clearly worked out. Once liberal constitutionalist premises are rejected a flood of new, vexing problems washes over the constitutional landscape. Postliberal constitutionalists have perhaps not worked out the details of a new constitutionalism because they have been preoccupied with consolidating their critique of liberal constitutionalism, an old horse that will not easily die. The early years of the Charter must not have been encouraging to postliberal constitutionalists. Lower courts were issuing judgements declaring that "...the Charter is written in terms of what the state cannot do to the individual, not in terms of what the individual can exact from the state."[64] The Supreme Court of Canada declared in 1984 that the Charter is a purposive document designed to "protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain government action inconsistent with those rights and freedoms; it is not in itself an authorization of governmental action."[65] In the Court's first Charter freedom of religion case, Justice Brian Dickson argued that "One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. 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 alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be

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[64] *Baxter v. Baxter* (1983), 36 R.F.L. (2d) 186, (O.H.C.J.), quoted in Mary Eberts, "The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions" in Claire Beckton and A. Wayne MacKay, eds., *The Courts and the Charter* Volume 58 of research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, (1985), 169.

[65] *Hunter v. Southam Inc.* [1984] 2 S.C.R, 145, 156.

forced to act in a way contrary to his beliefs or his conscience."[66] And in what must have been a bittersweet victory for feminist postliberals, Madame Justice Bertha Wilson voted to strike down the Criminal Code's prohibition of abortion in a rhetorical flourish worthy of Locke himself. She argued that "the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence."[67]

The judiciary was evidently in the thrall of liberal constitutionalism early in the Charter era. But this dominance would soon be challenged, leaving the courts with a choice that would test their statesmanship and their power to persuade.

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[66] *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295, 336. Bertha Wilson also began her career as a Supreme Court Justice by adhering to a liberal constitutionalist understanding of liberty. She argued in 1984 that the right to liberty protected by the Charter means "the right to pursue one's goals free of governmental constraint." She also rejected the claim in the same case that section 7 of the Charter imposes positive obligations on government. Government inaction, she wrote, cannot constitute a violation of the right to life, liberty, and security of the person. *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441, 488-89.

[67] *R. v. Morgentaler* [1988] 1 S.C.R.30, 164. For an attempt to reconcile Wilson's liberal rhetoric with feminist postliberalism, see Diana Belevsky, "Liberty as Property" *University of Toronto Law Journal* 45 (1995), 209-46.

Chapter 4

Vertical Charter Application: The Definition of Law

Introduction

This chapter and the next will trace the development of Charter application doctrine in the courts, particularly the dimensions of that doctrine involving section 32 of the Charter. While Charter application may seem a straightforward matter, the courts have had no easy time with it. Before a court considers a substantive Charter claim in a given case, it must decide two things. First, it must consider whether the law at issue between the parties is subject to Charter norms. Section 52 of the Constitution Act, 1982 declares that "any law that is inconsistent with the provisions of the Constitution [including the Charter] is, to the extent of the inconsistency, of no force or effect." Are some "laws" beyond Charter application? Second, it must determine if one of the parties (or one of the legal instruments such as a legislative provision or an act of legislative discretion) is part of government or sufficiently governmental to trigger Charter application. This of course requires the courts to employ some definition of government so as to distinguish governmental conduct from non-governmental conduct. When is a person a private person and when is that person an agent of the Crown? How is this determined? Is a court "governmental" for section 32 purposes? If so, does its adjudication of private disputes transform them into public matters falling under the rubric of the Charter? More generally, how deeply into society should governmental action be understood to penetrate?

Charter application in respect to law and government are closely related and to some extent overlapping. Lower courts early in the life of the Charter were often unclear as to which concept governed the threshold Charter application decisions in particular cases. However each issue will be treated in a separate chapter. This chapter will consider how

lower courts in general handled Charter application issues, and will then examine the definition of "law" for purposes of Charter application in some detail.

"Vertical" Charter application refers to the application of Charter standards "downward" into society. The term derives from conventional graphical depictions of the relationship between constitutions, states, and societies. Generally, the constitution, given its status as supreme law, is placed above the state, and the state is placed above society. The constitution "acts" on or governs the state, while the state acts on or governs the society. The assumption throughout is that while one level may act on and influence the other, and may be influenced by the other, it is not collapsed in some ontological sense into the other. Democratic societies are putatively self-governing and thus control to some appreciable extent the state, in which case the placement of the state "above" society becomes somewhat problematic. But the constitution is always understood to be above society and government, even if it is subject to change by formal or informal means by one or both of the state and society. This conventional graphical depiction, of course, simplifies matters, glossing over the societal and political influences on constitutional interpretation, judicial appointment, courts' dockets, and so on. But this aside, the constitution-state-society hierarchy captures the conventional understanding.[1]

The conventional understanding is a liberal constitutionalist one. Vertical Charter application introduces a complexity into the hierarchy, namely the application of constitutional norms to society itself. At its logical extent, postliberal constitutionalism recognizes no meaningful distinction between state and society, and dispenses with the need to condition

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[1] The conception of Charter application as "vertical" should not be confused with the understanding of section 32 held by at least one Supreme Court justice. Beverly McLachlin wrote in a case that involved section 32 the following: "Constitutional guarantees may apply in two ways. They may apply 'vertically' to relations between the individual and the state. They may also apply 'horizontally', governing relations between private individuals and corporations. The Canadian Charter falls into the former category." *Dagenais v. CBC* [1994] 3 S.C.R. 835, 942. This dissertation proceeds on the assumption that both possibilities cited by McLachlin are "vertical' in character. The difference is that the second, "horizontal" possibility is actually a *deeper* form of vertical Charter application than the first in the sense that it applies Charter norms beyond the state and directly into civil society.

Charter application on the finding that a party to a dispute (or the courts enforcing the law) is governmental or that the law at issue between the parties to a dispute is subject to the Charter. To this extent the postliberal constitutionalist paradigm renders the conventional hierarchy obsolete. The constitution in this scheme governs a state-society melange, refusing to acknowledge any clear distinction between them. No longer, in this view, does the state mediate constitution and society.

This chapter argues that while lower courts early in the Charter era were all over the map in the question, the Supreme Court of Canada initially enunciated a restrained, liberal constitutionalist Charter application doctrine, refusing to apply Charter standards to the common law. In so doing the Court intended that private law disputes between private parties would be disposed of by courts without Charter standards affecting the proceedings or the development of legal principles. As soon as the Court established this course, however, it was subjected to ringing criticisms, most of them coming from a more or less postliberal constitutionalist direction. Soon the Court began to change course, confining the reach of its leading Charter application case and moving tentatively in the postliberal direction urged by its critics. It now appears that the Charter does indeed apply in important ways to private legal disputes, a circumstance which suggests that the Court feels the strain of the clash of constitutionalisms.

The Lower Courts

Perhaps the most vexing issues facing lower courts in this matter related to the status of workers' rights and the application of the Charter to unions, collective agreements, and arbitration boards. It must be noted at the outset that most Charter challenges to these entities were motivated by a desire to escape the constraints or limitations they placed on the liberties of claimants. Lower courts found that unions were not caught by the Charter.[2]

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[2] *Re Wark and Green et al* (1984), 15 D.L.R. (4th) 577 (N.B.C.Q.B.); and *Tomen v. FWTAO* (1989), 61 D.L.R. (4th) 565 (O.C.A.).

Nor were collective agreements.[3] In *Bhindi v. British Columbia Projectionists*, the issue was the constitutionality of a collective agreement providing for a closed shop. A majority of the British Columbia Court of Appeal decided that the Charter was mostly concerned with the protection of individuals against the intrusions of government and that section 26 of the Charter protects "the ability to enter into private contracts." Collective agreements would thus be beyond Charter scrutiny. The dissenting judge and other commentators insist that the decision was plainly wrong since collective bargaining as such, as well as permissive legislation allowing collective agreements to include closed shop provisions, represent clear statutory departures from the common law of contract.[4]

The status of labour arbitration boards was highly contentious. In one case an arbitration board was faced with a Charter challenge to an employer's discipline of an employee and held that the Charter does apply because "Neither judge-made nor arbitrator-made law escapes the overriding values of the Charter....We believe the Charter is intended to stand four-square as the guarantor of fundamental rights and freedoms in all corridors of our Canadian society. We therefore conclude that the Charter applies in the administration of the collective agreement..."[5] However, a series of decisions by boards and courts suggested otherwise, even though in some cases, the clear connection between the boards and the legislation creating them was acknowledged.[6] A court in one case ruled

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[3] *Re Treasury Board (Transport Canada) and Kite, Smart, and Conroy* (1986) 24 L.A.C. (3d) 214 (P.S.S.R.B.); *Re Hammant Car and Engineering Ltd. v. USWA, Local 8179* (1986), 23 L.A.C. (3d) 229 (Ont. arb. bd.); and *Re Mohawk College and OPSEU* (1986), 33 D.L.R. (4th) 277 (O.C.A.).

[4] *Bhindi v. British Columbia Projectionists, Local 348, Int'l Alliance of Picture Machine Operators of U.S. and Canada* (1986), 24 C.R.R. 302 (B.C.C.A.).See also Peter Hogg, *Constitutional Law of Canada*, 4th edition (Toronto: Carswell, 1997), 846.

[5] *Re Health Labour Relations Ass. on behalf of Surrey Memorial Hospital and Hospital Employees Union, Local 180* (1985), 18 L.A.C. (3d) 369 (B.C. board), 385.

[6] *Re Lornex Mining Corp. and USWA, Local 7619* (1983), 14 L.A.C. (3d) 169 (B.C. arb. bd.); *Algoma Steel Corp v. USWA, Local 2251* (1984), 17 L.A.C. (3d) 172 (Ont. arb. bd.); *Greater Niagara Transit Commission and ATW Local 1582* (1987), 43

that an arbitration board's order that a blood sample be taken from a hospital employee accused of stealing drugs was not subject to the Charter because "there is no legislation here which affects the rights of the griever which the board is being asked to exercise. There is no act of government being relied upon."[7] The court was oblivious to the fact that the board owed its very existence to legislation.

The difficulties associated with Charter application to labour issues can be understood in terms of judicial reluctance to intrude upon an area of law and policy designed precisely to be kept from the courts' expensive and cumbersome processes – and no doubt the courts' historical antipathy to economic collectivism. As a result, they had to concoct a variety of reasons to shield arbitration boards from Charter scrutiny, including declarations that contemporary collective bargaining structures are to be understood in terms of the old common law right of freedom of contract; that the legislation creating enforceable collective agreements and the quasi-judicial institutions for their administration are of no moment; and that a constitutionally determinative difference exists between legislation *permitting* collective bargaining mechanisms and those of a *mandatory* nature. However, the courts were also concerned not to emasculate the Charter by narrowly defining its substantive terms or its threshold application provision. It is of some interest that the court in *Glace Bay* struck down the board order on the basis of a right to privacy enunciated in a Charter of Rights decision by the Supreme Court. What is taken away with one hand can be given with the other.[8]

D.L.R. (4th) 71 (On. Div. Ct.).

[7] *Glace Bay Community Hospital v. Nova Scotia Nurses Union* (1992), 7 Admin.L.R. (2d) 314 (N.S.T.D.), 320.

[8] A related matter should be noted parenthetically. The courts have had to decide whether administrative tribunals like labour boards have the jurisdiction to conduct judicial review based on the Charter and grant Charter remedies pursuant to section 24(2). An important factor in this question is not only the competence and independence of administrative bodies but also efficiency and procedural simplicity. Given the almost limitless potential number of Charter claims, especially when threshold Charter application provisions are interpreted expansively, the latter issues become important. Rather than

Vertical Charter Application in the Supreme Court: The Definition of Law

The Court's judgement in *Operation Dismantle*[9] established early in the life of the Charter that the Charter would apply to the executive branch of government and not only to the executive's exercise of statutory authority but exercises of authority flowing from prerogative powers. In her reasons concurring in the decision of the majority, Wilson rebutted the claim that the wording of section 32 suggested an exclusion of the prerogative from Charter application. The Government of Canada argued that since the Charter applies "to Parliament and government of Canada in respect of all matters within the authority of Parliament", the Charter's application must be restricted to powers emanating from statute. Wilson rejected this reasoning. The limiting phrases relating to the federal and provincial governments ("in respect of all matters..."), she said, "are merely a reference to the division of powers in sections 91 and 92 of the Constitution Act, 1867. They describe the subject-matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive action."[10] She signaled to the wider legal and political community that a niggardly interpretation of the Charter was to be avoided.

Dolphin Delivery[11] is undoubtedly one of the most notorious decisions the Court has rendered, and has provoked some of the most heated criticism of any Charter decision. *Dolphin* raised several important issues at once – the definition of "government" in section 32, the constitutional status of the common law, the application of the Charter to private

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keep for itself the job of judicial review, the Supreme Court by a narrow majority in *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929 held that administrative tribunals can exercise Charter review and grant Charter remedies. Such decisions themselves, of course, would be subject to judicial review by courts. So if the Charter applies to labour boards, labour boards can also apply the Charter.

[9] *Operation Dismantle Inc. et al v. The Queen et al* [1985] 1 S.C.R. 441.

[10] Ibid., 464.

[11] *RWDSU v. Dolphin Delivery* [1986] 2 S.C.R 573.

litigation, the definition of freedom of speech and expression, and labour rights under the Charter. The Court had to answer all of them at a point early in the life of the Charter. Added to this was the complexity of the facts and the procedural history of the case. In regard to Charter application, the decision is important not only for what it says about section 32, but also about the status of "law" in terms of section 52 of the Constitution Act, 1982.

The action stemmed from a labour dispute between a union and Purolator Courier, a federally incorporated firm. The union had reason to believe that Purolator was allied with Dolphin Delivery, a British Columbia incorporated company, and that Purolator was contracting out business to Dolphin during the labour dispute. The union wanted to picket Dolphin, alleging that it was an ally of Purolator's. Dolphin objected and sought an injunction restraining such action. The matter had to be settled on the basis of the common law because the federal labour code was silent on the legality of picketing third parties during a labour dispute. The crucial constitutional question was whether the Charter protected the union's right to picket Dolphin Delivery's premises.

The substantive freedom of speech issue, while important, paled in comparison to the application questions. William McIntyre on behalf of the Court first considered whether the common law is subject to the Charter. Without a doubt it is, he wrote. The plain language of section 52 – which says that "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." – cannot be ignored.

He went on to consider whether the Charter applies to private litigation and admitted that this is "subject of controversy in legal circles" and had not been resolved by the Court.[12] After a survey of academic opinion on the matter, McIntyre referred to section 32 and declared it to be "conclusive on this issue."[13] "Government" in section 32, he wrote, "refers not to government in the generic sense - meaning the whole of the governmental apparatus

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[12] Ibid., 593.

[13] Ibid., 597.

of the state – but to a branch of government."[14] Further:

> It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive, and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative....The action will...be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a Charter right or freedom. In this way the Charter will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.[15]

McIntyre thus suggests that the Charter applies to the common law but only when the common law is enervated by some form of governmental action. However, government action is limited to executive conduct, not judicial conduct. A court order does not constitute government action:

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in so doing they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation.[16]

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[14] Ibid., 598.

[15] Ibid., 599.

[16] Ibid., 600.

This will not do, McIntyre concluded. "A more direct and a more precisely defined connection between the element of governmental action and the claim advanced must be present before the Charter applies."[17]

Readers of this decision may be forgiven for their confusion. McIntyre argues that the Charter applies to the common law, that it applies to governments, legislatures, and even to courts. But it does not apply to private litigation. When courts – which are subject to the Charter – decide private disputes, the charter does not apply to the resolution of the dispute though it does apply to the courts hearing the cases. How can this confusion be accounted for? Clearly McIntyre attempted to reconcile the contradiction between section 32 and section 52. While section 32 seems to limit the Charter to the legislative and executive branches of government, section 52 applies the Charter to "all law," even that which is judicially developed and applied independently of the legislative and executive branches of government. It is the common law, or private law, which governs the relations among private persons. If, then, the Charter is to prevail over the common law, it will apply directly to private persons and relations, a result antagonistic to the more narrowly tailored section 32. Constitutional writ like holy writ cannot be self-contradictory. It requires interpretive dexterity indeed on the part of judges to make its aspects mutually consistent.[18]

Academic observers widely noted the confusions and contradictions in the judgement. Otis was sympathetic to the plight of the Court and excused it as a "welcome compromise between unfettered parliamentary sovereignty and the all-embracing 'constitutionalisation' of private dealings."[19] While the Court failed to "articulate the values underlying the public-

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[17] Ibid., 601.

[18] Edward P. Belobaba argues that the Court did the best it could given the logical dilemma facing it. The only way to reconcile sections 32 and 52 was to define "government' in section 32 to exclude the judicial branch of government. See his "The Charter of Rights and Private Litigation: The Dilemma of *Dolphin Delivery*" in Neil R. Finkelstein and Brian MacLeod Rogers, eds., *Charter Issues in Civil Cases* (Toronto: Carswell, 1988), 29-46.

[19] Ghislain Otis, "The Public/Private Distinction in Canadian Constitutional Law" *Public Law* (1987), 517. Similarly, H. Patrick Glenn suggests that the Court "properly

private distinction in Canadian constitutional law, it is fair to believe," he wrote, "that the dichotomy is designed to implement an implicit adherence to the traditional liberal philosophy of constitutionalism."[20] Another explained the decision in terms of the Court's sensitivity to the limits of its institutional capacity to apply constitutional standards intelligently to private relations, as well as its fear that the application of the Charter to private law would stimulate an unmanageable flood of litigation.[21] Robert Howse suggested that the *Dolphin* decision was "a major setback in charter jurisprudence" not because the Court attempted to place "*some* limits...on the applicability of the Charter to private activity" but because it did so in a blunt manner, relying on a formalistic definition of government action, and in the absence of an articulated constitutional theory underlying the same.[22]

Others were unforgiving in their criticisms of *Dolphin*. They argued that its attempt to constrain Charter application was incoherent, flimsy, incomplete, unconvincing, and unprogressive. Some argued, building on an article by Brian Slattery,[23] that the distinction between common law and statute for purposes of Charter application is completely arbitrary. The common law, for example, permits people to discriminate in respect to membership in private organizations. If the Charter does not apply to private law, those organizations can continue to discriminate. If a legislature passes a provision in its human rights legislation which permits private organizations to continue to discriminate – that is, to be exempt from

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concluded that judicial activity is not state action such that it need be subject to the Charter, at least where it resolves disputes between private parties according to the common law." H. Patrick Glenn, "The Common Law in Canada" *Canadian Bar Review* 74 (1995) 281.

[20] Otis, 518.

[21] Ian Greene, *The Charter of Rights* (Toronto:Lorimer, 1989), 83.

[22] Robert Howse, "Dolphin Delivery: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" *University of Toronto Faculty of Law Review* 46 (1988), 248-58.

[23] Brian Slattery, "Charter of Rights and Freedoms – Does it Bind Private Persons?" *Canadian Bar Review* 63 (1985), 148-61.

the provisions of human rights legislation – and if the Charter applies to legislation, then should the Charter apply to the exempting provision of the law and bring those private bodies within the Charter's reach? How material should a legislative act be?[24]

Critics charged that the Court ruled that the Charter both applies and does not apply to the common law. The notion that common law is caught by the Charter only when it is the basis for some governmental action "undermine[s] almost totally" the Court's central claim that the common law is subject to the Charter by virtue of section 52.[25] Further, the distinction between public and private, state and non-state, is impossible to make in reality. The distinction, in so far as it possesses any currency, is an ideological construct designed to shield forces of power and money from Charter rights.[26] These critics combine their criticisms of *Dolphin* with criticisms of legal liberalism in the era of the positive state and of the corporation, an era in which state and society are implicated in one another's affairs.

Thus *Dolphin* became for those on the political left something of a symbol of the depredations of liberalism and of the delusive belief in a politically transformative judiciary

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[24] Allan C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press: 1995), 140-42.

[25] Brian Etherington, "Notes of Cases: *RWDSU v. Dolphin Delivery*" *Canadian Bar Review* 66 (1987), 832.

[26] Allan C. Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" *University of Toronto Law Journal* 38 (1988), 278-97. Mixing a left critique with an indictment of the Court's institutional hubris, Mandel argues: "despite the great disappointment of the Charter supporters is it hard to imagine any other result at this point. It is not that the courts could not administer a society through the Charter. Maybe they will one day. In a sense they do it already because the only things beyond their reach are those they choose to place beyond their reach. But the ideological implications of applying the Charter to the common law as such, and via the common law to everything, are great. The common law is...the sanction for calling a right fundamental. No right to strike at common law, no constitutional right. To say that the common law is subject to the Charter would be like saying the Charter is subject to the Charter. Moreover, if the courts were 'government' where would they get the right to overrule the other branches of government? In other words, the courts have good reason to maintain the fiction that they are merely the disembodied voice of the Charter. That they *are* the Charter." Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* Second edition (Toronto: Thompson Educational Publishing, 1994), 285.

enforcing the Charter. For postliberal constitutionalists, *Dolphin* was a disappointing example of the Court's timidity in growing out of a narrow, anachronistic liberal constitutionalism.

Several points should be noted. First, McIntyre did offer a generous reading of public law attracting Charter scrutiny. He suggested the Charter applies to "many forms of delegated legislation, regulations, orders-in-council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliaments and the legislatures."[27] In other words, he anticipated that the Charter could apply far down the chain of legal delegation of authority and that governments would not be able to avoid Charter review merely by acting in ways other than legislation *per se.* He noted that the Charter would apply to private law when a party to a dispute before the courts is governmental. He offered a generous view of governmental action on which the Court in subsequent cases would build. Of course, how generous is left unclear. Private companies are incorporated by statute. Does their origin in an act of the legislature transform them into governmental actors subject to the Charter? Quebec's private law exists in the form of a legislative code. Is private law thus made public in that province?

Second, *Dolphin's* framework has been applied in many cases. In *Slaight Communications v. Davidson*[28] the issue was the constitutionality of an order by a labour arbitration board in respect to the writing of letters of reference for a former employee unjustly dismissed from his job. The board ordered that the company provide a letter of reference setting out certain items regarding the employee's performance to anyone who asks, but that requests for information beyond what is contained in the letter be refused. Was such an order a violation of section 2(b) Charter rights? A majority of the Court ruled a violation occurs only when the employer is required to relate opinions about the employee it does not truly hold. For the purposes of this discussion, the Court found that the federal labour legislation grants arbitration boards significant discretion and when the legislation is imprecise in what it requires boards to do, boards' exercise of their

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[27] *Dolphin*, 602.

[28] [1989] 1 S.C.R. 1038.

administrative discretion is subject to Charter scrutiny. Thus the discretionary activities of administrative bodies, even when they act according to their enabling legislation, are subject to Charter review, a reasonable finding flowing directly from the Court's decision in *Dolphin.*

In *Tremblay v. Daigle*,[29] a pregnant woman broke off a relationship with her boyfriend and sought an abortion. The estranged boyfriend, the father of the child, sought a court order restraining her, arguing that the foetus has a right to life protected by the Quebec Civil Code, the Quebec Charter of Human Rights and Freedoms, and section 7 of the Canadian Charter. He argued further that as father of the child he had a right of veto over the mother's abortion decision. The Court in an unsigned decision found that the rights asserted by the father under Quebec civil law and the Quebec Charter simply do not exist. In regard to the Charter, the Court faithfully applied *Dolphin* and refused to consider whether "everyone" in section 7 includes the unborn. "It is not necessary in the context of the present appeal to address this issue. This is a civil action between two private parties. For the Canadian Charter to be invoked, there must be some sort of state action which is being impugned....[*Dolphin*] provides a full answer to the Charter argument."[30]

The third point to remember is that the Court quickly responded to an unforeseen result of the holding that the Charter does not apply to courts. A strict reading of McIntyre's opinion would suggest that it would be impossible for a court itself to violate a person's Charter rights. The Court in a case the following year held that courts, "as custodians of the principles enshrined in the Charter, must themselves be subject to Charter scrutiny in the administration of their duties."[31] Accordingly, a judge could be found to have violated an accused person's right to trial within a reasonable time. Similarly, in a case in which a judge on his own motion issued an injunction enjoining picketers from blocking access to a courthouse, the Supreme Court considered whether picketers' Charter rights were violated

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[29] [1989] 2 S.C.R. 530.

[30] Ibid., 571.

[31] *Rahey v. The Queen,* [1987] 1 S.C.R. 588, 633.

by the injunction and held that the issue was "the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely 'public' in nature, rather than private. The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the Charter. At the same time, however, this branch of criminal law, like any other, must comply with the fundamental standards established by the Charter."[32] So *Dolphin* was modified: certain judicial actions, public in nature, can attract Charter scrutiny in the absence of government action.

Finally, the Court soon found it useful to exploit a loophole in *Dolphin* itself. McIntyre wrote in *Dolphin*: "Where...private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the *fundamental values* enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes will be decided at common law."[33]

The "Charter values" loophole indeed has become something of a Trojan horse, allowing the Court to infuse Charter considerations into disputes turning on the interpretation of common law rules.[34] In the public law context the court has readily and

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[32] *B.C. Government Employees Union v. B.C. (A.G.)* (1988), 53 D.L.R. (4th) 1 (S.C.C.), 22.

[33] *Dolphin*, 598. Emphasis added.

[34] In cases considering the definition of provisions in statutes, the Court has also said the "Charter values must not be ignored." *Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 554. Thus if there are two possible definitions of a provision available, the courts should adopt the one more consistent with Charter values. *Hills v. Canada (Attorney General)* [1988] 1 S.C.R. 513, 558.

easily altered common law rules to conform to charter standards, a practice quite consistent with McIntyre's rule that the Charter applies to the common law when a governmental actor is party to an action. In several criminal cases involving the status of common law rules – for example, the rule allowing the Crown to lead evidence of an accused's insanity at any point in a trial and without the permission of the accused; the rule that a spouse, even one who is irreconcilably separated from the other, is not competent to act as a witness at the other's trial; and the rules governing publication bans in criminal trials[35] – the Court applied the Charter directly to the common law.

In other cases, the meaning and implications of *Dolphin's* Charter values rule are rather unclear. In *Young v. Young*,[36] a married couple got a divorce, the mother retained custody of the children, and the father was given regular access. The father was a Jehovah's Witness and included his children in his religious activities and talked to them about Witness doctrine when they were with him. The custodial parent objected to these practices, claiming that they traumatized the children. She obtained a court order restricting the father's ability to proselytize the children. He argued that this constituted an unconstitutional restriction on his section 2(a) Charter rights, and additionally, that the "best interests of the child" standard developed at common law and embedded in the Divorce Act was unconstitutionally vague and indeterminate.

The case turned on the constitutionality of and proper interpretation to be given to the "best interests of the child" test: does it refer largely to harm to the child or exposure of the child to harm, or is it a more positive, inclusive concept? Is it unconstitutionally vague? A bare majority decided the case in favour of the access parent, ruling that some demonstration of harm is a reasonable interpretation of the best interests of the child test in these circumstances, and accordingly that the decision of the court of first instance should stand. All members of the Court found that the test itself comported perfectly with

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[35] Respectively, *R. v. Swain* (1991), 63 C.C.C. (3d) 481 (S.C.C.); *Salituro v. The Queen* (1991), 68 C.C.C. (3d) 289 (S.C.C.); *and Dagenais v. CBC.*

[36] [1993] 4 S.C.R. 3.

"Charter values." In her dissenting opinion, L'Heureux-Dubé stated at the outset that "the purposes underlying the protection of religious and expressive freedoms have little if anything to do with regulating activities between family members. Such rights are public in nature and have typically referred to and encompassed freedom of the individual from state compulsion or restraints."[37] This restrained, conventional view is matched by her application of *Dolphin* to the circumstances of this case: "once the best interests test itself has been found to accord with Charter values, the trial judge's order itself is not subject to further constitutional review, as the necessary state infringement of religious rights required to sustain a challenge based on the Charter is no longer present....The *sine qua non* to any application of the Charter is the presence of state action, whether by legislation or other means."[38] This, she said, is a dispute between private parties, so the Charter is not engaged. Her reasons were in the minority, and other justices did not address the Charter application issues systematically.[39] It is unclear whether the Charter applies to court orders which interpret and apply the best interests test.[40]

Hill v. Church of Scientology of Toronto[41] raised more directly the issue of the constitutionality of common law rules applicable in litigation between private parties. The case involved false accusations made by a lawyer against a Crown prosecutor that the latter breached a court order and deliberately misled a judge. Contempt proceedings were

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[37] Ibid., 89.

[38] Ibid., 90.

[39] L'Heureux-Dubé's reasoning won the day in a companion case with similar facts. Two justices who voted against her in *Young* held their noses and voted with her this time. She stated that the best interests standard complies with charter values and that the Charter "does not apply to private disputes between parents in a family context." *P.(D.) v. S.(C.)* [1993] 4 S.C.R. 141, 181. Notice the qualifier she adds in this decision.

[40] G.D. Chipeur and T.M. Bailey, "Honey, I Proselytized the Kids: Religion as a Factor in Child Custody and Access Disputes" *National Journal of Constitutional Law* 4 (1994), 101-122.

[41] (1995), 126 D.L.R. (4th), 129 (S.C.C.).

initiated against the prosecutor and the accusations were repeated by the robed lawyer in front of a courthouse. After the proceedings were dismissed the prosecutor brought a libel action. The defence argued that the existing common law of libel was inconsistent with free speech values and that Canadian libel law should be brought into line with the landmark United States Supreme Court decision in *New York Times Co. v. Sullivan.* In that case the American Supreme Court applied the Bill of Rights protection of free speech to the common law of libel almost without comment, and found that the First Amendment requires a plaintiff in actions involving criticism of official conduct to prove not merely that statements were untrue but that they were made "with knowledge that it was false or with reckless disregard of whether it was false or not...."[42]

The Canadian Supreme Court was unwilling to narrow the common law of libel but it did say a great deal about the application of the Charter to private litigation. The prosecutor was held in this case to be acting in his own capacity and not as a public official, even though the government employing him funded his litigation. For a unanimous Court in the result, Peter Cory wrote impassively: "Private parties owe each other no constitutional duties and cannot found their cause of action upon a Charter right. The party challenging a common law cannot allege that the common law violates a Charter *right* because, quite simply, Charter rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with Charter *values.*"[43] In her concurring opinion, Claire L'Heureux-Dubé put the matter more forcefully: "even though the Charter does not directly apply to the common law absent governmental action, the common law must none the less be developed in accordance with Charter values."[44]

L'Heureux-Dubé has also cited Charter values to *forestall* development of the

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[42] 376 U.S. 254 (1964), 279-280.

[43] *Hill v. Scientology*, 157.

[44] *Ibid.*, 189-190.

common law. In her concurring judgement in *Dobson (Litigation Guardian of) v. Dobson,*[45] she argued that while at common law a child may sue his or her parents for negligence, and while a child born alive may sue third parties for injuries sustained *in utero*, a child born alive shall not be able at common law to sue his or her mother for injuries sustained *in utero*. To apply common law liability for negligence generally to pregnant women in relation to the unborn "is to trench unacceptably on the liberty and equality interests of pregnant women. The common law must reflect the values enshrined in the *Canadian Charter of Rights and Freedoms*. Liability for foetal injury by pregnant women would run contrary to two of the most fundamental of these values – liberty and equality."[46]

Here is where the strategic value of Charter values doctrine can readily be appreciated. In *Tremblay v. Daigle*, discussed earlier in this chapter, the Court was confronted with a Charter challenge to Quebec civil law (the Quebec equivalent of anglo-Canadian common law) to the effect that a foetus has the right to life. The Court in that case gave what must be one of the most restrained decisions since *Dolphin*, arguing that the issue is a strictly legal one, not a scientific, moral, or ethical one. And on strictly legal terms, the foetus is not a legal person. Such reasoning is hard to square with the Court's frequent recourse in other cases to non-legal evidence of all kinds in aid of its decision making. It has canvassed extrinsic evidence regarding the effects of hate promotion,[47] pornography consumption,[48] and cigarette advertising,[49] to name just a few cases. Clearly the Court was put in an awkward spot by being asked to expand foetal rights after striking

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[45] <http://www.droit.umontreal.ca/doc/csc-scc/en/rec/html/dobson.en.html>

[46] Ibid., paragraph 84. Other justices disposed of Dobson's claim by relying on the doctrine of public policy, asserting that such a large development of the common law should be made by legislatures, not courts.

[47] *R.v. Keegstra* [1990] 3 S.C.R. 597; *R. v. Zundel* [1992] 2 S.C.R. 731.

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

[49] *R.J.R.-MacDonald v. Canada* [1995] 3 S.C.R. 199.

down Canada's abortion legislation in *R. v. Morgentaler.*[50] In *Dobson*, the Court's problems were compounded by the presentation of undeniable evidence of injuries persons can sustain before birth, and by the fact that the parameters of the constitutional debate were confined to the longstanding common law "born alive rule" according to which persons can sue others for injuries sustained *in utero* if and when they are born alive. The Charter values doctrine allowed L'Heureux-Dubé to acknowledge here what it did not acknowledge in earlier cases, and yet decide the case in conformity with the ruling in *Daigle,* by declaring that the Charter values of liberty and equality for pregnant women outweigh the interests of children born alive but with injuries caused by their mothers before their birth.

In *Daigle*, the Court had to rely on *Dolphin's* liberal constitutionalist application doctrine to achieve a result preserving the reproductive rights of women. Unwilling to rely in this case on *Dolphin's ratio decidendi* – that the Charter does not apply to private law – L'Heureux-Dubé was able to achieve a similar result by deploying *Dolphin's* Charter values doctrine. This is evidence for the proposition that as the courts dispense with threshold issues of Charter application, they develop other techniques to tailor rights interpretation in non-traditional (that is to say, non-state) factual circumstances.

There is thus no reason to think that the application of Charter values to the common law is a dead letter, as Cory's tone in *Hill* may imply. From the courts' perspective, the beauty of the appeal to Charter *values* may be that these values are even vaguer and more ambiguous than the meanings of substantive Charter provisions themselves, giving judges more discretion to plumb their meaning in particular cases.[51]

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[50] [1988] 1 S.C.R. 30.

[51] Patrick Macklem, "Constitutional Ideologies" *Ottawa Law Review* 20 (1988), 150. See also Kate Sutherland, "The New Equality Paradigm: The Impact of Charter Equality Principles on Private Law Decisions" in David Schneiderman and Kate Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997), 245-70. See also Richard Baumann, "Business, Economic Rights, and the Charter" in ibid., 88.

Consider the list of fundamental Charter principles contained in the phrase "free and democratic society." In *R. v. Oakes*[52] the Court enunciated the values informing the Charter and embedded the protection of individual rights in a longer, complex list. These values are, "to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[53]

Can there be any specificity in this list? Even advocates of an "expansive" theory of section 1 interpretation admit that it grants courts great, perhaps overwhelming, discretion to make policy decisions. Janet Hiebert, for example, argues that the Charter should not be confined to a narrow, liberal constitutionalist view of the relationship between state and society. She argues that fundamental Canadian democratic values embrace more than liberal individual rights dogma. The Charter, however, enumerates only liberal values. She reserves for section 1 the protection of those non-enumerated values as important to Canadian democratic life as the liberal rights-based ones. Thus for her section 1 gives courts the opportunity to weigh non-liberal values when considering the constitutionality of impugned legislation or administrative conduct. The *Oakes* list of values is for her a pretty good list of the postliberal principles that should be brought to bear in Charter review. Her "expansive approach" to rights limitation means that courts enforce liberal and postliberal values when they interpret the Charter. She admits, however that "Because courts, under this approach, would both interpret rights broadly and recognize that non-enumerated values may justify imposing limits on protected rights, conflicts would arise more frequently [in this section 1 interpretation than under others] between rights claims and governmental objectives." Further, "the complexity of policy development gives rise to compelling concerns about courts' capacity to scrutinize the

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[52] [1986] 1 S.C.R. 103.

[53] Ibid., 136.

merits of policy choices."[54]

Justice Aharon Barak of the Supreme Court of Israel considered this problem in a 1996 article in which he argues for direct application of constitutional human rights principles to private law relations. In particular he responds to the liberal constitutionalist claim that to apply constitutional human rights standards to private relations would frustrate a central human rights value of "autonomy of the individual will."[55] He is referring to liberal constitutionalism's double privacy principle discussed in chapter 2. Barak advances the postliberal constitutionalist position against the priority liberal constitutionalism places on individual freedom from government. In response to the argument that constitutional standards would prevent, say, a parent from distributing his or her inheritance unequally among his or her children, Barak argues that "among the totality of basic rights which must be considered are the basic rights of human dignity and personal development, and these contain the autonomy of the individual will. From these the principle of freedom of connection and the principle of freedom of contract are derived."[56] He suggests a "comprehensive balancing of the conflicting values"[57] at stake in a private law case. In other words, the constitutionalization of private law involves the courts in a balancing function not unlike section 1 analysis, in which liberal conceptions of individual liberty are present but reduced in importance relative to other constitutional principles of equality, non-discrimination, and fair treatment. More generally, he repudiates liberal constitutionalism's double privacy principle, in favour of a singular constitutional principle of privacy which in instant cases would be balanced against other constitutional values. His argument is thus postliberal in the sense that he wishes to avoid

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[54] Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal & Kingston: McGill-Queen's University Press, 1996), 50.

[55] Aharon Barak, "Constitutional Human Rights and Private Law" *Review of Constitutional Studies* 3 (1996), 268.

[56] Ibid.

[57] Ibid., 269.

a liberal constitutional privileging of privacy. He is following in Sunstein's footsteps, applying constitutional scrutiny to "existing distributions" in society whether or not the state is directly complicit in their creation.

Existing uncertainties, then, regarding the court's balancing of interests in section 1 analysis will be replicated, if not multiplied, if the Charter is more profoundly applied to private relations. Can there be a principled way of weighing the competing values of "the inherent dignity of the human person" and the "accommodation of a wide variety of beliefs"? Is there a principled way of reconciling individual rights and collective concerns? Is it not the case that the Court has issued itself a blank cheque drawn on the "Charter values" account? And since Charter values apply in private litigation there is no longer a threshold section 32 limitation on judicial reach. It may not be too much to say that *Dolphin's* exclusion of private law from Charter application has effectively been repudiated.

Conclusion

The argument of this chapter is that there is evidence of postliberal constitutionalist influence in the Supreme Court's application of Charter standards to law. The common law historically was the bastion of liberal economic and social rights, giving pride of place to the rights of property and contract. It was individualistic in its compensatory principles. As such the common law fits awkwardly in the postliberal constitutionalist scheme. Sunstein's theory discussed in chapter 2, indeed, stresses the importance of "politicizing" the common law – subjecting it to formal constitutional constraint – in order to realize the "impartial constitution." Postliberal constitutionalists are not against liberty or privacy. Postliberal constitutionalism in this sense is not anti-liberal. Rather, postliberal constitutionalists simply want privacy to justify itself relative to other competing constitutional principles. Liberal constitutionalism gives privacy pride of place by limiting the application of constitutional principles to regions beyond government action (and by extension, refusing to tag Charter application on to courts defined as "government" for purposes of Charter application).

Substantive constitutional privacy rights must be balanced by other constitutional rights; but when the application of constitutional rights themselves is limited, privacy presumptively trumps other principles.

It is this feature of double privacy – its trumping character – that postliberal constitutionalists reject. The elimination of threshold limits on Charter application is how this rejection is accomplished. There is evidence in the Charter case law of such an elimination taking place. Of course, history rarely goes in a straight line and there are uncertainties and hitches in the movement toward a postliberal constitutionalism. Nonetheless, the Supreme Court's subsequent near-repudiation of its liberal constitutionalist decision in *Dolphin* is remarkable evidence of a clash of constitutionalisms.

Chapter 5

Vertical Charter Application: The Definition of Government

Introduction

The last chapter analyzed the Supreme Court's application of the Charter to private law in the absence of government involvement. If it had chosen to do so, the Court could have dispensed with the controversies over the types of law subject to the Charter simply by claiming that courts are governmental entities and that, since the Charter applies to governments, the courts and their activities trigger Charter application. Being bound by the Charter in their functions, the courts necessarily must apply Charter standards to their work. Accordingly, the Charter would apply to courts' adjudication of disputes, even private law disputes. In this sense, the definition of law and the definition of government are closely related; the same objectives can be achieved by recourse to either concept. Nonetheless, the courts have spent a great deal of energy on the definition of government in section 32. In its mind, "law" and "government" do not amount to the same thing, and so they must be treated separately.

This chapter argues that many vertical application decisions respecting the concept of government have been both confused and confusing, but some threads of consistency can be found amidst the confusion. The courts have demonstrated a willingness to diminish the importance of section 32 as a gatekeeping provision forestalling judicial review in cases where the Charter does not apply. Despite some early indications of a rigorous use of section 32 as a threshold application provision, section 32 now seems to be atrophying in the face of an apparent desire by the Supreme Court not to foreclose avenues for potential Charter review. Even in the criminal law, where one would think Charter application issues would be straightforward, the courts have applied Charter standards to actors not traditionally

considered part of the criminal justice process. In essence, Charter application doctrine is giving way to a nuanced, contextual rights limitation doctrine. As the courts apply Charter standards to new factual and legal situations unforeseen in the liberal consititutionalist paradigm, they increasingly tailor the meaning and scope of these rights to take account of the new contexts in which the Charter operates. They increasingly look to definitional strategies and nuanced application of the section 1 reasonable limits clause to achieve this. As a result, the Charter application provisions are doing less constitutional work, and the Charter rights limitation provisions are doing more. Those looking to section 32 for a clear distinction between governmental acts triggering the Charter and other acts to which the Charter does not apply are bound to be disappointed. Instead, they must look to the battery of mechanisms the courts have developed for tailoring the interpretation and limitation of rights for any sense of the limits to the extent to which Charter norms are to prevail in Canadians' lives.

This is a result one might expect in a climate of clashing constitutionalisms. Postliberal constitutionalism would apply Charter standards universally, in all spheres of civil life. Liberal constitutionalism restricts Charter application to government. An unsteady compromise between them would involve, first, an expansive definition of government allowing the courts to apply the Charter vertically into society; and second, an awareness that rights applied beyond their traditional bounds must take account of limiting factors, a deference postliberal constitutionalism pays to liberal claims that social actors are not as injurious to the rights of persons as is the state.

The Lower Courts

As soon as the Charter was proclaimed in 1982, lower courts found themselves having to decide what entities were governmental for the purposes of section 32. Some cases were easy to decide. Municipal bylaws, public schools, school principals and teachers, law societies, universities, the Royal Canadian Mint, and a children's aid society were all

construed to fall within the ambit of section 32.[1] On the other hand, the Ontario Hockey Association, the Appraisal Institute of Canada, the Ontario Jockey Club, a board of police commissioners, the Winnipeg Real Estate Board were found to lay outside the reach of the Charter.[2]

Other cases produced a diversity of responses. Consider issues relating to the activities of security guards. In *R. v. Lerke*, the trial judge held that a search of a person's coat for drugs by an employee of a bar was subject to the Charter's strictures, regardless of the public or private status of the person performing the search. The result was affirmed on appeal but the appeal judge concluded that the employee was acting in a public capacity when he arrested the patron for the possession of illegal drugs.[3] A University of Victoria security officer who searched a student's room in a dormitory was found not to be a state agent for the purpose of Charter application, a conclusion the judge arrived at reluctantly both because the point was not effectively argued in court and because of the perception that security officers would henceforth be free of constitutional constraint.[4]

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[1] Respectively, *Re McCutcheon and City of Toronto et al* (1983), 147 D.L.R. (3d) 193 (O.H.C.J.); *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (O.C.A.); *R. v. H.* 1985), 43 Alta L.R. (2d) 250 (Prov. Ct.); *Re Ontario English Teachers Association et al and Essex County Roman Catholic School Board* (1987), 36 D.L.R. (4th) 115 (Ont. Div. Ct.); *Re Klein and Law Society of Upper Canada; Re Dvorak and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.); *Re SFU and Association of University and College Employees, Local 224* (1985) 18 L.A.C. (3d) 361 (B.C. arb. bd.); *Re Roy et al and Hackett et al* (1987), 45 D.L.R. (4th) 415 (O.C.A.); and *Children's Aid Society of London (City) and Middlesex (County) v. H.(T.)* (1992), 41 R.F.L. (3d) 122 (Ont. Div. Ct.).

[2] Respectively, *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513; *Re Chyz and Appraisal Institute of Canada* (1984), 13 C.R.R. 3 (Sask. C.Q.B.); *Russo v. Ontario Jockey Club* (1987), 46 D.L.R. (4th) 359 (Ont. H.C.J.); *Philips and Reiger v. Board of Police Commissioners of Moose Jaw et al* (1988), 67 Sask. R. 49 (Sask. C.Q.B.); and *Peg-Win Real Estate Ltd. and the Winnipeg Real Estate Board* (1985), 19 D.L.R. (4th) 438 (Man. C.Q.B.).

[3] *R. v. Lerke* (1984), 11 D.L.R. (4th) 185 (Alta. C.Q.B.); affirmed (1986), 25 D.L.R. (4th) 403 (Alta. C.A.).

[4] *R. v. Fitch* (1994), 93 C.C.C. (3d) 185 (B.C.C.A.).

In addition, early decisions differed on the status of hospitals[5], and on whether government in its capacity as employer was subject to the Charter.[6] It would take authoritative pronouncements by the Supreme Court to set the interpretive pattern for Charter application. It appears, however, that the Supreme Court has had a hard time of it, not least because different conceptions of constitutionalism have affected its work.

Vertical Charter Application in the Supreme Court: The Definition of Government

Dolphin Delivery established that the Charter applies to the executive and legislative branches of government and that some form of governmental action is required to trigger the Charter in specific cases. But little flesh was put on this principle. One can imagine myriad examples of legal disputes in which some governmental connection, however attenuated, could be drawn for the purposes of engaging the Charter. The Supreme Court was faced with the devilish details of Charter application in a series of cases in the late 1980s having to do in one way or another with age discrimination and the constitutionality of mandatory retirement policies. Mandatory retirement initially appeared as an element of the embryonic Bismarckian welfare state but emerged more fully as a hard-won victory of the labour movement in its contest with employers over conditions of work. As such, mandatory retirement is bound up with the rights of labour and the legal recognition of unions and collective agreements – a recognition requiring positive legislative overturning of traditional

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[5] The courts in *R. v. Larose* (1983), 25 M.V.R. 225 (Ont. Dist. Ct.) and *Sniders et al v. Nova Scotia (A.G.)* (1988), 20 C.C.E.L. 20 (N.S. trial div.) decided that they are caught. However, in *Canadian Urban Equities Ltd. v. Direct Action for Life* (1990), 70 D.L.R. (4th) 691 (Alta. C.Q.B.), which involved the rental of space in a privately owned building by a hospital for a "reproductive health clinic", the court decided that the property manager seeking an injunction against protesters was acting on the basis of common law property rights and that hospitals are not government for the purposes of s.32. Therefore, the pro-life group opposing the motion to enjoin its protests could not rely on Charter rights.

[6] *Re Ontario Council of Regents for Colleges of Applied Arts and Technology (St. Lawrence College) and OPSEU* (1986), 24 L.A.C. (3d) 144 (Ont. arb. bd.); and *Re Algonquin College and OPSEU* (1985) L.A.C. (3d) 81 (Ont. arb. bd.).

common law antipathies to collective economic action. And the common law, like many of the provisions of the Charter, asserts individual rights strongly, whereas the claims of labour have been collective and majoritarian in character. Principles of collective organization have always asserted the right of the greater part of the workforce to conclude agreements and impose obligations on workers even if individual workers disagree. Mandatory retirement policies have operated in similar terms: once such a policy is put in place, there shall be no dissenters.

Canadian human rights laws provide legislative guarantees of individual rights to employment and other services in the private sector without discrimination on the basis of a list of group characteristics. Almost without exception, they recognize the validity of mandatory retirement policies and collective agreement provisions by defining age as a prohibited ground of discrimination in employment in such a manner as to protect mandatory retirement (and other age-based schemes like pensions and life insurance). In other words, the individual right to be free from age-based discrimination applied usually to people between the ages of 18 and 65, or sometimes between the ages of 40 or 45 and 65. Alternatively, age discrimination *per se* would be prohibited but particular instances of age-based discrimination like mandatory retirement policies, and superannuated insurance plans could be justified as reasonable or legitimate.

The question is whether these relationships are private or public for the purposes of the assertion of Charter equality rights, particularly the right not to be discriminated against on the basis of age. One could argue that since labour unions and legally enforceable collective bargaining exist by dint of positive state action, this area of employment is caught by the Charter. Or maybe some feature of one or both parties in an employment relationship bears some connection to government to trigger section 32. Finally, one could say that though the parties themselves are private actors and thus immune to charter scrutiny, the human rights legislation governing their relationship is itself subject to the Charter, in which case the Charter reaches the private economic relationship through the instrumentality of the human

rights legislation.[7]

The Supreme Court faced this issue in *McKinney v. University of Guelph*,[8] one of a series of decisions released concurrently. *McKinney* itself grouped into one case a series of applications that mandatory retirement policies operative at several universities in Ontario were contrary to section 15 guarantees against age discrimination. The universities established mandatory retirement in various ways: some by way of provisions of collective agreements, some by policy and practice, some by pension plan, some by formal resolution of the board of governors. The professors seeking relief all argued that the Charter applies directly to universities and thus that the mandatory retirement policies are directly subject to section 15 analysis. Additionally, they argued that if the first argument fails, the Charter still indirectly reaches the policies by applying directly to the human rights legislation permitting them. So the Court had to consider in depth the meaning of "government' in section 32 and the extent to which government and its coercive instruments extend into Canadian society. *McKinney's* importance has to do not merely with the result of the specific age discrimination issue. As Manfredi notes, the debate between the two major protagonists in this decision, Gerard LaForest and Bertha Wilson, "represents one of the most interesting exchanges in the early history of Charter jurisprudence, since it involved questions about the nature of government, the state, and constitutionalism in Canada."[9]

McKinney's length – 220 pages in the *Canada Supreme Court Reports* – is matched by its complexity. And its complexity is created not only by the issues at stake but by the divisions within the Court on both the reasons and the result. Two major interpretive blocs formed on the main issues. LaForest seemed to represent a pragmatic, liberal constitutionalist

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[7] The Ontario Court of Appeal in *Blainey* used this latter interpretive route to find that the Ontario Minor Hockey Association discriminated against Justine Blainey by refusing her a place on one of its otherwise boys-only teams. The Ontario human rights legislation allowing such organizations so to discriminate was found constitutionally wanting. *Re Blainey* (1986) 54 O.R. (2d) 513 (C.A.)

[8] [1990] 3 S.C.R. 229.

[9] Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland and Stewart, 1993), 148.

view while Wilson advocated a more postliberal constitutionalism and application doctrine. Their reasons will be compared in detail in terms of their respective constitutionalisms, their reading of section 32, and their application of the Charter to universities in the case before them.

LaForest cited previous Charter decisions in support of the principle that the Charter's purpose is to protect the rights of Canadians against government encroachments. The Charter, he averred, "is essentially an instrument for checking the powers of government over the individual."[10] He continued:

> The exclusion of private activity from the Charter was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful economic institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity. [11]

To apply the Charter universally, he wrote, would limit individual freedom, including freedom of contract, create a parallel system of tort law, and "could impose an impossible burden on

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[10] *McKinney*, 261. He cited in support of this principle *Hunter v. Southam* [1984] 2 S.C.R. 145, *Operation Dismantle Inc. et al v. The Queen et al* [1985] 1 S.C.R. 441, *Big M Drug Mart v. The Queen* [1985] 1 S.C.R. 295, *RWDSU v. Dolphin Delivery* [1986] 2 S.C.R. 573, and *Tremblay v. Daigle* [1989] 2 S.C.R. 530. In *Hunter v Southam*, Dickson for the Court wrote that the Charter "is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action." *Hunter v. Southam*, 156.

[11] *McKinney*, 262. In his reasons concurring with LaForest, Sopinka argued that "the role of the Charter is to protect the individual against the coercive power of the state." Ibid., 444.

the courts. Courts are not well-suited for the resolution of certain kinds of disputes."[12] Administrative agencies and tribunals were created precisely to replace unwieldy courts in the management of social wrongs. LaForest's constitutionalism stressed the singularity of governmental oppression as well as a pragmatic, institutional analysis of the relative competence of the different branches of government.

Wilson found LaForest's constitutionalism to be an Americanized anachronism. According to LaForest's theory, she suggested, "states are a necessary evil. Because of the potential for tyranny and abuse which large states embody, the role of government should be strictly confined. Social and economic ordering should be left to the private sector. The more the state interferes with this private ordering, the more likely it is that the freedom of the people will be curtailed. Thus, the minimal state is an unqualified good."[13] Clearly this caricatures LaForest's more pragmatic understanding that a Charter limited to the control of government need not necessarily limit the substantive role of government in social and economic life. She elevated LaForest's largely institutional analysis to philosophical heights. It is true that constitutionalism for LaForest has a lot to do with preserving a region of individual freedom from constitutional scrutiny, but there is no evidence that LaForest was particularly taken with Hayekian theories of the minimal state.

For her part, Wilson admits that LaForest's "minimalist" constitutionalism may once have been valid; but it is no longer. She traced LaForest's constitutionalism to the American revolutionary experience of the 18th century and the suspicion of government it bred. Canada's history is different, she argued. The Canadian state has always been interventionist, benevolent, protective, and compatible with Canadians' enjoyment of freedom. The "political philosophy of laissez-faire has not been embraced to any substantial degree in Canada."[14] "Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society....It is, in my

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[12] Ibid., 262-63.

[13] Ibid., 342.

[14] Ibid., 355.

view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action."[15] But it is also true, she argued, that the Canadian state is not monolithic. "There has always been and continues to be a broad sphere of purely private activity in Canada."[16]

This too caricatures the reality. The historical comparison between Canada and the United States appears more like a comparison of 18th century America with late twentieth century Canada. How could she miss Hamiltonian protectionism and mercantilism? How does she account for Roosevelt's New Deal? It is odd to consider that this trumpeting of the organic Canadian state comes from the justice most widely known for her resolute assertion of individual rights. Indeed, in this very case it is historical Canadian economic collectivism in the form of state-sanctioned mandatory retirement policies, justified in terms of the greater good of the whole, which she voted to invalidate in the name of individual rights. If anything bespeaks American political culture, it has to be the individual rights tradition. Who, then, is the more Canadian in this case, LaForest or Wilson?

Wilson states that the crucial distinction between her and LaForest is this: "...those who enacted the Charter were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role. I do not think they intended to do this by carving out or preserving 'private' spheres of activity. I believe, however, that they considered it crucial *to establish norms by which government would be constrained in performing the many roles it has assumed and no doubt will continue to assume.*"[17] Against a constitutionalism in which spheres of life can be defined by the presence or absence of government control, she asserts a constitutionalism of basic norms guiding not the reach of government action but rather its character. Juxtaposed to the traditional constitutionalism in which freedom is preserved by limiting the reach of government is a new

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[15] Ibid., 356.

[16] Ibid.

[17] Ibid., 357-8. Emphasis added.

constitutionalism in which a set of norms – among them individual freedom and autonomy – should be given wide, if not sweeping, application to inform the quality of government intervention whenever and wherever it occurs. This comports with the movement toward postliberal constitutionalism outlined in chapter 2. It amounts to a rejection of liberal constitutionalism's double privacy doctrine and allows courts to apply constitutional norms society-wide.

These two constitutionalisms have implications for the interpretation of section 32. For LaForest it is of some importance to define "government" strictly to limit the Charter to things truly governmental. And things governmental possess a coercive element. To do otherwise is to defeat liberal constitutionalist principles. For Wilson, on the other hand, constitutions are about norms, not limits; the key is to apply norms to governmental action in all its manifestations. A broad section 32 test advances this goal. A constitutionalism of norms arguably renders Charter application superfluous, since the point of the society-wide respect for constitutional norms means that they must apply society-wide. In fact, any threshold limitation of application would *inhibit* Wilson's constitutionalism. Notice that society-wide application of constitutional norms does not mean the same thing as society-wide intervention of government. Wilson states that one of the norms to apply to any governmental action is the safeguarding of individual autonomy. Her favourable view of the role of government meshes with her support for the principle of individual freedom; indeed, she wants to marry the two notions in a theory of the constitution and of Charter application.

LaForest's test begins with *Dolphin's* analysis of "government" under section 32 and provides more detail on the kinds of connection between an entity and government that trigger Charter review. He cited *Slaight* to the effect that Charter review follows the chain of legislative delegation from legislation to delegated legislation, administrative bodies, and exercises of executive discretion pursuant to legislation. There must be a strong "nexus" between government and the entity or person at issue. And this nexus must involve an element of compulsion or coercion. There must be evidence of governmental power flowing to and through an entity for the Charter to be triggered. Accordingly, "the mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way

sufficient to make its actions subject to the Charter."[18] If it were otherwise, the Charter would apply widely to the private sector and the "obvious purpose" of section 32 would be flouted. Either someone has to be required by government to do something or someone within "the government apparatus" must be empowered to do something.[19] It is not enough that an entity serves some sort of "public purpose" or that its decisions may be reviewable in the courts. "Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of government."[20] Either actions must be undertaken under "statutory compulsion" or as part of the apparatus of government. LaForest left open the possibility that while an entity may itself not be governmental, an aspect of its activities may indeed be governmental.[21]

Wilson objected to what she considered the unsystematic, *ad hoc* nature of LaForest's test. She apparently also found it too narrow. "If this Court is to discharge its responsibility of ensuring that our constitution does provide 'unremitting protection of individual rights and liberties' against government action, then it must not take a narrow view of what government action is."[22] Her understanding was that LaForest's minimalist constitutionalism implied a narrow section 32 test to keep the courts from applying the constitution to activities beyond what is necessary. LaForest caught the contradiction in her reasoning. He replied that even if it were true that he advocated an American, minimalist view of government as at best a necessary evil – which he did not – and if the constitution was indeed a bulwark of individual rights against the oppressions of the state, then the implication would be to advocate a sweeping Charter application test so that conduct with barely a hint of government

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[18] Ibid., 265-66.

[19] Ibid., 267.

[20] Ibid., 269.

[21] Ibid., 273-4.

[22] Ibid., 358. She is quoting Dickson in *Hunter v. Southam* here.

compulsion would be subjected to the rigours of Charter scrutiny.[23] LaForest's is a liberal constitutionalist theory of section 32 grounded not so much in an ideological commitment to the minimal state but rather in a sense of the limits of efficacious judicial review. He agrees with Peter Hogg's theory of Charter application, discussed in chapter 3: where the state goes, so should the Charter.

Wilson's section 32 discussion began with a defense of *Dolphin* against its many critics. She claimed that it was not so much an attempt to create a public/private distinction as to define government action. After reviewing academic commentary on the point, she said she remains of the view that the Charter "was aimed at government action, both legislative and administrative" and that human rights legislation should be left to operate in its sphere subject to governments' determinations as to adequacy. "I do not believe that the Charter was intended as an alternate route to human rights legislation for the resolution of allegations of private discrimination."[24]

Consistent with her view of the nature of the Canadian state, Wilson's section 32 test is designed largely to avoid any linkage between Charter application and classical liberal, minimal government ideology. Her test is a three-fold one, no one branch of which is adequate on its own to dispose of an application question. The first of the three branches of the test is the "control" test which, like LaForest's, looks for a nexus of control between government and an entity. By itself, this test is inadequate because governments often create arm's length agencies to implement public policies without overt, daily political interference. This is especially true in the case of administrative bodies charged with the administration of citizen entitlements. Administrative independence deliberately severs the nexus for which the control branch is designed to look. And governments should not, she argued, be allowed to shirk their Charter responsibilities by adopting this public policy technique.

The second branch is the "government function" test, which looks not for a nexus but rather for a function performed by an ostensibly non-government entity which governments

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[23] Ibid., 275.

[24] Ibid., 342.

traditionally perform. For example, private law enforcement bodies would be caught because they perform a function governments perform. The problem, she thinks, is that this test runs the risk of employing a static, narrow, and outdated sense of government functions. "A function becomes governmental because a government has decided that it should perform that function, not because that function is inherently a government function."[25] Finally, the "government entity" branch focuses on the question "whether an entity performs a task pursuant to statutory authority and whether it performs that task on behalf of government in furtherance of a governmental purpose....More precisely this approach looks at the nature of a body's statutory authority and addresses the possibility that government has delegated its powers to a subordinate body."[26] In other words, this last test operates as a residual test catching entities that appear governmental but are not snagged by the first two branches of Wilson's test.

Wilson developed a generous, even sweeping, test so that the purposes of the Charter can be fulfilled and so that the Charter can keep step with government as "a constantly evolving organism."[27] Implicit in this evolutionary view is that government would grow or "evolve" into a larger, more interventionist, though still benevolent, entity. This sunny view fails to account for the contraction of the positive state since the 1970s and the constitutional implications of same. If the state 'evolves downward' in a contractionary sense, does Charter application shrink with it? The answer would seem obvious. But as a subsequent chapter on state inaction suggests, the answer is in fact by no means obvious.

LaForest traced the various ways in which government legislation established universities, government funds them, public policies affect them, and how the public regards them. After this meticulous review of their connections to government, he noted that it "is evident...that the universities' fate is largely in the hands of the government and that the universities are subjected to important limitations on what they can do, either by regulation

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[25] Ibid., 365.

[26] Ibid., 365-6.

[27] Ibid., 370.

or because of their dependence on government funds."[28] This is the sort of remark that would seem to precede a finding that universities are caught by section 32. But LaForest did not travel this path. Universities, he claimed, are self-governing and the "government has no legal power to control the universities even if it wished to do so....[T]hey manage their own affairs and allocate [government] funds as well as those from tuition, endowment funds, and other sources."[29] Further, he suggested, the universities have a particular claim to independence from government based on the tradition of academic freedom. Altogether, the universities escape Charter application. Wilson would have applied the Charter to universities. Taken together, the three tests suggested to her that the universities are sufficiently governmental to attract Charter application.

Though *McKinney* was largely a contest between LaForest and Wilson, in fact there were several fractures among the members of the panel hearing the appeal. LaForest refused to apply the Charter directly to universities, but had to consider whether the human rights legislation's limited definition of age for the purposes of human rights complaints was consistent with section 15 of the Charter. He found a Charter violation but applied a loose section 1 standard to save the law.[30] Wilson applied the Charter directly to universities, found the mandatory retirement policies contrary to section 15, and determined that the policies were not a reasonable limitation on charter rights. L'Heureux-Dubé agreed with Wilson's approach to section 32 but decided that universities are not caught. She agreed with Wilson on the human rights legislation's constitutionality. Cory agreed with Wilson on the section 32 test, on the governmental status of universities, and on the section 15 violation, and on the human rights law's violation of section 15; but he agreed with LaForest on the interpretation

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[28] Ibid., 272.

[29] Ibid., 273.

[30] LaForest did not have to consider whether the universities mandatory retirement policies violated section 15 of the Charter, given his decision on the application issue. But he went to consider the arguments anyway and would have found a section 15 violation but that the infringement would be saved under section 1 as a reasonable limit on the professors' equality rights.

of section 1 on the direct application issue and on the status of the human rights legislation. Sopinka agreed with LaForest. In short, the members of the Court were all over the map on this case, and whatever hope Wilson may have had for her section 32 test being a more systematic, less *ad hoc* approach than LaForest's, in fact it produced little consensus when applied to a set of facts.[31]

Divisions continued in the other age discrimination cases decided concurrently with *McKinney*. In *Stoffman v Vancouver General Hospital*,[32] the issue was not mandatory retirement as such but rather the constitutionality of a policy of the Vancouver General Hospital withholding admitting privileges from doctors who reached their 65th birthday. Since employment was not involved, British Columbia's human rights legislation was not at issue. In a 4-3 decision, the hospital was found not to be caught by the Charter. Despite legislative provisions requiring ministerial approval of regulations including the one at issue, LaForest held that the Charter did not apply. He introduced a new distinction pertinent to section 32 analysis: "the difference between ultimate or extraordinary, and routine or regular control."[33] Ministerial control in this case, LaForest argued, is of the latter variety, and this is too distant a relationship to trigger Charter application. Wilson did not dispute LaForest's distinction; she merely applied it differently to the facts. "Apart from the extraordinary powers of the Lieutenant Governor," she wrote, " the routine discharge of the [hospital] Board's function involves the articulation and implementation of hospital policy by a body dominated by government representatives....[T]he extensive supervisory power which the Province exercises over the Hospital supports the conclusion that [it] is a government entity for the purposes of s. 32(1) of the Charter"[34] She did in fact apply the Charter to the hospital and

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[31] The Court divided in the same fashion in a similar case involving the constitutionality of a mandatory retirement policy at the University of British Columbia. *Harrison v. UBC* [1990] 3 S.C.R. 451.

[32] [1990] 3 S.C.R. 483.

[33] Ibid., 513.

[34] Ibid., 538-9.

attracted L'Heureux-Dubé to her position. A hospital is "totally different" from a university, the latter argued; she thus distinguished her position her from that in *McKinney* and *Harrison.*[35]

The Court paid another visit to the hospital in *Eldridge. v. B.C. (A.G.).*[36] Here the issue was a Charter challenge to the lack of funding for sign language interpretation services for deaf persons receiving medical attention. LaForest for the Court ruled in favour of the claimant and noted that while *Stoffman* decided that the Charter does not apply to hospitals, a body not itself part of government may perform certain acts that are caught by the Charter. Recalling a distinction he advanced in *McKinney*, he wrote that either the actor itself is governmental, in which case all of its acts are reviewable, or a private entity performs certain acts that are governmental in nature, in which case those particular acts of an otherwise private entity are reviewable. The factors relevant to a determination of the reviewability of certain acts "do not admit of any a priori elucidation." In this case the hospital is vested with the authority to provide medically necessary services according to the Hospitals Insurance Act. The structure of the Act reveals "that in providing medically necessary services, hospitals carry out a specific governmental objective....[The Act] provides for the delivery of a comprehensive social program."[37] LaForest found that in providing such services, the hospital was exercising governmental authority subject to the Charter.

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[35] In *R. v. Dersch* [1993] 3 S.C.R. 768, the Court dealt with a seizure of blood by police without an accused's consent. The accused was hospitalized following a car accident. Blood was initially taken by the doctor for medical testing. A second sample was taken by the doctor with the consent of the accused and a blood alcohol reading was obtained for medical purposes. Police asked for the blood test results and the doctor complied. The accused argued that the police seizure breached his section 8 rights. The Supreme Court followed *Stoffman* in ruling that neither the hospital nor the doctor's conduct is caught by section 32. A doctor can act in a government capacity when ordered by police. This was not the case here. Only the police conduct is subject to the Charter in this case.

[36] [1997] 3 S.C.R. 624.

[37] Ibid., 664-5.

Douglas/Kwantlen Faculty Assn. v. Douglas College[38] involved a mandatory retirement policy in effect in a community college, and more specifically a complaint by an employee that the mandatory retirement provision of a collective agreement violated his section 15 equality rights. Here all members of the Court were persuaded that the college was a Crown agent and clearly subject to the Charter.[39] Divisions arose as to the constitutionality of the agreement's mandatory retirement provision. A bare majority supported the mandatory retirement provision – predictable in light of the companion cases already discussed.

But a subsidiary application question arose for Sopinka in relation to section 15. He stumbled over the reference to "law" in section 15 of the Charter. Section 15(1) declares that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination...." For a time the Court applied a stringent definition to "law" in section 15. In *R. v. S.(S)*,[40] the Court considered a claim arising from the Young Offenders Act. A provision of that Act permitted provincial authorities to create alternative measures programs to handle persons accused of crimes. Provinces were not required to set up such programs. A majority of provinces, excluding Ontario, had such programs. The accused in an Ontario proceeding argued that the absence of a program in Ontario constituted a section 15 violation of the right to equal benefit of the law. He alleged that he was discriminated against on the basis of province of residence. The Supreme Court rejected his claim, arguing among other things that the absence of the program is not "law" for the purposes of section 15. The law in this case is the legislative provision the

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[38] [1990] 3 S.C.R. 570.

[39] Wilson distinguished community colleges from universities in British Columbia by noting that while universities were once autonomous but then became entangled in government control, community colleges never were independent but from the beginning were products of government policy. Thus she applied her evolutionary view of government. Ibid., 611.

[40] [1990] 2 S.C.R 254.

constitutionality of which is unimpeachable.[41]

This result is certainly surprising since it shields exercises of discretion pursuant to law from Charter challenge. This contradicts explicit references to Charter application to regulations and executive acts pursuant to law in *Operation Dismantle* and *Dolphin*. The Court quickly corrected this error in *Douglas,* noting that the provision of the collective agreement can be considered the "law" of the governmental entity (the college) for the purposes of section 15 analysis. In this way, entities found to be governmental under section 32 are deemed to enact "laws" for the purposes of section 15. Whatever brake "law" in section 15 might have been on Charter application, this subsidiary threshold application provision was interpreted out of existence in *Douglas.*

Sopinka, however, refused to go along with the majority in *Douglas* on this issue. If a collective agreement is considered law for section 15 purposes, he remarked, then the ambit of negotiating room for employees and employers would be reduced significantly. There may be occasions, he thought, when an individual could contract out of equality rights. "While I do not dispute that 'law' is not confined merely to legislative activity, I am of the view that an element of coercion must be present even in a government 'activity' or 'program' for such to be reasonably characterized as law. This element of imposition or prescription by the state distinguishes law from voluntarily-assumed rights and obligations....While [law] is to be given a large and generous construction, I do not think that it can be ignored. In my opinion, it was not intended to apply to purely consensual conduct. The Charter was intended to protect the individual from the coercive power of the state and not against the individual's own voluntary

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[41] A complicating factor in this case which probably led the Court to dispose of it as it did was the federalism question and the effect of finding a section 15 violation on inter-provincial diversity in a policy area in which provinces can stake at least some claim. Said the Court: "Obviously, the federal system of government itself demands that the values underlying s. 15(1) cannot be given unlimited scope. The division of powers not only permits differential treatment based upon province of residence, it mandates and encourages geographical distinction." Ibid., 288. This is an excellent illustration of the tension between the Charter and federalism discussed in chapter 3.

conduct in dealing with state entities."[42]

Sopinka's remark raises several application issues. To what extent is coercive governmental power transmitted into employment relations? To what extent should Charter standards apply to employment and other contractual matters? Can a person contract away rights in the same way that some other legal rights in the Charter – like the right to remain silent upon arrest or detention – may be waived? The *Douglas* question raises issues that differ from those in *S.(S.)*. The application of the Charter to discretionary conduct is far less coercive in the former case; and the discretionary conduct at issue in *Douglas* is far more 'private' than in *S(S.)*. Sopinka tried to shield certain employment activities, if not from the Charter, then from section 15 of the Charter. The rest of the Court would have none if it. The arm of governmental control extends from the legislature through the college to the collective agreement provisions it negotiates with its employees. It is this arm of control which apparently transforms a mandatory retirement provision from a freely negotiated contract provision among private economic actors to a constitutionally suspect exercise of governmental power among parties one of whom is determined to be governmental under section 32. Sopinka's view is consistent with the liberal constitutionalist instinct to keep contractual matters beyond constitutional purview. His view seems to echo earlier decisions of lower courts, discussed in chapter 4, which equate collective bargaining issues with employment matters generally subject to the common law of contract, and therefore beyond Charter review. Voluntariness is the crucial assumption governing the common law of contract and Sopinka imports that assumption here. The majority in this case, however, saw coercion where Sopinka saw voluntary contractual conduct, and applied constitutional standards as a result.

Sopinka and the other members of the Court agreed on coercion being a central criterion in the triggering of section 32. But under what conditions is coercon significant for Charter application purposes? When is governmental coercion present? Though they did not say so explicitly, a possible reason why members of the Court are wary of letting people

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[42] *Douglas*, 617.

contract out of Charter rights, especially equality rights in employment, is that the spectre of coercion lurks behind apparently and legally voluntary contractual relations in the marketplace. If the courts do not maintain that Charter rights cannot be contracted away, then they will indeed by contracted away under the disproportionate influence of capital and management over labour. Fair enough, but the disproportionality argument was easiest to make *before* the advent of trade unionism and its progressive institutionalization in the laws of the land. The legislative protection of collective labour rights was developed precisely to equalize the power of partners at the negotiating table. The *Douglas* case deals with just these circumstances. Sopinka's seemingly aberrant view of the negotiability of rights under section 15 actually carries some weight and gave other justices pause in future cases.

A 1991 decision of the Court in the *Commonwealth* case grappled with the relationship between government and property rights in the era of the administrative state, in particular what private property characteristics attach to public property.[43] The Supreme Court in the pre-Charter era considered the extent to which private property because of its openness to the public and its melding with traditional characteristics of public places begins to acquire public qualities which limits the exclusive rights of private property owners. In *Harrison v. Carswell*,[44] a case decided by the Court before the Charter era, the Court was faced with the claim that owners of a shopping mall did not possess the right to limit picketing activities directed at one of the tenant firms. The Court in that case did not expand the right to picket to limit private property rights but the dissenting judgement by Bora Laskin bristled at the mechanical deference to precedent which supports the assertion of private property rights against the more novel rights of organized labour in more complex contemporary economic conditions. Even the majority agreed with the spirit of the argument to expand labour rights in this case but declined to do so for reasons of institutional capacity of the courts and deference to the other more representative branches of government in a parliamentary system.

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[43] *Committee for the Commonwealth of Canada v. Canada* [1991] 1 S.C.R. 139.

[44] [1976] 2 S.C.R. 200.

In *Commonwealth* the issue was section 2(b) rights of free speech and expression in relation to public property. The respondent in this case was a political group which distributed political leaflets at Montreal's Dorval Airport. Airport management asked members of the group to stop their activities, citing airport regulations granting management the authority to prohibit the conduct of any business or undertaking without ministerial consent. The group challenged the constitutionality of this limitation on its activities, alleging that its free speech rights were violated. Its challenge was unanimously upheld by the Supreme Court, and all members of the Court found that the Charter applied to the airport and its management. Not surprisingly perhaps, members divided on just *how* the group's claim should be upheld. Part of the problem was how to characterize public property. In public places like parks and street corners people traditionally enjoyed rights of free speech, especially political speech. But publicly-owned property in more modern times is often devoted to highly specialized activities whose functions may be disrupted or impeded by the broad assertion of rights exercisable against governments. Traditionally, private property owners possessed a nearly absolute right to exclude others and their various activities, political or otherwise, from their property. Here the question is the degree to which government can acquire some of these private property prerogatives with respect to property it owns and devotes to particular functions. Much section 32 jurisprudence concerns how things that look private are actually public in character; *Commonwealth* addresses the flip-side of this, namely the extent to which something that is public acquires private characteristics whose effect is to limit or exclude the exercise of constitutional rights. In this case, significantly, the public/private issues arise not so much in the threshold section 32 analysis but in the consideration of the merits of the substantive Charter claim. *Commonwealth* thus illustrates one of the contentions of this chapter, namely that Charter rights limitation doctrine can be expected to increase in importance as Charter application doctrine decreases in importance.

L'Heureux-Dubé on her own behalf asserted the simplest and most trenchant section 2 rights interpretation. For her there are two considerations. The first is the application of the

analysis of section 2(b) rights developed in *Irwin Toy*[45] to the effect that section 2(b) is engaged whenever the effect of a law or regulation is to restrict expression. The second consideration concerns the time, place, and manner in which expression is limited. She granted, as did the other members of the Court, that section 2 rights on public property cannot be absolute. One cannot stop traffic on a busy highway to make a political speech and get away with it just because one asserts section 2(b) rights in respect of a free speech goal considered by the Supreme Court to be among the most highly prized purposes advanced by section 2. She applied section 2 rights robustly in support of expressive activities regardless of the time, place, and manner in which they are exercised. Time, place, and manner considerations would enter into section 1 rights limitation analysis.

Writing for Sopinka, Lamer proposed a functional analysis wherein the very definition of section 2 rights in particular cases must take account of the nature and function of the public place in which they are being asserted. Some expressive activities in certain contexts, he argued, are simply incompatible with the performance of a legitimate function of a public entity. Persons should not be able to avail themselves of section 2 protection in support of shouting provocative things about bombs and terrorism – politically meaningful and salient as they might be – while in an airport terminal awaiting boarding onto a plane. Such speech is incompatible with the legitimate function of an airport, namely the maintenance of a safe and efficient system of passenger air traffic. Accordingly, Lamer applied a definitional or internal limitation to section 2(b) rights, applying them to certain forms of expressive activity only when that activity is compatible with the legitimate functions of the public property in question. If the speech is compatible with the functions of the public property and is restricted, a Charter violation will be found and section 1 analysis will be undertaken to determine if the restriction is justified. So expressive rights are balanced against other citizens' legitimate access to government services a public place is designed to provide; but the balance takes place within the definition of the section 2(b) right itself as well as within section 1 analysis.

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[45] *Irwin Toy v. Quebec* [1989] 1 S.C.R. 927.

The *Commonwealth* case is notable for the connections the Court established between Charter application and Charter rights definition and limitation. It was confronted with non-traditional public property and the need to tailor Charter rights to account for the specialized purposes to which public property is put in the modern era. In the end, the different interpretive strategies of L'Heureux-Dubé and Lamer carry relatively little importance.[46] What is important is that members interpret Charter rights differently depending, among other things, on the particular mix of public and private qualities of public places.

This point deserves extended comment. In *Irwin Toy* the Court dealt with a provision of Quebec consumer protection legislation which restricted companies' ability to advertise in a manner directed at children under 13 years of age. Irwin Toy argued that this restriction constituted a violation of its section 2(b) rights and that the Quebec government could have employed less drastic means than an advertising ban in advancing legitimate goals such as the protection of children.

The section 1 test developed by the Court in the famous *Oakes* case was stringent: it required the defender of a Charter violation to show that the impairment of a right was the least drastic means available to attain a pressing and substantial objective. Government must demonstrate to the Court that the impugned policy represented a "minimal impairment" of rights in the service of other legitimate objectives. In other words, the defenders of an impugned policy had to prove on a civil standard that no other policy it considered could have both achieved the objective and restricted people's Charter rights to a lesser degree than the one under consideration.

In subsequent cases, many of them having to do with the constitutionality of non-criminal laws, the Court was quickly confronted with the possibility that in many areas of public policy it would always be possible to imagine a less intrusive means government could use to attain a given legislative objective and that it would be difficult for a court or anyone else to gauge with precision whether the policy in question indeed represented the least intrusive limitation of rights consistent with the attainment of a legitimate social objective. If

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[46] These differences of interpretation did not affect the result. The political group won a unanimous decision of the Court.

so, most if not all non-criminal social and economic legislation would fail the section 1 justification stage of Charter review.

In *Irwin Toy* the Court followed the path it blazed in *Edwards Books*[47] and imposed a more relaxed section 1 test and justified it in terms that take into account the institutional capacity of courts to evaluate scientific evidence and other "social facts" as well as the relationship between judicial and legislative branches of government. In relaxing the "least drastic means" branch of the *Oakes* section 1 test, Dickson, Lamer, and Wilson wrote that "matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government....When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function."[48] In *Commonwealth* as well as the series of decisions released concurrently with *McKinney*, a majority of members of the Court imposed relaxed section 1 standards when they found Charter contraventions by the entities in question.

So in cases of social policy legislation in which the state is embedded in society, mediating the claims of conflicting societal groups and interests, the courts should adopt a deferential posture. In other words, as the Charter follows the state into society, the courts impose section 1 standards more flexibly and with careful attention to context. Section 1 considerations overtake threshold section 32 considerations. It should be noted, in addition, that the state's mediating function can be performed through the instrument of criminal law

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[47] *R. v. Edwards Books and Art* [1986] 2 S.C.R. 713.

[48] *Irwin Toy*, 993.

as well as social and economic regulation. In *R. v. Keegstra*[49] the Court adopted the relaxed, "state mediation" standard of review to justify the hate provisions of the Criminal Code even though they were found to violate the right to free expression under section 2(b).

A recent decision regarding the application of Charter standards to public schools also illustrates the relationship between Charter application and rights limitation. In *R. v. M.(M.R.)*[50] the issue was the constitutionality of a search of a student's person by the school's Vice-Principal who was told by another student, whom he felt he could trust, that the student being searched possessed illegal drugs. The student argued in court that the drugs found on his person should not be admitted because his section 8 Charter right not to be subject to unreasonable search and seizure was violated. The Vice-Principal did not meet the requirements for a search normally imposed on state agents like police officers. The Supreme Court decided the matter in favour of the Vice-Principal, noting that while the Charter applies to the school and the activities of the Vice-Principal, the Vice-Principal is not a state agent; and because of the particular nature of a school and the obligation of school officials to keep order, the Vice-Principal is not bound by the more stringent section 8 standards applicable to police officers. Charter application is one thing – and, increasingly, not a big thing – but contextual considerations affecting the meaning of a right to be applied are quite another.

The decision in which the labour movement, the market economy, government action, and Charter application all collide is *Lavigne v. Ontario Public Sector Employees Union.*[51] Merv Lavigne was employed as an instructor in the Haileysbury School of Mines in Ontario. His employment conditions were governed by a collective agreement between the school's administration and the teacher's union. The "Rand formula" applied, according to which all employees are required to pay dues to the union – the compulsory check off – but are not required to be members of it. Lavigne was not a union member and objected to the use of a portion of his fees by the union for the support of political causes like disarmament and the

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[49] [1990] 3 S.C.R. 697.

[50] [1998] 3 S.C.R. 393.

[51] [1991] 2 S.C.R. 211.

NDP which he did not support. The National Citizens Coalition (NCC) sponsored his Charter challenge to the check off provision of the collective agreement. Ontario labour legislation permitted the negotiation of such provisions but did not require them. In this case the economic role of government and consequently the application of the Charter to economic affairs occupied centre stage.

Lavigne is a particularly salient example of how Charter application issues force political contestants into otherwise unpalatable identities. Lavigne's sponsor, the NCC, supports the liberal constitutionalist position; "more freedom through less government" is its motto. It successfully used the Charter to have courts strike down limits on the ability of non-party "third parties" to spend money in election campaigns. Lavigne's case was another use of the Charter by the NCC to roll back egalitarian policies, this time in regard to collective bargaining and the state-sanctioned power of unions. But to have union powers trimmed by Charter rights, the NCC had to argue for expansive Charter application, a clear case of postliberal constitutional strategies in the service of (classical) liberal political ends. The OPSEU, on the other hand, was put in a defensive posture and sought to avoid being limited by the application of Charter rights. Contrary to the instincts of many of its intellectual defenders, the union had to assert the public/private distinction and claim that it was a private body and outside of the reach of the Charter. It was implicitly arguing that collective bargaining is a private matter, the common law of contract in a new form but no less private for constitutional purposes. The OPSEU aligned itself in legal terms with those anti-unionists early in the Charter era like Bhindi (whose case was discussed in chapter 4) who contended that unions are not caught by the Charter. Constitutional politics makes strange bedfellows; it also forces contestants to make legal arguments at odds at times with their political identities. Charter application doctrine in this sense is an ideological chameleon, subject to deployment for many political purposes.

In many respects, the concrete Charter application issue in *Lavigne* was easy to resolve. Four potential hooks for Charter application presented themselves: the school; the union; the labour legislation permitting the negotiation of compulsory check-off provisions in collective agreements; and the collective agreement itself. Wilson dismissed the union's

argument that the real issue in the case was the union's spending of its money, a matter beyond the purview of the courts given that unions are private entities. The issue, she said, is the compulsory check off provision and any connection this bears to government. All agreed that the school was a Crown agent and so the threshold issue was disposed of with little controversy. And the Court unanimously agreed that Lavigne's constitutional challenge should be rejected. What is more interesting here is the emergent consensus about Charter application.

Wilson dismissed union arguments that the Charter does not apply because this is an employment matter. Consistent with her views expressed in *McKinney* about the evolving role of government, she argued that government should not be able "to avoid its constitutional obligations simply by electing to govern its affairs through the vehicle of contract."[52] The Charter must follow government in the development of non-traditional means of action. However, governments often act not by proscribing conduct but by encouraging it, arranging incentives for doing things, or setting conditions on the performance of certain kinds of conduct. Personal income tax returns are littered with mechanisms that are not terribly coercive but which express governmental preferences that citizens and other bodies act in certain ways and not others. "It is trite knowledge," she noted, "that what is essentially regulatory legislation governing private parties' dealings among themselves constitutes much of the work of Parliament and the legislatures. Such statutes serve to set the boundaries of private action but are in general unconcerned with how citizens choose to conduct themselves within those boundaries. Thus, in a great many instances 'permissive legislation' does not connote governmental approval of what is permitted but connotes at most governmental acquiescence in it."[53]

Permissive legislation put her in an interpretive bind. She was unwilling to apply section 32 categorically to regulatory legislation because she was apparently sensitive to the manifold increase in regions of life to which the Charter would then apply. She seemed to

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[52] Ibid., 244.

[53] Ibid., 247.

grant that regulatory legislation is less coercive than other, more proscriptive legislation, and that it is the element of coercion that influences section 32 application. If this was her reasoning, then she had conceded ground to LaForest. On the other hand, to exempt permissive legislation from the Charter would allow governments to use this vehicle to shirk their Charter obligations, a possibility that concerned her in this and other decisions. Principle collides with consequence. She does not resolve the conflict; she merely attempts a balance by suggesting that, "in each case all the circumstances would have to be carefully examined to determine whether government had significantly encouraged or supported the act which is called into question. Depending upon the context, the enactment of a permissive provision may indeed support a finding of governmental approval or encouragement of a particular activity sufficient to invoke the protective guarantees of the Charter."[54] On this issue at least she advocates a case-by-case incrementalism for which she criticized LaForest in *McKinney*. Wilson's equivocation on regulatory legislation recalls Sopinka's concerns regarding the interpretation of "law" in section 15 raised in *Douglas*. Here Wilson is at least willing to entertain the notion that a permissive law may not be particularly coercive and perhaps may not attract Charter scrutiny. Does this mean that Wilson restrained her expansive reading of section 32? If the foregoing passage signaled a revision, her remarks quoted below should dispel any such notion.

Wilson made a more radical argument for a generous reading of section 32, a claim which advances her position beyond that which she set out in *McKinney*. "There are very good reasons for holding that the Charter applies to all activities of governmental entities and not merely to those we might characterize as falling within its proper governmental domain. In many respects the way in which government conducts its affairs serves as a model for organization in the private sphere."[55] In this comment is the working out of Wilson's

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[54] Ibid., 248. It is perhaps important to note in this context that *Lavigne* was the last case in which Wilson asserted her cumbersome three-fold section 32 test. She was never able to attract a majority of members of the Court to her position. She noted that in this case at least, her interpretation of section 32 did not yield different results than LaForest's reading.

[55] Ibid., 245-6.

constitutionalism advanced in *McKinney*. If the constitution is about the advancement of norms rather than limits, and if government is to embody those norms in its various activities, there is little in the concept of Charter application to delimit the extension of these norms throughout society. Thus for Wilson, Charter application generally and section 32 specifically lose fundamental importance as threshold constitutional considerations. Indeed the lack of concern for the element of governmental coercion in the passage just quoted suggests that the constitution has in principle nothing to do with limiting the coercive power of the state, but has everything to do with the society-wide promotion of constitutional norms.[56]

If Wilson moved to LaForest on section 32, then LaForest underwent something of a conversion to her position. He agreed not merely with the concrete issues but also with her more philosophical approach to Charter application. His new understanding is worth quoting at length:

> In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare. In such circumstances, government activities which are in form 'commercial' or 'private' transactions are in reality expressions of government policy, be it the support of a particular region or industry, or the enhancement of Canada's overall international competitiveness....To say that the Charter is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the Charter was enacted.
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> The respondents put forward the argument that the government will be placed at a competitive disadvantage if it has to comply with the provisions of the Charter when acting as a buyer or a seller in the private marketplace.

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[56] Recent developments help to illuminate some of the implications of this reasoning. Two CIDA employees have successfully sued the Government of Canada for being dismissed in violation of section 15 of the Charter. Said their lawyer: "It is a ground-breaking case. What is significant is that the Federal Court of Appeal confirmed that public servants can bring an action under the Charter of Rights if they're discriminated against by governmental officials." Glen McGregor, "Aid bureaucrats claim racial discrimination, win jobs back" *National Post* (January 2 1999), A1,4.

> In no respect is this argument compelling....the Charter is not intended to serve a simply negative role by preventing the government from acting in certain ways. *It has a positive role as well, which might be described as the creation of a society-wide respect for the principles of fairness and tolerance on which the Charter is based*.....Through the process of applying the Charter to government decision-making, the government becomes a kind of model of how Canadians in general should treat each other.[57]

The Court's development of section 32 doctrine in *Lavigne* was applied in *Godbout v.Longeuil (City)*[58] which concerned a provision of a contract of employment Godbout signed committing her to move within a specified time to a residence within the boundaries of the municipality for whose government she was to be employed. Though she signed the contract voluntarily, when the period of grace ended she objected to the residency requirement, arguing that it offended her right of privacy generally protected by section 7 of the Charter and provisions of the Quebec Charter of Human Rights and Freedoms. A majority of the Court elected to dispose of the case on the narrower grounds of the Quebec Charter, agreeing with the employee's argument. But LaForest and two others charged ahead where others feared to tread, applying the Charter to the municipality and thus to the contract provision, noting that *Slaight* and *Lavigne* establish beyond doubt that the Charter applies to government's commercial and contractual activities as much as to its legislative ones. He also found that the requirement breached section 7 of the Charter (even though the point was not even argued before the Court), and although he did not say so, he tacitly ruled that one cannot contract out of one's Charter rights. He also made explicit a distinction to which the Court had earlier only referred in passing. An entity is caught by the Charter by two routes. Either it is a part of the apparatus of government in which case all of its activities are subject to the Charter. Or, "particular entities will be subject to Charter scrutiny in respect of certain

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[57] *Lavigne*, 314-5. Emphasis added. Lavigne's particular Charter claim met with defeat. His section 2 rights of free expression and association were not unconstitutionally breached. LaForest employed a loose, deferential section 1 test to justify what he considered the checkoff provision's violation of section 2(d).

[58] [1997] 3 S.C.R. 844.

governmental activities they perform, even if the entities themselves cannot accurately be described as 'governmental' per se...."[59]

What began as a pitched constitutionalist battle between two understandings of Charter application has now become a muddier affair, with protagonists initially opposed more recently making gestures of understanding to one another. What can be said with confidence is the liberal constitutionalist conception of the state as a potential threat to rights and liberty, never strong in the Canadian tradition, has receded noticeably even since the beginning of the Charter era. Probably the most emblematic sign of this is the 1991 claim by former constitutionalist disputants LaForest and Wilson – who differed vociferously in *McKinney* the year before – that government is a societal model for human relations. This is not tantamount to saying that constitutional norms binding government also bind non-government actors. But it takes the conceptual debate in that direction. "Government" for purposes of Charter application remains a requirement in defining the application of the Charter. But its importance has receded. It is not hard to infer that the links between state and society in the welfare state, the influence of legal realism, and the theory that oppression has social as well as political roots – all of which were discussed in chapter 2 – have fostered a change in constitutionalist thought in respect to Charter application. The Court has not applied the Charter to social relations as such. The conceptual foundation, however, is changing to make this possible.

A test of this thesis exists in the field of criminal law, where the lion's share of Charter litigation is concentrated and where the liberal constitutionalist paradigm exerts its strongest influence.

Section 32 and Criminal Law

The criminal law is the archetypal expression of singular and exclusive state power, and the state's coercive power over people engaged in the criminal justice process is a major reason

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[59] Ibid., 878.

for the development of charters of rights. Charter legal rights apply more strictly, for example to persons linked with the coercive state than to others, even in the evidence gathering process. This is because the state represents a particular threat to civil liberties of accused persons, threats which private persons do not clearly pose. The courts have said that Charter rights would be stringently enforced against the state in criminal matters precisely because of the state's overwhelming power over individual accused persons in criminal processes.[60]

What happens, however, when entities other than the traditional state criminal apparatus are involved in criminal proceedings? What Charter standards apply in these circumstances? A line of cases concerning Crown disclosure obligations in criminal prosecutions lends a clue. Traditionally, prosecutors were able to withhold from the defense evidence in its possession, whether or not that evidence was relevant to the accused's case, and whether or not the Crown intended to introduce that evidence. Thus the Crown could use the element of surprise to its advantage, and it could decide against introducing evidence which would damage its case against the accused. Needless to say, the accused in such circumstances was put at a disadvantage relative to the Crown. While as a matter of informal arrangement in civil matters evidence would routinely be shared among counsel to expedite the legal process, this occurred unevenly in the criminal realm. This evidentiary advantage of the Crown was bound to attract criticism in the Charter era.

The Court in *Stinchcombe*[61] established that section 7 of the Charter included the right to a fair trial, and that this right includes the right of the accused to mount a full defense to a charge. And this right in turn requires that the accused have access to relevant evidence in the Crown's possession. Thus section 7 rights of the accused impose on the Crown a general duty to disclose evidence to the defense, whether or not it intends to use that evidence. Crown counsel have discretion about the type of evidence relevant to the accused, wrote Sopinka for the Court, but this discretion is reviewable by a judge who shall apply "the

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[60] David M. Paciocco, *Getting Away With Murder: The Canadian Criminal Jutice System* (Toronto: Irwin Law, 1999).

[61] *R. v. Stinchcombe* [1991] 3 S.C.R. 326.

general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make a full answer and defense, unless the non-disclosure is justified by the law of privilege."[62] Defense counsel had a modest standard to meet in seeking the disclosure of evidence in the possession of the Crown.

What if evidence is not in the possession of the Crown but may be relevant to the accused's defense? Notice that this question raises the possibility that section 7 legal rights in criminal proceedings potentially involve entities and persons not directly associated with the state. In *R. v. O'Connor*,[63] the Court was confronted with a complicated procedural tangle linked with the prosecution of a Roman Catholic Bishop from British Columbia charged with a series of sexual assault offenses. At an early stage in the proceedings, the defense requested disclosure of school and therapeutic records of the complainants, some of which were in the hands of third parties. The records were to be examined by the defense to see if they were consistent with other evidence the Crown proposed to submit. Crown prosecutors temporized and it was never entirely clear whether the reasons for delay were oversight, incompetence, or deliberate obstruction of justice. In any event, after repeated requests by defense and the judge for disclosure went unanswered, the trial judge stayed proceedings for reason of abuse of process by the Crown. At issue before the Supreme Court were the circumstances under which a stay is appropriate in situations like this, and what standards should apply to the disclosure of evidence relevant to the accused but not in the possession of the Crown.

It should be noted that complainants' privacy in sexual assault matters preoccupied the Court in some of the most difficult Charter cases it has considered. In *Seaboyer*,[64] a divided Court narrowly struck down provisions of the Criminal Code which limited the kinds of evidence about the complainant an accused could enter in a sexual assault trial. The decision aroused heated criticism because of the Court's willingness to allow accused persons

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[62] Ibid., 340.

[63] [1995] 4 S.C.R. 411.

[64] [1991] 2 S.C.R. 577.

to lead evidence about the sexual history of complainants, a result which would violate their privacy and discourage the reporting of crimes of sexual assault, leaving sexual assault and its victims in the shadows of the private realm. Parliament reacted vigorously to *Seaboyer,* replacing the invalidated provisions with new Criminal Code sections carefully tailoring victims' and accused persons' rights as well as establishing new rules for determining consent in sexual relations.

Facing the Court in *O'Connor* was, potentially, an attempt to circumvent Parliament's response to *Seaboyer* by attacking the credibility of complainants through the Court's new disclosure rules. For the majority on this issue, Sopinka distinguished disclosure to the defense of evidence in the possession of the Crown from production to the court of evidence not in the Crown's possession but which may be relevant to the ability of an accused to make a full answer and defense to a charge. Such evidence, it should be noted, is not part of the Crown's case, and is in the possession of parties having no obligation to assist the defense.[65] Such parties may be schools, doctors, hospitals, social workers, and counseling agencies. The defense must ask the judge for a disclosure order and show that the evidence to be disclosed is "likely relevant" to the defense. If and when the evidence is produced to the court, it is assessed by the judge in terms of a series of competing factors, including: "(1) the extent to which the record is necessary for the accused to make a full answer and defense; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised on any discriminatory belief or bias and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by the production of the record in question."[66] In other words, the Court attempted a principled approach to situations in which an accused's fair trial right requires disclosure of evidence in the possession of non-state entities with respect to which complainants have an expectation of privacy. The Court held that when the evidence is in the possession of the Crown,

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[65] *O'Connor*, 434-5.

[66] Ibid., 442.

complainants' privacy interests have been surrendered and the accused has to meet a modest standard of proof of relevance to gain access to the evidence. When the state does not have the evidence, the accused has to meet a more onerous test because the third parties in possession of the evidence are not part of the criminal justice system and because the complainant has not relinquished privacy interests in the information at issue.

O'Connor's distinction between Crown and non-Crown possession of evidence arose in the *Carosella*[67] case. The complainant visited the Windsor Ontario Sexual Assault Crisis Centre in 1992 to inquire about laying charges regarding an assault that allegedly occurred in 1964. She was interviewed by staff at the Centre, told her story, and proceeded with charges. At the beginning of the trial in October 1994, the defense was granted a motion requesting the court to order the production of records from the Centre to the court so that the judge could consider its disclosure to the accused. The files produced to the court contained no interview notes or anything else of importance. It was subsequently discovered by the Court that the Centre had a policy in place requiring counselors to take notes of their interviews with clients in such a way that the records would be of little assistance to defense counsel if subpoenaed; a policy of the Centre also provided that notes of interviews in cases in which the police are "involved" – but in which there is no order to produce – are to be routinely shredded. The complainant was not consulted about the file before its shredding. She was told at the start of her 1992 interview at the Centre that any information she gave could be subpoenaed in a criminal proceeding. She said that was fine with her.[68]

Sopinka for a narrow 5-4 majority ruled that the accused's section 7 rights were violated and that under section 24(1) a stay of proceedings is an appropriate result in the case. A court could not be expected to order production of evidence which no longer exists. The complainant can be assumed to have consented to the use of the interview information in a trial. As Sopinka summed up the case, "Given the circumstances, it is clear that the file would have been disclosed to the Crown. As material in the possession of the Crown, only the

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[67] *R. v. Carosella* [1997] 1 S.C.R. 80.

[68] Ibid., 94.

Stinchcombe standard would have applied. But even if the somewhat higher *O'Connor* standard relating to production from third parties applied, it was met in this case. Once the material satisfied the relevance test of *O'Connor*, the balancing required in the second stage of the test would have inevitably resulted in an order to produce; confidentiality had been waived and the complainant and the Crown consented to production."[69]

Sopinka's opinion, however, was informed by more than the complainant's waiver of her privacy interests. He noted at the outset that "Government funding is provided to the Centre pursuant to the terms of comprehensive agreement which requires the Centre, *inter alia*, to develop a close liaison with local health, justice and social service agencies, train and supervise its volunteers, be available for consultations with ministry staff, maintain financial records and statistics for submission to the minister upon request, maintain program records and submit annually to comprehensive report respecting the services provided, and maintain as confidential and secure all material that is under the control of the Centre which is not to be disclosed except where required by law."[70] He also criticized the Centre's "high-handed"[71] shredding activities which not only obstructed justice in this case but also ignored the wishes of the complainant who was willing to have the records disclosed and who indeed may have wanted them disclosed to substantiate her claims. Finally, Sopinka supported his decision that a stay of proceedings was the only appropriate remedy in this case by dwelling on the damage to the integrity of the criminal justice system if the trial were to continue: "...the complete absence of any remedy to redress or mitigate the consequences of a deliberate destruction of material in order to deprive the court and the accused of relevant evidence would damage the image of the administration of justice. In this regard, the Court can take into account that *the destruction of documents was carried out by an agency that not only receives public money but whose activities are scrutinized by the provincial government.*"[72]

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[69] Ibid., 107-8.

[70] Ibid., 90-91. Emphasis in original.

[71] Ibid., 107.

[72] Ibid., 113-114. Emphasis added.

Sopinka claimed in *O'Connor* that third parties have no obligation to assist the defense. Here he either contradicts that assertion or brings the Centre within the ambit of constitutional fair trial obligations due an accused person. In effect he brought a non-state entity within the ambit of the criminal justice system and imposed on it the same obligations imposed on the state. It is not hard to see why. The Centre acted to tilt the balance in sex assault prosecutions away from the accused and toward the complainant by limiting the availability of counseling evidence to the defense. If the Centre was not considered a part of government and therefore part of the criminal justice apparatus, it would have no disclosure obligations other than those arising from the subpoena of evidence. In order for the Court to punish the Centre for its obstructionism, it brought it within the ambit of the Charter and neutralized the effect of its shredding policy by applying section 7 rights to grant the accused what the Centre had tried to deny him: a stay of proceedings. Given the care with which justices in earlier cases justified application of the Charter to particular entities or activities, Sopinka's easy, even cavalier, application of the Charter to the Sexual Assault Crisis Centre appeared less a threshold application provision and more a weapon to be brandished against others who stand in the way of the courts. In the end, *Carosella* suggests that an expansive Charter application doctrine can be used to extend government's criminal law function into society.

The future of vertical Charter application in areas of criminal law is unclear. On the one hand, the liberal constitutionalist public-private distinction remains alive and well in cases like *R. v. Hodgson*[73] which considered the admissibility at trial of evidence in a sexual assault case. The accused made statements to the parents of a sexual assault victim which were later used to convict him. The trial judge failed to conduct a voir dire to determine whether evidence was freely tendered. A consideration relevant to the case was whether the recipients of the statement, in this case the victim's parents, were "persons in authority" linked sufficiently to the coercive arm of the state. If they were deemed so, then the statements might very well not be admissible. The Supreme Court decided that the parents were not

[73] [1998] 2 S.C.R. 449.

conventional persons in authority, and that the judge did not err in failing to conduct a voir dire. The evidence was ruled admissible. So the liberal constitutionalist public/private distinction is alive and well in Canadian criminal law. If it were not, the Court could not credibly make a distinction between recipients of confessions who are associated with the coercive apparatus of the state and those who are not.

On the other hand, Charter application issues will undoubtedly continue to crop up in interesting ways. In his report on the wrongful conviction of Guy Paul Morin, the Hon. Fred Kaufman noted that jailhouse informants played a sinister role in the injustices Morin suffered. He recommended among other things that "Where an in-custody informer actively elicits a purported statement from an accused in contemplation that he or she will then offer himself or herself up as a witness in return for benefits, he or she should be treated as a state agent."[74] This recommendation illustrates once again that Charter application can be extended not simply by a complete rejection of liberal constitutionalism's double privacy principle; it can be extended by expansive definition of concepts like "government", "law", and in this case, "state agent." Between the ideal types of liberal and postliberal constitutionalism, there are myriad halfway houses and stopping points which courts, in the throes of the clash of constitutionalisms, will visit.

Conclusion

This review of the case law on section 32, and in particular of the definition of "government" in section 32, yields the following conclusions.

The Supreme Court has set out to apply the Charter vertically or downward into Canadian society, defining "law" and "government" expansively to embrace more activities and entities than are traditionally considered subject to constitutional bills of rights. Vertical Charter application has been controversial among members of the Court. Initially, the Court in the *Operation Dismantle* and *Dolphin* cases set out on a conventional path on section 32

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[74] Commission on Proceedings Involving Guy Paul Morin, *Report* (1998) http://www.attorneygeneral.jus.gov.on.ca/reports.htm.

interpretation but soon expanded it. Early in the life of section 32 interpretation, members of the Court disagreed on the appropriate test to apply to application issues but soon these differences were resolved in favour of a more activist, expansive, pragmatic – I would say, postliberal – approach. But even when there was consensus on the principles of Charter application, justices were by no means agreed on their application to given sets of facts. The Charter application decisions are among the most divided, lengthy, and complex the Court has rendered.[75]

Nonetheless, the Court has moved, albeit unevenly, toward an expanded application of the Charter, bringing more and more entities and activities potentially and actually within its scope. This increases the potential number of Charter challenges and has allowed, if not required, the Court to take account of the distinct qualities of entities and activities, not at the threshold stage at which rights are applied or not, but at the stages at which rights are defined and limited. All of this is consistent with Sunstein's analysis discussed in chapter 2. Recall that Sunstein argues for an expansive bill of rights application doctrine to allow constitutional norms to influence society, summoning social actors to come forth and submit their reasons in defense of status quo distributions of resources. Not all distributions will be censured; but all should be subject to reasoned review. Thus Charter application is intimately linked with Charter right interpretation and limitation. When the Court has applied the Charter to entities and activities not traditionally a part of government it has tailored its approach to the definition and limitation of rights. Charter application doctrine bears an important relationship to Charter rights interpretation and limitation. Consider *Lavigne, McKinney,* and *Commonwealth.* Those justices who applied the Charter to non-traditional spheres of governmental action then applied a loose, deferential section 1 test to assess the

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[75] For a review of the section 32 cases up to 1993, see Robin Elliott, "Scope of the Charter's Application" *Advocates' Quarterly* 15 (1993), 204-37. Summarizing the Supreme Court's application jurisprudence, he suggests that the best way to understand section 32 is not to ask whether the Charter applies to a certain type of law or a certain type of activity, but whether the Charter "applies to a particular entity in the performance of a particular function."(204) This nicely captures the ambiguity of the Court's interpretation of section 32. Aside from broad principles of governmental control, courts are really left to decide whether the charter applies on a case-by-case basis.

reasonableness of a Charter right violation. As the importance of section 32 wanes, the importance of section 1 waxes.

A final conclusion is that section 32 is an ideological chameleon. Diverse ideological interests may be served by one or another interpretation of the Charter application provisions. For example, the Court has interpreted section 2(d) freedom of association rights narrowly, much to the disappointment of organized labour. But the Court has allowed that section 2(b) rights of freedom of expression include the expressive activities of unions like picketing. This is what prompted a union to assert its right to picket an alleged ally of a company against which it was striking in *Dolphin*. On the other hand, unions wanted to avoid Charter application in *Lavigne* because their internal spending priorities and hard-won rights to organize in the workplace were challenged by a litigant asserting *his* section 2 Charter rights. While women's groups have had great expectations for the Charter and particularly section 15, the Charter in some cases has been used against them, as in *Carosella*. While the Court's development of Charter application doctrine seems sympathetic with the administrative welfare state, there is otherwise no particular political program or ideology associated with a restrictive or expansive Charter application doctrine. Different persons associated with different political and ideological causes may have interests in broad application in some cases, and narrow application in others. Much may depend on what side of the Charter challenge one is on.

Chapter 6

Charter Application, Underinclusive Benefits, Discrimination, and State Inaction

Introduction

Early Charter decisions stressed that the Charter is engaged when government acts in some positive way. In *Hunter v. Southam*, Dickson for the Court commented that the Charter's purpose "is to guarantee and protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain government action inconsistent with those rights and freedoms; it is not in itself an authorization of government action."[1] McIntyre in *Dolphin*[2] similarly limited application of the Charter to government action.[3] These decisions were made, however, before any major section 15 equality rights case came before the Court. Such a clear limitation on Charter application would soon prove difficult to uphold.

This chapter will examine the Charter's application to instances in which it is government's "failure to act" that is found constitutionally wanting. Specifically, this chapter is concerned with the relationship between section 15 and legislation which either prohibits certain forms of discriminatory treatment in the private sector, or which selectively metes out certain public benefits. Human rights legislation is a form of state action reaching into society and setting public standards for the making of decisions in activities like employment, tenancy,

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[1] *Hunter v. Southam* [1984] 2 S.C.R. 145, 156.

[2] *Retail, Wholesale, and Department Store Union v. Dolphin Delivery* [1986] 2 S.C.R. 573.

[3] Such liberal constitutionalist restraint has led some commentators to conclude that the Charter would never be triggered in cases of state inaction. For example, Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), 50.

and membership in various associations. Section 15 of the Charter applies a stringent standard of non-discrimination on government action. The case law reveals two trends. The first is that human rights legislation, though passed in conventional legislative processes is actually quasi-constitutional in nature. The second is that section 15 of the Charter is emerging as the standard by which both public and private conduct is to be judged. While in a formal sense section 15 binds only government, in fact it is increasingly being applied to societal relations. The interpretive mode through which this application of equality standards is achieved is the application of the Charter to state inaction. As the cases indicate, the courts rest Charter application on ever more slender instances of state action. The implication is that state *in*action may be as legitimate a circumstance triggering Charter review as state action. Such a result would suggest the ascendancy of postliberal constitutionalism.

This chapter takes issue with those perspectives on the Charter which hold that the courts have foreclosed the possibility of a postliberal constitutionalism by interpreting section 32 and section 52 restrictively, imposing on them a liberal constitutionalism. Gavin Anderson argues precisely this and also suggests that the legislative and administrative vehicles able to "fill the Charter gap" by applying "a social democratic conception of human rights" – human rights legislation and their enforcement bodies – have failed to take up the challenge. He concludes that Charter review and the interpretation human rights legislation have followed the same liberal constitutionalist path.[4] The reality is a good deal more complicated than this.

Positive and Negative Rights

Many provisions of the Charter incorporate what are called positive rights, namely rights which when asserted require the government to act in a certain way and actively provide a form of treatment. Positive rights are contrasted with negative rights which when asserted require the state to refrain from acting in certain ways. Negative rights are archetypal liberal

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[4] Gavin W. Anderson, "Filling the 'Charter Gap?": Human Rights Codes in the Private Sector" *Osgoode Hall Law Journal* 33 (1995) 749-83.

rights.[5] But even liberal conceptions of constitutionalism embrace some positive rights, many of which are included in the Charter. Sections 3 and 4 of the Charter contain, for example, a right to vote which imposes on Parliament a duty to hold elections periodically and conduct them fairly; section 5 requires Parliament to sit once per year; section 10 requires police to undertake certain procedures when arresting or detaining a person; section 11 requires that persons charged with an offence be tried within a reasonable time; and section 7 requires that trials be conducted fairly, and correspondingly requires that the government provide legal assistance to accused persons in certain cases and that Crown prosecutors disclose potentially material evidence to the accused before trial. In addition, the Charter contains some peculiarly Canadian positive rights like language rights provisions requiring laws to be translated in both official languages; and requiring governments to be able to respond in either official language to requests made by persons; and requiring governments to set up and fund from public funds school educational programs in either official language where numbers warrant.

These positive rights are at times controversial. Some object to the legal rights because they place onerous burdens upon the state and distract it from its primary crime control functions. Positive legal rights, goes the argument, tip the balance too far in favour of due process concerns which coddle criminals.[6] Others object to the language rights for reasons having to do with Canada's national identity and the place of French-speakers within it.[7] Quebec nationalists have frequently argued that the Charter entrenches a particular language policy designed to diminish the role of provincial governments in the protection of

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[5] Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118-72; and C. Michael MacMillan, "Social Versus Political Rights" *Canadian Journal of Political Science* 19 (1986), 283-304. A more idiosyncratic definition of negative and positive rights is suggested by David Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness" *Canadian Journal of Political Science* 22 (1989), 699-716.

[6] Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson, 1992), chapter 3.

[7] This was a common complaint of disgruntled Westerners annoyed with what they perceived as Quebec's stranglehold on Confederation in general and federal government largesse in particular.

linguistic particularity. Thus the language provisions of the Charter are bound up in larger debates about federalism, distinct societies, and the Canadian identity, as an earlier chapter discussed.

It is possible to argue in a more Hayekian fashion[8] that all positive rights, including those of a legal and linguistic character are objectionable because they require the state to act in ways which diminish liberty, and which can have appreciable budgetary implications. The rub here is that in the separation of powers in most constitutional orders, representative legislatures, not courts, have the power of the purse. No judicial decision is without financial implications of course, but some decisions, critics claim, are more fiscally consequential than others.[9] Positive rights of any variety have financial consequences which threaten the stability of an institutional division of authority in a properly constructed constitutional order.

Whatever the salience of this constitutional critique of positive rights, its use in the cases of legal and linguistic positive rights pales by comparison with the possibilities inherent in judicial interpretation of section 15 of the Charter. Section 15 reads:

> **15.** (1) every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or

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[8] Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), part II.

[9] Consider the outcry associated with one Supreme Court decision having appreciable fiscal consequences: *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177, which required the federal government to provide resources to hear appeals for all persons denied refugee status. Resources deployed were not even adequate and amnesties were later effectively granted to scores of applicants. The Court in this case (and others) insisted that administrative inconvenience and financial costs go no distance against the enforcement of Charter rights. See Peter H. Russell, Rainer Knopff and F.L. Morton, eds., *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1989), 393-4.

ethnic origin, colour, religion, sex, age or mental or physical disability.

While section 15(2) is an explicit authorization of remedial programs designed to target preferential public benefits to specific groups identified by one or more of the listed or unlisted grounds in section 15(1), there is a positive element in section 15(1) itself. The section creates a right to the "equal benefit" of a law or program without discrimination. This provision is far-reaching in its implications. "Benefit" is usually defined with reference to material goods and money. But what if we define "benefit" to include psychological goods too? Put differently, what if there is a political economy of symbolic recognition whose implication is that the state can be held constitutionally to account for failing to recognize in symbolic terms the status of certain groups? The potential reach of section 15 standards is increased markedly. And as the following discussion will suggest, the courts have applied equality standards to the political economy of recognition.

More fundamentally, government is largely about the making of distinctions, that is, about deciding among options, withholding scarce resources from some so that they can be given to others. When resources are finite – and they almost always are – governments must choose. For equality rights purposes, the question is when a distinction is discriminatory. As the labyrinthine history of section 15 interpretation suggests, this is no simple matter.[10] This chapter considers only a part, but an important part, of that larger history of equality rights jurisprudence.

The relationship between discrimination and the making of distinctions is of particular significance when human rights legislation is the focus of constitutional review. Not only can the application of section 15 norms have appreciable fiscal implications on the other branches of government; but section 15 can be used by courts to render constitutionally reviewable the

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[10] As Hogg notes, there was a "disturbing" number of cases which conflated distinction and discrimination in the lower courts before the Supreme Court developed rules to clarify the law. Peter Hogg, *Constitutional Law of Canada* 4th edition (Toronto: Carswell, 1997), 1244. Those rules have been subject to continual division and reformulation since the landmark *Andrews v. Law Society of B.C.* [1989] 1 S.C.R. 143.

state's failure to benefit certain groups.[11] As will become apparent, one approach to the question is to say that when government acts it must do so in a manner that comports with constitutional standards. But it is indeed a small conceptual step from this approach to the one which calls into question the very need for evidence of state action at all in determining the constitutionality of certain states of affairs. And if state inaction as such can be constitutionally suspect, it follows that the Charter applies *in toto* to society as such. In this manner section 15 becomes its own vertical pseudo-application provision.

Discrimination and the Law

At common law, private property owners are free to dispose of their property as they wish, and this means that employers and other contractors can discriminate on the basis of race or religion or some other ground with impunity. Until the second world war, government legislation sometimes explicitly targeted particular groups for adverse treatment. For a variety of reasons,[12] in the 1940s governments began to act to curtail discriminatory practices, not only by removing some overtly discriminatory provisions from the law books, but also by passing laws prohibiting discrimination in certain activities on the basis of certain listed group characteristics.[13] Early legislative efforts to advance what Tarnopolsky calls "egalitarian civil

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[11] In one of its most recent section 15 cases, the Supreme Court emphasized section 15's "strong remedial purpose." In addition it said that "equality in s. 15 must be viewed as a substantive concept differential treatment, in a substantive sense, can be brought about either by a formal legislative distinction or by a failure to take into account the underlying differences between individuals in society." *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, 508, 516-17.

[12] See Cynthia Williams, "The Changing Nature of Citizen Rights" in Alan Cairns and Cynthia Williams, eds., *Constitutionalism, Citizenship and Society in Canada*, Research Studies for the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 33 (Toronto: University of Toronto Press, 1985), 99-132.

[13] Ian A. Hunter, "The Origin, Development, and Interpretation of Human Rights Legislation" R. St. J. Macdonald and John P. Humphrey, ed., *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto; Butterworths, 1979), 77-110; Walter Tarnopolsky, *Discrimination and the Law*, (Toronto: De Boo,

liberties" were limited affairs, quasi-criminal statutes requiring aggrieved individuals to take a party to court and prove in a judicial action that intentional discrimination took place. They were limited also in the sense that the activities covered by the statutes and the lists of grounds on which discrimination were limited, and discrimination was defined as intentional or direct rather than indirect or systemic (or "effects-oriented). But in principle, it became a matter of public policy that removing overtly discriminatory provisions from legislation was not enough; concerted state action was required to root out the most egregious forms of discrimination in the private realm.

Three changes took place from the late 1940s to present. First, the number of activities to which anti-discrimination provisions applied increased from employment to fair accommodation in public services and eventually to membership in various professional and employment associations. Second, the grounds on which discrimination was prohibited also increased. The first prohibited grounds were race-related; other criteria associated with life cycle and lifestyle characteristics were later added.[14] Some jurisdictions experimented with open-ended lists of prohibited grounds. British Columbia was one such case whose 1973 legislation prohibited discrimination "without reasonable cause" and defined certain (but not all) grounds of discrimination as not to constitute reasonable cause.[15] Third, anti-discrimination statutes were consolidated into comprehensive codes and administrative, educational, and enforcement structures were built in to make the pursuit of complaints easier for aggrieved persons, and to emphasize the remedial and educational objectives of human rights rather than the punitive aspects of a quasi-criminal process. As R. Brian Howe suggests, codification of human rights legislation "produced in Canada a new concept: that

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1982), part 1; Rainer Knopff, *Human Rights and Social Technology: The New War on Discrimination* (Ottawa: Carleton University Press, 1989), chapter 2.; and Neil Nevitte and Allan Kornberg, eds., *Minorities and the Canadian State* (Oakville: Mosaic Press, 1985).

[14] Thomas Flanagan, "The Manufacture of Minorities" in Nevitte and Kornberg, eds., *Minorities and the Canadian State*, 107-24.

[15] Thoms M.J. Bateman, *The Law and Politics of Human Rights in British Columbia, 1983-1984* (M.A. Thesis, University of Calgary, 1988).

it was the responsibility of the state, through law and through an administrative commission, to counter discrimination and provide for the social rights to equal opportunity."[16]

Human rights policy developed in a linear and expansive, but incremental, fashion. Human rights commissions and representatives of identifiable groups argued for the steady expansion along all three dimensions. And indeed there is a certain logic to this, whether one relies upon a bureaucratic politics view of the growth of organizations,[17] upon ideological principles of reform liberalism or humanism[18], or, as does Howe, upon the discrepancy effect of the ideals of Canadian liberal democracy versus the reality experienced by many Canadians. Howe notes, however, that human rights policy, at least in Ontario, the leader among provinces in this policy field, developed in an incrementalist manner which suited both reformers and governments seeking to avoid charges of radicalism and of overturning settled social arrangements.[19] This policy incrementalism was matched by the inclusion of provisions in human rights laws which permitted discrimination in various ways. Age discrimination was permitted in the age of minority and with respect to mandatory retirement, pension plans and insurance. Classes of human activity were exempt from legislation: people were allowed to discriminate on any ground in respect to taking in boarders, for example. Hiring in various organizations like religious and fraternal groups was exempted. In general terms, legislation allowed discrimination on the basis of a prohibited ground if that discrimination could be shown to be a *bona fide* requirement or otherwise reasonable and justifiable. In other words, human rights codes were concerted interventions by the state into what were to that point

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[16] R. Brian Howe, "The Evolution of Human Rights Policy in Ontario" *Canadian Journal of Political Science* 24 (1991), 787.

[17] Flanagan, "The Manufacture of Minorities;" Ian Hunter, "Liberty and Equality" *McGill Law Journal* 29 (1983), 1-23; and Ian Hunter, "When Human Rights Become Wrongs", *UWO Law Review* 23 (1985), 197-204. In addition to a bureaucratic politics explanation, Hunter points to the "essentially theological" nature of human rights in which egalitarianism functions as an eschatological ideal. In this he underscores Howe's theory of the ideological purposes of human rights legislation.

[18] Knopff, *Human Rights and Social Technology.*

[19] Howe, 790-91.

areas of human activity governed only by the common law, and common law placed few limitations on contractual freedom. At the same time, governments attempted to strike sensitive balances between public norms and private spheres of autonomy, autonomy here referring to its individual or personal and its corporate or "entity-focussed" dimensions.

These legislative developments have been matched by the importance the Supreme Court has assigned to anti-discrimination laws. Human rights laws have been assigned quasi-constitutional status. This latter phrase may seem odd, if not incoherent: an act of a legislature is either positive law repealable by the legislature, or constitutional in nature, in which case it is supreme over positive law and amendable by extraordinary means. As Ian Greene has argued, this is too simplistic a dichotomy, as it fails to capture the ways in which certain legislation may be elevated above other legislation without being made strictly constitutional. He refers to "manner and form requirements" legislatures can build into legislation to make them special. Under a strict theory of parliamentary sovereignty, a legislature cannot bind another in the future. But in fact, legislatures may declare in legislation that unless certain procedural requirements are met, a particular legislative act will have primacy over future legislative acts. Indeed, most human rights acts contain primacy clauses of some kind which declare that other laws, even those passed subsequently to the human rights legislation, found inconsistent with human rights legislation, must yield to human rights policies.[20]

The Supreme Court has not only respected the technical primacy of anti-discrimination

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[20] Ian Greene, "The Myths of Legislative and Constitutional Supremacy" in David P. Shugarman and Reg Whitaker, eds., *Federalism and Political Community: Essays in Honour of Donald Smiley* (Peterborough: Broadview, 1989), 267-90. As Peter Hogg puts it, the degree to which legislatures can bind future legislatures through manner and form requirements "is not entirely free from doubt;" nonetheless, in general terms, "while the federal parliament or a provincial legislature cannot bind itself as to the substance of future legislation, it can bind itself as to the manner and form of future legislation." Peter Hogg, *Constitutional Law of Canada*, 316. Great Britain has adopted a limited form of judicial review in its new Human Rights Act, allowing courts to interpret provisions in conformity with the Act's provisions or otherwise declare that the law is incompatible with the human rights provisions. See Kate Malleson, "A British Bill of Rights: Incorporating the European Convention on Human Rights" *Choices: Courts and Legislatures* 5 (1999), 21-39.

laws in the sense just described, but has often given them a particular constitutional importance as well. In *Insurance Corporation of B.C. v. Heerspink*,[21] the issue before the Supreme Court was the termination of Heerspink's house insurance when the corporation learned from press reports that he was being committed to trial for marijuana trafficking. The corporation argued that it was merely undertaking an appropriate risk analysis of a policy holder, and that the insured agreed in the insurance contract that his insurance may be terminated with notice by the corporation. Heerspink argued that he was being denied insurance "without reasonable cause" – the standard of non-discrimination contained in the B.C. human rights legislation. A majority upheld Heerspink's claim. In his reasons, Lamer altered the above-described manner and form rule. A straight-forward reading of the rule requires that a law is a normal law unless there is explicit language elevating it above others. But another, more controversial reading is that unless there is explicit language to the contrary, the subject matter of the law itself invites courts to elevate it above all others. The majority favoured the latter approach. Wrote Lamer in one of the majority judgements:

> When the subject matter of a law is said to be the comprehensive statement of the 'human rights' of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the [human rights] Code or in some other enactment, it is intended that the Code supercede all other laws when a conflict arises.... [The Code] should be recognized for what it is, a fundamental law....[A]s it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.[22]

In like manner, the Court in *Ontario Human Rights Commission v. Borough of*

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[21] [1982] 2 S.C.R. 145.

[22] Ibid., 158.

Etobicoke[23] considered whether a clause in a collective agreement providing for mandatory retirement age of 60 for firefighters was age discrimination. McIntyre for the Court dismissed arguments that the discrimination may be upheld as a *bona fide* occupational requirement because it was a voluntarily agreed contractual arrangement. "While the Code contains no explicit restriction on such contracting out [of the terms of the age discrimination provisions of the Code], it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of such enactments and that contracts having such effect are void, as contrary to public policy."[24]

Subsequent decisions have undergirded the importance, primacy, and fundamental character of human rights legislation. The Court in *O'Malley* declared that human rights legislation "is of a special nature, not quite constitutional but certainly more than the ordinary...."[25] Other decisions make it clear that human rights provisions are to be given a large and liberal interpretation, that discrimination is to be defined broadly to include systemic factors, that remedial purposes are to be generously interpreted, and that limitation clauses to which respondents can appeal to justify infringements of legislation are to be strictly

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[23] [1982] 1 S.C.R. 202,

[24] Ibid., 213. In 1945 in *Re Drummond Wren* [1945] 4 D.L.R. 674 the Supreme Court declared invalid a racially restrictive covenant. In the absence of any explicit legislative prohibition, the Court based its decision on the common law doctrine of public policy. Quoting the legal realist Oliver Wendell Holmes, the Court decided that public policy is a blanket notion capturing what is expedient in a set of circumstances to the public good, the latter advanced in various political pronouncements, treaties, and legislation. Hogg considers it inadvisable to base human rights primacy on the idea of public policy, since public policy priorities are numerous and courts are incapable of determining which public policies supercede others. Hogg, *Constitutional Law of Canada*, 318n51.

[25] *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears* [1985] 2 S.C.R. 536, 547.

construed.[26]

It is of some interest that the Court has found on a couple of occasions that inaction on the part of respondents in discrimination complaints can be impugned. In *Zurich Insurance*, the issue was whether car insurance rates which were more costly for young single male drivers were contrary to Ontario's human rights legislation. The legislation in question allowed discriminatory policies like this to stand if respondents demonstrate that practical alternatives to the impugned policies are unavailable. Members of the Court disagreed among themselves about what standard of hardship is implied in the word "practical." The majority decided in favour of the insurance company but in her dissenting opinion, McLachlin argued that the company was unable to demonstrate the absence of a practical alternative to the policy because it failed to collect statistics in other non-discriminatory ways which then could be assessed as to their relative practicality. For her, the insurance company was in the wrong because it *failed* to act in a manner to be able to discharge its obligations under the legislation.[27]

In *Brooks v. Canada Safeway Ltd.*[28] The Court considered a case of pregnancy discrimination under Manitoba's human rights legislation. Safeway's group insurance plan provided for disability leave in the event of sickness or accident but excluded from disability coverage all pregnant employees for a period surrounding the expected date of birth. The

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[26] See *Bhinder v. Canadian National Railway Co.* [1985] 2 S.C.R. 561; *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 1114; *Brossard (Town) v. Quebec (Commission des Droits de la Personne)* [1988] 2 S.C.R. 279; *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321; *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892; and *Dickason v. University of Alberta* [1992] 2 S.C.R. 1103.

[27] *Zurich Insurance*, 383. Human rights boards of inquiry also impugn inaction. In *Ontario Human Rights Commission and Hudler v. Haskett* (Board of Inquiry, October 7, 1997), the Mayor of London, Ontario was found to have discriminated on the basis of sexual orientation for failing to exercise her discretion to publicly recognize the contributions of the homosexual community to the civic life of that city.

[28] [1989] 1 S.C.R. 1219.

period during which pregnant women were ineligible for benefits could partly be covered by maternity benefits available through the Unemployment Insurance Act but this did not fully replace the income available to other employees under the insurance plan. Clearly, there was adverse treatment experienced by pregnant women. The Supreme Court enthusiastically used the case to reverse the much-maligned *Bliss* precedent[29] in which the Court ruled that pregnancy-related discrimination was not sex discrimination. For the purposes of this study *Brooks* is important for how the Court responded to a particular argument advanced by Safeway in its own defence. Safeway suggested that while the plan does indeed deny to pregnant women disability benefits for a specified period, such differential treatment is a matter of underinclusion of benefits, not discrimination, and it cited favourable United States Supreme Court decisions in support. To this Dickson for the Court responded that the reasoning of the American cases "does not fit well within the Canadian approach to issues of discrimination....Underinclusion may be simply a backhanded way of permitting discrimination....Once an employer decides to provide an employee benefit package, exclusions from such schemes may not be made in a discriminatory fashion. Selective compensation of this nature would clearly amount to sex discrimination."[30] While in the instant case Safeway could legitimately be accused of withholding benefits from pregnant employees for mean-spirited pecuniary reasons, the larger logic of the reasons should not escape notice. Dickson imposed a high standard on employers, allowing them no room to extend benefits in incremental fashion. Two options, according to the decision, seem to present themselves to employers: act either completely and comprehensively, or do not act at all.

In an appeal of a human rights decision that a mandatory retirement policy at the University of Alberta is not age discrimination contrary to Alberta's human rights legislation, the Supreme Court concerned itself primarily with whether the board of inquiry properly interpreted the law's own limitations clause, and with the degree to which the courts should

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[29] *Bliss v. Attorney General of Canada* [1979] 1 S.C.R. 183.

[30] *Brooks*, 1240.

defer to the decisions of administrative tribunals. Charter questions were not directly engaged. But the decision in *Dickason* is notable also for what was said about the relationship between the Charter and human rights legislation. In her dissent, L'Heureux-Dubé wrote that there is "considerable interplay between the Charter and provincial human rights legislation, due to the similarity of their goals and the specific guarantees they provide."[31] Much of the disagreement among members of the Court concerned not whether but rather the degree to which the Charter's section 1 reasonable limits jurisprudence should be used to give meaning to a similar justificatory provision in Alberta's human rights legislation. The majority suggested that just as the *Oakes* test is varied according to the circumstances of particular cases, so should the justificatory provisions in human rights legislation. The dissenters disagreed, arguing that private parties should be subject to the most stringent test at all times. This Court, said L'Heureux-Dubé, "owes no deference to the policy of a private employer....Private employers are unrepresentative and accountable to no one, except to the extent that their conduct is regulated through law."[32] Her argument is based partly on a claim that the Alberta government did not legislate specifically to exempt mandatory retirement policies from the age discrimination protections of the human rights legislation. Since the legislature (by its inaction) decided to defer to the judgement of a human rights board of inquiry on the reasonableness or not of mandatory retirement, the courts should defer to that, and thus to the decision of a particular board of inquiry. So she converts an argument for curial deference both to the legislature and an administrative tribunal to an argument for the trenchant application of quasi-constitutional equality standards to private employers.[33]

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[31] *Dickason*, 1160.

[32] Ibid., 1163-64.

[33] In *Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 554, the Court considered whether a human rights board of inquiry properly interpreted family status to include same-sex couples for the purposes of the interpretation of a clause of a collective agreement. A prior issue is the degree to which the Court should defer to the decision making of an administrative tribunal. A majority of the Court held that in the absence of a privative clause and in view of evidence that Parliament considered and then rejected adding sexual orientation as a prohibited ground, the board's decision should be reversed.

This review of the development and interpretation of human rights legislation suggests that anti-discrimination provisions – what Tarnopolsky call "egalitarian civil rights" – have acquired quasi-constitutional status. Laws altering in significant ways private contractual relations become fundamental in their general importance and primary in their application over other laws. Courts acquire significant latitude in the interpretation and enforcement of their provisions. And as this quasi-constitutional status becomes entrenched, the courts more readily refer to Charter of Rights jurisprudence in giving meaning to the human rights provisions. In the end, the quasi-constitutionalization of human rights provisions serves to blur the distinction between state and society in the application of anti-discrimination provisions. Thus are the seeds of a postliberal constitutionalism sown.

Section 15 and Underinclusive Provision of State Benefits

If human rights laws are reaching constitutional heights, then constitutional provisions are descending from the ether into the nether world of civil life. While on conventional terms the Charter applies only to governments, in fact, section 15 of the Charter has been given wide scope and ostensibly applies directly to private, non-state affairs in the absence of state action. To this point section 15 standards have not been applied directly to private affairs. But in a sense they do not have to be. Instead courts can, in the age of the administrative state, point to *some* form of state action, however slender and oblique, to engage section 15: when the state acts, the threshold application test is met and that state action is subjected to section 15 equality standards. What becomes apparent is that the Supreme Court is unwilling to see underinclusive extensions of benefits as constitutionally benign. Tentative, incremental, selective legislative incursions into the private realm are thus subject to the universalizing logic of section 15. Potentially, section 15 can use any form of state action as an instrumentality for the society-wide application of Charter equality norms.

One of the most important cases on the discriminatory character of underinclusivity

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L'Heureux-Dubé for the dissenters articulated an 'activist-deferential' position, arguing that the courts should not lightly second-guess administrative tribunals.

– as well as what remedial action courts can take in response to a finding of unconstitutionality – is undoubtedly *Schachter v. Canada*.[34] Schachter wished to avail himself of benefits administered under the Unemployment Insurance Act. The Act provided for 15 weeks of paid maternity leave for natural mothers. It also provided for a total of 15 weeks parental leave for adoptive parents, to be used by the parents in accordance with their wishes. Schachter was a natural father and thus ineligible for parental benefits. The issue for the Court was primarily a remedial one: what to do when a legislative benefit is unconstitutionally underinclusive. The government of Canada conceded a section 15 violation and by the time the case reached the Supreme Court, it had amended its legislation to equalize benefits for natural and adoptive parents. Nonetheless, the Court went ahead with a consideration of the question of Charter remedies in cases of underinclusivity.

Remedies put the courts in a position between the purposes of legislatures and the purposes of the Charter, Lamer said in his majority judgement. Essentially, courts must be sensitive to legislative intentions and budgetary considerations, limiting the reading in of remedial provisions into otherwise valid legislation to cases where they think the legislature would do the same thing itself were it apprised of the unconstitutionality of a legislative provision. But courts must also respect the purposes of the Charter, and the courts' failure to use the reading-in remedy "would mean that the standards developed under the Charter would have to be applied in certain cases in ways which would derogate from the deeper social purposes of the Charter."[35] Equality rights cases like this one provide the most obvious example:

> The right which was determined to be violated here is a positive right: the right to equal benefit of the law. Positive rights by their very nature tend to carry with them special considerations in the remedial context. It will be a rare occasion when a benefit conferring scheme is found to have an unconstitutional purpose. Cases involving positive rights are more likely to fall into the remedial classifications of reading down/reading in or striking down

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[34] [1992] 2 S.C.R. 679.

[35] Ibid., 701.

> and suspending the operation of the declaration of invalidity than to mandate an immediate striking down. Indeed, if the benefit which is being conferred is itself constitutionally guaranteed (for example, the right to vote), reading in may be mandatory. For a court to deprive persons of a constitutionally guaranteed right by striking down underinclusive legislation would be absurd.[36]

One lower court enthusiastically endorsed the *Schachter* approach. In *Knodel v. British Columbia (Medical Services Commission)*[37] the issue was the "restrictive", heterosexual definition of spouse in an employee benefits package for nurses. The homosexual partner of a nurse sought benefits on the nurse's death and was refused. The court found that definition of spouse to be unconstitutionally underinclusive of homosexual relationships. When the government "takes on an obligation and provides a benefit, section 15(1) makes denial of that benefit to other groups questionable."[38] To remedy the defect, the court defined spouse inclusively, citing *Schachter* in support.

The Supreme Court of Canada initially proceeded more tentatively. In *Egan v. Canada*[39] the issue was whether one partner in a longstanding same-sex relationship was unconstitutionally denied the spousal allowance available to a spouse when the other opposite-sex spouse becomes eligible for the federal old-age pension and when the household income is below a certain amount. In other words, was the definition of spouse in the

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[36] Ibid., 721. Lamer would have struck down the discriminatory provision and suspended the declaration of invalidity to allow parliament to react to the decision. This was obviated by Parliament's amendment of the law in anticipation of such a result. Lamer could have cited the Court's decision in *R. v. Edwards Books and Art* [1986] 2 S.C.R. 713 to the effect that the Charter is a sort of equality ratchet: it can be used to increase classes of beneficiaries, not reduce them. "In interpreting and applying the Charter," Dickson wrote, "I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged individuals." Ibid., 779.

[37] [1991] 6 W.W.R. 728.

[38] Ibid., 758.

[39] [1995] 2 S.C.R. 513.

legislation underinclusive and therefore discriminatory contrary to the terms of section 15 of the Charter? All members of the Court agreed that sexual orientation is a group characteristic implicitly protected by section 15 of the Charter. A bloc of four justices led by LaForest held that Parliament's distinction between married and cohabiting heterosexual couples on the one hand and all manner of couples – like friends, siblings, homosexual couples – on the other, "does not exacerbate an historic disadvantage; rather, it ameliorates an historic economic disadvantage, both for couples who are legally married and those who live in a common law relationship."[40] Sopinka cast his swing vote with the majority and affirmed the incrementalist policy approach by arguing that "government must be accorded some flexibility in extending social benefits and does not have to be proactive in recognizing new social benefits."[41] Further, he argued, the record indicates a steady expansion of the list of eligible persons for such benefits and the courts need not act on the assumption that the current list of beneficiaries will stand for all time. In other words, he counseled remedial restraint in view of the likelihood that the legislature would expand the list of policy beneficiaries. Presumably the obverse would be true, that the courts would impose an inclusive remedy in the face of evidence of legislative opposition. Either way, Sopinka's restrained judgement is among the more activist written in the Charter era.

Employing a robust effects-oriented interpretation of section 15 which relies both on the objective nature of discriminatory distinctions as well as the subjective impact these create among those affected, L'Heureux-Dubé easily found the exclusion of homosexuals from the old age pension scheme to be contrary to section 15 and not saved under section 1. In his dissenting opinion, Cory wrote that homosexuals are clearly denied equal benefit of the law. Repeating what had by this time become a truism of section 15 jurisprudence, Cory argued that *when* government extends a benefit, it must do so in a non-discriminatory fashion. Aside from the calculation of economic advantages and costs associated with one's eligibility for state benefits, the law "confers a significant benefit by providing state recognition of the

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[40] Ibid., 539.

[41] Ibid., 572.

legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them even though no economic loss is occasioned."[42] Here is the appearance of the political economy of human dignity and recognition, mentioned in the introduction to this chapter. As a consequence, Cory implied, it does matter whether one frames a public policy, as LaForest did, in terms of the extension of benefits to some or as the denial of benefits to others. Quite aside from the distribution of material resources, what matters is the effect of the making of distinctions on "human dignity". In the political economy of recognition of symbolic status, he suggests, one cannot deploy considerations of policy incrementalism and institutional claims of budgetary priority in defence of legislative distinctions.[43]

Egan represented a narrow loss for the equality rights of homosexuals, a result at odds with an impressive record of judicial victories won by homosexuals in the Charter era.[44] The Court by a small margin upheld the constitutionality of a decision by government to favour certain forms of family relationships in the distribution of public benefits. But the victory for the government was slender, and Sopinka's swing vote pointed to an incremental expansion

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[42] Ibid., 594.

[43] Cory's position comports with L'Heureux-Dubé's whole interpretive approach to section 15 analysis, particularly the centrality of the concept of equal recognition of the dignity of persons. For her, subjective response to treatment is as important as the objective nature of treatment. "If a projectile were thrown against a soft surface, then it would leave a larger scar than if it were thrown against a resilient surface. In fact, the depth of the scar will be a function of both the nature of the affected surface and the nature of projectile used. In my view, assessing discriminatory impact is, in principle, no different. In order for a court to determine from a subjective-objective perspective whether the impugned distinction will leave a non-trivial discriminatory 'scar' on the group affected, it is instructive to consider two categories of factors: 1) the nature of the group adversely affected by the distinction and 2) the nature of the interest adversely affected by the distinction. In my view, neither is completely meaningful without the other." Ibid., 553

[44] Didi Herman, "The Good, the Bad , and the Smugly: Sexual Orientation and Perspectives on the Charter" in David Schneiderman and Kate Sutherland, eds. *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997), 200-17.

of classes of beneficiaries which would soon include homosexuals. The minority justices clearly equated underinclusion with discrimination and indeed enlarged the notion of equality to include not only material (thus quantifiable) benefits but also moral and psychological benefits associated with the public recognition of the legitimacy of a certain sexual orientation. The effect of this application of the politics of recognition would be to undercut claims that courts should defer to legislatures in the distribution of material benefits. When it comes to recognition, the dissenters signaled, there is plenty to go around, and the courts have as much authority as legislatures to distribute it.

While the Court in *Egan* narrowly denied the section 15 claim, it narrowly granted it in *Miron v. Trudel*.[45] The issue was again the restrictive definition of spouse, this time concerning an insurance policy. Trudel was injured by an uninsured driver and as a result could no longer support his common law wife and family. His only recourse was to apply for benefits from his common law wife's insurance plan. The plan was held to extend to legally married spouses only. A 5-4 majority of the Supreme Court found this unconstitutionally underinclusive of common law spouses, granted the Charter claim, and read in common law spouse, noting, paradoxically in light of the *Schachter* rule, that a "substantial number of deserving candidates" were denied benefits under the underinclusive policy.[46] While in *Schachter* the Court said that the remedy of reading in could be used because its policy and fiscal consequences would be minimal, here the Court is saying that the same remedy is appropriate because there would be many beneficiaries as a result. The two rules are not easily reconciled.

Egan and *Miron* were followed by a restrained decision having to do with state inaction/underinclusion. In *Adler v. Ontario*[47] the issue before the Court was an application for a declaration that the Ontario government's failure to fund Jewish and Christian Reformed religious schools is contrary to sections 2(a) and 15 of the Charter. The claimants pointed to

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[45] [1995] 2 S.C.R. 418.

[46] Ibid., 507.

[47] [1996] 3 S.C.R. 609.

the public funding of secular public schools and Roman Catholic schools and suggested that the differential treatment is constitutionally suspect. As in *Egan*, the Court here had a difficult time disposing of the case, for a variety of reasons: education funding is bound up with constitutional obligations outlined in section 93 of the Constitution Act, 1867; section 15 interpretation remained controversial; and justices were divided on the degree to which state inaction is constitutionally reviewable. The applicants lost by a vote of 7-2. But even the majority justices could not agree among themselves as to how to dispose of the case.

Writing for four others, Iacobucci relied on the Court's opinion in *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*[48] in which it held that a decision to extend public finding to the upper grades of Catholic schools in Ontario was not contrary to the Charter rights of non-Catholics. The Court in that reference held that public funding of Catholic education, while in the formal sense discriminatory against non-Catholic groups, was mandated by section 93 of the Constitution Act, 1867; and one part of the constitution cannot be used to strike down another part. In *Adler*, Iacobucci argued that section 93, a "child born of historical exigency," is "a comprehensive code with respect to denominational school rights."[49] While section 15 standards may apply to the exercise of plenary jurisdiction, they do not apply to exercises mandated by the constitutional head of power as such. Public funding arrangements in this case are constitutionally mandated. A province may decide to fund schools other than those it is required to fund under the terms of section 93, wrote Iacobucci. "However, an ability to pass such legislation does not amount to an obligation to do so."[50] A majority of justices was thus able to dispose of the equality rights Charter claim – and avoid ordering major changes in education policy with significant financial and political implications – without touching the section 15 underinclusivity question.

Sopinka, writing for Major, disagreed with Iacobucci's understanding of section 93. Section 93 is not a comprehensive code; instead, Sopinka argued, it is merely a plenary

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[48] [1987] 1 S.C.R. 1148.

[49] *Adler*, 642.

[50] Ibid., 649.

power which happens to constitutionalize the rights of certain minority denominational schools. So the application cannot be refused on that ground. Rather, it should be refused in more direct terms, he averred. Addressing the section 2(a) freedom of religion, Sopinka responded that "the statute does not compel the appellants to act in any way that infringes their freedom of religion."[51] The appellants can send their children to a school of their choice; they may merely have to pay more to do so depending on their choice. "While a distinction is made between these religious groups and the separate Roman Catholic schools, this distinction is constitutionally mandated and cannot be the subject of a Charter attack. The legislation is not the source of any distinction amongst all the groups whose exercise of their religious freedoms involves an economic cost....On this account, the appellants have no complaint cognizable in law since the disadvantage they must bear is one flowing exclusively from their religious tenets."[52] His reliance on state action doctrine to dismiss the appeal is worth quoting at length:

> ...failure to act in order to facilitate the practice of religion cannot be considered state interference with freedom of religion. The fact that no funding is provided for private religious education cannot be considered to infringe the appellants' right to educate their children in accordance with their religious beliefs where there is no restriction on religious schooling....[T]here are many spheres of government action which hold religious significance for religious believers. It does not follow that the government must pay for religious dimensions of spheres in which it takes a role. If this flowed from s. 2(a), then religious marriages, religious corporations, and other religious community institutions such as churches and hospitals would all have a Charter claim to public funding. The same could be said of the existing judicial system which is necessarily secular. The appellants' argument would lead to an obligation by the state to fund parallel religious justice systems founded on canon law or Talmudic law, for example. These are clearly untenable suggestions.[53]

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[51] Ibid., 700.

[52] Ibid., 702. See also 705.

[53] Ibid., 702-3.

Sopinka, then, denied the appellants' Charter claim by resting on a liberal constitutionalist notion of state action, sensing that granting a Charter claim based on state inaction could propel the courts down a slippery slope at the end of which is judicial application of Charter standards to societal circumstances having nothing to do with state interference. Here he employs a distinctly negative rights rendering of freedom of religion, arguing that the causes of the applicants' burden is rooted in social or private affairs (their religious beliefs) having nothing to do with a constitutional infirmity. This suggests a liberal constitutionalist disposition of Adler's Charter claim.

McLachlin went along with Sopinka on section 2 analysis. Unequal financial burden in the exercise of choice among religious schools – that is, in the absence of state prohibition of the exercise of choice in this matter – does not constitute a section 2 violation. Additionally, she argued, the lack of opportunity complained of by the appellants "has no history of recognition. Absence of state funding for private religious practices, as distinct from prohibitions on such practices, has never been seen as religious persecution. Never...has it been suggested that freedom of religion entitles one to state support for one's religion."[54] She disagreed with Sopinka, however, on the section 15 question, arguing that to hold, as did Sopinka, that the burden placed upon the appellants is a result of their own choice and not the law is to empty discrimination of any content, for such a claim could be made of *any* claim of discrimination.[55] She found a section 15 violation but employed a loose section 1 standard to save the underinclusive legislation.

L'Heureux-Dubé agreed with McLachlin and Sopinka on the section 2 issue and with McLachlin on her finding of a section 15 violation. To be a member of certain religious groups protected by section 15, she argued, is to be required to send one's children to non-funded religious schools. Thus a distinction is unwittingly created by the legislature between those who can access the publicly funded system, and those who for religious reasons cannot. "This distinction results in a total denial of the equal benefit of funded education for the

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[54] Ibid., 713.

[55] Ibid., 716.

appellants on the basis of their membership in an identifiable group, a group made up of small religious minority communities."[56] L'Heureux-Dubé would have found the violation not saved by section 1. Complete non-funding, she claimed, is not a minimal impairment of a "core" Charter right, and when "core" Charter rights are infringed, a stringent section 1 test must be used. Partial funding would in her opinion probably have passed constitutional muster.

Only *Adler's* result is easy to grasp. Justices were fundamentally divided as to how to reject the appellants' claim. The state inaction issues were muddied somewhat by the existence of the collateral section 93 issue which five justices used to dispose of the case. The rest of the Court save one justice was concerned about the implications of granting the appellants' claim. Sopinka was led into incoherence in his desire to reject the section 15 argument. McLachlin had to deploy a loose section 1 test to save the legislation. Only L'Heureux-Dubé went ahead with the full implications of the underinclusivity-as-discrimination approach.[57] Her approach would convince a unanimous bench in *Eldridge.*

Eldridge v. British Columbia (Attorney General),[58] discussed in a previous chapter in the context of the definition of "government" for the purposes of Charter application, concerned the failure of medical authorities acting under the terms of B.C. legislation to provide sign language interpretation services to deaf persons in that province receiving medical care. Eldridge was a deaf, pregnant woman to whom publicly-funded signing services were denied because authorities did not consider them "medically required services" under the legislation. For a unanimous Court, LaForest found sign language interpretation so closely

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[56] Ibid., 657.

[57] A final anomaly is that the justices found it important to distinguish a section 2(a) freedom of religion result from a section 15 equality rights result. State action is crucial in the former case but not the latter. This restriction on section 2 interpretation cannot be firmly rooted in principle. For Dickson, in another decision in which section 2(a) rights were central, declared that "a truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs, and codes of conduct. A free society is one *which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. " R. v. Big M Drug Mart* [1985] 1 S.C.R 295, 336. Emphasis added.

[58] [1997] 3 S.C.R. 624.

intertwined with the effective provision of medical services that it falls within the legislative definition of "medically required services." That provision, wrote LaForest, impugns the *state's failure to correct even those disadvantages it has not itself created.* As an effects-oriented protection, section 15 prohibits "adverse effects of a facially neutral benefits scheme." Section 15 "makes no distinction between laws that impose unequal burdens and those that deny unequal benefits."[59] Discrimination follows from state failure to take positive steps to ensure disadvantaged groups benefit equally from services to the public. When government extends a benefit, it must do so in conformity with equality rights, and so must extend the scope of programs so that all benefit equally. Government action cannot be the source of inequality.[60] Without difficulty, he found a section 15 violation in the government's failure to provide signing services and also found that such a denial was not a minimal impairment of the section 15 right required by section 1 of the Charter. In ringing, unanimous terms, the Court invoked state inaction as constitutionally wanting and dismissed argument relating to added financial costs as "purely speculative."

Section 15 and Underinclusive Human Rights Legislation

The cases discussed above have to do with the application of section 15 to the extension of public benefits. They indicate that though there have been bumps along the way, the logic inherent in *Schachter* worked its way through to unanimous endorsement in *Eldridge*. In these cases, the section 15 standard of "equal benefit of the law" implies that underinclusive benefits are potentially – even likely – to be discriminatory denials of benefits for excluded groups. The logic of equal benefit is also that appeals to the need for state action to engage the Charter fall on deaf ears: state inaction is as reviewable as positive action. Given that legislation conferring monetary benefits can be found to be unconstitutionally underinclusive, can the same be true of human rights legislation? If human rights protections are quasi-

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[59] Ibid., 680.

[60] Ibid., 678.

constitutional in status, reaching up from the legislative realm to the starry constitutional heights, can the constitutional anti-discrimination standard embodied in section 15 descend from those heights into the terrestrial realm to which human rights legislation applies? Can human rights legislation be truly constitutionalized? Can the Charter be totalized? Can private life, then, be subject directly to Charter standards?

There is reason to think so. As discussed in a previous chapter, the Supreme Court in *McKinney*[61] considered the constitutionality of a university's mandatory retirement policy. Part of the decision dealt with whether the Charter applied directly to universities as governmental entities under section 32 of the Charter. A majority of the Court held that it did not. But that left in question whether provisions of the British Columbia human rights legislation limiting the prohibition of age discrimination to the years 18-65 were contrary to section 15. Again the Court was sharply divided on the point. The reasons for the division are worth examining.

For the majority LaForest argued the following. Views of age discrimination are changing. Age discrimination was once not considered a human rights matter at all but is now of increasing importance. Nonetheless, age is unlike other prohibited grounds of discrimination, mostly because there is indeed an imperfect but plausible inverse relationship between age and ability. Accordingly, age discrimination is not subject to as stringent a standard of Charter review as other types. Legislation permitting mandatory retirement policies, though clearly contrary to the terms of section 15 of the Charter, should be subject to loose, deferential section 1 analysis, because mandatory retirement pertains to complex socio-economic factors on the effects of which the social science evidence is inexact, leaving courts in no better a position than legislatures to judge its worth. Mandatory retirement policies represent hard-won victories of the labour movement engaging in free and equal bargaining in the private sector, under the terms of permissive labour legislation, with employers. When the B.C. legislature passed its human rights legislation permitting mandatory retirement policies, it was not sanctioning mandatory retirement but rather sought to "protect

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[61] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229.

individuals within a particular age range." This case cannot be likened to the *Blainey*[62] case in which Ontario's human rights legislation allowed certain organizations to discriminate on the basis of sex. "The situation is quite different here. The Legislature sought to provide protection for a group which it perceived to be most in need and did not include others for rational and serious considerations that, it had reasonable grounds to believe, would seriously affect the rights of others."[63] The legislature, "should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic, or budgetary, that would arise if it attempted to deal with social problems in their entirety, assuming such problems can ever be perceived in their entirety."[64]

Finally, Laforest argued, "the Charter...was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. This invites a measure of deference to legislative choice....[T]he courts should not lightly use the Charter to second-guess legislative judgement as to how quickly it should proceed towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but...the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person."[65] Thus the majority decision touts restraint, respect for legislative incrementalism, and a concern not to apply the Charter to human rights legislation in such a way as to flout the purposes of the Charter application provisions by

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[62] *Re Blainey* (1986) 54 O.R. (2d) 513 (O.C.A.).

[63] *McKinney*, 316-17.

[64] Ibid.

[65] Ibid., 318-19.

applying the Charter to the private realm via the instrumentality of human rights legislation.

In her dissenting decision, Wilson shared little of Laforest's restraint. She did agree on the relationship between the Charter and private action to the extent that the Charter should not apply directly to private action and thus become a parallel human rights instrument alongside human rights legislation which is designed precisely to take certain kinds of disputes out of the courts and into a more congenial institutional setting for the resolution of human rights problems.[66] However, she rejected arguments that since governments are not obliged to pass human rights legislation in the first place, underinclusive protection could not be discriminatory.[67] Once government decides to act, she said, it must do so in a non-discriminatory manner. Additionally, Wilson challenged LaForest directly on the section 1 test issue. She claimed that a stringent section 1 test must be invoked *because* human rights legislation is at issue. While for LaForest, a loose test is implied because of the way in which human rights laws penetrate society, she argued that the purposes of human rights legislation – "to preserve, protect, and promote human dignity and individual self-worth and self-esteem" – demand a high section 1 bar.

L'Heureux-Dubé voted to declare invalid the restrictive definition of age in the human rights legislation. One comment regarding the limits of Charter application to underinclusive human rights legislation is worth quoting in full because it evidences a quandary about what degree of state action is necessary to trigger Charter attention. Wilson argued the conventional line that when the state acts, underinclusive action is caught. She left unanswered more specific questions. For example, if the government prohibits discrimination on the basis of race, religion and sex, but not age, is that legislation unconstitutionally underinclusive of age? Here is L'Heureux-Dubé's answer: "...if the provinces chose to enact human rights legislation which only prohibited discrimination on the basis of sex, and not age, this legislation could not be held to violate the Charter. However where, as in the present case, the legislation prohibits discrimination on the basis of age, and then defines "'age' in a

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[66] Ibid., 341-42.

[67] Ibid., 412.

manner that denies this protection to a significant segment of the population, then the Charter should apply. Thus, if the province chooses to grant a right, it must grant that right in conformity with the charter."[68] This suggests the granting of rights and benefits is all-or-nothing. Legislatures are not able, L'Heureux-Dubé suggests, to grant benefits on partial terms. But even this position became vulnerable in light of future case law.

All of the complexities and controversies of Charter application to underinclusive human rights legislation collided in *Vriend v. Alberta*, in which the issue was whether the absence of sexual orientation in the list of prohibited grounds in Alberta's human rights legislation constituted a violation of section 15 of the Charter. Here is a case in which L'Heureux-Dubé's reasoning in *McKinney* is put to the test. Vriend was employed since 1987 as a lab instructor at The King's University College, a Christian liberal arts institution. When it was discovered by the college's authorities that he was homosexual, he was asked to resign. He did not, and so was dismissed. He later laid a complaint of employment discrimination with the Alberta Human Rights Commission but the complaint could not proceed because the ground of discrimination which he alleged – discrimination by reason of his homosexuality – was not covered by the legislation. Subsequently, he launched a court action requesting a declaration that the underinclusivity of the Alberta law was unconstitutional.

He won at the trial level, but in a 2-1 ruling that surely ranks among the most candid and nakedly political a Canadian court has ever rendered, the Alberta Court of Appeal reversed the trial decision, basing its decision largely on section 32 grounds.[69] The most technical element in the reasons was the argument that underinclusion is not necessarily discrimination. Relying on the reasoning of L'Heureux-Dubé in *McKinney* on the question of Charter application to underinclusive human rights legislation, O'Leary wrote there is a difference between discriminating against a group in the internal structure of an Act of the legislature and making a distinction – which is always the case – between those grounds included in the legislation and those potential grounds not so included. "It cannot be

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[68] Ibid., 436.

[69] *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595 (A.C.A.).

asserted," he wrote, " that this is a law which discriminates on the *basis* of sexual orientation; at most all that the [human rights law] does is distinguish between the specified prohibited grounds of discrimination and the various potential grounds (including sexual orientation) which could be included but which are not."[70] While homosexuals may face inequalities of various descriptions, these inequalities are rooted not in the legislation in question but in society generally, beyond the reach of Charter review. Further, he argued, to follow the logic of the claim that underinclusive legislation is contrary to the Charter is to require human rights legislation to "mirror" section 15; and the effect of this is to flatten the legitimate diversity across jurisdictions Canadian federalism allows and encourages, and to have the Charter apply to private conduct through the back door – that is using human rights legislation as an instrumentality to circumvent the section 32 threshold limitation.[71]

Justice McClung agreed with these arguments and made them himself, but without the restraint and courtesy of his colleague. Instead, he wrote a polemical, sometimes shrill, rebuke of "constitutionally hyperactive," "ideologically determined," and "rights-restless" judges who refuse to respect the larger constitutional requirements of the separation of powers and the role of the legislature. His rhetoric provoked one observer to dub him the Judge Bork of the north.[72] He advanced technical arguments to the effect that the law cannot be contrary to section 15 because homosexuals and heterosexuals alike[73] could avail themselves of the protections against discrimination on the basis of a number of listed grounds. But it seems he knew this manner of disposing of the case would not get him far, and so resorted to other means of rejecting the claim. Fundamentally, McClung claimed that state inaction simply does

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[70] Ibid., 627. Emphasis in original.

[71] Ibid., 628-30.

[72] See F.L. Morton, "Canada's Judge Bork: Has the Counter-Revolution Begun?" *Constitutional Forum* 7 (1996), 121-25.

[73] McClung assumed for the sake of argument that "sexual orientation" is limited in its meaning to "'traditional' homosexual practices shared by consenting adults" but flagged for his readers his disquiet about the indeterminacy of the term. *Vriend* (A.C.A.), 611.

not attract Charter application. "When they choose silence, provincial legislatures need not march to the Charter drum. In a constitutional sense they need not march at all."[74] While some comments early in his reasons suggest that he holds this position because inaction evidences complete neutrality on the issue in question, in fact, there is much in the reasons to suggest that he is clearly aware that silence or inaction may indeed be inspired by a decision to "depute" certain matters to resolution in the private realm.[75] This is important because ample evidence demonstrated that the legislature and government debated proposals to include sexual orientation in the list of prohibited grounds but declined to act.

McClung reserved some of his most bitter vitriol for the lower court's "reading up" remedy of inserting the missing words into the legislation to bring it into conformity with the Charter. "Reading up is pure judicial legislation, however it may be rationalized," he argued, and this violates the constitutional separation of powers between judicial and legislative branches.[76] Legislatures can protect rights too, he argued, and have better resources for setting the legislative timetable. Thus, for the Alberta Court of Appeal, high constitutional and political implications attach to applying the Charter to state inaction in human rights.

In her dissenting opinion, Hunt introduced an artful distinction between formal "Acts" of legislatures and "acts" or "actions" of government to refuse benefits through positive legislation. In this case, the application issue was clear for her: an Act is being impugned. Underinclusion when it is a matter of policy, as in this case, is constitutionally reviewable. The deliberate exclusion of homosexuals from the human rights law not only denies them a benefit available to others but demonstrates the government's acceptance, and maybe an encouragement, of discrimination against homosexuals, which exposes them to material and psychological harms triggering a breach of section 15. She would have found a Charter breach but as a remedy would have suspended a declaration of invalidity for one year.[77]

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[74] Ibid., 605. See also 602-3; 608-9; 617; and 621.

[75] Ibid., 602.

[76] Ibid., 617ff.

[77] Ibid., 631-64.

The Supreme Court would have none of this. In a majority opinion jointly authored by Cory and Iacobucci,[78] the Court refused to accept that this was a pitched battle between judges and legislators. This way of framing the issue is "misleading and erroneous," Cory wrote. "Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures." In addition, "courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen."[79] For anyone remotely familiar with Charter jurisprudence, this is a distinction without a difference. The Constitution is a vaguely worded document which is given specific meaning, case to case, by courts. And courts are staffed by judges. Further, while the Supreme Court has made frequent use of the claim that whatever power judges wield was given to them by elected representatives when the Charter was entrenched, the Court has also explicitly ignored the intentions of drafters of the Constitution when it considered it expedient to do so.[80] Some question how democratic was the patriation and

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[78] *Vriend v. Alberta* [1998] 1 S.C.R. 493. Major dissented on the question of remedy; he preferred to allow the legislature to form its own response rather than have the Court impose one on it. L'Heureux-Dubé concurred in the result but urged her own interpretation of section 15.

[79] Ibid., 562-7.

[80] A previous chapter has discussed the legislators' intentions for section 32 of the Charter and what little influence these intentions have had on the courts. For a sense of what the Supreme Court has felt about drafters' intentions for constitutional provisions, See *B.C. Motor Vehicle Reference* [1985] 2 S.C.R. 486, in which the Court gave to section 7 a substantive meaning when the evidence offered by the Department of Justice to a parliamentary committee in 1980-81 was that the provision was worded for the purpose of avoiding a substantive interpretation. It was in this very opinion that the Court also said that the role of the courts in Charter interpretation is not undemocratic because elected legislators gave them the power by entrenching the Charter. Are we to conclude that legislators democratically decided to give courts a *tabula rasa?* See also Brian Dickson, "The *Canadian Charter of Rights and Freedoms*: Dawn of a New Era?" *Review of Constitutional Studies* 2 (1994), 1-19. This is not to say that as a tactical measure governments may not find it useful to slough off political hot potatoes to courts. The *sub judice* rule itself is a convenient escape from the media scrum.

Charter entrenchment process on which the courts rely in repelling criticisms of their power.[81]

After delivering their riposte to the Alberta Court of Appeal on the role of the courts, Cory and Iacobucci held that the law was unconstitutionally underinclusive of protection from discrimination for persons on the basis of sexual orientation. The Court read in that protection. Because the Court of Appeal dwelt on it, the Supreme Court also had to address the larger constitutional questions inherent in Charter application to state inaction. Seemingly in response to the hyperbole of the Alberta Court of Appeal, the Supreme Court was equally striking in its rhetorical reach. Section 32, Cory wrote, should be given relatively little importance in Charter decision making, for any rigorous use of it to limit Charter application forecloses Charter review. "Undue emphasis should not be placed on the threshold test since this could result in effectively and unnecessarily removing significant matters from full Charter analysis."[82] The judicial deference urged in the argument that legislative omissions should be left to the legislature is unwarranted. Such an argument, he said, "makes a very problematic distinction between legislative action and inaction" and it seeks "to substantially alter the nature of considerations of legislative deference in Charter analysis."[83] In other words, questions of Charter rights *application* should be replaced by questions of Charter rights *limitation* under section 1 analysis, thus allowing courts full powers of review of greater portions of human activity. Nothing in section 32 as such limits it to "positive action encroaching on rights or the excessive exercise of authority."[84] There "is no legal basis" for distinguishing a "positive act" from an "omission."[85] To rely upon omission to shield a law from Charter review would be to allow the form rather than the substance to determine

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[81] Reg Whitaker, "Democracy and the Canadian Constitution" in Keith Banting and Richard Simeon, eds., *And No One Cheered: Federalism, Democracy, and the Constitution Act* (Toronto: Methuen, 1983), 240-260.

[82] *Vriend*, (S.C.C.), 529.

[83] Ibid., 529-30.

[84] Ibid., 530.

[85] Ibid., 531.

reviewability. Where, as here, "the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the Charter."[86] If the mere silence of the legislation was enough to remove it from section 15(1) scrutiny, then any legislature "could easily avoid the objects of s. 15(1) simply by drafting laws which omitted reference to excluded groups."[87] So the importance the Court of Appeal placed on section 32 was summarily deflated by the Supreme Court. One wonders if the Court will in future be able, if it so chooses, to resurrect it as a threshold application provision with interpretive force.[88]

Cory vindicates one assessment of the Alberta Court of Appeal decision. Diane Pothier argues that "there is a superficial attractiveness to the notion that the Charter cannot be used to challenge legislative silence, just as there is a superficial attractiveness to the idea that silence is the absence of sound. Yet when one starts to look and listen closely, there is no sharp distinction between what the legislature says and what it declines to say. In other words, there really are sounds of silence."[89]

On the remedial question, the Court read in sexual orientation to the list of prohibited grounds of discrimination, going further than did the Hunt dissent at the Court of Appeal level. She would have suspended a declaration for invalidity of the legislation for one year to

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[86] Ibid., 533.

[87] Ibid., 541.

[88] On this point it is instructive that in a decision concerning the underinclusivity of spousal support provisions in Ontario's Family Law Act, the Supreme Court found an unjustified section 15 violation and devoted nary a page to section 32 application questions. *Eldridge* and *Vriend* have quickly become orthodoxy on the issue of unconstitutional underinclusivity. See *M. v. H.* (May 20, 1999) S.C.C. http://www.droit.umontreal.ca/doc/csc-scc/en/rec/html/m&h.en.html.

[89] Diane Pothier, "The Sounds of Silence: Charter Application when the Legislature Declines to Speak" *Constitutional Forum* 7 (1996), 119. Just as there is really no difference between sound and silence, she suggests, there is also no difference between positive and negative rights, particularly in equality jurisprudence. This is because equality is a matter of comparison of groups and their relative conditions, not a matter of action. Ibid., 117.

allow the legislature to respond. This was a natural result given her repeated reference to the fact that the legislature was faced repeatedly with proposals for adding sexual orientation but rejected them every time. It was logical in the sense that Lamer in *Schachter* suggested that Court should read in when they are confident that the legislature would make the same change themselves were its members apprised of the unconstitutionality of the impugned legislation. Other decisions indicate that courts consider it advisable to consult evidence of legislative intent in deciding remedial issues.[90] In *Vriend*, the Court seemed to ignore its own rule set out in *Schachter*, namely that reading in is advisable only when the courts think legislatures would do "the right thing" themselves. Surely it was caught in a bind. While evidence of legislative antipathy to inclusion of sexual orientation was helpful in finding the requisite state "action" to trigger Charter review, that same evidence would lead the court not to read in sexual orientation as a constitutional remedy. The Court was caught in something of a catch-22 — a catch-*32*, so to speak. In the end the majority opted for reading in.

Some think judicial reference to legislative intentions for purposes of constitutional remedies is wrong. According to one observer, there are difficult evidentiary obstacles to determining the mind of the other branches of government. But the more basic point is that "when something is unconstitutional does it really matter what the legislature thought or intended?" If something is unconstitutional, Khullar argues, courts need not defer at all to legislative intentions with respect to remedial measures. If the quasi-constitutional character of human rights legislation is considered, and if "Charter values" are given adequate expression, courts should take what remedial measures they see fit.[91] By reading in sexual orientation, the Supreme Court in *Vriend* in essence adopted Khullar's approach. Cory argued that in this case there was "a deliberate decision to omit" sexual orientation from the Act. This

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[90] See *Mossop*, 580; *Miron*, 509; and *Haig v. Canada* (1992), 9 O.R. (3d), 495 (O.C.A),. In these cases, the court referred to evidence of the intentions of the legislature in remedial analysis. Reading in of excluded words was used when government officials already expressed a desire to do the same themselves. Conversely, restrictive definitions of phrases were adopted when legislative intent of this nature was evident.

[91] Ritu Khullar, "*Vriend*: Remedial Issues for Unremedied Discrimination" *National Journal of Constitutional Law* 7 (1997), 238-241.

constitutes an "act of the Legislature to which Charter should apply." He thus employed the Act/act distinction used by Hunt of the Alberta Court of Appeal.

A more fundamental question is whether any positive legislative action is necessary to trigger Charter review. Wrote Cory, "It has not yet been necessary to decide in other contexts whether the Charter might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the Charter. Nonetheless, the possibility has been considered and left open in some cases."[92] In this case, the question does not arise, wrote Cory, because the human rights law is indeed legislation constituting state action.

Notice the change the Court wrought in *Vriend*. To this point, judging from *obiter dicta* in previous cases, it seemed to be necessary for legislatures to insert a certain prohibited ground into legislation in order for the Court to find the state action requirement satisfied. Now the mere passing of legislation satisfied the test. The Court blessed the reasoning in decisions like *Knodel* and *Haig*. Many questions are begged by this development of state action doctrine. Can the Charter apply in the absence of state action? What if Alberta never had human rights legislation? Can the action taken by other provinces constitute state action sufficient to force the Alberta government to pass similar human rights protections? What if Alberta did have human rights legislation on the books and then decided to repeal the whole Act? Would it matter whether such action was in response to an adverse court decision or not? Does the Act of repeal constitute a Charter infringement?[93] What remedy is appropriate if a court finds the repeal of legislation to be reviewable state action? The Supreme Court at least considered some of these possibilities and responded thus : "It is...unnecessary to

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[92] *Vriend* (S.C.C.), 534.

[93] Precisely this argument has been made in respect to the repeal of Ontario's employment equity legislation by the Harris Conservatives in 1995. Also, Judith Keene argues that in an era of government downsizing, Charter challenges to the state action involved in cutting back social programs may be the best strategy social policy beneficiaries can follow. Judith Keene, "Claiming the Protection of the Court: Charter Litigation Arising From Government 'Restraint'" *National Journal of Constitutional Law* 9 (1998), 97-116.

consider whether a government could properly be subjected to a challenge under section 15 of the Charter for failing to act at all, in contrast to a case such as this where it acted in an underinclusive manner."[94] While it was not necessary for the Court to answer this question to dispose of this case, it seems necessary for *someone* to answer it. For if the Charter applies in the absence of state action, is it not approaching the point where the Charter applies society-wide at behest of litigants or indeed of the Courts themselves?

If not only Acts but also "acts" or "actions" of governments and legislatures can constitute state action for the purposes of Charter application, then a variety of definitional and evidentiary problems arise. Does it matter if intentions are expressed by a cabinet member or a private member? By a government backbencher or opposition? What does government's decision making regarding litigation reveal about legislative intentions?[95] What about a cabinet member versus a minute of cabinet? What about a legislative proposal sponsored by government but which it allowed to die on the Order Paper? Or one which is withdrawn due to public pressure? Or a proposal a government contemplated but killed in committee?[96] Or a law certain groups asked the government to consider? Or most profoundly, a law the government, if it cared about human rights, should have considered and passed but did not?

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[94] *Vriend* (S.C.C.), 533-34.

[95] What if a government fails to pass legislation reflecting a certain policy and then must respond to a case in court? Does the kind of legal argument submitted by the government reveal anything regarding state action? One observer has argued that based on her experience in the Ontario government, "In contrast to policy or legislative issues involving the Charter, the government's position in litigation in cases involving the Charter is not always recognized as a public policy issue that should be taken to Cabinet for discussion." Julie Jai, "Policy, Politics and Law: Changing Relationships in Light of the Charter" *National Journal of Constitutional Law* 9 (1998), 17.

[96] Some have argued that the mere study of a law (common law or otherwise) or policy is state action. "Government agencies, legislative committees, and law reform commissions are engaged in the ongoing process of examining common law rules to discern whether they require alteration or codification. It is plausible that, where common law doctrine has been left intact, this itself constitutes a conscious public choice...." Robert Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" *University of Toronto Faculty of Law Review* 46 (1988), 251.

Or what about a law the government simply never contemplated? Should it be held accountable for failing to consider new needs and new human rights developments? At what point along this continuum is the minimal state action requirement satisfied?

It is indeed hard to find a stopping point once one moves from the state action pole. Not only is this conceptually the case; the evidentiary issues are formidable. If government "consideration" may constitute reviewable "action," how is consideration defined? Does it require some concerted, extended effort or can this criterion be satisfied if one person writes one letter to one minister asking for a particular form of legislative action and is politely put off? The beauty of a robust doctrine of state action is that the evidentiary issues are fairly simple; the bane of a move away from state action is that there is no obvious or clear stopping point between that pole and the state inaction pole. Cory pointed in *Vriend* to some Charter provisions which on their own terms require government to act and therefore create rights triggered on application by claimants: for example section 23 Charter language rights. One wonders if section 15 is evolving into a similar sort of provision.

Some commentators say that this is definitely the case. Bruce Porter argues that the Court's search for evidence of state action on which to hang a finding of unconstitutional underinclusivity is at best a timid act of judicial restraint, at worst a disingenuous refusal by courts to follow through on the implications of section 15's guarantees of substantive equality.[97] Early in the Charter era, Porter notes, the Supreme Court, in the leading section 15 decision in *Andrews*, recognized that section 15 provided a guarantee of more than formal equality before the law. But it shied away from saying that the Charter placed positive obligations on government to provide for those human needs which prevent people from enjoying substantive equality. Wrote McIntyre of section 15: "This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, not does it impose on individuals or groups an obligation to

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[97] Bruce Porter, Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*" *Constitutional Forum* 9 (1998), 71-81.

accord equal treatment to others. It is concerned with the application of law."[98] As late as 1995, L'Heureux-Dubé wrote that "Although section 15 of the Charter does not impose upon the governments the obligation to take positive actions to remedy the symptoms of systemic inequality, it does require that the government not be the source of further inequality."[99]

But *Eldridge* and *Vriend*, Porter suggests, cast this interpretive pattern into doubt, and represent the first explicit endorsement by the Supreme Court that section 15 can be used as a bulwark of substantive equality. He argues that while the Court to this point was loath to impose positive obligations on the state in the absence of state action, the issue "has now been placed decisively in the 'undecided' category."[100] The real issue in *Eldridge*, he claims, had nothing to do with state action. "The story leading up to Robin Eldridge's inability to communicate effectively with her physician ...was not the story of a discriminatory distinction in law created by the elect legislators. It was, as Justice Wilson imagined it in *Andrews*, a familiar story of government officials showing little understanding of, or inclination to attend to the needs of, a disadvantaged minority. The issue never reached the floor of the legislature....The Court thus focused on the failure to provide for a particular need and dispensed with the unnecessary complexities of the *Andrews* analysis of a distinction in law. In this type of 'failure to provide' discrimination, the comparison is not between those who are provided a benefit and those who are denied it, [but rather] between those who need a benefit in order to enjoy equality and those who do not."[101] In looking for evidence of state action in these cases, the Court "*is resisting the implications of its own analysis. The Court has effected, in these cases, a profound change in the approach to the analysis of the*

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[98] *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143, 163-4.

[99] *Thibaudeau v. Canada* [1995] 2 S.C.R.627, 655.

[100] Porter, "Beyond *Andrews*," 74. According to Martha Jackman, the Court's decisions in *Eldridge* and *Vriend* "put into question the idea that government inaction cannot form the basis of a section 15 claim." Martha Jackman, "'Giving Real Effect to Equality': *Eldridge v. B.C. (A.G.)* and *Vriend v. Alberta*" *Review of Constitutional Studies* 4 (1998), 364.

[101] Porter, "Beyond *Andrews*", 76-7.

'application of law' under section 15 which has prevailed since *Andrews*."[102]

In other words, the Supreme Court is moving toward a postliberal constitutionalist understanding of equality and the social sources of discrimination which was discussed in connection with Cass Sunstein's theory of constitutional law in chapter 2. Recall that Sunstein argues that the constitution should not presume the justice, neutrality, or inevitability of the distributional status quo, but instead summon forth the proponents of existing distributions to present their reasons in defence of these distributions. Given that Sunstein and other postliberal constitutionalists diminish the conceptual distance between law and politics and hold political frameworks accountable for creating, sustaining, and acquiescing in social castes, it follows that constitutional standards must apply broadly; and they must hold governments accountable not just for what they do but for what they fail to do. The Supreme Court in *Vriend* is afflicted by the same problem as is Sunstein. In Chapter 2, it was suggested that Sunstein may be resisting the implications of his analysis, shielding private relations from constitutional review but for reasons his analysis does not support. Here, the Supreme Court is chipping away at the distinction between state and society, whose implication is the atrophy of Charter application doctrine; yet it is, as Porter argues, resisting the implications of its own analysis.

Imagine another problem more peculiar to human rights legislation. Courts frequently say that a government should not be permitted to do indirectly what it may not do directly. So a legislature could limit, say, the protection from discrimination afforded homosexuals not by excluding sexual orientation from the listed of prohibited grounds but by limiting the areas of human activity to which those protections apply. A government could pass legislation prohibiting discrimination on the basis of a long list of group characteristics. But it could prohibit discrimination on these grounds only in one area of human activity, say public employment notices. Thus an employer would not be allowed to discriminate in advertising for jobs but would be able to discriminate in the actual hiring and firing of employees. Quite aside from the inclusivity of the list of prohibited grounds, the list of affected activities could

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[102] Ibid., 75. Emphasis added.

be "underinclusive." But underinclusive relative to what? Not the constitution, because section 15 does not mandate (at least on a plain reading, an important qualification) the areas of human life in which discrimination is not allowed. Then underinclusive relative to other jurisdictions' human rights protections? What authority would a court possess to read in the excluded areas of human activity to which the anti-discrimination provisions should apply? What does this say about the relationship between federalism and the Charter? Should the courts then remove themselves from this thicket and defer to the democratic process? If so, how can this be squared with activism on the question of underinclusive grounds of discrimination? My point is this: human rights legislation may be restrictive not only in the underinclusivity of prohibited grounds of discrimination, but in underinclusive areas of human activity to which those protections apply. Both types of restrictions reduce the force of legislation. On what basis, given that the objectives of legislation are impaired either way, would a court be able to remedy underinclusive lists of prohibited grounds but not underinclusive lists of affected areas of human activity? On what grounds would it remedy both?

While the Supreme Court's remedy in *Vriend* seems an imperious application of Charter norms, in other respects the decision was not very radical. After all, most other jurisdictions' human rights laws include sexual orientation as a prohibited ground – though even here, this was at times the result of judicial remedy following findings of unconstitutional underinclusivity.[103] Second, the courts in the *Vriend* case noted that the Alberta government stated publicly that it would await and abide by any decision of the courts with respect to the underinclusivity of Alberta's human rights legislation. The Supreme Court (with the lone exception of Justice Major, the Alberta member of the Court who refused to read in sexual orientation) took this as a veritable invitation to legislate in its place. In a real sense, the

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[103] See *Blainey*. See also *Haig*, in which the Ontario Court of Appeal read sexual orientation to the Canadian Human Rights Act; and *Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations* (1995), 127 D.L.R. (4th) 694 (Nfld. T.D.), in which the same was done with respect to that province's human rights legislation. See also Didi Herman, "The Good, the Bad, and the Smugly."

courts did not wrest legislative power from the representative branches of government; those branches as a tactical matter found it attractive to give it to them.[104]

In another sense, the Supreme Court's discussion of Charter application in *Vriend* is far-reaching. It diminishes the importance of threshold application considerations as such in Charter decision making, opting instead for maximal judicial review of Charter claims and using interpretive devices like the "contextual approach" to rights definition and section 1 tests for rights limitation to adjust Charter application to the circumstances of instant cases. Furthermore, the Court in *Vriend* advanced the constitutionalization of human rights legislation by applying the section 15 yardstick to provincial human rights legislation. There is little in the decision which denies that the logical endpoint of this process is the conformity of provincial and federal laws to Charter equality standards. When the Court was confronted with the "mirror" argument, Cory responded in the following terms:

> ...it is simply not true that human rights legislation will be forced to "mirror" the Charter in all cases. By virtue of s. 52 of the Constitution Act, 1982, the Charter is part of the "supreme law of Canada", and so, human rights legislation, like all other legislation in Canada, must conform to its requirements. However, the notion of "mirroring" is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the Charter would not be made through the mechanical application of any "mirroring" principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its

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[104] *Vriend* (S.C.C.) perfectly supports the theory that the existence of the Charter and the judicial policy-making power it creates can often serve the interests of governments too sensitive to political winds to take responsibility for difficult, controversial, and potentially divisive issues. Those concerned about a judicial imperium have to direct their concerns as much to governments as to the courts. F.L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms" *Canadian Journal of Political Science* 20 (1987), 31-55. See also Jai, "Policy, Politics and Law" for a discussion of how the Rae government allowed courts to extend social policy benefits to gays – something the government was unable to do through the legislature.

specific context and whether the discrimination could be justified under s. 1.[105]

This is not much of a rebuttal. After all, the contextual factors to which Cory points include the quasi-constitutional character of human rights legislation, so his reliance on contextualism is no answer to the charge.[106] As McLachlin indicated in *Miron*, courts should interpret section 15 of the Charter in much the same way they interpret human rights legislation.[107] Whether the society-wide application of section 15 is a good thing or not is beside the prior point that deep vertical application of section 15 standards is what the *Vriend* decision portends. All of which comports with a postliberal constitutionalism.

This section has indirectly touched on the relationship between Charter rights and remedies. A few points are in order. Courts have generally resisted the expansion of their remedial powers to the point where the constitutional principle of the separation of powers is threatened. In other words, the making of public policy, and especially the setting of fiscal priorities of government, are the preserve of the legislative branch, and judges should not intrude on that function. This principle is most cogent in the context of the liberal constitutionalist paradigm because that paradigm attempts to confine the courts' policy-making functions, directing them to mete out justice to parties to disputes rather than use cases to pronounce on wider questions of social justice and the merits of public policy. Recall the discussion in chapter 2 regarding the principles of compensatory justice in the common

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[105] *Vriend* (S.C.C.), 552-3.

[106] Of course, there are practical difficulties associated with the "mirror" argument, chiefly that the section 15 equality standard which human rights codes are to mirror is itself flexible. The list of prohibited grounds of discrimination in section 15 is open-ended; as courts include more and more analogous grounds in section 15's guarantees, human rights codes will be engaged in a perpetual process of catch-up. And the list of potentially prohibited grounds of discrimination is long indeed. Writers make cogent arguments for the inclusion of myriad grounds of discrimination. See for example J. Paul R. Howard, "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination" *Advocates' Quarterly* 17 (1995), 338-91. His analysis considers the merits of new protected grounds like obesity and appearance as well as modifications of the definitions of existing grounds like disability and sex.

[107] *Miron*, 491.

law framework, which liberal constitutionalism defends and which postliberal constitutionalists like Sunstein attack. Remedial issues, according to liberal constitutionalism, are in principle confined to the parties to the dispute at hand. Furthermore, limited remedial powers are consistent with liberal constitutionalism in the sense that constitutional review for liberal constitutionalists is *primarily* (with important exceptions noted at the beginning of this chapter) about telling government what they cannot do, not what they must do. In this context the remedial issues are relatively simple.

Constitutional review, of course, forces courts out of this narrow common law framework to pronounce on the constitutional propriety of legislation and official conduct; policy issues come directly into play.[108] Postliberal constitutionalism abets this movement because it opens more potential areas of constitutional inquiry to the judicial review, and because it accepts the legal realist critique of the law/politics distinction. Realism, as discussed in chapter 2, understands legal decision making fundamentally to be policy oriented. In addition, postliberal constitutionalists hold governments accountable for their sins of omission as well as their sins of commission. For them, courts must tell governments what they must do to comply with the constitution. Limited remedial functions invite the sort of criticism Khullar makes – if the issue is constitutional justice, why is it important for courts to defer to legislatures on how to fix constitutional shortcomings? If Charter values are at stake, why should they not have society-wide application? Postliberal constitutionalism is less deferential to separation of powers issues than is liberal constitutionalism.

Charter remedy issues are complex because at times Charter loss in court will lead to a legislative victory, as in the *Thibaudeau*[109] case. Sometimes, as in *Schachter*, the government will have fixed the problem even before the Supreme Court pronounced on it, in which case courts have very good evidence of what a government would intend were it apprised of the unconstitutionality of its particular policy. In any event, the courts seem

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[108] Christopher P. Manfredi,"'Appropriate and Just in the Circumstances': Public Policy and the Enforcement of Rights under the Canadian Charter of Rights and Freedoms" *Canadian Journal of Political Science* 27 (1994), 435-464.

[109] *Thibaudeau v. Canada* [1995] 2 S.C.R. 627.

sensitive to separation of powers issues. In his study of section 24(1) remedial cases, Manfredi concludes that while section 24(1) "provides judges with an opportunity to shape and administer social policy directly through positive and prospective remedies." The evidence from his study of 82 cases from 1982 to 1992 is that there is no "explosion of activist remedial decree litigation."[110] He also noted that as the public policy salience of cases increased, appeal courts have been more circumspect in directing prospective remedies. But his data set ended at a point when courts began to read in excluded grounds in social benefit schemes. In *Haig*, the Ontario Court of Appeal read sexual orientation into Ontario's *Human Rights Code*. In *Tétreault-Gadoury*[111] the Supreme Court extended unemployment insurance benefits to persons over 65 years of age. In *Miron* the Court redefined "spouse" to include common law partners for purposes of beneficiaries of accidents pursuant to compulsory automobile insurance plans. In *Eldridge*, insured medical services were defined to include sign language interpretation services. And in *Vriend*, sexual orientation was added to Alberta's human rights legislation. In the *Haig* case, Justice Krever suggested reading in is actually a restrained judicial remedy, far less intrusive than invalidating the whole law, and it is inconceivable, he said, that the legislature would intend to repeal the whole act. Peter Hogg, however, writes that "the remedy is a good deal more radical than Krever J.A. acknowledged." This is precisely because of the mirroring argument discussed earlier, and the unpredictability associated with what analogous grounds the courts will eventually read into

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[110] Manfredi, "'Appropriate and Just in the Circumstances'," 453. More emphatically, Michael Mandel has argued that the courts' remedial powers have been singularly unsuccessful in expanding the "public sector' of state-provided benefits to increase the social power of Canadians and diminish that of the corporations. He notes that lower courts have often equalized benefits downward by striking down benefits altogether when courts found a discriminatory underinclusion of benefits. And when discriminatory underinclusivity was found by a court, governments would often grant the benefit to the affected group and subtract funds from other policies affecting other needy people. Judicial remedial powers, he suggests, are intrinsically limited to distributional questions: they can slice the public resource pie in different ways, but they cannot increase its size. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* 2nd edition (Toronto: Thompson, 1994), 389-99.

[111] *Tétrault-Gadoury v. Canada* [1991] 2 S.C.R. 22.

the general prohibition of discrimination in section 15 of the Charter.[112]

In *Eldridge*, LaForest for the Court gestured in the direction of a restrained judicial remedy, arguing that "It is not this Court's role to dictate how [the unconstitutional non-funding of sign language interpretation services] is to be accomplished."[113] But he continued: "Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services."[114] So while the Court in this case did not read in to the definition of medically necessary services the provision of interpretation services, it may as well have done so.

Thus the clash of constitutionalisms in respect to state inaction and underinclusivity have implications for courts' remedial powers. Here, as elsewhere, the courts have demonstrated an ambivalence about the constitutionalist road to travel.

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[112] Hogg, *Constitutional Law of Canada*, 930-1. An exception to the pattern described here is *Law v. Canada (Minister of Employment and Immigration)*. In this case, a woman widowed at age 30 claimed that her section 15 rights were violated because the survivor's benefit under the Canada Pension Plan does not extend to survivor's under 35 years of age. The Court refused to grant the section 15 claim, arguing that (relatively) young adults do not constitute a discrete and insular minority subject to historical disadvantage, and that the purpose of the law, to provide for the long-term income security of those who are likely to have difficulty finding employment, is consistent with the terms of section 15.

[113] *Eldridge*, 691-2.

[114] Ibid.

Conclusion

One scholar tested the thesis that despite superficial similarities, human rights legislation, probing as it does the private realm and advancing a battery of social rights, can advance social democratic, egalitarian ideals; whereas the Charter, bound to the public realm by section 32 and protecting only legal and political rights, can be counted on only to promote classical liberal ideology.[115] His investigation of the Ontario Human Rights Code, however, suggested to him that classical liberal ideals prevail in *both* the Charter and the humans rights legislation. Thus he sees convergence where there ought to be dissimilarity.

This chapter suggests a different conclusion. It suggests that a merger of the two human rights models is indeed taking place. Human rights laws are only a little lower than the constitutional angels; and section 15 increasingly condescends to correct inequalities in private life. Substantive results are uneven but they suggest that Anderson's is too crude an assessment of events. I suggest that both human rights laws and section 15 do affect conduct in the private, non-government realm. But the pattern is increasingly postliberal constitutionalist, not liberal constitutionalist. As Fader has argued, the judicial finding that legislative silence is reviewable state action represents a "*fundamental shift in the nature of Canadian constitutional law...a fundamental departure from an orthodox brand of constitutional theory.*"[116] Underinclusivity is increasingly considered discriminatory. The state action hook required to trigger Charter review is becoming smaller, slenderer, more remote, more tangential with time. The logical completion of this jurisprudence is that Charter review can take place (and possibly, Charter standards can prevail) without recourse to a threshold finding of state action. In this manner postliberal constitutionalism is establishing a presence in Charterland. Courts apply the Charter to entities and activity farther and farther away from the core activities of the state prized by liberal constitutionalists. And by seizing on human

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[115] Gavin W. Anderson, "Filling the 'Charter Gap?'"

[116] Richard Fader, "Reemergence of the Charter Application Debate: Issues for the Supreme Court in *Eldridge* and *Vriend*" *Dalhousie Journal of Legal Studies* (1997), 212-13. Emphasis added.

rights legislation, courts, at the urging of litigants and their sponsors, have constitutionalized those areas of private activity to which anti-discrimination provisions apply. One might think courts would apply charter standards deferentially in cases involving human rights legislation. There is evidence, however, to the contrary, which suggests that human rights laws will be required to mirror Charter equality standards.

Chapter 7

Conclusion

This study has attempted to shed light onto an area of Charter of Rights jurisprudence to which political scientists have devoted relatively little attention. The bulk of political science scholarship, as discussed in the introduction, is dedicated to the "big" civil liberties issues like the fundamental freedoms, and language rights which emanate from Canada's constitutional tradition. Political scientists have also paid close attention to the effect of the Charter on the separation of powers, on the decision-making and institutional capacities of courts, and on Canadian political culture. Chiefly, law professors have delved into the law and politics of Charter application doctrine. Political scientists' inattention to Charter application issues has meant that they have overlooked an area of constitutional law with important implications for judicial power, the institutional capacity of courts, and for larger intellectual inquiries into Canadian constitutionalism.

The empirical findings of this study are as follows. Section 52 of the Constitution Act, 1982 declares that all laws are subject to the Constitution. The courts have devoted considerable attention to the definition of law for application purposes, aware, as chapter 4 argued, that if "law" includes private law, or the common law, then Charter standards would apply to a whole range of activity otherwise independent of formal, written constitutional standards. Early decisions of the Supreme Court declared, somewhat contradictorily, that private law would be exempt from Charter application, and that courts would not be considered government entities for purposes of Charter application when they develop the common law and decide private law disputes between private actors. Almost as soon as this pronouncement was made in the notorious *Dolphin Delivery* case of 1986, the Supreme Court was subject to a barrage of criticism, accused of approaching the Charter and application issues in a niggardly, incoherent fashion. Even though the *Dolphin* decision was

not as restrained as some seemed to think, nonetheless the Court demonstrated a sensitivity to the criticism and soon departed in important ways from its central holding in that landmark case. One of the most important means of doing so was the exploitation of a passage in *Dolphin* itself, in which Justice McIntyre, almost as an afterthought, wrote that even though the Charter does not apply directly to private law, the courts should nonetheless take account of "Charter values" as they develop and adapt private law principles to contemporary conditions. This loophole proved to be something of a Trojan Horse, allowing the Court both to grant and reject Charter claims when either seemed prudent. The effect of this has been to introduce a significant degree of ambiguity into the Charter-private law relationship. The least that can be said is that the restrained definition of "law" in *Dolphin* has been narrowed substantially, if not effectively repudiated.[1]

On the definition of government for purposes of Charter application, chapter 5 suggested that judicial division on the matter was there at the beginning, then receded in the face of an emerging consensus on an expansive definition of "government" for purposes of section 32. Despite this consensus, pockets of ambiguity and ambivalence still exist. The leading decision in this line of cases is *McKinney v. University of Guelph*, a long and complex ruling, notable not just for the divisions it illuminated among members of the Supreme Court, but also for one of the most interesting discussions of constitutionalism, the Charter, and government penned by the high court. In that ruling a majority refused to find mandatory retirement policies in effect at several universities to be in violation of the Charter. The members of the Supreme Court were all over the place on how exactly the Charter applied to the policies.

Over a short period, a consensus began to form and in the *Lavigne* case the two principal combatants in *McKinney*, Wilson and LaForest, wrote complementary decisions. They agreed not only on the result – Lavigne's argument, that compulsorily collected union

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[1] Indeed, the Supreme Court judges themselves consider the alteration of common law in the Charter era a commonplace. Said one in an anonymous interview: "After the Charter gave the judges a right to strike down a statute, altering the common law was a piece of cake." Quoted in Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998), 186.

dues devoted in part to political causes with which Lavigne did not agree unjustifiably limited his section 2 rights, was rejected – but also on questions of Charter application and on views of the relationship between state and society. Supreme Court decision making in this area indicates that the threshold Charter application issue – does the Charter apply to the person, entity, or activity at hand? – is not as important as it initially appeared, and its relative atrophy is matched by the increasing importance of rights limitation doctrine, the principles governing the factual contexts in which rights should be limited in their application. In other words, an important change has been wrought in recent years: the question of whether the Charter applies is less salient (because the answer is often yes) than the question of how and with what stringency Charter standards apply. Charter claimants may in particular cases be no further ahead in terms of the bottom line result one way or the other, as the case of *R. v. M.(M.R.)* makes clear. And justices have stumbled over obstacles in the way of more expansive Charter application. Sopinka's understanding of "law" in section 15 in the *Douglas* case comes to mind. But with recent developments more issues are brought within the Charter's ambit and subject to judicial review. The scope of potential activities and entities subject to Charter review has increased.

These developments are perceptible in areas of public law generally, where the line between state and society in the era of the administrative state is blurred. They are also perceptible in the criminal law, where the state-society distinction is often thought to be much clearer. Chapter 5 indicated that a line of cases concerning Crown disclosure obligations pursuant to section 7 of the Charter implicitly engage questions of Charter legal rights application to entities outside the state as it is traditionally conceived. *Carosella* illustrates this vividly.

In chapter 6, it was argued that the section 15 equality rights provision of the Charter has evolved into a Charter application provision quite independently of sections 32 and 52. A large body of case law indicates that governments are increasingly held to account not just for what they do and ought not to have done, but also for what they ought to do but have left undone. In other words, state inaction is increasingly reviewable. Section 15 of the Charter resembles both the Old Testament Decalogue and the New Testament Sermon on the Mount

in this respect – lots of "shalls" as well as "shall nots." State inaction has been reviewed in the context of underinclusive provision of state benefits. In general terms, the courts have declared that when the state acts to provide some benefit, it cannot withhold that benefit from people contrary to section 15. When the state acts, these cases suggests, it must act in conformity with the Charter.

When section 15 is considered in relation to human rights legislation in effect at both the provincial and federal levels of government, the potential exists for the application of Charter standards to societal, non-state entities, persons, and activities, through the instrumentality of that legislation. This is what has happened. The courts have for a long time considered human rights legislation "quasi-constitutional" in nature, even though it governs "private" conduct between and among non-state actors in areas of activity like employment, tenancy, and membership in associations. As pieces of legislation, human rights laws are undeniably subject to the Charter so controversial application issues do not arise. Instead, the issue is the degree to which the list of protected group characteristics in human rights laws are to mirror the list of protected groups characteristics in section 15. Both the decision making of the Court and the commentary of academic Charter watchers suggests that a perfect mirroring is the logical implication of the Court's construction of section 15. Underinclusivity of protected grounds of discrimination has been found constitutionally wanting in many cases. In addition, the Court is, as one commentator put it, "decidedly undecided" about whether there needs to be *any* evidence of state action in order for courts to impose section 15 obligations on legislatures. In this area of constitutional law, Charter application issues diminish in importance in comparison to rights limitation issues, and on this point judges have not been of one accord. Thus human rights legislation bears a close relationship to the Charter's equality rights guarantees and serve as a key conduit for Charter application to civil society.

So the general trend emerging from the empirical analysis in this study is that the Supreme Court of Canada has expanded Charter application, using sections 32 and 15 of the Charter and section 52 of the Constitution Act, 1982. But it has done so haltingly and inconsistently; there have been reversals along the way, many divided judgements, and from

case to case some judges have altered their positions. There are no straight lines here. And even in cases where the Charter was found to apply, the result was not always a win for the Charter claimant. Indeed, as decisions like *Dobson* indicate, Charter values may be invoked in private law to *deny* a claim in tort. But the success of an actual Charter claim is in principle separate from the main point of this study, namely that the Supreme Court has, with difficulty in some cases, and imagination in others, expanded the application of Charter standards to regions beyond the strictly governmental.

What can account for this jurisprudence? A few theories suggest themselves. The first is the bureaucratic politics theory which considers institutions of all kinds, courts included, as growth-oriented, almost biologically-driven organisms, seeking expansion and the occupation of policy space to ensure long-term survival and the augmentation of the power and prestige of their officers.[2] Expanding the scope of Charter application to include more potential cases in its rubric would be consistent with a theory that sees political institutions to be in constant search of more status, more work, and a more central place in the governance of a polity.

Second, some theories look to changes in political culture. Some scholars have attributed the twentieth century rise of the politics of rights and rights consciousness to changes in Canadian political culture predating the Charter's entrenchment. Inglehart's theory, described most simply, combines a socialization hypothesis with a scarcity hypothesis. Essentially, he claims that we value what we lack and that formative childhood experiences have lasting effects through adult life. He assumes that people arrange their needs in a manner consistent with Maslow's hierarchy of needs, according to which we pursue first our base material survival needs and when these are satisfied pursue the satisfaction of higher order more abstract, spiritual, aesthetic, and/or ideological needs. Inglehart suggests that advanced industrial societies in the late twentieth century are characterized by affluence and relative security. People growing up in these conditions take for granted the satisfaction of their material needs and instead pursue political goals associated with equality, environmental

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[2] Anthony Downs, *An Economic Theory of Democracy* (New York: Harper, 1957).

quality, and so on. Post-industrial societies take for granted quantity of life and instead seek quality of life; this makes them postmaterial. So the substantive political agenda in a postmaterialist context is oriented to more egalitarian concerns.[3]

Neil Nevitte and Ian Brodie have applied Ronald Inglehart's theory of postmaterialist political change to the Canadian context.[4] They argue that postmaterialist political values have influenced Canadian political culture for some time predating the entrenchment of the Charter. Not only do changes in political culture alter the substantive political agenda; they alter also the forms political action takes. Postmaterialists are less deferential to political elites and are prone to use direct political action to achieve their political goals as opposed to more traditional representative institutions and processes.[5] They are receptive to courts and the use of rights to achieve their goals. In this view, the Charter has not *created* a rights consciousness, as scholars like Alan Cairns have suggested; rather, the Charter has been a vehicle for the pursuit of a political agenda embedded in the postmaterialist Canadian political culture. Knopff and Morton have applied Inglehart's and Nevitte's postmaterialist theory specifically to Charter politics, arguing that a "Court Party" of intellectual, political, judicial, and legal elites has formed around the Charter, operating it as an instrument for egalitarian goals consistent with the substantive postmaterialist agenda and with many of the jurisprudential developments discussed in this study.[6] In essence, Knopff and Morton tack

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[3] See Ronald Inglehart, *The Silent Revolution* (Princeton: Princeton University Press, 1977); Ronald Inglehart, *Culture Shift in Advanced Industrial Society* (Princeton: Princeton University Press, 1990).

[4] Ian Brodie and Neil Nevitte, "Evaluating the Citizens' Constitution Theory" *Canadian Journal of Political Science* 26 (1993), 235-60.

[5] Neil Nevitte, *The Decline of Deference: Canadian Value Change in Cross-National Perspective* (Peterborough: Broadview, 1996).

[6] F.l. Morton and Rainer Knopff, "The Supreme Court as the Vanguard of the Intelligentsia: The Charter Movement as Postmaterialist Politics" in Janet Ajzenstat, ed., Canadian Constitutionalism: 1791-1991 (Ottawa: Canadian Study of Parliament Group, 1991), 57-80; Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson, 1992); F.L. Morton, "The Charter Revolution and the Court Party" *Osgoode Hall Law Journal* 30 (1992), 627-52.

onto a theory of political culture a theory of interest group politics which sees political institutions significantly affected by, if not at the mercy of, a coterie of interest groups. Expansive Charter application doctrine would be welcome to the postmaterialists, as it broadens the range of justiciable rights-based issues.

Third, a recent study finds changes in political culture and the existence of a receptive judiciary to be necessary but not sufficient conditions for the "rights revolution" sweeping across twentieth century liberal democracies, of which the expansion of Charter application doctrine described here would be one manifestation. Charles Epp's recent study argues that no rights revolution is possible without "a proper support structure for legal mobilization" in place to get political issues phrased as rights claims before the courts in the first instance. He argues:

> ...cases do not arrive at supreme courts as if by magic....[T]he process of legal mobilization – the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights – is not in any simple way a direct response to opportunities provided by constitutional promises or judicial decisions, or to expectations arising from popular culture. Legal mobilization also depends on resources, and resources for rights litigation depend on a support structure of rights-advocacy lawyers, rights-advocacy organizations, and sources of financing.[7]

Epp's account complements both the political culture approach and Knopff and Morton's interest-group/Court party approach, emphasizing the material and intellectual resources required to gain access to an otherwise expensive, inaccessible institution. Epp's study differs from Knopff and Morton's in the important sense that while Knopff and Morton see the Court party as an anti-democratic movement bypassing parliamentary, majoritarian channels of policy making, Epp sees the rights revolution as a welcome democratization of access to the courts. Epp takes pains to stress in his study that organized, strategic use of courts for policy purposes did not begin with the Warren Court in the United States or the

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[7] Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), 18.

Charter in Canada. Business interests in the 19th century had used strategic litigation to great effect, a measure of success new social movements identified by race, gender, ethnicity, sexual orientation, and so on, have more recently been able to match.

Epp's theory would help to explain key expansions in Charter application doctrine. Various groups of what Cairns calls "Charter Canadians" were involved in litigation discussed in this study, either as sponsors or interveners. Litigants were able to draw upon masses of intellectual armament provided by the scholarly output of legal academics supportive of an expansion of the scope of Charter application.

The explanation that this study proposes for the expansion of Charter application is different from the foregoing but by no means opposed. Indeed, the above theories complement the approach pursued here. This dissertation argues that the Supreme Court of Canada's development of Charter application doctrine can be explained by the impact of fundamental intellectual forces associated with liberal and postliberal constitutionalism. Liberal constitutionalists favour limited Charter application. They see Charters of rights as mechanisms limiting the state in its power to act contrary to the negative rights of individuals. In the enduring liberal tension between liberty and equality, they prize liberty, giving it clear expression in what I have called the principle of double privacy: not only do constitutional rights protect privacy rights, like the right not to be subject to unreasonable search and seizure; but the judicial enforcement of constitutional rights itself is to be limited to government, securing a realm of private human activity beyond the reach of the state, the judiciary, and of constitutional standards of conduct. Liberal constitutionalist reasoning is evident in the Supreme Court's decision in *Dolphin* and in Laforest's judgement in *McKinney*, as well as in myriad other decisions relating to the criminal law.

Postliberal constitutionalists share much with their liberal counterparts but find liberal constitutionalism narrow, unduly protective of the "private" realm, and out of step with the twentieth century administrative state. They favour a more expansive Charter application doctrine and accordingly reject the double privacy principle. They also seek to apply constitutional standards to the state's sins of omission, and see the state (in so far as it embodies Charter values) as something of a model for human relations in all spheres. The

constitution for them is about equality and freedom from domination, whether that domination is rooted in the state or in society. Constitutional norms, for postliberals, should apply society-wide, unconstrained by liberal constitutionalism's double privacy principle.

The clash of constitutionalisms theory developed here is compatible with the political culture approach, and with Knopff and Morton's and Epp's approach. Those theories in one way or another assume the existence of political and constitutional ideas which funding agencies and interest group elites transmit into Charter litigation. Elites of various kinds are animated by visions of the constitution and of society, and they seek to realize those visions by institutional action linked to the Charter. This dissertation fleshes out the intellectual visions at play in Charter litigation, to which these authors more or less obliquely refer.

However, the clash of constitutionalisms theory differs from the other theories in at least one respect. One may be led, on reading Knopff and Morton or Epp, to conclude that the movement to a new postmaterialist model of rights has been linear and without conflict. Indeed, Knopff and Morton at times imply that the Court party is given over totally to the postmaterialists, that it is an ideological bloc in which classical liberals and "conservatives" are distinctly unwelcome. They foster the impression that Supreme Court jurisprudence is uniformly left-egalitarian – postliberal in the sense in which I use the term. There is indeed a lot of evidence to support judicial postliberalism. But this study suggests that Supreme Court decision making contains much tension, division, ambivalence, uncertainty, and equivocation, something not stressed in the other studies.[8] In other words, the Supreme Court is caught in the throes of a *clash* of constitutionalisms; it has not been captured by any one ideological program.

The clash of constitutionalisms itself may be linked to other forces at work in late

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[8] Of course, such lack of uniformity in decision making is due to institutional conditions as well as intellectual quandaries. The Supreme Court assembles nine legal experts in a collegial setting and gives them almost complete control over their docket. They then select the most controversial of the 600 or so leave applications per year and then render decisions on which there appears to be little incentive to present a united voice. Most members of the Supreme Court think that dissents are both inevitable and healthy. See Greene et al, *Final Appeal*, 121.

twentieth century Canada. Of course, the clash is consistent with recent studies that show that charters of rights do not represent a uniform conception of rights. Work by Peter Russell, Ian Urquhart, and Paul Sniderman and his colleagues, discussed earlier in this study, suggest that while there is broad agreement on "rights" in general – who can be against rights? – consensus quickly dissolves when specific applications and meaning of rights are posed in particular fact situations. Those who set for the Charter a particular political program – the achievement of a pan-Canadian nationalism, a "progressive" egalitarian society, a liberal individualistic society, all discussed in chapter 3 – were bound to be disappointed because rights in current conditions represent the articulation of political purposes in justiciable terms. The political pluralism pervading Canadian society naturally pervades Charter litigation and its rights discourses.

The clash also speaks to the nature of liberalism. Liberalism is a broad church, and it is never clear who is in and who is out. So pervasive are liberal ideas that it pervades the intellectual air we breathe, as Arblaster has said, and so the parameters of the liberal communion are hard to define with precision.[9] But the bigger the church, the more numerous will be the quarrels among its members. Liberal principles and institutions can be put to multiple uses. Such is the case with the Canadian Charter of Rights and Freedoms. The Charter was born largely for the attainment of liberal purposes like the advancement of individual rights and the restriction of state excesses, yet the date of its birth was marked also by mounting attacks on just these liberal principles. The Charter entered a political and constitutional world in flux. Foundational constitutionalist assumptions could not be taken for granted. Scholars increasingly considered the constitution a site for the political and philosophical conflicts of the age. In an important sense, tensions and weaknesses long lurking in the shadows of liberal politics and constitutionalism were increasingly laid bare.

Michael Foley has argued that all constitutions, even – indeed especially – the most sophisticated and durable ones, leave certain basic political issues unresolved. There are certain issues which constitutions do not attempt to spell out, resolve, and master. Stable

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[9] Anthony Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Basil Blackwell, 1984), 3-14.

constitutional order often depends on certain problems being strategically avoided. This is his theory of constitutional abeyances:

> Gaps in a constitution should not be seen as simply empty space. They amount to a substantial plenum of strategic content and meaning vital to the preservation of a constitution. Such interstices accommodate the abeyances within which the sleeping giants of potentially acute political conflict are communally maintained in slumber. Despite the absence of any documentary or material form, these abeyances are real, and are an integral part of any constitution. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a constitution as its more tangible and codified components. Those constitutional analysts and scholars who dismiss a 'written-unwritten' classification, therefore, are right to do so. But they are right for the wrong reasons....[T]hey are incorrect in overlooking those elements within both written and unwritten constitutions which remain in abeyance and thereby remain dependent upon an instinctive, indefinable, and thoroughly unwritten code of practical obscurity and accepted ambiguity.[10]

An example from Foley's book will help to flesh out his meaning. The United States Constitution contains a written enumeration of powers of government and of the respective institutions of government. Yet the powers of the executive are conspicuously vague, creating a potentially profound conflict between the constitutional principle of the rule of law on the one hand, and of the need for an energetic executive with substantial discretionary authority on the other. Despite the writtenness of the Constitution, the courts have studiously avoided the specification of powers of the President, preferring to duck the issue by invoking the "political questions doctrine." Indeed, Foley argues, the courts customarily say what is unconstitutional, but avoid saying what the constitution is. Even in the Nixon era of the 1970s, when the question of the limits of executive authority preoccupied politicians, the courts, the media, and scholars, this issue was never conclusively answered. The United States averted a constitutional crisis by leaving a veil over an undefined aspect of American constitutionalism, while at the same dealing with the Nixon problem.

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[10] Michael Foley, *The Silence of Constitutions: Gaps, Abeyances, and Political Temperament in the Maintenance of Government* (London: Routledge, 1989), 82.

Foley wants his readers to be clear: constitutional abeyances are strategic avoidances of constitutional truth and finality. They are gaps that can be filled at the cost of considerable stress, turmoil, and even crisis. Constitutional abeyances, he insists, "do *not* refer to a solid set of shared beliefs or to some notional compromise between definite positions. They refer to the habit of keeping unsettled questions in a state of remote irresolution through acceptable forms of obfuscation."[11] An abeyance represents the acceptance of a situation of "genuine indeterminacy."[12]

David Thomas has applied Foley's theory to gaps in the Canadian constitution, particularly the place of Quebec in Confederation. Thomas investigates the long history of obfuscation, fudging, and avoidance associated with Quebec's place as a small nation within a larger federation. Key constitutional exercises like the Meech lake Accord, he says, with its clever and devilishly ambiguous distinct society clause, say a lot and nothing at once. If Meech succeeded, it would have been an achievement of constitutional avoidance, a deliberate refusal to settle the Quebec issue once and for all.[13] Canada's near-death experience in November, 1995 is what can be expected when the veil is torn off constitutional abeyances.

The analysis of constitutional abeyances by Foley and Thomas is germane to Charter application doctrine and the clash of constitutionalisms. Liberal constitutionalism always harboured some dirty little secrets about the role of the state in facilitating the market economy and securing the exercise (and limitation) of property rights. Most classical liberals have made their peace with collective bargaining, the state's regulatory role, and human rights legislation which seeks to advance the principles of fundamental human dignity and the (limited) social right to employment and other necessaries, even though these represent state incursions into the private realm formerly thought the province of the common law of contract. Such incursions are justifiable in terms of the very principles of individual rights

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[11] Ibid., 98.

[12] Ibid., 114.

[13] David M. Thomas, *Whistling Past the Graveyard: Constitutional Abeyances, Quebec, and the Future of Canada* (Toronto: Oxford University Press, 1997).

liberals applaud. Yet liberal constitutionalists have not pursued the logic of these secrets to their end. To do so would invite the proposition that the state is implicated in almost all human activity, that the personal is the political. In terms of constitutional rights application doctrine, this would mean that the personal would also be the constitutional, a result at odds with the liberal double privacy principle.

The contradiction is readily apparent. Liberalism has a univeralizing logic according to which all parts of life should be lived according to principles of individual treatment and fairness – reason itself. But liberalism also upholds the autonomy of persons from overbearing control. So the very institutions which advance liberal principles may themselves diminish people's autonomy in the enforcement of those principles. Hence the double privacy principle represents something of an abeyance, a state of what Foley calls "unsettled settlement", a studied suspension of the resolution of tensions.

Postliberal constitutionalism casts a critical light on this constitutional abeyance, forcing courts to examine assumptions long ignored. In some ways postliberal constitutionalists want to complete or perfect the liberal constitutionalist project, extending fundamental liberal principles of liberty, equality, and fairness to persons in their various social settings, not necessarily flattening the diverse spheres of life into a bland uniformity, but certainly holding up to constitutional scrutiny, activities in those same spheres.[14] What this implies for the role of the courts, for the autonomy of those spheres of life, and for the autonomy of individual people has not been worked out, and a great deal of postliberal constitutional commentary is unhelpful in this respect. In the meantime, the courts have

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[14] Walzer, for example, argues for a thoroughgoing egalitarianism while recognizing that different "spheres of life" contain particular organizing principles of distributive justice. The principles of kinship, merit, need, free exchange, birth, democratic decision, all have different applications and different distributive results. Each makes sense in its proper sphere and does violence and injustice when applied elsewhere. Walzer does not want egalitarian principles to override the various distributive principles of justice operative in the myriad spheres of life. He wants each to flourish in its proper sphere. In other words, he wants a "complex equality" reconciled with a concept of pluralism. Michael Walzer *Spheres of Justice: a Defense of Pluralism and Equality* (New York: Basic Books, 1983).

struggled to justify a liberal constitutionalist Charter application doctrine in some cases, and limit the consequences of adopting a postliberal alternative in others. The empirical chapters of this study trace some of the entrails of a constitutional abeyance now brought into the public glare.

What does this mean for the future? Are the cases discussed in this study aberrant? Will one or the other of the clashing constitutionalisms win out? One of the findings of this study is that postliberal Charter application doctrine is making inroads in Supreme Court decision making. One reading of developments since the mid-1980s is that postliberal constitutionalism is steadily eroding the dominance of liberal constitutionalist thinking on the Supreme Court. However, there are several reasons to suggest that the clash of constitutionalisms is no fleeting thing. The first and perhaps most obvious point is that judicial decision making is partly a function of the personnel on the Court. Not only has there been fairly rapid turnover in Court membership recently, but judges once appointed sometimes surprise their appointing sponsors. Earl Warren is the quintessential American example, and in Canada this study has suggested that Gerard LaForest underwent a change in approach to Charter application over the period of his tenure. And of course, the cases decided by the Court are tough; the Court has almost complete control over its docket and will especially hear those cases which raise difficult issues of law and policy. In this sense all cases reaching the Supreme Court are aberrant, unrepresentative of the thousands that are resolved without raising questions of policy and constitutional principle. It is not hard to expect that tough cases in an institutional environment which values and encourages independent thinking will produce doctrinal twists and turns over time.

Second, many if not most Charter cases coming before the courts are laden with political significance. Groups with material interests often have much to gain or lose in a Supreme Court decision. Doctrinal purity may sometimes take a back seat to more pressing issues. Litigants are hence disposed at times to make arguments based on a constitutionalism that may not comport with their specific political goals. So the political use of the judiciary adds a volatility to the doctrinal course of the Court. For example, in the *Lavigne* case, the Ontario Public Sector Employees Union sought to shield itself and its activities from Charter

attack by claiming in court that it was a "private" entity beyond the reach of the Charter. Such an argument makes sense in the context of Merv Lavigne's challenge to its activities and status. But it is at odds with the broader understanding of the place of unions, particularly public sector unions, in Canadian politics and government. Unions after all owe their existence to state action and generally identify social justice with the ameliorative policies of the welfare state. A liberal constitutionalist argument in the *Lavigne* case flies in the face of broader political understandings unions seek to foster.

Another example is the *Carosella* case in which the Supreme Court seemed to link a sexual assault centre to disclosure obligations imposed on the Crown in criminal sexual assault cases. Here too one would think sexual assault centre personnel would favour a broad role for the state in the funding of services for victims of assault. The state is seen as an important protector of women's safety from the "private" hell of an abusive husband. Yet the Supreme Court, when faced with what appeared to be a flagrant circumvention of its own disclosure rules, seemed to define sexual assault centres to be part of the Crown for disclosure purposes. Sexual assault centre personnel could be forgiven for wishing they were not tied so closely to the public sector. Here, a liberal constitutionalist concern for accused persons' fair trial rights spawned the use of postliberal Charter application reasoning to secure those rights.

These examples indicate that political goals of all partisan and ideological stripes will force litigants into making Charter application arguments to help them win their cases; and court decisions as a result may be expected to borrow from both liberal and postliberal premises in order to dispose of the disputes. Constitutional principle may be one of the casualties in a process in which the Charter is put to the service of political ends. So the dominance of any particular political ideology does not spell the dominance of any one Charter application doctrine or constitutionalism. The Charter is too ideologically fungible for this. Essentially, the Charter enables groups unsatisfied with their treatment in the legislative and executive branches of government to try their hand in the judicial branch of

government.[15]

Third, and more fundamentally, the clash of constitutionalisms may indeed continue to have life because of shifting views of the state. It is possible that Canadians will at times see the state as benefactor, and at other times as menace. In the American context, Alan Brinkley has argued that while the New Deal "created a series of new state institutions that greatly, and permanently, expanded the role of the federal government in American life", views of the state nonetheless shift markedly and unpredictably. During the First World War, Americans understood German aggression in racial terms, tying it to intrinsic features of the German race. During the Second World War, however, this view of German aggression faded in comparison with the view that the problem was the totalitarian German *state.* Nazism became the example of what overweening state power could become. Whatever the beneficial effects of the New Deal, German totalitarianism became the sinister portent of the welfare state run amok. "The enemy was not the German people; it was their government. The threat of fascism was a threat from the state. And so it was to the state that Americans looked in the 1940s for signs of totalitarian danger at home."[16] It was no accident that at this time Hayek's *The Road to Serfdom* became a bestseller and many New Dealers began to doubt the

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[15] Stephen Griffin has explained the dominance of judicial review in the United States in terms of the "displacement of political authority." In the absence of effective national political institutions, other agencies have filled the policy breach, acting when Congress was unwilling or unable to do so. Of the late nineteenth century he writes: "The mismatch between private power and public authority led to a kind of breakdown in the constitutional order. Increasingly, Congress had to deal with complex, ongoing regulatory issues that could not be solved through the distribution of benefits. But Congress found itself unable to resolve these issues through the legislative process. Political parties and elections could not help because they were not oriented toward national policymaking. There was thus a gap between the public authority the electoral process provided and the kind of political authority the elected branches needed to deal with these new issues. The result was a displacement of public authority away from the democratic party-legislative process." Both courts and independent, quasi-judicial administrative agencies benefitted from the displacement. Stephen Griffin, *American Constitutionalism: From Theory to Politics* (Princeton: Princeton University Press, 1996), 79.

[16] Alan Brinkley, *Liberalism and its Discontents* (Cambridge, Mass.: Harvard University Press, 1998), 105.

uncomplicated goodness of state power. Americans continue to regard with suspicion the state on which they depend for so much.

As Theodore Lowi argued some time ago, crises of public authority translating into suspicion and distrust of state power may even *coincide* with the expansion of that same power, suggesting a complex relationship between the twentieth century state and constitutionalist ideas. He argued:

> The frenzy of governmental activity in the 1960s and 1970s proved that once the constitutional barriers were down the American national government was capable of prompt response to organized political demands. However, that is only the beginning of the story, because the almost total democratization of the Constitution and the contemporary expansion of the public sector has been accompanied by expansion, not contraction, of a sense of distrust toward public objects. Here is a spectacular paradox. It is as though each new program expansion had been an admission of prior governmental inadequacy or failure without itself being able to make a significant contribution to order or to well-being. It is as though prosperity had gone up at an arithmetic rate while expectations and therefore frustrations, had been going up at a geometric rate – in a modern expression of Malthusian law.[17]

Shifting views of the state are evident in Canada as well. While the Mountie in red serge remains a national icon, and while "peace, order, and good government" stands as the country's signal constitutional truism, several horrendous wrongful prosecutions – chiefly the cases of Donald Marshall Jr., David Milgaard, and Guy Paul Morin – have cast doubt on the competence and beneficence of Canada's police services, and provoked a series of studies and commissions that have reacted to a renewed suspicion of state power in criminal matters. Events like these help to cause a renewal of liberal constitutionalist thinking and decision making even when postliberal thinking on other matters may be ascendant. After Alan Cairns wrote his famous essay, entitled "The Embedded State: State-Society Relations in Canada", quoted in chapter 2 of this study, he attracted the criticism of Philip Resnick who detected in Cairns's argument a fear of the state, a concern that the thing had grown too large and

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[17] Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* 2nd edition (New York: W.W. Norton, 1979), 50.

ominous. Resnick chastised Cairns for seeming to raise a classical liberal critique of democratization.[18] However, a recent essay by Reg Whitaker[19] looks much more approvingly on Cairns's essay, an indication that views of the state, and accordingly views of constitutionalism, may change with the coming and going of the anxieties of the age.[20]

In short, the clash of constitutionalisms is dependent on many factors, and unpredictable events can cause one or the other constitutionalism to gain favour. Accordingly, while postliberal constitutionalist Charter application doctrine seems to be gaining strength, there is no historical inevitability here. The clash will continue.

A final word is in order regarding the style of the argument made in this study. Academic commentators favouring an expansive, postliberal Charter application doctrine have a term of derision for arguments to the opposite effect: the "floodgates argument."[21] The term suggests that, for critics of expansive Charter application, once Charter application is expanded a bit, then judges will rush like an uncontrollable torrent into every nook and cranny of Canadians' lives. Charter expansionists of course ridicule such reasoning, calling it alarmist and a distortion of the reality of constitutional review. The floodgates criticism could be made about this study, particularly insofar as it identifies a trend in the direction of postliberal constitutionalism in areas like Charter application to the common law and state inaction.

However, the main point of this study is not to sound the alarm about a judicial

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[18] See Philip Resnick, *The Masks of Proteus: Canadian Reflections on the State* (Montreal and Kingston: McGill-Queen's University Press,1990), 136-7.

[19] "The Changing Canadian State" in Harvey Lazar and Tom McIntosh, eds., *Canada: The State of the Federation, 1998/99: How Canadians Connect* (Montreal and Kingston: McGill-Queen's University Press, 1999), 37-60.

[20] For a recent example of an attempt to revise the Canadian myth of the benevolent state, see William Watson, *Globalization and the Meaning of Canadian Life* (Toronto: University of Toronto Press, 1998).

[21] Hester Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Sphere Ideology" *Dalhousie Law Journal* 10 (1986), 107-37; Michael Kanter, "The Government Action Doctrine and the Public/Private Distinction: Searching for Private Action" *Queen's Law Journal* 15 (1990), 33-63.

imperium, whatever the merits of such a claim; the point is to draw attention to conflicting constitutionalist ideas undergirding a certain area of Charter interpretation. And to the extent that the *clash* of constitutionalist ideas persists, judges will not be sliding uncontrollably down any slippery slopes. They have many devices at hand to resist interpretations they do not wish to make. That said, the empirical evidence does suggest some trends which cannot be ignored. If and when the clash of constitutionalisms is resolved decisively in favour of one of the contestants, one may expect a clearer path down some slippery slope.

Bibliography

Books

Arblaster, Anthony. *The Rise and Decline of Western Liberalism.* Oxford: Blackwell, 1984.

Axworthy, Thomas S., and Trudeau, Pierre Elliott, eds. *Towards A Just Society: The Trudeau Years.* Toronto: Viking, 1990.

Bakan, Joel. *Just Words: Constitutional Rights and Social Wrongs.* Toronto: University of Toronto Press, 1997.

Banting, Keith and Simeon, Richard, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act.* Toronto: Methuen, 1983.

Beatty, David. *Constitutional Law in Theory and Practice.* Toronto: University of Toronto Press, 1995.

_____. *Talking Heads and the Supremes: The Canadian Production of the Constitutional Review.* Toronto: Carswell, 1990.

Beaudoin, Gérald-A., ed. *The Charter: Ten Years Later.* Cowansville: Les Éditions Yvon Blais, 1992.

Berman, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition.* Cambridge, Mass.: Harvard University Press, 1983.

Berlin, Isaiah. *Four Essays on Liberty.* Oxford: Oxford University Press, 1969.

Berns, Walter. *Taking the Constitution Seriously.* Lanham: Madison Books, 1987.

Bickel, Alexander M. *The Morality of Consent.* New Haven: Yale University Press, 1975.

Bogart, W.A. *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada.* Toronto: Oxford University Press, 1994.

Brinkley, Alan. *Liberalism and its Discontents.* Cambridge, Mass.: Harvard University Press, 1998.

Brodie, Janine, Gavigan, Shelley A.M., and Jenson, Jane. *The Politics of Abortion.* Toronto: Oxford University Press, 1992.

Brodsky, Gwen, and Day, Shelagh. *Canadian Charter equality Rights for Women: One Step Forward or Two Steps Back?* Ottawa: Canadian Advisory Council on the Status of Women, 1989.

Brooks, Stephen. *Canadian Democracy: An Introduction.* 2nd ed. Toronto: Oxford University Press, 1996.

Bryden, Philip, Davis, Steven, and Russell, John, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life.* Toronto: University of Toronto Press, 1994.

Buchanan, Patrick J. *The Great Betrayal.* Boston: Little, Brown & Co., 1998.

Cairns, Alan C. *Charter versus Federalism: The Dilemmas of Constitutional Reform.* Montreal and Kingston: McGill-Queen's University Press, 1992.

Cairns, Alan, C. *Disruptions: Constitutional Struggles, From the Charter to Meech Lake.* Edited by Williams, Douglas E. Toronto: McClelland & Stewart, 1991.

Cook, Curtis, ed. *Constitutional Predicament: Canada After the Referendum of 1992.* Montreal and Kingston: McGill-Queen's University Press, 1994.

Couture, Claude. *Paddling with the Current: Pierre Elliott Trudeau, Étienne Parent, Liberalism, and Nationalism in Canada.* Edmonton: University of Alberta Press, 1998.

Dicey, A.V. *Introduction to the Study of the Law of the Constitution.* 10th ed., London: Macmillan Education, 1959.

Downs, Anthony. *An Economic Theory of Democracy.* New York: Harper, 1957.

Epp, Charles R. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective.* Chicago: University of Chicago Press, 1998.

Foley, Michael. *The Silence of Constitutions: Gaps, abeyances, and political temperament in the maintenance of government.* London: Routledge, 1989.

Gentles, Ian, ed. *A Time to Choose Life: Women, Abortion, and Human Rights.* Toronto: Stoddart, 1990.

Girvetz, Harry K. *The Evolution of Liberalism.* London: Collier, 1950.

Gray, John. *False Dawn: The Delusions of Global Capitalism.* London: Granta, 1998.

_____. *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age.* London: Routledge, 1995.

_____. *Post-liberalism: Studies in Political Thought.* London: Routledge, 1993.

Greene, Ian. *The Charter of Rights.* Toronto: Lorimer, 1989.

Greene, Ian, Baar, Carl, McCormick, Peter, Szablowski, George, and Thomas, Martin, *Final Appeal: Decision-Making in Canadian Courts of Appeal.* Toronto: Lorimer, 1998.

Griffin, Stephen M. *American Constitutionalism: From Theory to Politics.* Princeton: Princeton University Press, 1996.

Hayek, Friedrich A. *The Constitution of Liberty.* Chicago: University of Chicago Press, 1960.

Hiebert, Janet L. *Limiting Rights: The Dilemma of Judicial Review.* Montreal and Kingston: McGill-Queen's University Press, 1996.

Hobhouse, L.T. *Liberalism.* [1911] New York: Oxford University Press, 1964.

Hogg, Peter. *Constitutional Law of Canada.* 4th ed. Toronto: Carswell, 1997.

_____. *Constitutional Law of Canada.* 2nd ed. Toronto: Carswell, 1992.

Holmes, Stephen. *The Anatomy of Antiliberalism.* Cambridge, Mass.: Harvard University Press, 1993.

Hutchinson, Allan C. *Waiting for Coraf: A Critique of Law and Rights.* Toronto: University of Toronto Press, 1995.

Inglehart, Ronald. *Culture Shift in Advanced Industrial Society.* Princeton: Princeton University Press, 1990.

_____. *The Silent Revolution.* Princeton: Princeton University Press, 1977.

Kairys, David, ed. *The Politics of Law; A Progressive Critique.* 3rd ed. New York: Basic Books, 1998.

Kalman, Laura. *The Strange Career of Legal Liberalism.* New Haven: Yale University Press, 1996.

Knopff, Rainer. *Human Rights and Social Technology: The New War on Discrimination.*

Ottawa: Carleton University Press, 1989.

Knopff, Rainer, and Morton, F.L. *Charter Politics.* Scarborough: Nelson Canada, 1992.

Kreml, William P. *The Constitutional Divide: The Private and Public Sectors in American Law.* Columbia: University of South Carolina Press, 1997.

Laforest, Guy. *Trudeau and the End of a Canadian Dream.* Montreal and Kingston: McGill-Queen's University Press, 1995.

Lane, Jan-Erik. *Constitutions and Political Theory.* Manchester: Manchester University Press, 1996.

Lipset, Seymour Martin. *Continental Divide: The Values and Institutions of the United States and Canada.* New York: Routledge, 1990.

Locke, John. *Letter on Toleration.* [1689] Buffalo: Prometheus, 1990.

_____. *Two Treatises of Government.* [1689] Edited by Peter Laslett. New York: New American Library, 1965.

Lowi, Theodore. *The End of the Republican Era.* Norman: University of Oklahoma Press, 1995.

Lowi, Theodore. *The End of Liberalism: The Second Republic of the United States.* 2nd ed. New York: W.W. Norton, 1979.

Mallory, J. R. *Social Credit and the Federal Power in Canada.* Toronto: University of Toronto Press, 1954.

Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada.* 2nd ed. Toronto: Thompson Educational Publishing, 1994.

Manfredi, Christopher P. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism.* Toronto: McClelland and Stewart, 1993.

Manning, Morris. *Rights, Freedoms, and the Courts: A Practical Analysis of the Constitution Act, 1982.* Toronto: Emond-Montgomery, 1983.

McCormick, Peter. *Canada's Courts.* Toronto: Lorimer, 1994.

McCormick, Peter, and Greene, Ian. *Judges and Judging: Inside the Canadian Judicial System.* Toronto: Lorimer: 1990.

McIlwain, Charles. *Constitutionalism Ancient and Modern.* Ithaca: Cornell University

Press, 1947.

_____. *Constitutionalism and the Changing World.* Cambridge: Cambridge University Press, 1939.

McKercher, William R., ed. *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms.* Toronto: Ontario Economic Council, 1983.

McRoberts, Kenneth. *Misconceiving Canada: The Struggle for National Unity.* Toronto: Oxford University Press, 1997.

Mill, John Stuart. *On Liberty.* [1859] London: Penguin, 1974.

Monahan, Patrick. *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada.* Toronto: Carswell, 1987.

Moore, Christopher. *1867: How the Fathers Made a Deal.* Toronto: McClelland & Stewart, 1997.

Nevitte, Neil. *The Decline of Deference: Canadian Value Change in Cross-National Perspective.* Peterborough: Broadview, 1996.

Nevitte, Neil, and Allan Kornberg, Alan, eds. *Minorities and the Canadian State.* Oakville: Mosaic Press, 1985.

Paciocco, David M. *Getting Away with Murder: The Canadian Criminal Justice System.* Toronto: Irwin Law, 1999.

Peacock, Anthony, ed. *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory.* Toronto: Oxford University Press, 1996.

Resnick, Philip. *The Masks of Proteus: Canadian Reflections on the State.* Montreal and Kingston: McGill-Queen's University Press,1990.

Romanow, Roy, John Whyte, and Howard Leeson. *Canada...Notwithstanding: The Making of the Constitution, 1976-1982.* Toronto: Carswell/Methuen, 1984.

Rossiter, Clinton ed., *The Federalist Papers* [1787-88] New York: New American Library, 1961.

Rozack, Sherene. *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality.* Toronto: Second Story Press, 1991.

Russell, Peter H. *Constitutional Odyssey: Can Canadians Become A Sovereign People?*

Toronto: University of Toronto Press, 1992.

Russell, Peter H., Knopff, Rainer, and Morton, F.L., eds. *Federalism and the Charter: Leading Constitutional Decisions.* Ottawa: Carleton University Press, 1989.

Savoie, Donald. *Governing from the Centre: The Concentration of Political Power in Canadian Politics.* Toronto: University of Toronto Press, 1999.

Schneiderman, David and Sutherland, Kate, eds. *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics.* Toronto: University of Toronto Press, 1997.

Scott, Frank R. *Essays on the Constitution: Aspects of Canadian Law and Politics.* Toronto: University of Toronto Press, 1977.

Shklar, Judith N. *Legalism.* Cambridge, Mass.: Harvard University Press, 1964.

Smith, David E. *The Invisible Crown: The First Principle of Canadian Government.* Toronto: University of Toronto Press, 1995.

Smith, David E., Mackinnon, Peter, and Courtney, John C., eds., *After Meech Lake: Lessons for the Future.* Saskatoon: Fifth House, 1991.

Smith, Lynn, Coté-Harper, Giséle, Elliott, Robin, and Seydegart, Magda, eds. *Righting the Balance: Canada's New Equality Rights.* Saskatoon: The Canadian Human Rights Reporter, 1986.

Snell, James G. and Vaughn, Frederick. *The Supreme Court of Canada: History of the Institution.* Toronto: The Osgoode Society, 1985.

Sniderman, Paul M., Fletcher, Joseph F., Russell, Peter H., Tetlock, Philip E. *The Clash of Rights: Liberty. Equality, and Legitimacy in Pluralist Democracy.* New Haven: Yale University Press, 1996.

Sossin, Lorne M. *Boundaries of Judicial Review: The Law of Justiciability in Canada.* Toronto; Carswell, 1999.

Stewart, Gordon T. *The Origins of Canadian Politics.* Vancouver: University of British Columbia Press, 1986.

Sunstein, Cass. *The Partial Constitution.* Cambridge, Mass.: Harvard University Press, 1993.

Tarnopolsky, Walter. *Discrimination and the Law.* Toronto: De Boo, 1982.

Taylor, Charles. *Multiculturalism and the 'Politics of Recognition.'* Edited by Amy

Gutmann Princeton: Princeton University Press, 1992.

Thomas, David M. *Whistling Past the Graveyard: Constitutional Abeyances, Quebec, and the Future of Canada.* Toronto: Oxford University Press, 1997.

Trakman, Leon E. *Reasoning with the Charter.* Toronto: Butterworths, 1991.

Trudeau, Pierre. *Federalism and the French Canadians.* Toronto: Macmillan, 1968.

Unger, Roberto Mangabeira. *The Critical Legal Studies Movement.* Cambridge, Mass.: Harvard University Press, 1986.

_____. *Law and Modern Society: Towards a Criticism of Social Theory.* New York: Free Press, 1976.

Vincent, Andrew. *Theories of the State.* Oxford: Blackwell, 1987.

Walzer, Michael. *Spheres of Justice: a Defense of Pluralism and Equality.* New York: Basic Books, 1983.

Watson, William. *Globalization and the Meaning of Canadian Life.* Toronto: University of Toronto Press, 1998.

Watts, Ronald L., and Brown, Douglas M., eds. *Options for a New Canada.* Toronto: University of Toronto Press, 1991.

Women's Legal Education and Action Fund. *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada.* Toronto: Emond Montgomery, 1996.

Wormuth, Francis. *The Origins of Modern Constitutionalism.* New York: Harper Bros., 1949.

Articles

Ajzenstat, Janet. A. "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms." *Canadian Journal of Political Science* 30 (1997): 645-62.

Anderson, Gavin W. "Filling the 'Charter Gap'?: Human Rights Codes in the Private Sector." *Osgoode Hall Law Journal* 33 (1995): 749-783.

Barak, Justice Aharon. "Constitutional Human Rights and Private Law." *Review of*

Constitutional Studies 3 (1996): 218-81.

Bauman, Richard W. "Business, Economic Rights and the Charter." In *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics*, edited by David Schneiderman and Kate Sutherland. Toronto: University of Toronto Press, 1997. 58-108.

Belevsky, Diana. "Liberty as Property." *University of Toronto Law Journal* 45(1995): 209-46.

Belobaba, Edward P. "The Charter of Rights and Private Litigation: The Dilemma of *Dolphin Delivery.*" in *Charter Issues in Civil Cases,* edited by Neil R. Finkelstein and Brian Macleod Rogers. Toronto: Carswell, 1988. 29-46.

Berlin, Isaiah. "Two Concepts of Liberty." In *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118-72.

Brodie, Ian. "The Market for Political Status." *Comparative Politics* 28 (1996): 253-271.

Bzdera, Andre. "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review." *Canadian Journal of Political Science* 26 (1993): 3-30.

Cairns, Alan C. "The Past and Future of the Canadian Administrative State." In *Reconfigurations: Canadian Citizenship and Constitutional Change: Selected Essays by Alan C. Cairns*. Edited by Williams, Douglas E. Toronto: McClelland and Stewart, 1995. 62-96.

_____. "Reflections on the Political Purposes of the Charter." in *The Charter: Ten Years Later*. Edited by Beaudoin, Gérald-A . Cowansville: Lés Editions Yvon Blais Inc., 1992. 161-92.

_____. "The Governments and Societies of Canadian Federalism." In *Constitution, Government and Society in Canada: Selected Essays by Alan C. Cairns*. Edited by Williams, Douglas E. Toronto: McClelland and Stewart, 1988. 141-70.

_____. "The Embedded State: State-Society Relations in Canada." in *State and Society: Canada in Comparative Perspective*. Vol. 31 of research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada, edited by Banting, Keith. Toronto: University of Toronto Press, 1986. 53-86.

_____."The Judicial Committee and its Critics" *Canadian Journal of Political Science* 4 (1971): 301-45.

Cairns, Alan C. and Williams, Cynthia. "Constitutionalism, Citizenship, and Society in Canada: An Overview." In *Constitutionalism, Citizenship, and Society in Canada.* Edited by Cairns, Alan and Williams, Cynthia. Vol. 33 of research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada. Toronto: University of Toronto Press, 1985. 1-50.

Carlson, David Gray. "Liberal Philosophy's Troubled Relation to the Rule of Law" *University of Toronto Law Journal* 43 (1997): 257-88.

Castiglione, Dario. "The Political Theory of the Constitution." *Political Studies* 44 (1990): 417-35.

Chipeur, G.D., and Bailey, T.M. "Honey, Proselytized the Kids: Religion as a Factor in Child Custody and Access Disputes." *National Journal of Constitutional Law* 4 (1994): 101-22.

Cohen, Jean L. "Rethinking Privacy: Autonomy, Identity, and the Abortion Controversy." in *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, edited by Weintraub, Jeff and Kumar, Krishan. Chicago: University of Chicago Press, 1997. 133-65.

Committee for Political Realism. "An Appeal for Realism in Politics." In *Canadian Political Thought.* Edited by H.D. Forbes. Toronto: Oxford university Press, 1987. 338-348.

de Montigny, Yves. "Section 32 and Equality Rights." in *Equality Rights and the Canadian Charter of Rights and Freedoms.* Edited by Bayefsky, Anne and Eberts, Mary. Toronto: Carswell, 1985. 565-98.

Dearlove, John. "Bringing the Constitution Back In: Political Science and the State." *Political Studies* 37 (1989): 521-39

Devlin, Richard. "The *Charter* and Anglophone Legal Theory." *Review of Constitutional Studies* 4 (1997): 19-79.

_____. "Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson. *Queen's Law Journal* 22 (1997): 81-134.

_____. "Mapping Legal Theory. *Alberta Law Review* 32 (1994): 602-21.

Dickson, Brian. "The *Canadian Charter of Rights and Freedoms*: Dawn of a New Era?" *Review of Constitutional Studies* 2 (1994): 1-19.

Doody, Michael R. "Freedom of the Press, the Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege." *Canadian Bar Review* 61 (1983):

124-50.

Eberts, Mary. "Sex and Equality Rights" in *Equality Rights and the Canadian Charter of Rights and Freedoms*. Edited by Bayefsky, Anne, and Eberts, Mary. Toronto: Carswell, 1985. 183-230.

_____. "The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions." in *The Courts and the Charter*. Volume 58 of research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada. Edited by Beckton, Claire and MacKay, A. Wayne. Toronto: University of Toronto Press, 1985. 133-222.

Elkins, David. "Facing Our Destiny: Rights and Canadian Distinctiveness." *Canadian Journal of Political Science* 22 (1989): 699-716.

Elliott, Robin. "Scope of the Charter's Application." *Advocate's Quarterly* 15 (1993): 206-37.

Etherington, Brian. "Notes of Cases: *RWDSU v. Dolphin Delivery*." *Canadian Bar Review* 66 (1987): 818-38.

Fader, Richard. "Reemergence of the Charter Application Debate: Issues for the Supreme Court in *Eldridge* and *Vriend*." *Dalhousie Journal of Legal Studies* (1997): 187-235.

Finer, S.E. "Notes toward a History of Constitutions." in *Constitutions in Democratic Politics*. Edited by Vernon Bogdanor. Aldershot: Gower, 1988. 17-31.

Fisher, William W. III. "The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights." In *The Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law, 1971 and 1991*. Edited by Lacey, Michael J., and Haakonssen, Knud. New York: Woodrow Wilson International Center for Scholar and Cambridge University Press, 1991. 266-365.

Flanagan, Thomas. "The Manufacture of Minorities." In *Minorities and the Canadian State*. Edited by Nevitte, Neil and Kornberg, Alan. Oakville: Mosaic Press, 1985. 107-24.

Forbes, H. D. "Trudeau's Moral Vision" in *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory*. Edited by Peacock, Anthony. Toronto: Oxford University Press, 1996. 17-39.

Friedrich, Carl. "Constitutions and Constitutionalism." In *International Encyclopedia of the Social Sciences* Vol. 3 New York: Macmillan and Free Press, 1968. 318-26.

Fudge, Judy. "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles." *Osgoode Hall Law Journal* 25 (1987): 485-554.

Gibson, Dale. "Distinguishing the Governors From the Governed: The Meaning of 'Government' Under Section 32(1) of the Charter." *Manitoba Law Journal* 13 (1983): 505-22.

_____. "The Charter of Rights and the Private Sector" *Manitoba Law Journal* 12 (1982-83): 213-219.

Glenn, H. Patrick. "The Common Law in Canada." *Canadian Bar Review* 74 (1995): 261-92.

Greene, Ian. "The Myths of Legislative and Constitutional Supremacy." in *Federalism and Political Community: Essays in Honour of Donald Smiley*. Edited by Shugarman, David P., and Whitaker, Reg. Peterborough: Broadview, 1989. 267-90.

Halka, Elizabeth. "Madam Justice Bertha Wilson: A 'Different Voice' on the Supreme Court of Canada." *Alberta Law Review* 35 (1996): 242-65.

Hawkins, Robert E. and Martin, Robert. "Democracy, Judging and Bertha Wilson." *McGill Law Journal* 419 (1995): 1-58.

Heard, Andrew. "Quebec Courts and the Canadian Charter of Rights." *International Journal of Canadian Studies* 5-6 (1993): 153-66.

_____. "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal" *Canadian Journal of Political Science* 24 (1991): 289-307.

Herman, Didi. "The Good, the Bad , and the Smugly: Sexual Orientation and Perspectives on the Charter." In *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics*. Edited by Schneiderman, David and Sutherland, Kate. Toronto: University of Toronto Press, 1997. 200-17.

Hodder-Williams, Richard. "The Constitution (1787) and Modern American Government." in Bogdanor, Vernon, ed. *Constitutions in Democratic Politics*. Aldershot: Gowan, 1988. 73-104.

Hogg, Peter. "Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in *The Canadian Charter or Rights and Freedoms: Commentary*. Edited by Tarnopolsky Walter S. and Beaudoin, Gérald, eds. Toronto: Carswell, 1982. 2-24.

Hogg, Peter and Allison A. Bushell. "The Charter Dialogue Between Courts and Legislatures." *Osgoode Hall Law Journal* 35 (1997): 75-124.

Holmes, Oliver Wendell. "The Path of the Law" in Holmes, Oliver Wendell, *Collected Legal Papers*. New York: Peter Smith, 1952. 167-202.

Horowitz, Gad. "Conservatism, Liberalism, and Socialism in Canada; An Interpretation." in *Party Politics in Canada*. 7th edition, edited by Thorburn, Hugh G. Scarborough: Prentice-Hall, 1996.

Howard, J. Paul R. "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination." *Advocate's Quarterly* 17 (1995): 338-91.

Howe, R. Brian. "The Evolution of Human Rights Policy in Ontario." *Canadian Journal of Political Science* 24 (1991): 783-802.

Howse, Robert. "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law." *University of Toronto Faculty of Law Review* 46 (1988): 248-58.

Hunter, Ian. "When Human Rights Become Wrongs." *UWO Law Review* 23 (1985): 197-204.

_____. "The Origin, Development, and Interpretation of Human Rights Legislation." in *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms*. Edited by Macdonald, R. St. J. and Humphrey, John P. Toronto: Butterworths, 1979. 77-110.

_____. "Liberty and Equality." *McGill Law Journal* 29 (1983): 1-23.

Hutchinson, Allan C. and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter." *University of Toronto Law Journal* 38 (1988): 278-92.

Ionescu, Ghita. "The Theory of Liberal Constitutionalism." In *Constitutions in Democratic Politics*. Edited by Bogdanor, Vernon. Aldershot: Gowan, 1988. 34-49.

Jackman, Martha. "'Giving Real Effect to Equality': *Eldridge v. B.C. (A.G.)* and *Vriend v. Alberta*." *Review of Constitutional Studies* 4 (1998): 352-71

Jai, Julie. "Policy, Politics and Law: Changing Relationships in Light of the Charter." *National Journal of Constitutional Law* 9 (1998): 1-25.

Kay, Richard S. "American Constitutionalism." In *Constitutionalism: Philosophical Foundations*. Edited by Alexander, Larry. Cambridge: Cambridge University

Press, 1998, 16-63.

Keene, Judith. "Claiming the Protection of the Court: Charter Litigation Arising From Government Restraint." *National Journal of Constitutional Law* 9 (1998): 97-116.

Khullar, Ritu. "*Vriend*: Remedial Issues for Unremedied Discrimination." *National Journal of Constitutional Law* 7 (1997): 238-241.

Knopff, Rainer, and Morton, F.L. "Canada's Court Party." In *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory*. Edited by Peacock, Anthony. Toronto: Oxford University Press, 1996. 63-87.

_____. "Nation-Building and the Canadian Charter of Rights and Freedoms." In *Constitutionalism, Citizenship, and Society in Canada*. Edited by Cairns, Alan C. and Williams, Cynthia. Vol. 33 of research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada. Toronto: University of Toronto Press, 1985. 133-82.

_____. "Judicial Statesmanship and the Canadian Charter of Rights and Freedoms" In *The U.S. Bill of Rights and the Canadian Charter*. Edited by McKercher, William R. Toronto: Ontario Economic Council, 1983. 184-200.

L'Heureux-Dubé, Claire. "Making a Difference: The Pursuit of a Compassionate Justice." *UBC Law Review* 31 (1997): 1-15.

LaForest, Gerard. "The Canadian Charter of Rights and Freedoms: An Overview." *Canadian Bar Review* 61 (1983): 19-29.

Lessard, Hester. "The Idea of the Private: A Discussion of State Action Doctrine and Separate Sphere Ideology." *Dalhousie Law Journal* 10 (1986): 107-37.

MacDonald, R.A. "Postscript and Prelude: The Jurisprudence of the Charter: Eight Theses." *Supreme Court Law Review* 4 (1982): 321-50.

Macklem, Patrick. "Constitutional Ideologies." *Ottawa Law Review* 20 (1988): 117-156.

MacMillan, C. Michael ."Social Versus Political Rights." *Canadian Journal of Political Science* 19 (1986): 283-304.

Malleson, Kate. "A British Bill of Rights: Incorporating the European Convention on Human Rights." *Choices: Courts and Legislatures* 5 (1999): 21-42.

Mallory, J.R. "The Continuing Evolution of Canadian Constitutionalism." In *Constitutionalism, Citizenship, and Society in Canada*. Edited by Cairns, Alan and Williams, Cynthia. Vol. 33 of research studies prepared for the Royal Commission

on the Economic Union and Development Prospects for Canada. Toronto: University of Toronto Press, 1985. 51-98.

Manfredi, Christopher P. "On the Virtues of a Limited Constitution: Why Canadians Were Right to Reject the Charlottetown Accord." In *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory*. Edited by Peacock, Anthony. Toronto: Oxford University Press, 1996. 40-60.

_____. "'Appropriate and Just in the Circumstances': Public Policy and the Enforcement of Rights under the Canadian Charter of Rights and Freedoms." *Canadian Journal of Political Science* 27 (1994): 435-464.

_____. "The Use of United States Decisions by the Supreme Court of Canada Under the Charter of Rights and Freedoms." *Canadian Journal of Political Science* 23 (1990): 499-518.

_____. "Adjudication, Policy-Making and the Supreme Court of Canada: Lessons From the Experience of the United States." *Canadian Journal of Political Science* 22 (1989): 313-35.

Martin, Robert. "The Charter and the Crisis in Canada." in *After Meech Lake: Lessons for the Future*. Edited by Smith, David E., Mackinnon, Peter, and Courtney, John C., eds. Saskatoon: Fifth House, 1991, 121-38.

McClellan, A. Anne and Bruce Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32." *Alberta Law Review* 24 (1986): 361-75.

McConnell, W.H. "Canadian Constitutionalism: A Comparative Perspective." *Contemporary Law* (1992): 484-511.

McCormick, Peter. "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949-1992." *Canadian Journal of Political Science* 26 (1993): 523-540.

McGregor, Glen. "Aid Bureaucrats Claim Racial Discrimination, Win Jobs Back." *National Post*. January 2, 1999: A1, 4.

McKercher, William R. "The United States Bill of Rights: Implications for Canada." In *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms*, edited by McKercher, William R. Toronto: Ontario Economic Council, 1983. 7-26.

Morton, F.L. "Canada's Judge Bork: Has the Counter-Revolution Begun?" *Constitutional Forum* 7 (1996): 121-25.

_____."The Charter Revolution and the Court Party." *Osgoode Hall Law Journal* 30 (1992): 627-41.

_____."The Political Impact of the Canadian Charter of Rights and Freedoms." *Canadian Journal of Political Science* 20 (1987): 31-55.

Morton, F.L., Russell, Peter J. and Withey, Michael. "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis." *Osgoode Hall Law Journal* 30 (1992): 1-30.

Nevitte, Neil and Brodie, Ian. "Evaluating the Citizens' Constitution Theory." *Canadian Journal of Political Science* 26 (1993): 235-60.

Oliver, Michael. "Foreword." *McGill Law Journal* 42 (1997): 3-8.

Otis, Ghislain. "The Public/Private Distinction in Canadian Constitutional Law." *Public Law* (1989): 516-20.

Pateman, Carole. "Feminist Critiques of the Public/Private Dichotomy." In *Public and Private in Social Life*, edited by Benn, Stanley I and Gaus, Gerald. New York: St. Martin's Press, 1983. 281-303.

Petter, Andrew, and Hutchinson, Allan C. "Rights in Conflict: The Dilemma of Charter Legitimacy." *UBC Law Review* 23 (1989): 531-48.

Porter, Bruce. "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*." *Constitutional Forum* 9 (1998): 71-81.

Pothier, Diane. "The Sounds of Silence: Charter Application when the Legislature Declines to Speak." *Constitutional Forum* 7 (1996): 113-20.

Raz, Joseph. "On the Authority and Interpretation of Constitutions: Some Preliminaries." In *Constitutionalism: Philosophical Foundations*. Edited by Alexander, Larry. Cambridge: Cambridge University Press, 1998. 152-193.

Roach, Kent. "The Role of Litigation and the Charter in Interest Advocacy." In *Equity and Community: The Charter, Interest Advocacy and Representation*. Edited by Seidle, F. Leslie Montreal: Institute for Research on Public Policy, 1993. 159-88.

Rockefeller, Steven C. "Comment." In Taylor, Charles. *Multiculturalism and the Politics of Recognition*. Edited by Gutmann, Amy. Princeton: Princeton University Press, 1992. 87-98.

Rose, Richard. "Living in an Antimodern Society: How Russians Cope." *East European Constitutional Review* 8 (Winter/Spring 1999): 68-75.

Russell, Peter "The Political Purposes of the Charter: Have They Been Fulfilled? An Agnostic's Report Card." In *Protecting Rights and Freedoms: Essays on the*

Charter's Place in Canada's Political, Legal, and Intellectual Life. Edited by Bryden, Philip, Davis, Steven, and Russell, John. Toronto: University of Toronto Press, 1994. 33-44.

_____. "Overcoming Legal Formalism: The Treatment of the Constitution, the Courts, and Judicial Behaviour in Canadian Political Science." *Canadian Journal of Law and Society* 1 (1986): 5-34.

_____ ."The Effect of a Charter of Rights on the Policy-Making Role of the Canadian Courts." *Canadian Public Administration* 25 (1982):1-33.

_____ ."The Political Purposes of the Canadian Charter of Rights and Freedoms." *Canadian Bar Review* 61 (1983): 30-54.

Ryan, Joan. "Gut a land, Gut a People." *Albertaviews* 2 (1999): 37-41.

Schabas, William A. "Canada and the Adoption of the *Universal Declaration of Human Rights*." *McGill Law Journal* 43 (1998): 403-41.

Scheuerman, William E. "The Rule of Law at Century's End." *Political Theory* 25 (1997): 740-760.

Schneiderman, David. "Human Rights, Fundamental Differences? Multiple Charters in a Partnership Frame." In *Beyond the Impasse: Toward Reconciliation*, edited by Gibbins, Roger and Laforest, Guy. Montreal Institute for Research on Public Policy, 1998. 147-186.

Schochet, Gordon J. "Introduction: Constitutionalism, Liberalism, and the Study of Politics." In *Constitutionalism*. Edited by Pennock, Roland and Chapman, John W. New York: New York University Press, 1979. 1-15.

Shklar, Judith. "Political Theory and the Rule of Law." In *The Rule of Law: Ideal or Ideology?* Edited by Hutchinson, Allan C. and Monahan, Patrick. Toronto: Carswell, 1987. 1-16.

Sigurdson, Richard. "Left- and Right-wing Charterphobia in Canada: A Critique of the Critics." *International Journal of Canadian Studies* 5-6 (1993): 95-115.

Slagstad, Rune. "Liberal Constitutionalism and its Critics: Carl Schmitt and Max Weber." In *Constitutionalism and Democracy*. Edited by Elster, Jon and Slagstad, Rune. Cambridge: Cambridge University Press, 1988. 103-29.

Slattery, Brian. "Charter of Rights and Freedoms -- Does it Bind Private Persons?" *Canadian Bar Review* 63 (1985): 148-61.

Smith, Lynn. "Have the Equality Rights Made Any Difference?" In *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and*

Intellectual Life. Edited by Bryden, Philip, Davis, Steven, and Russell, John. Toronto: University of Toronto Press, 1994. 60-89.

Sutherland, Kate. "The new Equality Paradigm: The Impact of Charter equality Principles on Private Law Decisions." In *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics*. Edited by Schneiderman, David and Sutherland, Kate. Toronto: University of Toronto Press, 1997. 245-70.

Swinton, Katherine. "Application of the Canadian Charter of Rights and Freedoms (ss. 30, 31, 32)." In *The Canadian Charter of Rights and Freedoms: Commentary*. Edited by Tarnopolsky, Walter and Beaudoin, Gérald-A..Toronto: Carswell, 1982. 41-60.

Sypnowich, Christine. "Rights, Community, and the Charter." *British Journal of Canadian Studies* 6 (1991): 39-59.

Trudeau, Pierre."The Values of a Just Society" In *Towards a Just Society: The Trudeau Years*. Edited by Axworthy, Thomas S. and Trudeau, Pierre Elliott. Toronto: Viking, 1990. 357-85.

_____. "A Constitutional Declaration of Rights." in Trudeau, Pierre Elliott. *Federalism and the French Canadians*. Toronto: Macmillan, 1968. 52-60.

Tushnet, Mark. "The Dilemmas of Liberal Constitutionalism." *Ohio State Law Journal* 42 (1981): 411-26.

Urquhart, Ian. "Infertile Soil? Sowing the Charter in Alberta." In *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics*. Edited by Schneiderman, David and Sutherland, Kate.. Toronto: University of Toronto Press, 1997. 34-57.

Vernon, Richard. "Liberals, Democrats, and the Agenda of Politics." *Political Studies* 46 (1998): 295-308.

Vincent, Andrew. "Classical Liberalism and its Crisis of Identity." *History of Political Thought* 11 (1990): 143-61.

Wade, Terence. "Parliament and the Charter." In *The Charter: Ten Years Later*. Edited by Beaudoin, Gérald-A. Cowansville: Lés Editions Yvon Blais Inc., 1992. 127-34.

Wahlbeck, Paul J. "The Life of the Law: Judicial Politics and Legal Change." *The Journal of Politics* 59 (1997): 778-802.

Weinrib, Lorraine Eisenstat. "The Supreme Court of Canada and Section One of the *Charter*." *Supreme Court Law Review* 10 (1988): 469-513.

Wheeler, Harvey. "Constitutionalism" In *Handbook of Political Science* , Vol 5: *Governmental institutions and Processes*. Edited by Greenstein, F.I. and Polsby,

N.W. Reading: Addison-Wesley, 1975. 1-91.

Whitaker, Reg. "The Changing Canadian State." In *Canada: The State of the Federation, 1998/99: How Canadians Connect.* Edited by Lazar, Harvey and McIntosh, Tom. Montreal and Kingston: McGill-Queen's University Press, 1999. 37-61.

_____. "Democracy and the Canadian Constitution." In *And No One Cheered: Federalism, Democracy, and the Constitution Act.* Edited by Banting, Keith and Simeon, Richard. Toronto: Methuen, 1983. 240-260.,

Whyte, John D. "Is the Private Sector Affected by the Charter?" In Smith, Lynn, Coté-Harper, Giséle, Elliott, Robin, and Seydegart, Magda, eds. *Righting the Balance: Canada's New Equality Rights.* Saskatoon: The Canadian Human Rights Reporter, 1986. 145-86.

Williams, Cynthia. The Changing Nature of Citizen Rights." In *Constitutionalism, Citizenship and Society in Canada.* Edited by Cairns, Alan C. and Williams, Cynthia. Research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 33. Toronto: University of Toronto Press, (1985). 99-132.

Wilson, Bertha. "Will Women Judges Really Make a Difference?" *Osgoode Hall Law Journal* 28 (1990): 507-22.

Yalden, Robert. Liberalism and Canadian Constitutional Law: Tensions in an Evolving Vision of Liberty. *University of Toronto Faculty of Law Review* 47 (1994): 132-55.

Cases

Adler v. Ontario [1996] 3 S.C.R. 609.

Algoma Steel Corp v. USWA, Local 2251 [1984], 17 L.A.C. (3d) 172 (Ont. arb. bd.).

Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143.

Argentina v. Mellino [1987] 1 S.C.R. 536.

B.C. Government Employees Union v. B.C. (A.G.) [1988], 53 D.L.R. (4th) 1 (S.C.C.), 22.

B.C. Motor Vehicle Reference [1985] 2 S.C.R. 486.

Bhinder v. Canadian National Railway Co. [1985] 2 S.C.R. 561.

Bhindi v. British Columbia Projectionists, Local 348, Int'l Alliance of Picture Machine Operators of U.S. and Canada [1986], 24 C.R.R. 302 (B.C.C.A.).

Big M Drug Mart v. The Queen [1985] 1 S.C.R. 295.

Bliss v. Attorney General of Canada [1979] 1 S.C.R. 183.

Brooks v. Canada Safeway Ltd [1989] 1 S.C.R. 1219.

Brossard (Town) v. Quebec (Commission des Droits de la Personne) [1988] 2 S.C.R. 279.

Canada (Attorney General) v. Mossop [1993] 1 S.C.R. 554.

Canada v. Schmidt [1987] 1 S.C.R. 500.

Canada (Human Rights Commission) v. Taylor [1990] 3 S.C.R. 892.

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) [1987] 1 S.C.R. 1114.

Canadian Urban Equities Ltd. v. Direct Action for Life [1990], 70 D.L.R. (4th) 691 (Alta. C.Q.B.).

Children's Aid Society of London (City) and Middlesex (County) v. H.(T.) [1992], 41 R.F.L. (3d) 122 (Ont. Div. Ct.).

Committee for the Commonwealth of Canada v. Canada [1991] 1 S.C.R. 139.

Dagenais v. CBC [1994] 3 S.C.R. 835.

Dickason v. University of Alberta [1992] 2 S.C.R. 1103.

Dobson (Litigation Guardian of) v. Dobson <http://www.droit.umontreal.ca/doc/csc-scc/en/rec/html/dobson.en.html>

Douglas/Kwantlen Faculty Assn v. Douglas College [1990] 3 S.C.R. 570.

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

Eldridge v. British Columbia (Attorney General) [1997] 3 S.C.R. 624.

Glace Bay Community Hospital v. Nova Scotia Nurses Union [1992], 7 Admin.L.R. (2d) 314 (N.S.T.D.), 320.

Godbout v. Longeuil (City) [1997] 3 S.C.R. 844.

Greater Niagara Transit Commission and ATW Local 1582 [1987], 43 D.L.R. (4th) 71 (On. Div. Ct.).

Haig v. Canada [1992], 9 O.R. (3d), 495 (O.C.A).

Harrison v. Carswell [1976] 2 S.C.R. 200.

Harrison v. UBC [1990] 3 S.C.R. 451.

Hill v. Church of Scientology of Toronto[1995], 126 D.L.R. (4th), 129 (S.C.C.).

Hills v. Canada (Attorney General) [1988] 1 S.C.R. 513, 558.

Hunter v. Southam [1984] 2 S.C.R. 145.

Hunter v. Southam Inc. [1984] 2 S.C.R, 145, 156.

Idziak v. Canada (Minister of Justice) [1992] 3 S.C.R. 63.

Insurance Corporation of B.C. v. Heerspink [1982] 2 S.C.R. 145.

Irwin Toy v. Quebec [1989] 1 S.C.R. 927.

Irwin Toy v. Quebec [1989] 1 S.C.R. 927.

Kindler v. Canada (Minister of Justice) [1991] 2 S.C.R. 779.

Knodel v. British Columbia (Medical Services Commission) [1991] 6 W.W.R. 728.

Lavigne v. Ontario Public Sector Employees Union. [1991] 2 S.C.R. 211.

Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497.

M. v. H. (May 20, 1999) S.C.C.
http://www.droit.umontreal.ca/doc/csc-scc/en/rec/html/m&h.en.html.

McKinney v. University of Guelph [1990] 3 S.C.R. 229.

Miron v. Trudel [1995] 2 S.C.R. 418.

New York Times Co. v. Sullivan [1964] 376 U.S. 254.

Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations) [1995], 127 D.L.R. (4th) 694 (Nfld. T.D.).

Ontario Human Rights Commission and Hudler v. Haskett (Board of Inquiry, October 7, 1997).

Ontario Human Rights Commission and O'Malley v. Simpsons-Sears [1985] 2 S.C.R. 536.

Ontario Human Rights Commission v. Borough of Etobicoke [1982] 1 S.C.R. 202.

Operation Dismantle Inc. et al v. The Queen et al [1985] 1 S.C.R. 441.

P.(D.) v. S.(C.) [1993] 4 S.C.R. 141.

Peg-Win Real Estate Ltd. and the Winnipeg Real Estate Board [1985], 19 D.L.R. (4th) 438 (Man. C.Q.B.).

Philips and Reiger v. Board of Police Commissioners of Moose Jaw et al [1988], 67 Sask. R. 49 (Sask. C.Q.B.).

R. v. Big M Drug Mart [1985] 1 S.C.R 295.

R. v. Butler [1992] 1 S.C.R. 452.

R. v. Carosella [1997] 1 S.C.R. 80.

R. v. Cook [1998] 2 S.C.R. 597.

R. v. Dersch [1993] 3 S.C.R. 768.

R. v. Edwards Books and Art [1986] 2 S.C.R. 713.

R. v. Edwards Books and Art [1986] 2 S.C.R. 713.

R. v. Fitch [1994], 93 C.C.C. (3d) 185 (B.C.C.A.).

R. v. H. [1985], 43 Alta L.R. (2d) 250 (Prov. Ct.).

R. v. Harrer [1995] 3 S.C.R. 562.

R. v. Hodgson [1998] 2 S.C.R. 449.

R. v. J.M.G. [1986], 33 D.L.R. (4th) 277 (O.C.A.)

R. v. Keegstra [1990] 3 S.C.R. 697.

R. v. Larose [1983], 25 M.V.R. 225 (Ont. Dist. Ct.).

R. v. Lerke [1984], 11 D.L.R. (4th) 185 (Alta. C.Q.B.).

R. v. Lerke (1986) 25 D.L.R. (4th) 403 (Alta. C.A.).

R. v. M.(M.R.) [1998] 3 S.C.R. 393.

R. v. Morgentaler [1988] 1 S.C.R. 30.

R. v. O'Connor [1995] 4 S.C.R. 411.

R. v. Oakes [1986] 1 S.C.R. 103.

R. v. S.(S) [1990] 2 S.C.R 254.

R. v. Stinchcombe [1991] 3 S.C.R. 326.

R. v. Swain [1991], 63 C.C.C. (3d) 481 (S.C.C.).

R. v. Terry [1996] 2 S.C.R. 207.

R. v. Zundel [1992] 2 S.C.R. 731.

R.J.R.-MacDonald v. Canada [1995] 3 S.C.R. 199.

R. v. Keegstra [1990] 3 S.C.R. 597.

Rahey v. The Queen, [1987] 1 S.C.R. 588.

Re Algonquin College and OPSEU [1985] L.A.C. (3d) 81 (Ont. arb. bd.).

Re Blainey and Ontario Hockey Association [1986] 54 O.R. (2d) 513.

Re Chyz and Appraisal Institute of Canada [1984] 13 C.R.R. 3 (Sask. C.Q.B.).

Re Drummond Wren [1945] 4 D.L.R. 674.

Re Hammant Car and Engineering Ltd. v. USWA, Local 8179 [1986], 23 L.A.C. (3d) 229 (Ont. arb. bd.).

Re Health Labour Relations Ass. on behalf of Surrey Memorial Hospital and Hospital Employees Union, Local 180 [1985] 18 L.A.C. (3d) 369 (B.C. board).

Re Klein and Law Society of Upper Canada; Re Dvorak and Law Society of Upper Canada [1985] 16 D.L.R. (4th) 489 (Ont. Div. Ct.)

Re Lornex Mining Corp. and USWA, Local 7619 [1983] 14 L.A.C. (3d) 169 (B.C. arb. bd.).

Re McCutcheon and City of Toronto et al [1983] 147 D.L.R. (3d) 193 (O.H.C.J.).

Re Mohawk College and OPSEU [1986] 33 D.L.R. (4th) 277 (O.C.A.).

Re Ontario Council of Regents for Colleges of Applied Arts and Technology (St. Lawrence College) and OPSEU [1986] 24 L.A.C. (3d) 144 (Ont. arb. bd.)

Re Ontario English Teachers Association et al and Essex County Roman Catholic School Board [1987] 36 D.L.R. (4th) 115 (Ont. Div. Ct.)

Re Roy et al and Hackett et al [1987] 45 D.L.R. (4th) 415 (O.C.A.)

Re SFU and Association of University and College Employees, Local 224 [1985] 18 L.A.C. (3d) 361 (B.C. arb. bd.)

Re Treasury Board (Transport Canada) and Kite, Smart, and Conroy [1986] 24 L.A.C. (3d) 214 (P.S.S.R.B.).

Re Wark and Green et al [1984] 15 D.L.R. (4th) 577 (N.B.C.Q.B.)

Reference re Bill 30, An Act to Amend the Education Act (Ont.) [1987] 1 S.C.R. 1148.

Reference Re Manitoba Language Rights [1985] 1 S.C.R. 721.

Reference Re Ng Extradition [1991] 2 S.C.R. 858.

Reference Re Secession of Quebec [1998] 2 S.C.R. 217.

Retail, Wholesale, and Department Store Union v. Dolphin Delivery [1986] 2 S.C.R. 573.

Robichaud v. Canada (Treasury Board) [1987] 2 S.C.R. 84.

Roncarelli v. Duplessis [1959] S.C.R. 121.

Russo v. Ontario Jockey Club [1987] 46 D.L.R. (4th) 359 (Ont. H.C.J.).

RWDSU v. Dolphin Delivery [1986] 2 S.C.R. 573.

Salituro v. The Queen [1991] 68 C.C.C. (3d) 289 (S.C.C.).

Schachter v. Canada [1992] 2 S.C.R. 679.

Seaboyer v. The Queen [1991] 2 S.C.R. 577

Shelley v. Kraemer [1948] 334 U.S. 1.

Schreiber v. Canada (Attorney General) [1998] 1 S.C.R. 841.

Singh v. Minister of Employment and Immigration [1985] 1 S.C.R. 177.

Slaight Communications v. Davidson [1989] 1 S.C.R. 1038.

Sniders et al v. Nova Scotia (A.G.) [1988] 20 C.C.E.L. 20 (N.S.T.D.)

Stoffman v Vancouver General Hospital [1990] 3 S.C.R. 483.

Tétrault-Gadoury v. Canada [1991] 2 S.C.R. 22.

Thibaudeau v. Canada [1995] 2 S.C.R. 627.

Tomen v. FWTAO [1989] 61 D.L.R. (4th) 565 (O.C.A.).

Tremblay v. Daigle [1989] 2 S.C.R. 530.

United States v. Allard [1987] 1 S.C.R. 564.

Vriend v. Alberta [1996], 132 D.L.R. (4th) 595 (A.C.A.).

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

Weber v. Ontario Hydro [1995] 2 S.C.R. 929.

Young v. Young [1993] 4 S.C.R. 3.

Zurich Insurance Co. v. Ontario (Human Rights Commission) [1992] 2 S.C.R. 321.

Miscellaneous

Bateman, Thomas M.J. *The Law and Politics of Human Rights in British Columbia, 1983-1984.* M.A. Thesis, University of Calgary, 1988.

Canada, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence.* Ottawa: Queen's Printer, 1980-81.

Commission on Proceedings Involving Guy Paul Morin. *Report.* (1998) <http://www:attorneygeneral.jus.on.ca/reports.htm>.

Mallory, J.R. "Year 7: A Review of the McGrath Committee Report on the Reform of the House of Commons." Ottawa: Canadian Study of Parliament Group, 1992.

Government of Canada, *The Canadian Constitution, 1980: Proposed Resolution Respecting the Constitution of Canada,* Ottawa: Publications Canada, 1980.