

Reading the Supreme Court:
Jurisprudence as Text and Conversation

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The Charter of Rights and Freedoms, and the decisions of the Supreme Court of Canada, have generated a substantial body of academic commentary which, generally speaking, has attempted to situate Charter jurisprudence within the established research frameworks of peer-reviewed academic communities.¹ This paper is an attempt to develop an alternative reading of the Charter jurisprudence of the Supreme Court of Canada which emphasises both the novelty of full judicial review in Canada after 1982 and the continuing struggle of the Court to deal with some rather unusual features of the Charter of Rights and Freedoms.

This paper, therefore, should be seen as a *tentatif*, a sketch of what can be done if we treat the rather substantial body of case law that has appeared as a discursive framework of authoritative statements (texts) which provide the grammar and vocabulary for an ongoing conversation about the nature and limits of constitutionalised rights. The Canadian Charter of Rights and Freedoms was the product of a long and complex process of negotiation which accommodated many conflicting interests and conceptions of the right and good in a parliamentary democracy. As a result, the statements of rights range from traditional, common law, conceptions of benefits, privileges and immunities² through proclamations of a commitment to particular constitutive principles and goals³ to the traditional negative liberties and procedural guarantees of the "protective" model of democracy.⁴ Each of these clusters has produced a rather distinctive jurisprudence with the Supreme Court of Canada, on appeal, reading the statements of benefits and privileges rather narrowly with respect to the intent of the framers;⁵ and treating the proclamations of principles and goals as "Charter values" which come

1. For a review of the legal literature up to the mid-1990s, see Richard F. Devlin, "The Charter and Anglophone Legal Theory." *Review of Constitutional Studies* IV:1 (1997), 19-78. In political science, see the Bibliography in Patrick James, Donald E. Abelson and Michael Lutzig, ed., *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (Montréal and Kingston: McGill-Queen's University Press, 2002), pp. 239-256.

2. For example, sections 16 and 23 dealing with language rights and sections 25 and 35 dealing with aboriginal and treaty rights.

3. For example, the commitment to regional equalisation in section 36 and affirmation of multicultural heritage in section 27.

4. Sections 2 and 7 through 15. On the "protective model" of liberal democracy, see C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977), Chapter II.

5. See the recent ruling on language of education in Quebec: *Gosselin (Tutor of) v. Quebec (Attorney General)*. Neutral citation: 2005 SCC 15.

into play when the Court does a purposive reading of the Constitution Acts of both 1867 and 1982.⁶

For our purposes, however, the most interesting series of cases is the attempt to reconcile the statements of fundamental freedoms and liberties (sections 2, 3 and 7 through 15) with section 1 of the Charter, which states that "[t]he *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." Our concern will be with a process of adjudication which is very much grounded in some unusual features of the Canadian Constitution and the rather innovative Charter jurisprudence which the Canadian Court has developed. Section 1 tests of constitutional principles are working examples of how the Canadian Court has shown that universally defined procedural guarantees and substantive freedoms can be limited, without being denied, on a case-by-case basis, with reference to particular policy objectives. We will be particularly concerned with three cases that tested the boundaries of freedom of expression [section 2(b) of the Charter] with respect to pornography, language rights and third-party political advertising.⁷

Section 1 and section 33 (the notwithstanding clause) of the *Constitution Act 1982* are generally seen as concessions to the principle of parliamentary sovereignty and were strongly resisted by those who wanted a fundamentally liberal, entrenched, bill of rights that would be beyond the reach of legislatures.⁸ The American Bill of Rights, on the other hand, defines freedoms without a formal mechanism for legislative or judicial abridgement and the US Supreme Court developed the principle of "substantive due process" as a means of establishing boundaries where rights collide, and limiting or extending rights where public policy concerns were paramount.⁹ While the American Court may be informed by

6. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

7. Section 2 of The Constitution Act (1982) reads as follows: Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication; (c) freedom of peaceful assembly; and (d) freedom of association.

8. See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Second edition (Toronto: Thompson Educational Publishing, 1994), Chapter 1; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), Chapter 2; and Patrick Monahan, *Constitutional Law*, Second edition (Toronto: Irwin Law, 2002), Chapter 13.

9. See Roach, *op. cit.*, Chapter 2.

arguments with respect to policy objectives, it is under no constitutional obligation to take them into account.

In spite of the different institutional frameworks, the Canadian literature on the Charter has too often been driven by problem sets and research models that reflect the American, rather than the Canadian, experience with judicial review. As Miriam Smith observed, "[t]he study of law and politics in Canadian political science is dominated by normative claims about the Charter's impact on Canadian democracy at the expense of empirical explorations."¹⁰ Smith documents how a social conservative critique of the content of Supreme Court decisions and the interests of litigators coupled with some controversial assumptions about the legitimate form of a constitutional democracy drawn from American debates has inhibited an investigation of how litigation has functioned as only one of many strategies deployed by social movements manoeuvring for advantage in political space.¹¹

What I would like to suggest as an alternative is that we take a fresh look at the decision-making protocols or "rules of interpretation"¹² in our common law and appeal courts and try to determine how they have changed since the introduction of the Charter of Rights and Freedoms. In particular, I will be arguing for an approach rooted in both the study of classic texts in the tradition of political thought and empirical political science which will challenge reductionist accounts of the connection between the content of decisions and the context of legal judgements. Quite independently of the motives, preferences, biases and public policy considerations that may be latent in the arguments made in judicial decisions, judgements must be crafted within a context of justification governed by the norms of the common law and protocols of interpretation which are developed, case-by-case, over time. This paper, therefore, will focus on the "how" rather than the presumed "why" of judicial decisions.

10. Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science." *Canadian Journal of Political Science* XXXV:1 (2002), p. 5. See also Devlin, *op. cit.*, p. 73.

11. We could add to the inventory of analyses of the activities of the Court which are based on the American literature the studies of voting preferences and coalitions in the Court. See Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer, 2000); and Roy B. Flemming, *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver: UBC Press, 2004).

12. David M. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995).

Theory and Practices

Smith's approach to these issues rests on a neo-institutionalist account of how rational calculation within a matrix of options or "political opportunity structures" must also take into account how "groups are able to use rights claims to produce a symbolic and contentious politics that challenges the previously dominant 'codes' of Canadian society."¹³ Neo-institutionalism, or the new "institutionalism,"¹⁴ comes in a variety of flavours in Canadian political science: some studies are focussed on structural or institutional factors¹⁵ while others are more concerned with shifts in what is considered desirable and permissible in public discourse (the 'codes').¹⁶ What went missing in the literature, however, was a parallel analysis of both the external relations of the Supreme Court of Canada to other institutions of governance and an internal analysis of the discursive factors which come into play in judicial decision making.¹⁷

The new institutionalism, like Stephen Krasner's conception of the "regime,"¹⁸ was an attempt to build a bridge between the research traditions anchored in classical liberal conceptions of the rational actor (C. B. Macpherson's "possessive

13. Smith, p. 29. For a review of institutional models in Canadian politics with reference to the litigation strategies of new social movements, see Smith, *passim*; and Alexandra Dobrowolsky, "The Charter and Mainstream Political Science: Waves of Political Contestation and Changing Theoretical Concerns," in David Schneiderman, ed., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997), pp. 303-342.

14. James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: The Free Press, 1989). See also Michael M. Atkinson, "Public Policy and the New Institutionalism," in Michael M. Atkinson, ed., *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Jovanovich Canada, 1993), pp. 17-45.

15. For example, Wallace Clement and Glen Williams, ed., *The New Canadian Political Economy* (Montréal and Kingston: McGill-Queen's University Press, 1989).

16. For example, Janine Brodie and Jane Jenson, "Piercing the Smokescreen: Stability and Change in Brokerage Politics," in A. Brian Tanguay and Alain-G. Gagnon, ed., *Canadian Parties in Transition*, Second edition (Toronto: Nelson Canada, 1996), pp. 52-72.

17. The external relations have been dealt with by, *inter alia*, Janet Hiebert in *Charter Conflicts: What Is Parliament's Role* (Montréal and Kingston: McGill-Queen's University Press, 2002).

18. Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in Stephen D. Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983); and "Sovereignty: An Institutional Perspective." *Comparative Political Studies* XXI:1 (1988), 66-94.

individualism"¹⁹) and what Talcott Parsons called "institutionalised individualism" in twentieth-century American sociology: the widely shared assumption that socialisation into stable institutions was the critical process in both the development of a well adjusted personality and the integration of complex societies.²⁰ The new institutionalism was only one response, however, to a series of challenges to the empirical and theoretical credibility of these modernist conceptions of the relationship between self and society in the last quarter of the twentieth century.

The "disengaged self"²¹ in the rational actor model and the fully socialised role player of the sociological model came under attack in the 1980s. The communitarian challenge to the disengaged or unencumbered self at the core of John Rawls' theory of justice was simultaneously a philosophical critique, a sociological claim for the vitality of community, and a warning of the consequences for political life of imagining "a person wholly without character, without moral depth."²² The attack on institutionalised individualism or the 'oversocialized conception of man in sociology'²³ was followed by a reflexive turn in American sociology which was linked to Clifford Geertz's conception of "thick description" in ethnography.²⁴ "Thick description" shifted the focus of analysis away from institutional maps toward the symbolic patterning of interpersonal relationships and the active engagement of the ethnographer in an interpretive dialogue with local informants.

19. *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).

20. Parsons saw a convergence in mid-century American sociology on Durkheim's contention that "certain crucial goals and norms of the individual had to be understood as derived from his society and culture. . . . It is through lines of reasoning of this sort that such a concept as institutionalized individualism . . . has become crystallized. By this I refer to the idea that the degrees of freedom that make autonomous behavior possible are dependent on an individual's integration in a supra-individual matrix." ["Cause and Effect in Sociology," in Daniel Lerner, ed., *Cause and Effect* (New York: Free Press, 1964), p. 57].

21. Stephen K. White, *Sustaining Affirmation: The Strengths of Weak Ontology in Political Theory* (Princeton, N.J.: Princeton University Press, 2000), Chapter 1.

22. Michael Sandel, "The Procedural Republic and the Unencumbered Self." *Political Theory* XII:1 (1984), p. 90. See also Wayne Gabardi, "Contemporary Models of Democracy." *Polity* XXXIII:4 (2001), 547-568.

23. Dennis Wrong, "The Over-Socialized Conception of Man in Modern Sociology." *American Sociological Review* XXVI:2 (1961), 183-192.

24. Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 3-30.

Finally, postmodern and poststructural critique of the eighteenth-century matrix of rationalist assumptions which was alleged to be at the core of modern liberal theory has led to yet another conception of the self as both the inscription of a dominant culture and, at the same time, no more than the product of the intersecting activities and orientations that characterise life in late modern society. This notion of the self as being "situated" within a particular matrix of practices, or 'form of life,' has been put forward as an alternative to both the disengaged and institutionalised or conformist conceptions of the self.²⁵

While the collapse of Communism and the rise to hegemony of neoliberalism were held to be vindications of both the ideological superiority and empirical validity of possessive individualism, there is reason to believe that the collapse of the *grands narratifs*²⁶ and weakening of core institutions in late modern industrial society have led to some unexpected outcomes which are not easily subsumed by the rational actor model.²⁷ How we characterise these challenges is very much a matter of debate, but I would like to argue that mainstream liberal political theory has tended to dismiss these alternatives through the construction of regulative ideals that have a moral and ideological force that cannot easily be challenged. This paper, therefore, will demonstrate how competing conceptions of the motivational foundations of participants in liberal culture have persisted in the Supreme Court's jurisprudence.

The cases we will consider will focus on three distinct conceptions of the self and society. C. B. Macpherson claimed that the conception of the individual as having been emancipated from tradition was shaped and determined by the emergence of capitalism in the seventeenth century. The disengaged self as an autonomous, rational, actor thus appears early in the liberal tradition and has been re-formulated from time to time as philosophical fashions have changed. Talcott Parsons provided a parallel account of how classical liberal theory can be read rather differently as a precursor of the twentieth-century theorem which he called "institutionalised individualism."²⁸ Finally, we will have to determine how recent contributions to

25. See Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992).

26. Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press, 1984 [1979]).

27. See Craig Calhoun, "Social Theory and the Politics of Identity," in Calhoun, ed., *Social Theory and the Politics of Identity* (Cambridge, MA: Blackwell, 1994), pp. 9-36.

28. See the discussion of Locke in *The Structure of Social Action* (New York: The Free

liberal theory and practice that depend upon a "situated individualism" constitute an alternative to the older models.

While critical in nature, this paper will not attempt to subsume the alternatives construed as research paradigms through an improbable claim of theoretical closure;²⁹ finesse the philosophical issues through practical reasoning;³⁰ or discredit them as formal models via counterfactual critique.³¹ Rather, like the Court, I hope to contextualise³² the issues within a framework that emphasises their application to cases with reference to some examples from the Charter jurisprudence of the Supreme Court of Canada.

The intent is to initiate a process of theory-building which respects the matrix within which each of the models arose and leaves open the possibility that the diversity of late modern society has yet to succumb to the hegemonic ideology of neoliberal globalisation and possessive individualism. If, as Talcott Parsons once suggested, theory building resembles the work of a common-law appellate judge,³³ then the Supreme Court of Canada has been well positioned to monitor and re-form conceptions of the individual embedded in both statutes and principles of adjudication. The Supreme Court's Charter jurisprudence, given the generosity with which the Court began to extend intervener status in the late 1980s,³⁴ has

Press, 1949 [1937]), Chapter III.

29. See the discussion below of the conflict between morality and ethics in Nancy Fraser's account of redistribution and recognition as alternative frameworks for progressive politics, and her attempt to reformulate recognition issues as problems of status and discrimination which can be managed within a redistributive framework.

30. See, for example, the substantive or policy-based solutions to the conflict between modern liberal individualism and group-differentiated rights claims in the work of Will Kymlicka. For a critique of this strategy which challenges both its claim to be philosophically coherent and sociologically valid, see Sujit Choudhry, "National Minorities and Ethnic Immigrants: Liberalism's Political Sociology." *The Journal of Political Philosophy* X:1 (2002), 54-78

31. The best example of this strategy would be the communitarian challenges to Rawlsian liberalism. See, in particular, the work of Michael Walzer and Michael Sandel.

32. See Shalin M. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability." *Dalhousie Law Journal* XXII (Spring, 1999), 126- [unpaginated: accessed through Quicklaw].

33. Parsons, "On Building Social System Theory: A Personal History," in Parsons, *Social Systems and the Evolution of Action Theory* (New York: The Free Press, 1977), pp. 67-68.

34. According to F. L. Morton and Rainer Knopff [*The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), pp. 55ff.] the Court has been accepting 80 to 90 per cent of applications to intervene since the late 1980s.

been richly informed by briefs which contend for a wide variety of conceptions of the individual and citizenship. The negative response of critics on both the right and left to a more activist jurisprudence would seem to indicate that the Court's response has been both creative and effective; that is, not fully consistent with either a disengaged liberal paradigm of equality or a more sociologically informed critique of institutionalised (systemic) discrimination.

This paper will focus on the theoretical strategies which have been deployed to map the competing conceptions of the self rather than the philosophical claims of truth or validity. The methodological case for this approach has been made in a number of ways: epistemologically, by Stephen K. White in his demonstration of the continuing importance of situational data as "weak ontology" in contemporary political theory,³⁵ and methodologically in a number of attempts to re-cast the categories and procedures of empirical social science as embedded in 'narratives' which bridge the gap between research paradigms and the customs and practices of the political cultures of particular communities.³⁶ Even rational choice models in contemporary political science have been re-worked to flesh out the "thin" (disengaged) version with "cultural and communicative factors."³⁷

Many of these developments depend upon a convergence in recent years on the notion of discourse or narrative and the related concepts of discursive practices and discursive formations in social and political theory. One variant was introduced by Louis Althusser in neo-marxist theory³⁸ and there have been numerous extensions of the later work of Michel Foucault.³⁹ What these initiatives share is an attempt to

35. White, *op. cit.*; and "Weak Ontology and Liberal Political Reflection." *Political Theory* XXV:4 (1997), 502-523.

36. See, for example, Margaret R. Somers, "Narrating and Naturalizing Civil Society and Citizenship Theory: The Place of Political Culture and the Public Sphere." *Sociological Theory* XIII:3 (1995), 229-274. See also Charles Taylor's deconstruction of the procedures of empirical social science in "Interpretation and the Sciences of Man [1971]," in Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), pp. 15-57; and Sylvia Walby's review of many of the issues dealt with in this paper in "From Community to Coalition: The Politics of Recognition as the Handmaiden of the Politics of Equality in an Era of Globalization." *Theory, Culture & Society* XVIII:2-3 (2001), 113-135.

37. See Albert S. Yee, "Thick Rationality and the Missing 'Brute Fact': The Limits of Rationalist Incorporation of Norms and Ideas." *The Journal of Politics* LIX:4 (1997), 1001-1039; and Kristen Renwick Monroe, "Paradigm Shift: From Rational Choice to Perspective." *International Political Science Review* XXII:2 (2001), 151-172.

38. See Terry Eagleton, *Ideology: An Introduction* (London: Verso Books, 1991), Chapter 7.

39. See, for example, the discussion of "veridical discourses" and "rationalities" in Nikolas

escape either a reductionist or totalising theoretical account of self and society, deploying the concept of discourse as an open-ended but not indeterminate system of signs and significations (formations) which patterns social and political life. Like the concept of system, discourse has been generalised beyond its original sources and now can be seen as a research strategy that is less concerned with *formal* theoretical modelling and more interested in *substantive*, "empiricist," accounts of how discursive formations arise and interact with each other in complex societies.⁴⁰

The response of mainstream liberal political theory to the complexity of late modern society has also tended to rely on either a *formal*, universal and metatheoretical, critique of the positions in conflict which hypothesises neo-kantian regulative ideals as paradigmatic re-constructions of the issues as transcendental moral principles; or a *substantive* re-casting of the issues within a more particularistic conception of 'forms of life,' discursive formations or language games which ethically pattern or are constitutive of meaning in both research and everyday life.⁴¹ The formal or neo-kantian manoeuvre, however, tends to transform many of the practical problems of coping with novel forms of political action into philosophical issues.

According to Nancy Fraser, for example, the contest between a redistributive politics based on the idea of the disengaged or unencumbered self and an identity politics based on demands for recognition reduces to "the relation between morality and ethics, the right and the good, justice and the good life."⁴² Not surprisingly, demands for recognition ('damaged identity') are seen to be the result of discriminatory distribution, and the remedy is greater fidelity to the regulative ideal of equality in public policy making. Her approach to these issues privileges the need for a new, context-free, regulative ideal of justice; but I will attempt to show that philosophical debates offer little to policy makers, judges and citizens who require practical solutions in the absence of moral agreement. I will argue that the "contextualising" judgements of common law courts have depended on, and

Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999).

40. See Trevor Purvis and Alan Hunt, "Discourse, ideology, discourse, ideology, discourse, ideology . . ." *British Journal of Sociology* XLIV:3 (1993), pp. 484ff.

41. Choudhury, *op. cit.*, refers to this as the "contextual turn" in liberal theory.

42. Nancy Fraser, "Recognition without Ethics?" *Theory, Culture & Society* XVIII:2-3 (2001), p. 22.

continue to depend on, "ethical" and practical rather than "moral" (in the neo-kantian sense) justifications.

In some ways, this will be an attempt to flesh out an incidental remark made by Thomas Kuhn in the introduction to the third chapter of *The Structure of Scientific Revolutions*:

In its established usage, a paradigm is an accepted model or pattern. . . . In grammar, for example, '*amo, amas, amat*' is a paradigm because it displays the pattern to be used in conjugating a large number of other Latin verbs, e.g., in producing '*laudo, laudas, laudat.*' In this standard application, the paradigm functions by permitting the replication of examples any one of which could in principle serve to replace it. In a science, on the other hand, a paradigm is rarely an object for replication [like a grammatical pattern for conjugating verbs]. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions.⁴³

In other words, the common law is less concerned with theoretical paradigms or codes as grammar or pattern and more concerned with the syntax of legal procedures and the distinctive form of terminological discipline imposed by a legal vocabulary which shapes both meaning and legitimate practice. Kuhn's emphasis on the interplay between principle and practice is an effective tool for shifting our attention away from a number of currently popular approaches to the analysis of appellate court decisions based on the American experience with judicial review which overemphasise the role of moral or theoretical "principles" as patterns in judicial decision making.

First of all, there is the claim that the Court should employ an interpretivist or 'strict constructionist' approach to the cases before it. Assuming that an unambiguous original intent can be determined, it is argued that the court should confine itself to the will of the Founders.⁴⁴ Subsequent decisions would follow the grammatical sense of the working out of a paradigm. Secondly, it can also be claimed that the Court is constructing a set of binding policy decisions over time as it accumulates precedents dealing with particular constitutional principles. As case

43. Second edition (Chicago: The University of Chicago Press, 1970), p. 23.

44. F. L. Morton, "Judicial Politics Canadian-Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992," in Curtis Cook, ed., *Constitutional Predicament: Canada after the Referendum of 1992* (Montréal and Kingston: McGill-Queen's University Press, 1994), pp. 146-148.

law judgements increase in scope and complexity, the principle of *stare decisis* will ensure that future decisions in similar cases will become less indeterminate and more predictable. Thirdly, it can be argued rather differently that the binding power of the content of decisions is less important than the clarification of principles that are introduced in the deciding of cases, and the Court over time is developing something rather like a set of neo-kantian regulative ideals that will guide its interpretation of cases.⁴⁵ Each of these approaches, I will argue, makes inappropriate assumptions about judicial decision making as an activity.

In many ways, I am attempting to carve out disciplinary space in political science for an investigation of the process of justifying legal decisions which parallels the work of the "new historians" of political thought who also were concerned with the inappropriate reduction of texts to sets of philosophical propositions. As John Dunn put it in 1972:

The history of thought as it is characteristically written is not a history of men battling to achieve a coherent ordering of their experience. It is, rather, a history of fictions--of rationalist reconstructions out of the thought processes of individuals, not of plausible abridgements of those thought processes. It consists not of representations, but, in the most literal sense, of reconstructions, not of plausible accounts of how men thought, but of more or less painful attempts to elaborate their ideas to a degree of formal intellectual articulation which there is no evidence they ever attained.⁴⁶

The Cambridge School of political theory, as it is sometimes called, has produced an impressive body of work ranging from new editions of early modern texts to methodological inquiries which link textual analysis in the history of political thought to more contemporary theoretical concerns.⁴⁷ Younger members of the Cambridge school like the Locke scholar, James Tully, who are more oriented to recent developments in the philosophy of social science and linguistics have applied the insights of the "linguistic turn" to contemporary political discourse.⁴⁸ What

45. Cf. the discussion of "formal" specifications of the scope of section 2(b) protection in the cases reviewed below.

46. John Dunn, "The Identity of the History of Ideas, in Peter Laslett, *et. al.*, ed., *Philosophy, Politics and Society*, Fourth series (Oxford: Blackwell, 1972), p. 160.

47. Quentin Skinner, "Meaning and Understanding in the History of Ideas." *History and Theory* VIII:1 (1969), 3-53

48. See *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); and "The Agonic Freedom of Citizens." *Economy and Society* XXVIII:2 (1999), 161-182.

Kuhn and the Cambridge School share a focus on factors internal to a tradition of discourse, avoiding both inappropriate philosophical reconstruction and reduction to factors exogenous to the field.

Kuhn's point about the common law is that the process of justification of decisions involves an open-ended interplay between matters of fact and points of law within the legal tradition. However, while a common law court will attempt to respect precedent, it has a great deal of flexibility in determining which principles and which rules it chooses to apply in a particular case. An additional complication, which tends to undermine the application of many models developed to account for the practice of the American Supreme Court, is that the Canadian Court has available to it a constitutionally defined mechanism for adjudicating on the basis of public policy objectives which the American Court has had to synthesise in its jurisprudence.

The difference has to do with how the American Bill of Rights (the first ten amendments to their constitution) and the Canadian Charter of Rights and Freedoms are framed. The American rights are defined in exclusive and abstract terms. The first amendment, for example, reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Canadian Charter, on the other hand, recognises that guarantees of rights must accommodate some recognition of the modern principle that the people assembled in Parliament are sovereign (the doctrine of parliamentary supremacy). Section 1 of the Charter states:

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.

Lacking a constitutionally defined mechanism for the introduction of limits on rights which can be justified by public policy objectives, the American Supreme Court over the last century has developed two mechanisms to deal with cases where rights can be justifiably limited or where rights conflict. "Substantive due process" entails a reading by the Court of what must be present in order for a right to be enjoyed. One of the more contentious examples in American judicial politics would be Justice Brennan's reasoning in *Griswold v. Connecticut* (1965) that First Amendment rights

could not be enjoyed without the existence of a "zone of privacy," a principle that served as the basis for the judgement in *Roe v. Wade* (1973) that the state could not interfere with a woman's right to choose whether to have an abortion during the first trimester of pregnancy.

The second Court-determined rule of interpretation entails what has been called "definitional balancing": how to strike a mean between conflicting rights. The American Court in *Roe v. Wade* went on to decide that the state's interest in the protection of the unborn child could enter into consideration as the foetus neared viability and a graduated regime of mandatory counselling and restriction of the right to choose could apply after the first trimester.

"Substantive due process" operates very much like contemporary liberal political theory's attempt to articulate purely *formal*, neo-kantian, regulative ideals (such as Justice as Fairness) which will facilitate desired outcomes; while "definitional balancing" resembles the attempts to articulate ethically defensible arguments for rights with respect to *substantive*, foundational, virtues or principles (such as civility or mutual recognition) in liberal perfectionism and communitarian thought. In both cases, the process of determining outcomes is internal to the Court and less likely to respect the play of public policy considerations that can be presented in an adversarial process at trial.

The Canadian jurisprudence with respect to the scope of rights and freedoms, on the other hand, is based on an early Charter case which challenged a provision of the former Narcotics Control Act ("if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged and sentenced accordingly") which was held to violate section 11 (d) of the Charter:

11. Any person charged with an offence has the right . . .
- d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

The Court's decision in *R. v. Oakes* (1986) established that in cases where Charter rights were impaired, but an argument could be made by the Crown to justify the limit, a rather different kind of judicial reasoning would come into play [Chief Justice Dickson writing for the majority]:

Section 1 of the Charter has two functions: First, it guarantees the rights and freedoms set out in the provisions which follow it; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitutional Act, 1982) against which limitations on

those rights and freedoms may be measured.

The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. . . . The standard of proof under s. 1 is a preponderance of probabilities. Proof beyond a reasonable doubt would be unduly onerous on the party seeking to limit the right because concepts such as "reasonableness", "justifiability", and "free and democratic society" are not amenable to such a standard. . . . Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. . . . Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.⁴⁹

I would like to argue that the Canadian section 1 jurisprudence is a novel experiment which cannot easily be reduced to the conceptual frameworks of a legal realism (all decisions are ultimately reflections of larger societal and political forces) or a philosophy of law which attempts to impose either transcendental or exegetically derived moral principles as constitutional norms in the construction and evaluation of Court decisions.⁵⁰

The section 1 cases are not only precedent decisions (*texts*), but they also are an accumulating body of decisions which represent the Court's developing sense of the

49. *R. v. Oakes*, [1986] 1 S.C.R., 105-106.

50. Note Justice Arbour's response to the literature on law and the harm principle in *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 517 (at § 240): ". . . as guardians of the constitutional principles of fundamental justice, courts are not expected to merely choose from among the competing theories of harm advanced by criminal law theorists. As Doherty J.A. said in *R. v. Murdock* (2003), 11 C.R. (6th) 43 (Ont. C.A.), at para. 31: 'Nor should the harm principle be taken as an invitation to the judiciary to consecrate a particular theory of criminal liability as a principle of fundamental justice. This is so even if that theory has gained the support of law reformers, some of whom also happen to be judges. Judicial review of the substantive content of criminal legislation under s. 7 should not be confused with law reform. Judicial review tests the validity of legislation against the minimum standards set out in the Charter. Law reform tests the legal status quo against the law reformer's opinion of what the law should be.'"

boundaries and appropriateness of rigorous judicial review (*conversation*) with respect to different clauses of the Charter. Some important work has already been done on the call-and-response dialogue with Parliament which has opened up since the early 1990s with respect to judicial review,⁵¹ but the dialogue is far from being taken for granted and the Court is clearly still engaged in internal debates as to how it should respond to revised legislation which has previously failed constitutional testing.⁵²

What remains at issue as an *empirical* question is how rigorously the Court applies what has been called the Oakes test, and there is some evidence in recent judgements that the McLachlin Court may be drifting more toward "definitional balancing" in its Charter decisions.⁵³ It strikes me then that it is a legitimate task for a political science to determine whether there is any pattern--for example, in terms of specific Charter rights at risk,⁵⁴ precedents cited, the facts of the case, or

51. See, for example, Peter W. Hogg and Allison Bushell, "The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)." *Osgoode Hall Law Journal* XXXV:1 (1997), 75-124; Janet L. Hiebert, "A Relational Approach to Constitutional Interpretation: Shared Legislative and Judicial Responsibilities." *Journal of Canadian Studies* XXXV:4 (2000), 161-181; and Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

52. See *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519: Gonthier writing in dissent on a 5-4 split (§ 104): "In my view, especially in the context of the case at bar, the heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values. Importantly, the dialogue metaphor does not signal a lowering of the s. 1 justification standard. It simply suggests that when, after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the court lets Parliament have the last word and does not substitute Parliament's reasonable choices with its own."

Gonthier appears to have conflated two distinct phases in the evaluation of claims under the Charter. The first phase, as we shall see below, is purely formal. It is only when the Court begins to assess the proportionality of a rights violation that it considers the 'values' or policy commitments of the Crown.

53. See Arbour's dissent in *Malmo-Levine* (2003).

54. The Dickson and Lamer Courts, as we shall see, were quite rigorous in testing the early freedom of expression cases, assuming the right to be complete and unimpaired before engaging in a section 1 analysis. On the other hand, there appears to be a pattern developing in the McLachlin Court of avoiding section 1 tests when dealing with section 7 challenges and reading a rich and complex set of substantive commitments from the legal tradition into section 7 on a case-by-case basis. See the decision of the majority in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, neutral citation: 2004 SCC 4.

the responsibilities of Parliament⁵⁵--which can account for the variation in rules of interpretation.

Classical Liberalism and the Disengaged Self

Perhaps the most striking example of the Court deploying a classical liberal conception of the reasonable person was its response to the challenge to the Criminal Code provisions dealing with obscenity in the late 1980s. *R. v. Butler*⁵⁶ was the result of a series of charges laid against the operator of an adult video store and the first opportunity for the Court to deal with the boundaries of the Charter guarantee of freedom of expression with respect to pornography.

While Justice Sopinka, writing for the majority, was scrupulously careful to document the decision with respect to the requirements of the Oakes test, academic commentators have been more likely to parse the decision for evidence of successful interventions by the various interested parties.⁵⁷ However, the Court was quite clear about the necessity to separate a formal specification of what freedom of expression meant with respect to the circulation of materials depicting sexual activity from a more substantive conception of the harms associated with pornography.⁵⁸

The Court reviewed the pre-Charter history of the Criminal Code, noting that the nineteenth-century common law conception of obscenity as an offence against public morals (the Hicklin rule) had given way to a new definition in 1959 which implicitly reflected a recognition that value commitments were more diverse in a pluralistic society [*Butler*, 472ff.]. The Supreme Court in 1962 introduced a new test for what was now a statutory definition of obscenity as "the undue exploitation

55. Chief Justice McLachlin has acknowledged that the Court should defer to Parliament and the legislatures "on matters of social choice and expenditure of funds." ["The Judiciary's Distinctive Role in our Constitutional Democracy." *Policy Options* (September, 2003), p. 6].

56. [1992] 1 S.C.R. 452: [link to R. v. Butler at LexUM](#)

57. See, for example, Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000), Chapter Four; F. L. Morton and Rainer Knopf, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), Chapter One; and Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004).

58. There were earlier judgements, prior to *Butler*, which sketched the outlines of the scope of section 2(b) with respect to film screenings and advertising aimed at children: see *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494 and *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

of sex." Judson J. in *Brodie* adopted a 'community standards' of decency test from Australian and New Zealand jurisprudence which allowed the trier of fact, on a case-by-case basis, to assess materials that were brought before the courts.

The community standards test, however, led to inconsistent results since judges not surprisingly tended to reflect the more or less tolerant views of their jurisdictions. After the passage of the Charter, the courts could no longer simply apply the statutory definitions: it was also necessary to assess whether more fundamental constitutional guarantees of freedom of expression had been violated. According to Justice Sopinka,

[t]he *Hicklin* philosophy posits that explicit sexual depictions, particularly outside the sanctioned contexts of marriage and procreation, threatened the morals or the fabric of society. . . . In this sense, its dominant, if not exclusive, purpose was to advance a particular conception of morality. Any deviation from such morality was considered to be inherently undesirable, independently of any harm to society. . . . this particular objective is no longer defensible in view of the *Charter*. To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. [p. 492]

The commitment to classical liberal conceptions of individual freedom was clear: "[t]he values which underlie the protection of freedom of expression relate to the search for truth, participation in the political process, and individual self-fulfilment." [p. 499]. This "large and liberal" understanding of the scope of a fundamental freedom required some specification, or "contextualisation," with respect to sexually explicit materials.

In order to apply this formal conception of freedom, the Court determined that the community standard test should be one of tolerance, not of taste, and defined it in the abstract as not "what Canadians would not tolerate being exposed to themselves, but what they would not tolerate other Canadians being exposed to." [p. 478]. What is interesting about this definition is how it is 'disengaged' from individual tastes or community standards. We are asked, rather like Rousseau's citizen who has entered into the social contract, to consider not our particular will with respect to an issue but our opinion of what the General Will would be. Conceived rather differently, the Court is re-working a common law conception of how the hypothetical reasonable person should respond to a question about community standards.

The bulk of the academic commentary, however, is focussed on the second phase of testing for obscenity where the Court held that the phrase "undue exploitation" had to be understood as "a reasoned apprehension of harm." [p. 504]: "[i]n my view . . . the overriding objective of s. 163 [of the Criminal Code] is not moral disapprobation but the avoidance of harm to society." [p. 493] One of the more perceptive analyses of *Butler* from the point of view of liberal theory blurs the distinction between these two phases of the argument, and reads back into the formal definition of freedom of expression a conception of rights and harm adapted from J. S. Mill.⁵⁹ The authors are then able to conflate the abstract conception of toleration and a practical consideration of harms in a notion of "reciprocity": toleration becomes an ethical or practical commitment which is required to sustain the moral commitment to a civilised freedom that includes the virtue of self-restraint when it comes to respecting others' rights.

While this is a respectable and defensible solution to the Hobbesian problem of order (assuming unlimited freedom, how do we avoid conflict with others), it is not consistent with the quasi-Rousseauian conception articulated by the Court. The element of inhibition or respect for others in the Court's judgement is not based on an ethic of reciprocity but on the moral and psychological capacity to think in terms of the public interest rather than on the basis of a calculus of individual interests. Vernon and LaSelva appear to have substituted a substantive due process rendering of J. S. Mill's harm principle for the purely formal, abstract, conception of tolerance in Sopinka's decision. While rights and obligations may be re-cast as virtues in some versions of contemporary liberal theory, this is not the approach taken by the Supreme Court in *Butler*.

Subsequent pornography cases seem to bear out our interpretation. The Court's failure to come down strongly against the possession of child pornography in *R. v. Sharpe*⁶⁰ was almost universally condemned; but the separation of toleration from harm in *Butler* should have alerted court watchers to the fact that policy considerations with respect to harm (ethical judgements) would not be permitted easily to trump a moral commitment to freedom of expression. The Court will not "balance" competing claims in the Oakes test, nor is it prepared to override

59. Richard Vernon and Samuel LaSelva, "Liberalism, Feminism, and Pornography: *Regina v. Butler*," in Hugh Mellon and Martin Westmacott, ed., *Political Dispute and Judicial Review: Assessing the Work of the Supreme Court of Canada* (Scarborough, Ontario: Nelson, 2000), pp. 124-133.

60. *R. v. Sharpe*: neutral citation: 2001 SCC 2.

fundamental freedoms. As Joel Bakan put it in the context of an argument for the relative ineffectiveness of liberal rights to correct social wrongs, ". . . a huge gap exists between the rhetoric—judicial and popular—concerning the importance of freedom of expression in a democracy and the actual communications capacities of most people and . . . the liberal form of Charter rights means that Charter litigation can do little about this gap."⁶¹

Institutionalised Individualism: the Self in Society

The political and judicial history of *Ford v. Quebec (Attorney General)* goes back to the patriation of the Constitution in 1982. The Parti Québécois Government of the day refused to endorse the patriation package and the Quebec legislative assembly invoked section 33 of the Constitution Act (1982) to shield the laws of Quebec from challenges with respect to section 2 and sections 7 to 15 of the Charter.

The *Ford* case was only one of a number of cases which involved language policy. Bill 101, the Charter of the French Language (1977), was challenged in the late 1970s with respect to the protection of both official languages in section 133 of the Constitution Act (1867), and through the early years of the Charter the Court dealt with a number of live cases and references with respect to protection of minority languages under statute (the Manitoba Act 1870) and the detailed commitment to the protection of minority language education rights in section 23 of the Charter.⁶² What was distinctive about the *Ford* decision was the Court's conception of language as not simply an individual right to express oneself in the language of one's choice, but rather as medium which facilitates the integration of the individual into a particular community.

The political climate of the 1980s was not conducive to reasoned debate about language rights: a separatist party had won two consecutive elections in Quebec; a referendum seeking a mandate to endorse negotiations leading to a radically restructured federation had been bitterly fought, and lost; and regional discontent in other provinces had frequently included complaints about concessions to Quebec. However, the federal Conservative electoral sweep of 1984 and the re-election of what appeared to be a federalist Liberal party in Quebec in 1985 were seen as an

61. Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), p. 65.

62. For an overview of the cases, see Mandel, *op. cit.*, Chapter 3.

opportunity to re-open constitutional negotiations with Quebec. In the meantime, a challenge to the ban on the use of languages other than English on outdoor commercial signage launched in 1984 was working its way through the courts.

We will set aside the arguments and the rulings in the *Ford* case with respect to the Quebec Charter of Rights and Freedoms and focus on the section 2(b) case under the Canadian Charter. First of all, the Court noted that a challenge with respect to a fundamental freedom differed from challenges under section 133 (1867) and sections 16 to 23 (1982), inasmuch as the latter "are more akin to rights, properly understood, than freedoms. They grant entitlement to a specific benefit. . . . They do not ensure, as does a guaranteed freedom, that within a given broad range of private conduct, an individual will be free to choose his or her own course of activity":

. . . what the respondents seek in this case is a freedom as that term was explained by Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336: "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint." [*Ford*, p. 751

Freedom of expression with respect to language choice does not conflict with language rights as benefit:

The recognition that freedom of expression includes the freedom to express oneself in the language of one's choice does not undermine or run counter to the special guarantees of official language rights in areas of governmental jurisdiction or responsibility. The legal structure, function and obligations of government institutions with respect to the English and French languages are in no way affected by the recognition that freedom of expression includes the freedom to express oneself in the language of one's choice in areas outside of those for which the special guarantees of language have been provided. [*Ford*, p. 752]

The formal specification of the scope of section 2(b) with respect to language rights was drawn from an earlier statement in the *Reference re Manitoba Language Rights*.⁶³

63. [1985] 1 S.C.R. 721.

"The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. *Language bridges the gap between isolation and community*, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society." [Ford, p. 748: emphasis added]

Given that this referred to protection under statute, further elaboration was required to encompass the protection available under section 2(b). The Court went on to declare that

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality. That the concept of "expression" in s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter* goes beyond mere content is indicated by the specific protection accorded to "freedom of thought, belief [and] opinion" in s. 2 and to "freedom of conscience" and "freedom of opinion" in s. 3. That suggests that "freedom of expression" is intended to extend to more than the content of expression in its narrow sense. [Ford, pp. 748-749]

When challenged by counsel for the Government of Quebec to clarify how an arbitrary system of verbal and written signs that facilitates communication could be granted section 2(b) protection, the Court cited the work of a sociolinguist presented as evidence in an earlier case and the preamble to the Quebec Charter:

As one of the authorities on language quoted by the appellant Singer in the *Devine* appeal, J. Fishman, *The Sociology of Language* (1972), at p. 4, puts it: ". . . language is not merely a *means* of interpersonal communication and influence. It is not merely a *carrier* of content, whether latent or manifest. Language itself *is* content, a reference for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community." As has been noted this quality or characteristic of language is acknowledged by the *Charter of the French Language* itself where, in the first paragraph of its preamble, it states: "Whereas the French language, the distinctive language of a

people that is in the majority French-speaking, is the instrument by which that people has articulated its identity." [Ford, p. 750]

Given the framework within which fundamental freedoms are understood, this is the most comprehensive protection that can be afforded to one's choice of language. If any ambiguity remained on this point, the Court clearly rejected an argument that "commercial expression" on signage (following American precedents) could enjoy less protection than, for example, religious or political expression (p. 764).

The Court was also quite clear about the need to separate a formal specification of freedom of expression with respect to language from a substantive justification for its protection. With respect to a legal scholar's attempt to develop "rationales" for the protection of freedom of expression, they point out that

While these attempts to identify and define the values which justify the constitutional protection of freedom of expression are helpful in emphasizing the most important of them, they tend to be formulated in a philosophical context which fuses the separate questions of whether a particular form or act of expression is within the ambit of the interests protected by the value of freedom of expression and the question whether that form or act of expression, in the final analysis, deserves protection from interference under the structure of the Canadian *Charter* and the Quebec *Charter*. These are two distinct questions and call for two distinct analytical processes. The first, at least for the Canadian *Charter*, is to be determined by the purposive approach to interpretation set out by this Court in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and *Big M Drug Mart Ltd.*, *supra*. The second, the question of the limitation on the protected values, is to be determined under s. 1 of the *Charter* as interpreted in *Oakes*, *supra*, and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. The division between the two analytical processes has been established by this Court in the above decisions. First, consideration will be given to the interests and purposes that are meant to be protected by the particular right or freedom in order to determine whether the right or freedom has been infringed in the context presented to the court. If the particular right or freedom is found to have been infringed, the second step is to determine whether the infringement can be justified by the state within the constraints of s. 1. It is within the perimeters of s. 1 that courts will in most instances weigh competing values in order to determine which should prevail. [Ford, pp. 765-766]

The second, or substantive, phase of their analysis, linked to the proportionality phase of the Oakes test, reviewed a number of commission reports that documented the threats to the French language and accepted the overall goal of Bill

101 to protect the "*visage linguistique*" of Quebec society. The Court concluded, however, that the outright ban on the use of a language other than French was not 'proportionate to the legislative purpose,' "whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French '*visage linguistique*' in Quebec and therefore justified under the Quebec *Charter* and the Canadian *Charter*, requiring the exclusive use of French has not been so justified." [*Ford*, p. 780] The Quebec Government responded to the ruling with modest amendments to the language law in 1988 and once again invoked section 33. When the override expired in 1993, the Government introduced amendments which essentially followed the Court's recommendations.

The Court's insistence on a large and liberal interpretation of section 2(b), particularly with respect to commercial expression, provided an opportunity for the major tobacco companies to challenge mandatory health warnings on packages and restrictions on advertising and promotion and they were partially successful in having the restrictions struck down.⁶⁴ A new challenge to federal legislation passed in the wake of that judgement was heard by the Quebec Court of Appeal in the Fall of 2004 and the decision has yet to be released.

Situated Individualism: Freedom of Expression in Context

The *Butler* and *Ford* cases clearly separated a formal definition of the scope and nature of freedom of expression from substantive justifications for its limitation, making it clear that the second phase of the Oakes test required a "contextual" reading of the impaired right with respect to policy objectives. The majority in the *Harper* case,⁶⁵ however, deployed a rather different approach to the interpretation of Charter rights which insisted less on formal legal equality and recognised that individual capacities depend very much on the distribution of opportunities and resources in a diverse and stratified society. The result was a virtuoso reading of section 2(b) in conjunction with section 1 *and* section 3 (the right to vote) that rather blurred the distinction we have seen above between the formal and substantive phases of the Oakes test and verged on 'definitional balancing' coupled with a substantive due process reading of section 3.

64. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

65. *Harper v. Canada (Attorney General)*, neutral citation: 2004 SCC 33. [Link to Harper v. Canada \(A.G.\) 2004 at LexUM](#)

The issue, federal electoral legislation which restricted campaign spending by groups other than registered political parties, was brought to the courts shortly after the adoption of the Charter.⁶⁶ The plaintiffs claimed that limits on third party spending infringed section 2(b), freedom of expression; section 3, the right to vote (understood as the right to make a fully informed decision); and section 2(d), freedom of association. The last point was easily disposed of. The Court had already ruled in earlier cases that "[i]t is only the associational aspect of the activity, not the activity itself, which is protected." [*Harper*, § 125].

The majority, referring to an earlier challenge with respect to the organisation and financing of referendum campaigns in the province of Quebec,⁶⁷ saw the freedom of expression issue as inextricably linked to economic factors:

Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. [*Harper*, § 121]

In order to deal with the challenge, the majority found it necessary to consider more than section 2(b) in isolation in the first phase of the Oakes test:

At issue in this appeal is whether the third party spending provisions of the *Canada Elections Act*, S.C. 2000, c. 9, violate ss. 2(b), 2(d) and 3 of the *Canadian Charter of Rights and Freedoms*. To resolve this issue, the Court must reconcile the right to meaningfully participate in elections under s. 3 with the right to freedom of expression under s. 2(b). This appeal also requires the Court to revisit the principles and guidelines set out in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, in the regulation of elections. [*Harper*, § 50]

Section 3 had been dealt with previously, in a rather different context, with respect to the setting of electoral district boundaries to compensate for lower population densities, and the Court had ruled that section 3 did not require absolute equality of voting power [McLachlin writing for the Court in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158]:

It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation

66. For a legislative and litigation history of the issue, see *Harper*, § 56ff.

67. *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569.

comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative. . . . [Emphasis in original: *Harper*, § 68]

The majority declared that there was a link between effective and "meaningful" representation:

" . . . the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process. [Emphasis added: citing Iacobucci in *Figueroa*]"

Greater participation in the political discourse leads to a wider expression of beliefs and opinions and results in an enriched political debate, thereby enhancing the quality of Canada's democracy. . . . The question, then, is whether the spending limits set out in s. 350 [of the regulations] interfere with the right of each citizen to play a meaningful role in the electoral process. In my view, they do not. The trial judge found that the advertising expense limits allow third parties to engage in "modest, national, informational campaigns" as well as "reasonable electoral district informational campaigns" but would prevent third parties from engaging in an "effective persuasive campaign" (para. 78). He did not give sufficient attention to the potential number of third parties or their ability to act in concert. Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of "meaningful participation" would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote. Accordingly, there is no infringement of s. 3 in this case and no conflict between the right to vote and freedom of expression. [*Harper*, §§ 70 and 74]

The linkage of these concerns with the possibility of infringement of section 2(b) rights departs from the formal and rather rigorous reasoning of *Butler* and *Ford*. On this occasion, the Court appeared to be engaged in an exercise which involved balancing the various interests at stake, rather than dealing with freedoms as rights claims in the abstract:

Third party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse (Lortie Report, *supra*, at p. 340). As such, the election advertising of third parties lies at the core of the expression guaranteed by the *Charter* and warrants a high degree of constitutional protection. . . . In some circumstances, however, third party advertising will be less deserving of constitutional protection. Indeed, it is possible that third parties having access to significant financial resources can manipulate

political discourse to their advantage through political advertising.
[*Harper*, §§ 84 and 85]

Rather more formally, from the point of view of moral reasoning, the Court cited its judgement in *Libman*,

The impugned provisions impose a balance between the financial resources available to the proponents of each option in order to ensure that the vote by the people will be free and informed and that the discourse of each option can be heard. To attain this objective, the legislature had to try to strike a balance between absolute freedom of individual expression and equality among the different expressions for the benefit of all. From this point of view, the impugned provisions are therefore not purely restrictive of freedom of expression. Their primary purpose is to promote political expression by ensuring an equal dissemination of points of view and thereby truly respecting democratic traditions. [*Harper*, § 86]

and concluded that "[o]n balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient."

The majority was also concerned with the trial judge's dismissal of social science evidence, including the Report of the Royal Commission on Electoral Reform and Financing (the Lortie Report), and concluded that

This Court has, in the absence of determinative scientific evidence, relied on logic, reason and some social science evidence in the course of the justification analysis in several cases. . . . Similarly, the nature of the harm and the efficaciousness of Parliament's remedy in this case is difficult, if not impossible, to measure scientifically. The harm which Parliament seeks to address can be broadly articulated as electoral unfairness. Several experts, as well as the Lortie Commission, concluded that unlimited third party advertising can undermine election fairness in several ways. . . . This harm is difficult, if not impossible, to measure because of the subtle ways in which advertising influences human behaviour; the influence of other factors such as the media and polls; and the multitude of issues, candidates and independent parties involved in the electoral process. In light of these difficulties, logic and reason assisted by some social science evidence is sufficient proof of the harm that Parliament seeks to remedy. . . . The lower courts erred by demanding too stringent a level of proof, in essence, by requiring the Attorney General to establish an empirical connection between third party spending limits and the

objectives of s. 350. There is sufficient evidence establishing a rational connection between third party advertising expense limits and promoting equality in the political discourse, protecting the integrity of the financing regime applicable to candidates and parties, and maintaining confidence in the electoral process. [*Harper*, §§ 78, 79 and 104]

The federal spending limits were upheld, five judges in the majority and three dissenting in part.

The reasoning of the majority, and of the three judges who dissented, diverged most clearly on the second phase of what remained of the classic Oakes analysis. In the first phase, as we have seen, the reading of section 2(b) in conjunction with sections 3 and 1 ultimately was determined by what the Court characterises as the "harm" of electoral unfairness. The dissenters, concerned more with the size of the spending limits, were prepared to strike down the existing spending limits as unreasonable (given the current costs of media distribution) and saw them as undermining "effective participation" and "effective expression of ideas."

Conclusion:

A number of commentators began to remark on the Court's increasing willingness since the mid-1990s to abandon the rigorous Oakes test in favour of what Chief Justice Dickson once called the "normative standard," embodying "a less formalist, more flexible construction of s. 1 in balancing individual and community ends."⁶⁸ The rigid separation between the formal and substantive phases of the Oakes test seems to have left the Court with little flexibility when attempting to contextualise the formal meaning of a right or freedom with respect to a particular case and we saw how a measure of definitional balancing and a substantive due process reading of more than one of the guaranteed Charter rights and freedoms was required to fill out the meaning of section 2(b) in the *Harper* case.

If the alternative, however, is a greater reliance on the balancing of interests when considering the scope of a right or freedom which is more likely to rely on precedents and case law than moral principle, then we may be moving toward an era when substantive justifications with reference to case-specific ethical standards

68. Leon E. Trakman, William Cole-Hamilton and Sean Gatién, "R. v. Oakes 1986-1997: Back to the Drawing Board." *Osgoode Hall Law Journal* XXXVI:1 (1998), 87n. See also Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights." *Osgoode Hall Law Journal* XL:3-4 (2002), 337-368.

may be more plausible explanations for the outcome of decisions.⁶⁹ The shift, for Richard Moon,⁷⁰ seems to be the result of the transformations in late modern society outlined earlier in this paper. According to Moon, ". . . freedom of expression does not simply protect individual 'autonomy' (understood as freedom from others). Instead it protects the individual's freedom to interact with others. It rests on a recognition that human agency or autonomy is a capacity that is realized in communicative interaction."⁷¹ While this is a quite defensible conception of the late modern notion of situated individualism, it fails to acknowledge, first of all, that the Charter covers only actions by the State. Most instances of communicative incompetence or distortion may receive little relief from Charter decisions (see the statement by Joel Bakan, *supra*).

Secondly, Moon's analysis depends once again on a late modern disenchantment with the possibility of moral universals. In his analysis, "[moral] value and harm are really two sides of the same coin." (p. 352). While I have some sympathy in general terms for the position that the "malaise of modernity"⁷² is the erosion of a moral consensus, it may be premature to argue that we have lost all capacity to recognise and enforce principled positions and are left with nothing but situationally determined perceptions of harm (ethics). In fact, a convincing case has been made by many observers that rights discourse and adjudication have displaced moral thinking as a new kind of "disciplinary technology" that generates its own truth claims and power relations.⁷³

A less intellectually aggressive position might be to follow the lead of the Court as it struggled with its judgements, noting that relatively straightforward claims for protection with respect to either traditional rights or areas of the law where there was substantial agreement on the need for State intervention (for example, restricted circulation of obscene materials) could be handled relatively easily with the two-phase, or two-step, Oakes test. However, when there are conflicting conceptions of how to specify fundamental values, the Court has been softening the

69. For example, the scaling down of children's rights under section 7 in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*.

70. Moon (2002), *op. cit.*

71. *Ibid.*, p. 365.

72. Charles Taylor, *The Malaise of Modernity* (Toronto: Anansi, 1991).

73. See Carole Smith, "The Sequestration of Experience: Rights Talk and Moral Thinking in 'Late Modernity.'" *Sociology* XXXVI:1 (2002), 43-66.

distinction between the two phases and engaging in definitional balancing. In *Harper*, for example, the privileging of a deliberative conception of democracy downplays the competing, potentially contradictory, claims of either a participatory or a democratic accountability conception of democracy.

What Moon characterises as "the collapse of the general approach to limits on Charter rights" may be better understood as the result of more than one interpretive strategy being deployed, as circumstances warrant, with respect to qualitatively different kinds of cases. Although the "reasonable person" of the common law who is formally entitled to Charter Rights and Freedoms may no longer hold a uniform set of views, it will persist as a legal, if not a moral, fiction.