

“Charter Values” in Question: *Ontario v. Fraser* 2011

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The concept of “Charter values” – expressed either in that very term or closely related language – has appeared in no less than one hundred Supreme Court of Canada decisions since the Charter of Rights and Freedoms was adopted in 1982.¹ Why? The Charter protects “rights and freedoms”; what, if anything, is added by the idea of “Charter values”?

It turns out that in many instances quite a bit is added. While the term “Charter values” is sometimes used simply as a synonym for Charter rights and freedoms,² it often serves an independent jurisprudential purpose. In some instances, “Charter values” denotes a jurisprudential strategy to make a law Charter compliant without resorting to the sledgehammer of invalidation.³ In other cases, “Charter values” are invoked as underlying concepts that help judges give meaning to, and sometimes expand, the Charter’s explicit rights and freedoms. This last usage of Charter values - what might be called the underlying values usage - is the focus of this paper. In this sense, Charter values are part of the “unwritten principles” used to decide such cases as the *Quebec Secession Reference* (1998)⁴; they are also akin to the penumbral rights used by the U.S. Supreme Court in famous privacy rights cases. While this underlying values approach attracted occasional judicial unanimity it has also generated sharp disagreement among judges and commentators.

This paper examines the Charter-values controversy in *Ontario (A.G.) v. Fraser* (2011), setting it in the context of similar debates in other cases. We begin situating the “Charter values” debate in *Fraser* in the context of the overall development of Charter jurisprudence concerning labour relations. We then put this debate in a broader historical and comparative context, using as examples one American case (*Griswold v. Connecticut* (1965)) and two Canadian cases (the *Provincial Judges Reference* (1997) and the *Secession Reference* (1998)).

“Charter Values” and Labour Law: The Road to Fraser

Fraser is the most recent in a series of cases concerned with whether, and if so to what extent, the Charter constitutionalized the common elements of North America’s “Wagner model” of labour relations, including compulsory collective bargaining and the right to strike. Section 2(d) of the Charter guarantees “freedom of association,” but in an early Charter decision, *Alberta Labour Reference* (1987),⁵ a majority of the Supreme

¹ This figure is derived from the Canadian Legal Information Institute’s (CanLII) database (www.canlii.org) as of June 2012. A total of 99 of the Supreme Court of Canada’s decisions contain the

² For instance, in *Rodriguez v. British Columbia (A.G.)* (1993) the Court used section 7’s rights to life, liberty, and security of the person interchangeability with the values of life, liberty, and security of the person.

³ In Mark Harding’s (2011) account, the Supreme Court has invoked Charter values to alter common law precedents and to resolve ambiguous statutes.

⁴ Indeed, as we shall see below, the *Secession Reference* referred to unwritten “principles” and “values” (including Charter values) synonymously throughout.

⁵ The *Alberta Labour Reference* is one of the three *Labour Trilogy* Supreme Court decisions handed down on the same day in 1987 (*Reference Re Public Service Employee Relations Act (Alta.)*; *PSAC v. Canada*; *RWDSU v. Saskatchewan*). These cases dealt with interrelated labour issues such as: provincial legislation prohibiting essential public sector workers from striking, federal legislation altering public sector wages outside of collective bargaining, and back to work legislation.

Court determined that this was an individual rather than a collective right. That is, section 2(d) guaranteed the right of individuals to do in association what they were free to do as individuals, but it did not vest rights directly in such groups as unions. Thus collective bargaining and the right to strike were not constitutionally mandated. However desirable these rights might be in principle, the Charter did not require all desirable things. As Justice McIntyre put it in the majority 1987 judgment, “while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time” (*Alberta Labour Reference*, 1987: para. 151). From this perspective, labour law, in its collective dimensions, had been left to the legislative arena. As Christopher Hunter puts it, the Court’s traditional jurisprudence “viewed the collective bargaining process as a creature of modern legislation, distinct from, and not protected by, the fundamental freedoms envisioned by the *Charter*” (Hunter, 2011a). As late as 2009, constitutional authority Peter Hogg affirmed the appropriateness of this perspective, arguing that “without any clear prescription in the Charter, there is much to be said for leaving the regulation of labour relations to elected legislative bodies (and the sanction of the ballot box)” (quoted from *Fraser v. Ontario (A.G.)*, 2011: para. 227).

This reading of the Charter’s s. 2(d) “freedom of association” has been controversial from the beginning. It generated the vigorous dissent of Justices Dickson and Wilson in *Alberta Labour Reference*, for example. But it stood the test of time until 2001, when, in *Dunmore v. Ontario (A.G.)*, the Court found more scope for collective rights in section 2(d). The issue concerned the legislated rights of Ontario farm workers. Traditionally, agricultural workers (along with hunters and trappers) had been explicitly excluded from the protections of Ontario’s *Labour Relations Act* (LRA). In 1994, Ontario’s NDP government enacted the *Agricultural Labour Relations Act* (ALRA), which extended collective bargaining rights to farm workers for the first time. A year later, the newly elected Harris Conservatives enacted the *Labour Relations and Employment Statute Law Amendment Act* (LRESLAA), which contained a provision repealing the ALRA. Not only did this decertify existing collective agreements, but it re-subjected farm workers to their prior exclusion from all LRA protections. The farm workers went to court to challenge both the Harris government’s repeal of the ALRA and the section of the LRA that excluded agricultural workers from its ambit.

In *Dunmore*, the Court, while not rejecting the individual-rights involved in “freedom of association,” emphasized that such rights are sometimes best pursued through activities that “cannot be performed by individuals acting alone” (2001: para. 16). Section 2(d) must include such “collective” rights, said the *Dunmore* Court. This is necessary, wrote, Justice Bastarache, because

the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members (para. 17).

Not only does this mean that “a language community cannot be nurtured if the law protects only the individual’s right to speak,” but that there must be a freedom to organize in labour relations. That is, section 2(d) would no longer protect just the right to do

collectively what individuals could also do separately; it would now vest rights in groups as such, including labour associations:

the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level (para. 17).

This did not mean that there was now a constitutional right to collective bargaining or a right to strike. The *Dunmore* Court was not prepared to reject so completely the precedent set in the *Alberta Labour Reference* and affirmed in several subsequent cases. Thus, Justice Bastarache approvingly underlined the fact that “this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d).” Nevertheless, the fact that not “all [labour] activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection,” could not, in the Court’s view, mean that farm workers can be excluded from all LRA protections. What was required was a legislative scheme allowing farm workers to exercise their section 2(d) rights in a “meaningful” way (para. 67).

In response to *Dunmore*, the Ontario legislature enacted the *Agricultural Employees Protection Act* (AEPA) in 2002. The AEPA established a labour relations regime for farm workers, albeit one still separate from the *Labour Relations Act*. The AEPA protected farm workers who desired to organize and make representations to their employer; it prevented interference from exercising these rights; and it established a tribunal for disputes. As we shall see, however, it did not explicitly establish the full range of protections common to the Wagner model.

If *Dunmore* represented the first crack in the *Alberta Labour Reference* approach to s. 2(d), then *Health Services and Support–Facilities Subsector Bargaining Assn. v. British Columbia* (2007) represents its “last rites” (Cameron, 2009). In an effort to reduce escalating healthcare costs in the province of British Columbia, the provincial legislature passed Bill 29, which would override many existing collective agreements and loosen restrictions on contracting out work (Russell et al., 2008: 395). The controversial law was quickly challenged and eventually came before the Supreme Court of Canada in *Health Services*.

In “the most explicit reversal of an earlier Supreme Court Charter ruling to date” (Russell et al., 2008: 395), the majority *Health Services* opinion (co-authored by Chief Justice McLachlin and Justice LeBel) struck down Bill 29 on the grounds that s. 2(d) protected a constitutional right to collective bargaining. Gone was the view of “the collective bargaining process as a creature of modern legislation, distinct from, and not protected by, the fundamental freedoms envisioned by the *Charter*” (Hunter, 2011a). The Court explained that *Dunmore*, by recognizing the collective dimensions of s. 2(d), “opened the door to reconsideration of that view,” and that the two-decade long exclusion of collective bargaining from the Charter’s ambit could “not withstand principled scrutiny and should be rejected” (*Health Services*, 2007: para. 22).

The Court paired this bold reversal with a note of caution. The new right to collective bargaining, it maintained, is limited “to a general process of collective

bargaining, not to a particular model of labour relations, nor to a specific bargaining method.” Peter Hogg was not convinced:

The majority [in *Health Services*] claimed that it was not constitutionalizing “a particular model of labour relations.” But that is exactly what it was doing... Presumably, only compulsory collective bargaining on the Wagner model will now pass muster in Canada (quoted from *Fraser*, 2011: para. 227).

Ontario’s farm workers weren’t convinced either. Although the *Agricultural Employees Protection Act* (AEPA), enacted in response to *Dunmore*, had improved their situation considerably, it had not enacted all of the components of the Wagner model. For example, it did not contain a provision explicitly requiring that employers bargain in “good faith.” If *Health Services* had, despite protestations to the contrary, constitutionalized the Wagner model (as Hogg claimed), then the farm workers could challenge remaining deficiencies of the AEPA. This is what they did in *Fraser*.

Perhaps surprisingly, all but one dissenting Supreme Court judge rejected the farm workers’ claim and upheld the AEPA. Two opinions are key for our purposes: a five-judge opinion authored by Justices McLachlin and LeBel (joined by justices Binnie, Fish, and Cromwell) and a two-judge opinion authored by Justice Rothstein (joined by Justice Charron). Both rulings found the AEPA to be constitutional, but they arrived at that conclusion by very different routes, disagreeing most profoundly on whether upholding the AEPA required reversing *Health Services*.

For Rothstein, *Health Services* had wrongly constitutionalized the right to collective bargaining, contrary to long-established precedent (including *Dunmore*), and had thus made *Fraser* possible. The way to resolve *Fraser* was thus to overrule *Health Services* and return labour relations to full legislative control. In support of this conclusion, Rothstein drew on Hogg’s view that *Health Services* had constitutionalized the Rand formula “without any clear prescription in the Charter,” and that “there is much to be said for leaving the regulation of labour relations to elected legislative bodies (and the sanction of the ballot box)” (*Fraser*, 2011: para. 227).

Not surprisingly, Justices McLachlin and LeBel, the very judges who co-authored the majority opinion in *Health Services*, were unwilling to abandon their earlier ruling so quickly. They insisted, contrary to the farm workers’ claims, that the AEPA (properly understood) was compatible with *Health Services*, reminding readers that while the 2007 ruling did establish a right to collective bargaining (*Fraser*, 2011: paras. 38, 96), it did not guarantee a *specific* model of labour relations (*Fraser*: para. 77). For observers such as Hunter (2011b), McLachlin and LeBel’s reaffirmation of “the validity of *Health Services*” was based on “a far less progressive ratio” than had been generally assumed.

The debate in *Fraser* is more complex and subtle than this brief summary can capture. It will suffice, however, to contextualize the point of debate that constitutes our focus: the role of “Charter values” in constitutional interpretation. For Rothstein, the right to collective bargaining established by *Health Services* is “a stand-alone right created by the Court, not by the Charter” (*Fraser*, 2011: para. 200). To repeat Hogg’s formulation – which, of course, Rothstein quotes – the right to collective bargaining is “without any clear prescription in the Charter.” Instead, the right was derived, wrongly in Rothstein’s view, from underlying “Charter values.”

According to *Health Services*, collective bargaining must receive constitutional protection because it complements and promotes the “Charter values” of “human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy” (2007: paras. 81-85). Rothstein has serious doubts about the rigor of this approach. “Either the Charter requires something,” he writes, “or it does not” (*Fraser*: para. 252). He believes interpreting the Charter must “begin with the words of the *Charter* itself and must be bound by the normal constraints of legal reasoning and analysis.” The point of constitutional interpretation, Rothstein insists, “is not to simply promote, as much as possible, values that some subjectively think underpin the *Charter* in a general sense” (para. 252). These comments clearly echo Justice McIntyre’s earlier warnings in the *Alberta Labour Reference* that “the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time” (1987: para. 151). Rothstein was willing to concede that there are circumstances where the “Charter values” approach could be necessary to deal with “genuine ambiguity” in a statute (see *Bell ExpressVu* 2002: para. 62; see also Harding, 2011: ch. 4). However, the “Court cannot employ a *Charter* values argument to interpret the *Charter* itself” (*Fraser*, 2011: para. 253).

Rothstein’s concerns were rejected out of hand by his colleagues in the *Fraser* majority. “We can only respond,” wrote Justices McLachlin and LeBel, “that a value-oriented approach to broadly worded guarantees of the *Charter* has been repeatedly endorsed by the *Charter* jurisprudence over the last quarter century” (*Fraser*: para. 96). McLachlin and LeBel are quite right about the prevalence of the “Charter values” approach. Yet their dismissal of Rothstein’s views was too quick and easy. The issues Rothstein raises are of enduring jurisprudential significance and interest. The questions he poses crop up regularly and in a variety of contexts. To appreciate what is at stake, it is helpful to situate the *Fraser* debate about Charter values in a broader context. We do so using three examples: *Griswold v. Connecticut* (1963), the *Provincial Judges Reference* (1997), and the *Secession Reference* (1998).

Griswold v. Connecticut (1965)

At issue in *Griswold* was a Connecticut law prohibiting the sale of contraceptives. The law was no longer generally enforced in the 1960s, but opponents eventually managed to manufacture the standing necessary to challenge it. A majority of the Supreme Court found that the law infringed the right to privacy, especially marital privacy. But where in the US constitution was this right to be found? The answer was in the “penumbras formed by emanations from” a set of explicit constitutional rights that protect particular aspects of privacy (1965: 484). The First Amendment’s protection of freedom of religion and speech, for example, arguably has privacy dimensions. So do the Third Amendment’s constraint on soldiers being quartered in private homes and the Fourth Amendment’s protection against unreasonable search and seizure. Similarly, the Fifth Amendment’s guarantee against self-incrimination can be seen as a kind of privacy right. Finally, the Ninth Amendment’s acknowledgement of rights “retained by the people” could include privacy rights. According to Justice Douglas’s majority opinion in *Griswold*, the penumbras of these explicit rights create a “zone” of constitutionally protected privacy. Or, to restate it, underlying the various explicit privacy rights is the

more general principle or value of privacy. This unwritten underlying principle gives meaning and coherence to the explicit rights, which should be seen examples of a broader zone of constitutional protection. Other examples of the underlying principle can and should be made explicit, and brought to the surface, over time. These include the kinds of privacy needed to invalidate laws against contraception and, later (and even more controversially) against abortion.

Critics of this jurisprudential approach have always resisted its elastic potential to constitutionalize (and hence judicialize) almost everything. In the critics' view, *Griswold* goes far beyond using the underlying principle (or value) of privacy to give interpretive meaning and stronger protection to explicit privacy protections, such as the prohibition of unreasonable search and seizure; instead, it justifies the creating of entirely new constitutional rights. As Justice Stewart wrote in dissent in *Griswold*, the facts of the case did not involve

any abridgment of '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.' No soldier has been quartered in any house. There has been no search, and no seizure. Nobody has been compelled to be a witness against himself (1965: 529).

Not that Justice Stewart favoured the anti-contraception law at stake in *Griswold*. He considered it an "uncommonly silly law," and asserted his own view that "contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs" (1965: 528). Like Justice Douglas, in other words, Stewart clearly considered the law to be a regrettably infringement of privacy. But the Court had not been asked whether the law "is unwise, or even asinine"; it had been asked only whether it "violates the United States Constitution," and in Justice Stewart's view it did not. In other words, not all "silly," "unwise, or even "asinine" laws were unconstitutional. Privacy was good thing, but the constitution protected only some aspects of it, leaving the rest to legislatures, which were free to enact silly laws. The remedy provided by the constitution for such laws was legislative and electoral, not judicial:

If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books (*Griswold*, 1965: 531).

This is not unlike Hogg's view concerning collective bargaining – i.e., that "without any clear prescription in the Charter, there is much to be said for leaving the regulation of labour relations to elected legislative bodies (and the sanction of the ballot box)."

Provincial Judges Reference (1997)

In the Canadian context, the essence of the *Griswold* debate was replicated – though with respect to a very different issue – in the *Provincial Judges Reference*.⁶ This case arose because judges, along with the public sector more generally, had been subject to across-the-board salary reductions as part of governmental deficit- and debt-reduction strategies. The question was whether governments could cut judicial salaries in this way without violating “judicial independence.” The Supreme Court decided that the constitution required judicial salaries to be set on the recommendation of independent judicial compensation commissions. A government’s decision to pay less than such a commission advised, moreover, would be subject to review and potential reversal by judges.

Where did this hitherto unknown constitutional requirement of judicial compensation commissions come from? Not from any explicit constitutional provision but from the principle of judicial independence underlying several constitutional provisions. Section 11(d) of the Charter guarantees the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” Section 99 of the *Constitution Act, 1867* states that “Judges of the Superior Courts shall hold office during good behaviour,” and “shall be removable” only “by the Governor General on Address of the Senate and House of Commons.” Section 100 of the *1867 Act* specifies that the salaries of federally appointed judges “shall be fixed and provided by the Parliament of Canada.” Finally, the statement in the 1867 constitutional preamble – that the Constitution was “similar in Principle to that of the United Kingdom” – has been understood to include the principle of judicial independence.

In Chief Justice Lamer’s majority opinion in the *Judges Reference*, the “express” or “substantive” provisions of the constitution “merely elaborate” (1997: para. 95) “the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*” (para. 107). As “the very source of the substantive provisions” of the constitution, the underlying, unwritten principles are “not only...key to construing the express provisions,” but may also be used to “fill out gaps in the express terms of the constitutional scheme” (para. 95). As does Douglas in *Griswold*, Lamer holds that provisions expressly protecting parts of a basic principle are “merely” components of a broader constitutional zone of protection for that principle, all of which is open to judicial enforcement. Accordingly judges may bring new components to the surface from time to time – the right to marital privacy in *Griswold*, and the right to judicial compensation commissions in the *Judges Reference*.

As in *Griswold*, this elastic view of the constitution attracted opposition in the *Judges Reference*. Justice La Forest’s dissent in the latter case closely resembles Justice Stewart’s in the former. For La Forest “the express provisions of the Constitution are not, as the Chief Justice contends, ‘elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*’. On the contrary, they *are* the Constitution” (1997: para. 319). Like Stewart, La Forest resists the idea of a constitution that extends to everything that might in principle be desirable. Underlying

⁶ The actual name of this case is *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997]

principles can, to use Lamer's formulation, be helpful in "construing the express provisions," but for La Forest using them to "fill[] out gaps ... in the constitutional scheme" amounts to rewriting that scheme rather than interpreting it. "Construing" express provisions is democratically justifiable judicial function, in this view, but to add entirely new, previously unthought-of, rights is "to subvert the democratic foundation of judicial review" (ibid).

Peter Russell, among others, agreed. Not only did Russell find the "reading of our constitution" on which the Court based the new requirement for judicial compensation commissions "very far-fetched," but he noted that "[t]he six Supreme Court justices who went along with this decision seemed not a bit disturbed by the conflict of interest inherent in their ruling," namely, that it gives "judges the final word in deciding how much they should be paid" (2007: 68). Russell was disturbed – so disturbed, in fact, that he considered the Judges Reference his "top candidate" for reversal through the Charter's section 33 notwithstanding clause (2007: 67).

Secession Reference (1998)

In Canada, the use of underlying unwritten principles to "fill gaps" in the constitutional scheme was taken to its greatest heights in the *Secession Reference*. In this case, the constitutional "gap" to be filled was arguably what Michael Foley has called a constitutional "abeyance," – i.e., a purposeful constitutional silence that places the object of that silence beyond the reach of the constitution (Foley, 1989; LeRoy, 2004). In Canada, the question of how a province might secede from Confederation is plausibly understood as such an abeyance. The potential secession of the province of Quebec was a key factor in launching the constitutional reform process that led to the Constitution Act, 1982, with its Charter of Rights and its newly domesticated (i.e., "patriated") amending formulae (Romanow et al., 1984: xix; Russell, 2004: 99). Given the "top of mind" status of secession during this constitution making process, the absolute silence of the new constitutional documents on how to secede speaks loudly in support of the claim that this was indeed a purposeful silence, an "abeyance." On this basis, one might consider the issue of secession to be a gap in the constitutional order that should not be filled by judges.

However, the Supreme Court refused in the *Secession Reference* to declare the constitution irrelevant to the question of secession. Determining that an issue as important as secession could not lie beyond the reach of the constitution – i.e., that we enjoyed a "gapless constitution" with respect to secession – the Court declared a constitutional duty to negotiate in good faith upon an affirmative answer by a clear majority to a clear referendum question on secession (Howse and Makin, 1997: 190). Significantly, the Court based this duty not on any explicitly relevant constitutional provisions, but on underlying and unwritten constitutional "values" or "principles" (the two terms are used extensively and interchangeably throughout the judgment). The four main values or principles were federalism, democracy, the rule of law, and minority rights. Some of these are particular to the Constitution Act, 1867 (federalism). Others infuse the entire constitution (democracy, rule of law, and minority rights), and are, in part, "Charter values" (*Secession Reference*, 1998: para. 34).

As with respect to *Griswold* and the *Judges Reference*, the unwritten principles and values highlighted in the *Secession Reference* were all embodied in “express” or “substantive” provisions of the written constitution, and could helpfully illuminate the interpretation of those provisions. Yet the express provisions of the constitution played little role in the judgment. Indeed, according to Woehrling (1999), “[t]he most remarkable part of the decision was how the court answered all the questions without ever referring to the actual specific provisions of the constitution.” The reason was that the Court clearly needed to go beyond normal constitutional interpretation and fill a “gap” with a new constitutional rule or right. If *Griswold* arguably created a new right to marital privacy, and the *Judges Reference* created a new constitutional requirement for judicial compensation commissions, then the *Secession Reference* “essentially amended the amending formula of the constitution by clarifying the legal procedures that would be required for a province to leave the federation” (Bakvis et al., 2009: 89).

Unlike *Griswold* and the *Judges Reference*, the *Secession Reference* generated no dissent. The judgment came in the form of a unanimous, unsigned opinion of “the Court.” This is not surprising given the highly controversial public issues at stake. Faced with issues of such sensitivity, the Court strives for the increased institutional legitimacy conferred by *per curiam* unanimity. Justice La Forest was no longer on the Court to advance the kinds of concerns he underlined in the *Judges Reference*, but even if he had been there, political prudence might well have persuaded him to join the unanimous opinion. As Peter Russell (1983) said of the 1981 *Patriation Reference*, “questionable jurisprudence” is sometimes necessary to achieve “bold statescraft.”

The *Patriation Reference* itself had, of course, generated multiple opinions, which helped to highlight the overall “questionable jurisprudence.” In the *Secession Reference*, jurisprudential qualms were raised by commentators outside the Court, including retired Supreme Court Justice Estey (2000), who proclaimed that “The first two-thirds” of the judgment “were not required at all.” Constitutional scholar John Whyte wrote that, “The court pulled the duty to negotiate out of rarefied air” (1999: 133), and Patrick Monahan saw the Court engaging in a “purely legislative exercise, in which it define[d] the constitutional obligation based on its own conception of what would be appropriate” (2000: 91). Like the dissents in *Griswold* and the *Judges Reference*, these formulations all see underlying principles or values being used not to construe existing constitutional provisions but to create new ones, on the grounds that the constitution protects not just those dimensions of the underlying principles that it explicitly enumerates, but the principles as such, thus enabling judges to find new, implied rules and requirements over time.

Conclusion

Against the backdrop of such cases as *Griswold*, the *Judges Reference*, and the *Secession Reference*, the controversy about “Charter values” in *Fraser* continues a longstanding and persistent debate about the appropriate jurisprudential use of underlying, unwritten principles or values. That such principles and values exist, indeed that they can be appropriately understood as the “source” of “substantive” or “express” constitutional provisions (to invoke Justice Lamer’s formulation), seems beyond question. How else can one understand a constitutional guarantee against “unreasonable

search and seizure” than as a protection of “privacy”? How else can one understand the guarantee of judicial tenure during good behavior than as promoting “judicial independence”? How else can one understand the constitutional provision of elected legislatures than as implementing representative “democracy”? The controversy concerns how much of an underlying principle is given constitutional protection. Does the constitution protect (in a judicially enforceable way) only those features of a principle that it expressly articulates, or are the express provisions “merely” examples of a broader “zone” of constitutional protection justified by the principle?

Justice Rothstein’s insistence in *Fraser* that the objective of constitutional interpretation “is not to simply promote, as much as possible, values that some subjectively think underpin the *Charter* in a general sense” clearly takes the more limited view of the constitution’s reach – i.e., that it does not substantively protect everything that might plausibly be entailed in or implied by its underlying principles or values. On this he stands with Justice La Forest’s view in the *Judges Reference* that “the express provisions of the Constitution are not ... ‘elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*’. On the contrary, they *are* the Constitution” (1997: para. 319). And justices La Forest and Rothstein both echo the view of Justice Stewart in *Griswold* that a new, hitherto undiscovered privacy right could not legitimately be added to the explicitly protected privacy rights. Fitting the same pattern is Justice McIntyre’s 1987 caution that “the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time.” Also fitting the pattern is the perspective of commentators who, however much they might admire the “bold statescraft” (Russell, 1983) of the *Secession Reference*, think there is something questionable about jurisprudence that uses unwritten principles to amend the constitution’s explicit amending provisions in order to overcome a constitutional abeyance.

This kind of resistance to extensive constitutional elasticity is, to be sure, a minority position nowadays. As David Robertson argues, constitutional review around the world has increasingly become “a mechanism for permeating all regulated aspects of society with a set of values inherent in the constitutional agreement the society has accepted” (2010: 7). In other words, judges engaged in constitutional review increasingly seek to implement not just the explicit provisions of a society’s “constitutional agreement,” but the full “set of values inherent in” – or underlying – that agreement. This surely helps explain the “underlying values usage” of “Charter values” in the Canadian context.

The growing international prevalence of this expansive view of constitutional reach may also explain the short shrift given by justices McLachlin and LeBel to the reservations about it expressed by Justice Rothstein in *Fraser*. In 2005, Justice McLachlin went to great lengths, in a well-known speech in New Zealand (see McLachlin, 2006), to defend the kind of elastic constitutional approach described by Robertson. By the time of *Fraser*, she thought it unnecessary to say more than “that a value-oriented approach to broadly worded guarantees of the *Charter* has been repeatedly endorsed by the *Charter* jurisprudence over the last quarter century.” This exhibits the confidence of victors in a debate, who can simply assert their victory without feeling the need to substantively rebut the few remaining losers. “The debate has been settled,” McLachlin and LeBel seemed to be saying to Rothstein, “get over it.”

We agree that McLachlin’s side in this debate is dominant nowadays, not only in Canada but, if Robertson is right, around the world. We doubt, however, that the controversy will subside entirely. Driving the expansive view of constitutional reach is the idea that the constitutional must have something to say about every question or issue that is deemed to be of significance or importance. With respect to such matters, “silly” or even “asinine” laws cannot be constitutional. But to say that matters deemed sufficiently important must always have a constitutional dimension is to say that important matters can never be left wholly to the non-judicial branches of government. That, we suspect, is a view that will always attract at least some skepticism and opposition. Peter Hogg’s claim that, “without any clear [constitutional] prescription,” some important questions should be left “to elected legislative bodies (and the sanction of the ballot box)” – essentially the view expressed by Justice Stewart’s dissent in *Griswold* – is unlikely to die entirely away. Neither is Justice La Forest’s view that going as far beyond “express provisions” as the Court’s majority did in the *Judges Reference* “subvert[ed] the democratic foundation of judicial review.” To be sure, the latest version of the debate in *Fraser* seems unlikely to generate the kind of anger seen in Peter Russell’s reaction to the *Judges Reference*, but that does not diminish the importance of the *Fraser* debate.

We conclude with W.R. Lederman’s 1991 characterization of what we consider to be the enduring issue:

[I]f we characterize too many things as constitutional, we put too much of potential legal change to meet societal needs beyond the reach of the flexible statutory means of change... the problem of limiting what is to be considered “constitutional” in this sense is very real. The limits have to be severe. You cannot constitutionalize the whole legal system.

With respect to the Charter, Lederman insisted that we should not “turn every legal issue into a specially entrenched Charter issue” (1991: 119). On these grounds, we suspect, he would have been skeptical of the underlying principles usage of “Charter values.”

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