Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms

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I. INTRODUCTION

It is a great honour to address you today, although it is an honour mixed with sadness. I appear in the place of Mr Justice Walter Surma Tarnopolsky of the Ontario Court of Appeal, who died suddenly some weeks ago. Walter Tarnopolsky made an enormous contribution both to the study of human rights in Canada — he was a distinguished member of the law faculties of the Universities of Saskatchewan, Windsor, Ottawa, and Osgoode Hall Law School, during which time he authored or edited four books on human rights — and to the practice of human rights in Canada and around the world — he served, at various times, as President of the Canadian Civil Liberties Association, member of the Canadian Human Rights Commission, member of the United Nations Human Rights Committee, and most recently justice of the Court of Appeal. He was one of Canada's premier, pioneering, advocates of human rights, and he will be missed.

One of his many contributions — one I particularly cherish — is his book, *The Canadian Bill of Rights*.[1] Its title refers to the Canadian *Bill* of Rights, the unconstitutionalized statute, protected only by a manner and form requirement, that predated Canada's constitutionalized Charter of Rights.[2] Indeed, Walter Tarnopolsky's book, published in two editions prior to the adoption of the Charter of Rights in 1982, offers a useful overview of many of the means for the protection of human rights — not just the Bill of Rights but others as well–used in Canada prior to the Charter. There were many such means: statutory protections for human rights; common law principles regulating the relationship between legislature, government and courts; the procedural and evidentiary rules of the criminal law; principles of interpretation used by the courts when construing legislation that might endanger individual rights; and the courts' deployment of constitutional division–of–powers language to achieve human rights ends.[3] The recognition that such means existed, and in most cases still exist, is a useful point of departure for my remarks today.

I want to discuss the difference that a very specific mechanism — a charter of rights entrenched in the constitution — has made to the protection

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1 Walter S Tarnopolsky, *The Canadian Bill of Rights*, 1st ed (Toronto: Carswell, 1966) and 2d ed (Toronto: McClelland and Stewart, 1975)

2 Canadian Bill of Rights, SC 1960, c 44; Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982.

3 See, in addition to Tarnopolsky, supra, note 1, Roderick A Macdonald, "The New Zealand Bill of Rights Act: How far does it or should it stretch?" in *Proceedings of the 1993 New Zealand Law Conference: Law and Politics*, vol 1 (Wellington: New Zealand Law Society, 1993), 94 at 113ff.

of human rights and, more broadly, to constitutional discourse in Canada. There are familiar ways of stating the difference such a charter makes. Many assume simply that it secures greater protection for human rights. Others argue that it transforms the role of the courts, politicizing them. There is truth to both these suggestions, but with time they have come to seem hackneyed and simplistic. On the one hand, it is clear that the recourses that predated the Charter — complaints to human rights commissions or even reform of the day–to–day procedures of police, welfare agencies, or other public institutions — can have a greater impact on the rights of more people than the rarified, highly symbolic, and expensive adjudication that occurs under charters of rights. And on the other hand, although the Charter may have expanded the opportunities for controversy, the contrast between a traditional judiciary, mechanically executing the law, and an activist bench, creating new law, is often overdrawn. As all lawyers know, the methods of the common law and statutory interpretation necessarily involve creativity — a process of inquiry and reflection reaching beyond the dictation of statute or precedent — and the outcome is frequently controversial in areas not dependent on a charter of rights, as the history of labour law, aboriginal rights, and family law makes clear.

We can do better than the old saws. Experience like that of Canada allows us to sharpen our understanding of the impact of constitutionalized charters of rights, and central to that understanding must be the perception that charters do not merely protect more rights or protect them better. They have their own structural and symbolic character, and that character has an impact well beyond the outcome of particular cases, profoundly affecting the nature of constitutional debate within society generally. This paper, then, is not just about the conscious definition and vindication of human rights under the Canadian Charter (although it will discuss that). It is also about the Charter's subtle structural effects, effects that are sometimes unintended, unexpected and surprising.

II. An Overview of the Canadian Charter of Rights and Freedoms

A. The adoption of the Charter

The Canadian Charter of Rights and Freedoms was adopted in 1982 after two decades of constitutional debate. It was one outcome of the process of "patriation" — the long period of negotiation and popular debate that led to the enactment of a domestic amending formula for the Canadian constitution (prior to 1982, Canada's primary constitutional document was a statute of the British Parliament, its most important provisions amendable only by that legislature).[4] The Charter was, then, part of an exercise in nation–building. Indeed, it was designed to further a specific conception of Canadian nationhood. This was most evident in its provisions on

4 For citation of the Charter see supra, note 2. Prior to 1982, Canada's primary constitutional document was the British North America Act, 1867, 1867 c 3 (UK) (although there were a host of additional instruments enjoying constitutional status). In 1982, the Parliament of the United Kingdom, at the request of the Government of Canada, adopted the Canada Act 1982, 1982 c 11 (UK), patriating the Canadian constitution. That statute renamed the British North America Act the "Constitution Act, 1867", introduced two amendments to it, but otherwise left it intact (it also retained, frequently with new names, most of the other constitutional instruments). The *Canada Act* 1982 enacted a number of additional measures in the "Constitution Act, 1982", including the Canadian Charter of Rights and Freedoms, an amending formula for the entire constitution, and a number of miscellaneous provisions including section 35 (protecting aboriginal rights). Thus, the two principal documents of Canada's constitution are now the Constitution Act, 1867 and the Constitution Act, 1982, and these are supplemented by a number of lesser instruments.

language rights, which overruled elements in Quebec's Charte de la langue française,[5] legislation that was the centrepiece of the Parti Québécois' vision of a Quebec in which French would be the only language of public affairs. More generally, the Charter was designed to instil a single, unified vision of Canadian citizenship, one founded on the proposition that all Canadians should be in precisely the same position with respect to the Canadian state.[6]

The link between nation building and charters of rights is common. It was true of the French Declaration of the Rights of Man and the Citizen and of the rights protections in the United States constitution. It will very likely be true of Australia as well (should Australia adopt a constitutionalized charter of rights), given the close connection between the drive for an Australian charter, the quest for national renewal upon the centenary of the federation, and indeed the republican debate. Nationalism is a significant feature of charters of rights, often ignored by lawyers who tend to focus exclusively on their civil liberties dimensions. It is not necessarily benign. Like all nationalisms, it emphasizes the citizen's bond not merely to the country, but to a particular conception of the country. That conception may be contested. The emphasis on a single, undifferentiated citizenship, evident in the link between the adoption of the Charter and the federal government's opposition to any form of special status for Quebec, was controversial among French-speaking Canadians (including many federalist Quebecers). Two major aboriginal organizations opposed patriation largely because of what they considered to be insufficient attention to specifically aboriginal rights. As we will see below, the nationalist aims of the Charter of Rights have shaped its subsequent impact.

B. The contents of the Charter

What is in the Charter?

There are, of course, a number of substantive provisions affirming a series of rights, beginning with a set of commonly recognized "fundamental freedoms":

- freedom of "conscience and religion" (s 2a);
- freedom of "thought, belief, opinion and expression, including freedom of the press and other media of communication" (s 2b);
- freedom of peaceful assembly (s 2c); and
- freedom of association (s 2d).

5 *Charte de la langue française*, SQ 1977, c 5. With certain exceptions, section 73 of that statute restricted English schooling in Quebec to children whose parents (or one of them) had obtained their elementary schooling in English *in the province*. It was overruled by section 23 of the Charter, which granted the right to have their children educated in English to parents who had received their primary school education in English *anywhere in Canada* (I apologize for the convoluted expression, made necessary by the fact that the right is granted to the parents, not to the children). See *Quebec (AG) v Quebec Protestant School Boards*, [1984] 2 SCR 66. Other elements of Quebec's language law were also affected by the Charter, although not so directly. See *Ford v Quebec (AG)*, [1988] 2 SCR 712; *Devine v Quebec (AG)*, [1988] 2 SCR 790.

6 See Alan C Cairns, "Recent Federalist Constitutional Proposals", in Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, ed D E Williams (Toronto: McClelland and Stewart, 1991), 35 at 43–5; Peter H Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," (1983) 61 Canadian Bar Review 30; Rainer Knopff and F L Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms", in Alan C Cairns and Cynthia Williams, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985), 133. For a more complete discussion of the circumstances of patriation, see Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1993), 92–120.

Then comes a number of democratic rights, including the right to vote and provisions governing the sittings of the various legislatures (ss 3, 4, and 5).

The section on "legal rights" is introduced by section 7, a general provision protecting "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 7 is followed by a series of specific guarantees relating chiefly to criminal procedure, which forbid unreasonable search and seizure (s 8), prohibit arbitrary detention and cruel and unusual punishment (ss 9 and 12), entrench Canada's limited right against self-incrimination (s 13), and set out a number of rights on arrest and at trial, including the right to counsel, the presumption of innocence, the right to be tried within a reasonable time, and protection against double jeopardy (ss 10 and 11).

The Charter contains some substantive provisions expressly reflecting Canada's cultural diversity. These include rights to an interpreter for the deaf and for those who cannot speak the language of proceedings in which they are a party or witness (s 14). The Charter extends provisions in Canada's pre-1982 constitution regarding the use of English and French in the courts, Parliament, and government of Canada, affirms similar rights in the province of New Brunswick, and entrenches a right of access to services of the federal and New Brunswick governments in either official language (ss 16–22). The bilingual character of Quebec's courts and legislature is not included among these provisions but remains enshrined in Canada's pre-1982 constitution.[7] Canadian citizens who meet certain conditions are guaranteed the right to education in the official language of their choice, wherever numbers warrant (s 23). This right has been interpreted to include the autonomous administration of minority-language schools to an extent commensurate with the size of the minority population.[8] Although not technically within the Charter of Rights, the Constitution Act, 1982 also contains the very important guarantee of "existing aboriginal and treaty rights" (s 35).

There is very little specific protection for economic rights in the Charter, although, as we will see below, some have argued that section 7 (life, liberty and security of the person) has an economic component. In particular, there is no guarantee of property rights, despite the fact that one of Canada's principal political parties, the Progressive Conservative Party, has proposed that they be included. The only explicit guarantee of economic interests is section 6, protecting mobility rights, including the right "to pursue the gaining of a livelihood in any province".

Finally, there is the general guarantee of equality enshrined in section 15(1). It reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

I will discuss the effect of this provision below. For the moment it is sufficient to note that it is coupled, in section 15(2), with a saving clause for affirmative action programmes.

7 Constitution Act, 1867, s 133. For similar language rights in Manitoba, see Manitoba Act, 1870, SC 1870, c 3, s 23.

8 *Mahé v Alberta* (1990) 68 DLR (4th) 69 (SCC).

The substantive rights are conditioned by a number of general provisions of great importance. I will focus on three.

First, all the rights in the Charter are qualified by section 1, which states that the rights are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[9] Section 1 therefore authorizes limitations on all Charter rights but imposes a significant burden of justification on those seeking to sustain the limitations. As I describe below, this section has been responsible for the distinctive structure of reasoning under the Charter.

Second, section 33 of the Charter — the famous "notwithstanding clause" — allows legislatures to override many sections of the Charter as long as they do so expressly. Any invocation of the notwithstanding clause would lapse after five years, although it could be renewed. At the time of the Charter's adoption, defenders of the clause argued that it would not seriously diminish the effectiveness of the Charter, for a government intending to use it would bear a heavy burden of justification in the political arena (not in the courts; unlike section 1, the courts exercise no substantive control over the use of section 33).[10] This prediction has generally proven true, if one allows for the unique circumstances of Quebec. The clause has been used in six situations.[11] The province of Saskatchewan invoked it in a statute ordering a striking union back to work (the judicial decision on which this use of the clause was premised was later overturned on appeal).[12] The other five cases concern Quebec. The most important directly reflect, on the one hand, the limited legitimacy of patriation in that province, and, on the other, the province's reluctance to leave the fate of legislation designed to promote the use of French to an institution — the Supreme Court of Canada — the majority of whose members come from predominantly English-speaking provinces. In the first of these, Quebec invoked the clause with respect to all existing legislation to protest the patriation and amendment of the constitution over its objections; a similar clause was included in each subsequent statute for as long as the Parti Québécois remained in power.[13] (When the Liberals were elected, they allowed these to lapse.) The other occasion arose as a result of the Supreme Court's invalidation of provisions of Quebec's language law. Quebec, now with a Liberal government, enacted a modified version of the provisions, using the notwithstanding clause to protect it from challenge. In this latter case, the government paid a severe political price. Its use of the clause alienated many of its English-speaking supporters and ultimately contributed to the defeat of the Meech Lake Accord, a set of constitutional amendments on which the Liberals had staked much of their political capital.[14]

9 The wording will be familiar to those acquainted with the New Zealand Bill of Rights Act 1990, for it has been adopted in section 5 of that Act. The one possible exception to the application of the limitation clause in the Canadian Charter is section 28, which assures gender equality in the enjoyment of Charter rights.

10 For arguments in defence of the notwithstanding clause, see Paul C Weiler, "Rights and Judges in a Democracy: A New Canadian Version," (1984) 18 University of Michigan Journal of Law Reform 51 at 79–92; Peter H Russell, "Standing Up for Notwithstanding", (1991) 29 Alberta Law Review 293.

11 For this count, I rely on Peter W Hogg, *Constitutional Law of Canada*, 3d ed (Toronto: Carswell, 1992), 892–4 and Anne F Bayefsky, "The Judicial Function under the Canadian Charter of Rights and Freedoms", (1987) 32 McGill Law Journal 791 at 824.

12 SS 1984–85–86, c 111, s 9; *RWDSU v Saskatchewan*, [1987] 1 SCR 460.

13 These invocations of the clause are discussed in *Ford*, supra, note 5, at 733–45, the leading case on section 33.

14 The Supreme Court decisions, decided together, were *Ford* and *Devine*, supra, note 5. Those decisions were based primarily on Quebec's unentrenched Charter of Human Rights and Freedoms,

Finally, the Charter contains a set of interpretive clauses. Among these, section 25 protects aboriginal peoples from interpretations of the Charter (especially the equality provision) hostile to the recognition of their distinctive rights. Section 27 requires that the courts apply the Charter "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". Section 28 provides a special guarantee of gender equality, requiring that "notwithstanding anything in this Charter", Charter rights be guaranteed equally to men and women.

C. The Charter in the Courts

How has the Charter fared during the eleven years since its adoption? I will focus on three crucial aspects of Charter jurisprudence: 1) the interplay between the substantive rights and the general limitation clause (section 1); 2) the definition of equality under section 15; and 3) the treatment of economic rights under the Charter.

I should first say generally, however, that the Charter has come to occupy a great deal of room within Canadian legal culture.[15] The Supreme Court of Canada now decides somewhere around twenty–five Charter cases a year — an onerous load when one considers the size and complexity of many of those cases and the fact that the nine–member court is still the general court of appeal for Canada, deciding cases in virtually all areas of law. The Charter has had a dramatic effect upon some subjects. The regulation of abortion in the Criminal Code was, for example, struck down on the grounds that it interfered with women's security in a manner incompatible with fundamental justice.[16] A substitute provision failed to pass the Canadian Senate; consequently there is now no criminal provision regulating abortions in Canada. Restrictions on the political activity of public servants were invalidated, although the Supreme Court indicated that less sweeping restrictions would be permissible.[17] Canada's refugee process was ruled unconstitutional, the court holding that hearings were mandatory for the determination of refugee claims.[18] A Quebec law requiring the exclusive use of the French version of company names was struck down, resulting in considerable outcry among francophone Quebecers and the invocation of the notwithstanding clause noted above.[19] The structure of the legal profession in Canada has been recast; citizenship requirements and prohibitions on interprovincial law firms were ruled unconstitutional, permitting the creation of a number of pan–Canadian firms.[20]

The effect of the Charter has been most profound in the field of criminal law. Much of that law has now been redrawn in the light of the Charter.[21] Different gradations of mens rea have been constitutionalized, eliminating,

RSQ 1977, c C–12, although the Canadian Charter also figured in them. The substitute provisions were enacted by An Act to amend the Charter of the French language, SQ 1988, c 54. For a discussion of the circumstances and political fallout, see Webber, supra, note 6, 138–41.

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

16 *R v Morgentaler* (1988), 44 DLR (4th) 385 (SCC).

17 *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69.

18 *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177. In fact, half of the judges decided the case on the basis of the Canadian Bill of Rights, SC 1960, c 44.

19 *Ford*, supra, note 5.

20 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; *Black v Law Society of Alberta* [1989] 1 SCR 591.

21 See generally Hogg, supra, note 11, 1021–145. The Charter's provisions dealing with "Legal Rights" accounted for 74 of the Supreme Court's first 100 Charter cases: Morton, Russell, and Withey, supra, note 15, at 21.

for example, the felony–murder rule.[22] Offences that require the accused to disprove an element of an offence or even to establish a defence on the balance of probabilities have been held to violate the presumption of innocence. Thus, the requirement that the accused establish a defence of due diligence (as is the case in some environmental offences, for example) is prima facie in breach of the charter (although it may be saved under section 1).[23] Statutorily defined minimum sentences have been invalidated.[24] Arrest procedures have been overturned by a generous interpretation of the right to counsel together with the right to remain silent.[25] As a result of one decision on the right to trial within a reasonable time, 47,000 criminal charges were stayed or withdrawn in the province of Ontario alone.[26] In another decision, the Supreme Court struck down the "rape shield" provision in the Criminal Code, which imposed restrictions on the accused's ability to question a complainant about her past sexual history.[27]

The Charter has, then, had a very real effect on the law. Its effect is much greater than a mere canvassing of the cases suggests, for it has also exercised an influence *in terrorem*. At the time of its adoption, many legislatures revised their statutes to avoid potential challenges, and the Charter remains a potent touchstone in the criticism of legislative action.

1. The relationship between the substantive rights and the general limitation Clause

Over the course of the last decade, a number of trends have emerged. Most importantly, Charter jurisprudence has been dominated by the structural relationship between the list of substantive rights and section 1. Section 1 has permitted, even encouraged the courts to define the Charter's substantive provisions in broad terms. There is, after all, no need to read limitations into the rights; in the end, any limitations can be justified within section 1. Some have argued that section 1 actually precludes the courts from reading restrictions into the rights because to do so would evade the strict requirements of section 1, especially the burden of proof on the state.[28] The tendency towards broad interpretation is apparent in the freedom of expression cases. There, the Supreme Court has decided that any action designed to convey meaning constitutes expression, and that all content and all forms of expression, except forms that are, in themselves, acts of violence, fall within the scope of the guarantee.[29] Thus, the right has been held to apply to commercial advertising, to pornographic films, to hate literature, and to negotiations between a prostitute and her client.[30] One aspect of this broad definition is that the infringement of Charter rights does not depend on the state actor's intention. Effect alone is enough.[31]

22 *R v Vaillancourt* [1987] 2 SCR 636 (felony–murder rule). For the constitutionalization of mens rea generally, see Hogg, ibid, 1033–36, 1038–45.
23 See Hogg, ibid, 1100–1104.
24 *R v Smith* [1987] 1 SCR 1045, although note the severe qualifications to this case discussed in Hogg, ibid, 1131–35.
25 These cases are much to numerous to cite. See Hogg, ibid, 1047–8, 1076–87.
26 *R v Askov* [1990] 2 SCR 1199. The figure of 47,000 comes from *R v Morin* (1992), 71 CCC (3d) 1 (SCC) at 7. *Askov's* effects were not confined to minor offences. *Askov* itself involved conspiracy to commit extortion and a number of weapons offences.
27 *R v Seaboyer* [1991] 2 SCR 577.
28 For the effect of this kind of argument, see *Andrews*, supra, note 20, at 177–8.
29 *Irwin Toy v Quebec (AG)* (1989) 58 DLR (4th) 577 (SCC) at 606–8; *R v Keegstra* [1990] 3 SCR 697 at 729–33.
30 *Ford*, supra, note 5; *Irwin Toy*, supra, note 29; *R v Butler* (1992), 89 DLR (4th) 449 (SCC); *Keegstra*, supra, note 29; *Reference Re Criminal Code (Man)* [1990] 1 SCR 1123.
31 *R v Big M Drug Mart* [1985] 1 SCR 295 at 331–4; *Andrews*, supra, note 20, at 164–5, 173–5; *Irwin Toy*, supra, note 29, at 608–9, 612–3.

In the criminal field, broad definition has been coupled with strict requirements for limitations under section 1. The principal test for section 1, the *Oakes* test, was developed in a criminal case.[32] Under that test, the court must first determine that the aim of the limitation is sufficiently important to justify restricting constitutional rights. In the words of the case, it must determine if the aim is "pressing and substantial". If it is, then the court must decide whether the means chosen adequately respect the right. This involves, (1) ensuring that there is a rational connection between the objective and the limitation, (2) ensuring that the right has been impaired as little as possible, and (3) evaluating whether in any event the extent of the infringement outweighs the benefit obtained.[33] The requirement of "least impairment" — the requirement that the means chosen impair the right as little as possible — apparently sets a very high standard of justification. It seems to require that the court canvass the full range of policy options. If an option exists that, in the court's opinion, would impair the right less than that chosen by the legislature, it must strike down the law.

Oakes has been applied most rigorously in criminal cases, probably because there the courts are confident in their grasp of the interests involved (although even in criminal matters some recent decisions have shown more deference towards legislative policy[34]). Outside the criminal field, the courts have been much less demanding. This is true despite the fact that until recently they purported to apply the same test. In the non–criminal cases, virtually all legislative objectives have been held to be "pressing and substantial". Moreover, the courts have begun to require only that the legislature have a "reasonable basis" for believing that the means it chose will attain the end.[35] Indeed, in areas where limitations require the balancing of conflicting and complex interests, the courts allow the legislature very great latitude in devising a solution, taking (in non–criminal cases) most of the sting out of the requirement of least impairment.[36]

The result has been a bifurcation of the application of the Charter, as the Supreme Court has recently acknowledged.[37] The courts impose a much more demanding standard on the criminal law, accounting in part for the Charter's greater impact in that field. Outside the criminal law they are much more tolerant of legislative action. In fact, in non–criminal matters it sometimes seems that the Charter's principal consequence has been to require an extensive (and expensive) rejustification of legislative action, rejustification that is almost always successful.[38]

This relaxation of the *Oakes* test was not the result of a judicial failure of nerve. It was, paradoxically, the inevitable consequence of the decision

32 *R v Oakes* [1986] 1 SCR 103.
33 The test is set out in *Oakes*, ibid, at 138–40.
34 See, for example, *Reference Re Criminal Code (Man)*, supra, note 30.
35 *Butler*, supra, note 30, at 483–4.
36 See, for example, *Irwin Toy*, supra, note 29, at 625–30; *McKinney v University of Guelph* (1990) 76 DLR (4th) 545 (SCC) at 665–73.
37 *Irwin Toy*, supra, note 29, at 625–6; *McKinney*, supra, note 36, at 666.
38 This, of course, is an exaggeration. For examples of successful Charter claims outside the criminal field, see supra, notes 16–20. See also the lists of statutes nullified by the Supreme Court of Canada in Morton, Russell, and Withey, supra, note 15, at 27–8, and by all Canadian courts of appeal in F L Morton, G Solomon, I McNish, and D W Poulton, "Judicial Nullification of Statutes under the Charter of Rights and Freedoms, 1982–1988", (1990) 28 Alberta Law Review 396 at 400–410. These generally support the conclusion in the text if, in the first, one allows for the authors' inclusion of cases on language–rights provisions predating the Charter, and in the second, one controls for cases reversed on appeal or disapproved by later Supreme Court decisions. I include within "criminal cases" those concerned with penal prosecutions under regulatory statutes.

to give the substantive rights very broad definition. If freedom of expression only includes political speech, then one can require strict justification. If, on the other hand, it comprises every attempt to convey meaning, including such things as tobacco advertising and "the imagery of a sexual gadget", then there will be irresistible pressure to relax the standard, at least for those cases. It makes no sense to subject the regulation of advertising to the same level of scrutiny that one imposes on restrictions on political speech.[39]

Thus far, my comments have dealt with the structure of the Charter generally. I should, however, say a word about two specific aspects of the Charter of considerable importance to its political role and social impact.

2. Equality rights

One of these is the Charter's guarantee of equality in section 15(1). Section 15 has claimed the lion's share of attention in academic commentary and popular debate, despite the fact that its practical impact on Canadian law has been much less than (for example) the provisions governing the criminal process.[40] The reason is, of course, that charters of rights are not just about litigation but also about social symbolism, and the symbolic force of a general guarantee of equality, combined with its potential reach as an instrument of social criticism, is immense. But how does one bring that symbolism down to earth? Although the concept of equality has enormous resonance, it is very difficult to define. In its simplest terms, equality seems to require that all persons be treated alike, but once one realizes that not everyone starts out the same and that all legislation requires the drawing of distinctions, that simple definition loses its appeal.

Indeed, the Supreme Court has unambiguously rejected the view (espoused by some academic commentators in the early days of the Charter) that all legislative distinctions between persons were *prima facie* in breach of section 15, therefore requiring justification under section 1. It has instead focused, with good reason, on the list of "enumerated grounds" in section 15 (race, national or ethnic origin, colour, religion, sex, age, mental or physical disability), concluding that discrimination occurs within the meaning of the Charter only when a disadvantage is imposed based on those or analogous grounds.[41] The problem then becomes to determine what is analogous. Two competing suggestions have emerged, sometimes present in the same judgment, without much explanation of their relationship.

The first is that section 15 prohibits discrimination against "discrete and insular groups". On this view, section 15 is designed to correct state action that imposes greater hardship on groups that already suffer disadvantage within society. Equality rights take on a distinctly activist cast, advancing the cause of the disadvantaged; the prohibition on discrimination in section 15(1) ends up being based on precisely the same motivation as the protection of affirmative action in section 15(2).[42] This reasoning was strongly

39 This point is made most forcefully by Peter Hogg, also using the example of freedom of expression, in supra, note 11, at 812–3 and 856–7, and in "Interpreting the Charter of Rights: Generosity and Justification", (1990) 28 Osgoode Hall Law Journal 817. For "the imagery of a sexual gadget", see *R v Butler* (1990), 60 CCC(3d) 219 (Man CA) at 238 (per Twaddle J A, dissenting), cited with approval by the majority in *Butler*, supra, note 30, at 472.

40 Section 15 did inspire a "flood" of litigation in the years following its proclamation (for numbers, see Morton et al, supra, note 38, at 411). Some argued for a very broad conception of "equality", which would have opened a vast array of legislation to challenge. But in the end, the section produced few successful challenges, in part because of the more restricted definition of "equality" accepted in *Andrews*, discussed below.

41 The leading case is *Andrews*, supra, note 20.

pressed by the advocacy group, the Women's Legal Education and Action Fund (LEAF), in the first major equality case to reach the Supreme Court, and figured prominently in the court's decision.[43] It suffers, however, from one serious problem. It suggests that only groups subject to general social disadvantage — apart from the challenged law — benefit from equality rights. The commonly-accepted link between equal and identical treatment is still too strong to permit this, especially for the enumerated grounds (which are expressed in gender- and race-neutral terms). Indeed, more recently the Supreme Court has impliedly acknowledged that men as well as women may benefit from the guarantee of sexual equality.[44] If the benefit of the enumerated grounds is not confined to disadvantaged groups, surely the same goes for analogous grounds. The language of "discrete and insular groups" may capture part of what section 15 proscribes, but it cannot capture the whole.

The second attempt to define analogous grounds focuses on the fact that the enumerated grounds are all "personal characteristics". In fact, this language was used in the same judgement that first embraced "discrete and insular groups".[45] The phrase, "personal characteristics" must be too wide; some commentators have therefore emphasized that the relevant characteristics are also immutable.[46] This language too is insufficient. First, one of the enumerated grounds, religion, is clearly not immutable. It may be worthwhile treating it as though it were, but if so, then the heart of section 15 lies in the reason for embracing the fiction. Second, there are some immutable qualities on which distinctions are routinely made without raising equality issues. Government employers, labour arbitrators, and colleges, for example, routinely make important distinctions based on the inherent abilities of individuals — on their intelligence, their adaptability, their ability to get along with others in a work environment. Are these, prima facie, instances of discrimination to be justified under section 1? They are certainly based on characteristics that are, in important respects, immutable. It seems extravagant, however, to suggest that they trigger the equality concerns protected by section 15, and indeed the singling out of "mental and physical disability" in section 15 seems to require a distinction based on a more serious handicap than the ordinary gradations of ability.[47]

The debate over the meaning of equality therefore remains unresolved. The courts have rejected the view that all distinctions are *prima facie* discrimination. They have also held that substantive (rather than superficial) equality is the goal, and that a law can therefore be discriminatory in its effect even if expressed in neutral terms.[48] There remains, however, considerable work to be done in defining the scope of substantive equality.

3. Economic rights

The final aspect of Canada's jurisprudence I wish to discuss is the courts' handling of economic rights.

42 See Colleen Sheppard, *Study Paper on Litigating the Relationship between Equity and Equality* (Toronto: Ontario Law Reform Commission, 1993).
43 *Andrews*, supra, note 20, at 152–3 (per Wilson J) and 183 (per McIntyre J).
44 *R v Hess* [1990] 2 SCR 906.
45 *Andrews*, supra, note 20, at 151 (per Wilson J) and 174 (per McIntyre J).
46 See, for example, Hogg, supra, note 11, 1167–71.
47 See also the assumption that distinctions on grounds of individual "capacities" do not violate equality: *Andrews*, supra, note 20, at 174–5 (per McIntyre J).
48 *Andrews*, supra, note 20, at 164–5, 171.

I have already mentioned that the Charter contains no guarantee of property rights. The only provision that bears expressly on economic rights is section 6 (mobility rights). That section has been used to strike down restrictions on the interprovincial practice of law. It is, however, of restricted scope, confined as the relevant subsections are to barriers to distinctively *interprovincial* movement.[49] There are other provisions that have greater potential for the judicial entrenchment of economic rights, especially the guarantee of liberty in section 7.

Does section 7 include economic liberty (freedom of contract perhaps), or is it confined to physical liberty? The answer is, like so much else, uncertain. The British Columbia courts have flirted with the view that the practice of a profession is included within "liberty", and in one case a unanimous Court of Appeal invalidated restrictions on doctors' billing numbers imposed by the provincial medical insurance scheme.[50] This seems a wholly unjustified sally into the constitutional entrenchment of economic interest, all the more suspect because it drew upon the discredited doctrine of "substantive due process" in US constitutional law and was apparently limited to professionals (the same court held that dairy farmers' quotas did not benefit from protection).[51] Thus far, however, the Supreme Court has declined to repudiate such an expansive definition of liberty (although the present Chief Justice, Antonio Lamer, has done so).[52] Part of the reason may be that some academic commentary has argued that "security of the person" in section 7 includes an element of economic security, perhaps protecting a right to welfare. The court may be unwilling to exclude that argument by loose language in an inappropriate case, without having the matter argued before it.

In general, however, the Supreme Court has demonstrated great reluctance to include, within the Charter, rights having strong economic overtones. This has been evident in labour cases, particularly those on whether the right to strike (or any other aspect of collective bargaining) is protected under "freedom of association". In those cases, one major element of the court's reasoning was the express acknowledgement that judges were ill-fitted to conduct the sensitive balancing required in labour matters. The majority of the court noted the legislature's tendency to create specialized tribunals, insulated from the courts, to administer labour law, and suggested that it would be folly to intrude again into that field through the application of the Charter. It was buttressed in its conclusion by the general scarcity of economic rights in the Charter.[53] Given these reasons, it seems unlikely that the court will read into the Charter strong protection for economic interests.

49 *Black*, supra, note 20; *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357.

50 *Wilson v BC Medical Services Commission* (1988) 53 DLR (4th) 171 (BCCA). See also *Re Mia and Medical Services Commission* (1985) 17 DLR (4th) 385 (BCSC).

51 The dairy farmers' case is *Milk Board v Clearview Dairy Farm [1987] 4 WWR 279 (BCCA). For reliance on the substantive due process cases, see Mia*, supra, note 50, cited with approval in *Wilson*, supra, note 50.

52 *Reference Re Criminal Code (Man)*, supra, note 30, at 1162–80 (per Lamer J, as he then was). In that case, Dickson C J expressly declined to address the matter (at 1140–1). See, however, *R v Edwards Books*, [1986] 2 SCR 713 at 785–6.

53 *Re Public Service Employee Relations Act* [1987] 1 SCR 313 at 391–2 (per LeDain J) and 412 and 414–20 (per McIntyre J). This was one of a "trilogy" of cases decided simultaneously on the right to strike, the others being *PSAC v Canada* [1987] 1 SCR 424 and *RWDSU*, supra, note 12. Their implications for the constitutional protection of collective bargaining were reinforced by *PIPSC v NWT (Commissioner)* [1990] 2 SCR 367.

III. STRUCTURAL CONSEQUENCES OF A CHARTER OF RIGHTS

This brief account of jurisprudence under the Charter has revealed ways in which the arrangement of rights and limitations in the document has shaped Charter adjudication. In this part, I want to step beyond those lawyerly considerations to suggest more subtle, structural effects of a constitutionalized charter, effects that are less obvious but ultimately, I believe, of greater importance. These interrelated and often overlapping effects are principally the result of the abstract manner in which Charter rights are expressed (influenced by features already canvassed), the pre–eminent symbolic force of a constitutionalized charter, and the close relationship between charters of rights and national aspirations.[54]

These effects are, I hope, neither inevitable nor unmanageable, and in the conclusion I offer a few proposals on how they might be managed. Indeed, the Supreme Court of Canada has avoided many (though by no means all) of the pitfalls described here. As I explain later, however, that avoidance has come at a cost. Moreover, in the popular arena the problems have proven more intransigent. The very character of constitutionalized charters of rights, together with the purposes they serve in political debate, tends strongly to produce the effects described here. It is often extraordinarily difficult to resist those tendencies, raising serious questions about the value of constitutionalized charters.

Consequence 1: The privilege accorded private over public action

The first structural bias afflicting charters of rights is the creation of an in–built privilege for private over state power. It is easy to fall prey to the fallacy that human rights are simply about curbing state power — that rights result, almost by definition, from restricting the state. Liberties can, however, be greatly undermined by private action, for example by an employer's refusal to accommodate the religious observance of its employees; by the only newspaper in a city unduly restricting the range of opinion expressed in its pages (eg by reporting the actions of only one political party in an election campaign); or by men using their privileged position within the workforce or their dominance in a relationship to amass family assets within their own, exclusive, ownership. Far from limiting individual liberty and equality, the intervention of the state may advance precisely those interests that charters of rights are designed to protect.[55]

54 For a thought–provoking discussion that shares many points in common with this analysis, develops in different ways some of the same observations, and adds others, see Macdonald, supra, note 3, 142–169.

55 Nor is the distinction between public and private action straightforward. Private action is rarely wholly private (on any definition of that term); it often receives power and structure from law. There is a particularly clear example of this in the South African constitutional talks. Property rights are often considered the archetypal private right. The constitutional protection of property has been a central demand of the South African National Party. Yet in South Africa, existing property rights are, to a large extent, patently the result of deliberate, racially–discriminatory government action, including, in recent years, the forced dispossession of many non–whites of their land solely because of their race under, for example, the Group Areas Act, S South Africa 1966, No 36, and its predecessors. In those circumstances, an unqualified guarantee of property rights would, in the name of protecting a "private" sphere, freeze in place the consequences of past (and not very long past) public action. Similarly, work on the family has stressed the extent to which "private" relations are in fact shaped by broader social factors, not least law (see, for example, Frances E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform", (1983) 96 Harvard Law Review 1497 at 1509–1513; Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), 122–3, 129–31). I, like Okin (and others), do not reject the distinction entirely. There is good reason to recognize the existence of a private sphere that is subject to different standards and means of regulation, including with respect to human rights (and indeed my suggestions below, note 63, regarding the scope of the Charter, do that). But we should not forget

Certain aspects of charters of rights, however, create a bias against the use of state power — indeed may actively favour the exercise of private power. This can happen in a number of ways. The very fact that charters focus on limiting the state alone (and have more symbolic punch than legislative measures designed to constrain private power) reinforces the misconception that human rights are essentially about limiting government. In more practical terms, challenges based on the charter can impair the state's ability to undertake remedial measures, or at least impose a heavy burden of justification on the state, while leaving private action unconstrained.[56] This structural bias is accentuated by the legal profession's traditional commitment to private property and suspicion of administrative action. It is further buttressed by the limited scope of court proceedings, which tend to pit one claimant against the state, screening out other persons who may be affected but who are not themselves parties to the action. The general form of this argument is familiar,[57] and I will not elaborate further. I will, however, give two examples from recent Canadian experience, which I hope will suggest that the concerns have substance. They will also show how the kind of bias described here can creep into decisions on charters of rights despite one's best efforts.

The first concerns the privileged position, in Charter jurisprudence, of the common law. The individualism and conservatism of the common law tends to shape, almost unconsciously, the interpretation of the Charter, resulting in an implicit preference for common–law and against statutory rights. The distortion is particularly serious in the field of labour law, where workers' rights to engage in collective action are almost entirely the product of statute.

Take, for example, the Supreme Court's decisions on the scope of application of the Canadian Charter. The Court has held that the Charter applies to the actions of the legislative and executive branches of government, and to the courts when they act for their own institutional ends, but that it does not apply to the common law in suits between private parties.[58]

what we are about: we are deliberately defining a private sphere, for the specific purpose of the kind of regulation in issue, not recognizing one that exists naturally for all purposes. This has two consequences. First, the definition of the private sphere, even for a constitutionalized charter of rights, may legitimately differ in different contexts; property rights, for example, may be dealt with differently in South Africa than in another country. Second, we should not slip into the error of thinking that what counts as private action for the purposes of a charter's application should be exempt from other forms of legal regulation; it may well be appropriate to control it vigorously by means other than a charter of rights.

56 Note that the argument that follows is *not* that charters of rights themselves should be extended to all action, public and private. I part company from some critics of the public/private distinction in that I accept that charters are generally not appropriate vehicles for the regulation of non–state actors (although I reiterate what I said in note 55: we should not fall into an exaggerated conception of the sanctity of the private; the distinction is a construction, and should be treated accordingly). My point is simply that the exclusive focus of charters on the public sphere, and their symbolic prominence, may serve to impede other means of promoting human rights — means that can respond effectively to threats to equality or liberty from private action. The remedy is not the extension of charters (which after all remain clumsy devices for dealing with non–state actors), but rather a clear understanding of their limitations, so that they can be restricted to conform to those limitations.

57 See Hester Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Sphere Ideology", (1986) 10 Dalhousie Law Journal 107; Andrew Petter, "The Politics of the Charter", (1986) 8 Supreme Court Law Review 473; Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles", (1987) 25 Osgoode Hall Law Journal 485; Allan C Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter", (1988) 38 University of Toronto Law Journal 278.

58 The Supreme Court's original statement on this matter was *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573, although the reasoning in that case has been substantially (if implicitly) modified by other cases, especially *BCGEU v British Columbia (AG)* (1988), 53 DLR(4th) 1 (SCC).

The common law is presumed to constitute, then, a neutral baseline, impervious to the Charter, while statutory interventions are subject to full Charter scrutiny. The questionable nature of this presumption, especially in the labour field, is manifest in the very case in which the Supreme Court decided that the Charter did not reach the common law: *RWDSU v Dolphin Delivery*. There, a union had challenged a lower court's injunction against peaceful picketing (picketing that the court assumed to be entirely without coercion, purely for the purpose of communicating information) on the basis that the injunction infringed the union members' freedom of expression. The injunction was founded on the economic tort of inducing breach of contract. The Supreme Court held that this exercise of judicial authority lay beyond the scope of the charter. It supported its conclusion on the grounds that judges, in elaborating and applying the private law, are not exercising the kind of purposeful statecraft that the Charter was meant to control.[59] In this, the judges succumbed to their own mythology. The common law's position on trade unions, as John Orth has shown so well, was as much the product of conscious statecraft as any legislation. It was founded on the same policy choices as the restrictive labour statutes of the 18th and 19th centuries, and indeed developed in tandem with them.[60] The net effect of the court's decision was to reconstruct 18th–century labour policy as natural and unchallengeable — little more than a crystallization of a private relationship — while the 19th and 20th–century statutes emancipating workers' associations were taken to be state–determined and exceptional.

The risk inherent in *Dolphin* is that the common law's antipathy to trade unions will become the norm from which departures are judged. Some have argued, for example, that the Charter should apply to a very broad range of trade union activities precisely because those activities would be invalid without statutory intervention[61] — again forgetting that the illegality of unions and collective agreements at common law was based on conscious policy against unions, not some kind of neutral, natural justice. The Supreme Court has refused to follow this line of reasoning, deciding instead that the activities of unions are essentially private.[62] This is the better view. It would be well if the line between public and private defined in *Dolphin* could, in the same spirit, be reconsidered.[63]

59 *Dolphin Delivery*, supra, note 58, at 600.

60 John V Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721–1906* (Oxford: Clarendon Press, 1991), especially at 25–42.

61 Hogg, supra, note 11, at 838–9; *Re Bhindi and BC Projectionists* (1986) 29 DLR (4th) 47 (BCCA) at 60–5 (per Anderson J A, dissenting). For another example, perhaps inadvertent, of the presumptively natural character of individual employment relations as opposed to relationships structured through collective bargaining, see Wilson, J's dissenting reasons in *McKinney*, supra, note 36, at 619–20 and 626–7, where she doubts whether employees can, through a collective agreement that stipulates employees' age of retirement, contract out of the Charter's prohibition on age discrimination, but accepts that they can do so through individually–negotiated voluntary retirements.

62 *Lavigne v OPSEU* (1991) 81 DLR (4th) 545 (SCC) at 618–9.

63 This is not the place to offer a complete discussion of the Charter's scope. There have been many attempts to draw the line that deserve greater attention than is possible here. It seems to me that the Charter should, however, at least apply to state–determined limitations on Charter rights, and that judges in the exercise of their judicial functions qualify as state actors for they wield the coercive power of the state in the public interest. It should thus apply to situations in which the very content of the common law limits Charter rights, just as it applies to the limits imposed by the court in *BCGEU*, supra, note 58. In both situations, a public institution, clothed with the power of the state, is directly responsible for the limitation. (This approach would incidentally avoid the problem, arising on *Dolphin's* reasoning, of the Charter's differential application to Canada's common– and (codified) civil–law traditions, a problem that was inexcusably ignored in *Dolphin*.) On this basis, for example, the content of the law of defamation would be exposed to Charter

My second example is taken from the dissent of Wilson J in *R v Edwards Books*, and reveals a different way in which charters of rights can favour private over public power. That was a challenge to an Ontario law providing for a common day of rest for employees in the retail sector. The law designated Sunday as the normal day of rest but created an exemption for businesses observing another day of rest, having a limited surface area, and having fewer than eight persons serving the public on any given Sunday. The reason for limiting the exemption was that as businesses became larger, they were less likely to be marked by the personality of their owners and therefore less likely to possess a claim to a distinctively religious conscience. At the same time, the greater the number of employees, the greater the number of third parties potentially deprived of the common day of rest. In *Edwards Books*, the majority of the Supreme Court upheld the Ontario act, on the grounds that the limitation on the religious exemption was indeed justified. Wilson J dissented, arguing that in order to preserve religious freedom, the exemption should be available to all firms: "the legislature must decide whether to subordinate freedom of religion to the objective of a common pause day, one scheme of justice, or subordinate the common pause day to freedom of religion, the competing scheme of justice, and, having decided which scheme to adopt, it must then apply it in all cases".[64] Now, this makes perfect sense if one focuses solely on the relationship between the store owner and the state, who, after all, were the only parties to the case. It becomes much more problematic if one takes into account the interests of the employees, who would have no say over whether the exemption was exercised but who would be dramatically affected as a result. The effect of Wilson J's ruling would be to protect the proprietor's ability to choose at the expense of the employees — an ironic result from one of the more progressive members of the court. Despite the fact that the majority upheld the law, the Ontario legislature amended it to comply with Wilson J's reasons.[65]

The problem in Wilson J's judgment (compounded in the legislature's subsequent response) is the narrowing of the focus of inquiry, so that it concentrates only on claimant and state and pays insufficient attention to the broader context shaping the legislature's initial choice of policy. This is one of the temptations of Charter litigation, contributing to the advantage accorded private over public power. It is of potential relevance not just in labour law, but also in such areas as cultural policy or family law, where again government intervention is often designed to mitigate the effects of private power.

Consequence 2: The hegemony of the language of rights

The second set of biases results from the overwhelming dominance of the language of rights in Canadian constitutional law. Human rights are an extremely important part of our constitutional order, but they are not the whole of it. The pre-eminence of the Charter of Rights — especially its

scrutiny. The problem of the Charter's application to court enforcement of private agreements in which the agreement's content (but not the common-law rules themselves) limits freedom of expression, raises more complex issues. I believe that this should fall on the private side of the line, but a proper response would involve a full discussion of the reasons for differentiating between public and private actors.

64 *Edwards Books*, supra, note 52, quotation from 809.

65 An Act to amend the Retail Business Holidays Act, SO 1989, c 3, s 4. The wisdom of the original limitation is suggested by this act's remarkable provisions for determining the religious beliefs of partnerships and corporations.

great symbolic force — tends to crowd out other concepts, especially respect for political autonomy.[66]

This was apparent during Canada's recent constitutional debates. Then, a number of influential commentators castigated a concern with autonomy as an example of the old, discredited "politics of power", in which self–interested elites vied for more power, all trying to take what they could with no justification in principle and no real concern for the citizenry. This was contrasted to the "politics of rights", focused on a pan–Canadian Charter and resistant to the parochialism allegedly inherent in regional diversity. This "politics of rights" was supposed to be everything the "politics of power" was not: principled, democratic, wholly concerned with the citizen as an individual.[67]

This, of course, was a gross caricature. If one cares about democratic participation — if one cares about being a member of a society in which public decisions are made through a process of public deliberation — then one will undoubtedly care deeply about the *structure* of political participation. It matters to me, for example, that I am a Canadian and not an American, not because Canadians are intrinsically better than Americans or because they have more rights than Americans but because I value Canada's distinctive public culture. Similarly, most Australians and New Zealanders care about their nationalities and would be reluctant to merge them (at least if the other won out!). It seems to me that comparable arguments can support a claim for more limited forms of provincial (or cultural) autonomy. The context in which one engages in public decision–making — the dimensions of one's political community, its language, one's attachment to its history — are of fundamental concern to individuals. That concern may not be a matter of "human rights". I have my doubts, for example, that provincial autonomy can be effectively addressed in terms of rights; it seems that the division of power between the provinces and the centre is more a matter of better and worse, appropriate and inappropriate, than entitlement. But that does not diminish its significance, a significance, moreover, to individuals and not merely to collectivities.[68]

The language of individual rights tends, however, to run counter to autonomy, especially when it occurs under a constitutionalized charter of rights. There is a natural temptation to say that if something is a matter of fundamental individual right, then it should be the same for all. This may well be true for some core values (although even here, differences of context may well generate differences in *how* the right is achieved: freedom of expression, for example, may support different measures in a society in which there are many media outlets owned by different persons than a society in which there is a private monopoly, or government–owned

66 For useful general discussions, see Alan C Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill–Queen's University Press, 1992); Rainer Knopff and F L Morton, *Charter Politics* (Scarborough: Nelson, 1992).

67 The terms in quotation marks are John Whyte's, although the argument was certainly used more widely. For an example, see John D Whyte, "The 1987 Constitutional Accord and Ethnic Accommodation", in K E Swinton and C J Rogerson, eds, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988), 263.

68 I develop these arguments further in Webber, supra, note 6, especially at 183–228. As the text suggests, I shy away from the language of "collective rights". That language virtually begs us to accept that the recognition of collectivities and individual rights are starkly opposed. Often, however, they are not. See my discussion, in Webber, supra, note 6, at 27–9, 229–59. In fact, the term "collective rights" is often severely misleading, the recognition in issue having very little, if anything, to do with the "rights" of a collectivity. Indeed, I wonder whether the currency of the term is yet another sign of the dominance of rights talk in political discourse; everything is talked about in terms of rights, even when that language is manifestly inappropriate.

media). It becomes much more problematic when a charter is interpreted very broadly, so that almost everything is talked about in terms of rights. Then, the insistence on identical treatment can leave the rights justification behind, unnecessarily impairing local or regional autonomy.[69]

The tendency of rights talk towards uniformity — towards suppressing local adaptation in the name of a general norm — has a potential impact on many areas of the law, not just on inter–provincial diversity. This includes, for example, the activities of administrative tribunals, especially those exercising a large element of discretion. Many of these tribunals were created precisely to permit adaption to very complex circumstances, yet if their activities become subject to Charter scrutiny (and the broader the interpretation of the Charter, the more likely this is), the more probable that their flexibility and responsiveness will be impaired.[70] The tendency towards uniformity is likely to have a particularly strong impact on the accommodation of cultural minorities. The establishment of different legal principles or different institutional structures for people of different cultures is particularly hard to justify in the presence of a charter of rights, given the close connection between cultural difference and some of the most suspect grounds of discrimination (religion, race, or ethnicity). The pre–eminence of a charter of rights can thus render more difficult the recognition of aboriginal rights, for example, or the protection of the autonomy of other cultural groups (French Canadians, for example), and indeed this seems to be a large part of what happened in Canada's recent constitutional negotiations.[71]

Now, this may seem an odd conclusion given that in Canada, Australia and New Zealand, the recognition of one particular kind of cultural autonomy, aboriginal rights, has often gone hand in hand with a renewed focus on individual human rights, the same people arguing for both. I believe strongly that the two can be reconciled, but we should not underestimate the potential for conflict, especially in the arena of popular debate. In Australia, for example, the recognition of aboriginal rights has thus far concentrated on land rights. These are the easiest to reconcile with the idea that equality requires that people be treated in precisely the same manner because the acceptance of aboriginal title can be presented as, above all, a corrective to the discriminatory expropriation of the past. On this view, the compelling reason for recognition is not that the distinctive culture of aboriginal people should find expression in their title to land but rather that aboriginal Australians, like all Australians, should have their property preserved. Indeed, the judgment of Brennan J in *Mabo* (with which Mason C J and McHugh J concurred) is striking in its reliance on the language of equality and anti–discrimination.[72] One suspects, moreover, that much of

69 See José Woehrling, "Le principe d'égalité, le système fédéral canadien et le caractère distinct du Québec", in Pierre Patenaude, ed, *Québec — Communauté française de Belgique: autonomie et spécificité dans le cadre d'un système fédéral* (Montreal: Wilson and Lafleur, 1991), 119. See also the conclusions of Morton, Russell, and Withey, supra, note 15, at 31–2; Macdonald, supra, n 3, 151.

70 Compare H W Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business", (1979) 17 Osgoode Hall Law Journal 1, which explores the tendency towards uniformity and hostility to discretion inherent in A V Dicey's conception of the rule of law, and criticizes that conception's regrettable effects on administrative law.

71 See Webber, supra, note 6, at 134–44, 163–6, 170–2, and 174–5.

72 *Mabo v Queensland* (1992), 107 ALR 1 at 15–16, 19, 27, 28, 29, and 41 (HC, per Brennan J). See also the discussion of the High Court's previous decision in *Gerhardy v Brown* (1985), 57 ALR 472, adverting to the difficulty of dealing with aboriginal rights through a conventional "affirmative action" framework: Australian Law Reform Commission, *Report No 31: The Recognition of Aboriginal Customary Laws* (Canberra: Australian Government Publishing Service, 1986), vol 1, at 113–7.

the popular sympathy for aboriginal rights in Australia (and Canada) is based on the attitude that underlies much affirmative action: the idea that aboriginal peoples have been discriminated against in the past, and that special measures may now be necessary to make them full Australians (or full Canadians). There is nothing inherently wrong with this; equality concerns are involved in the recognition of aboriginal rights. But if the sympathy is based on opposition to discrimination, it may not extend to the next wave of aboriginal rights: aboriginal demands for distinctive, culturally–based institutions, such as aboriginal self–government (or its common corollary, separate systems of aboriginal justice). Indeed, these demands may seem, to the very same people, anti–egalitarian, because they create lasting distinctions on the basis of culture (or, worse, race).[73]

There are, of course, ways to limit the tendency of rights talk to slide towards uniformity. In the Canadian context, for example, even when rights are perceived to be in issue, section 1 can be used to justify variation. There are, however, two problems with this approach. First, it can only work if the standard of justification is relaxed. If a legislature is restricted to choosing the option that impairs the right as little as possible (as the *Oakes* test originally suggested) there will be precious little room for variation.[74] Second, if section 1 is used, the variation is cast as exceptional, as suspect, as a qualification of fundamental rights to be interpreted narrowly. Alternatively, a constitution can expressly identify grounds for distinction. In the Canadian constitution, for example, aboriginal rights are recognized in a variety of ways, denominational schools enjoy constitutional protection, the federal division of powers impliedly affirms the legitimacy of regional variation, and arguably the Charter's interpretive clause concerning multiculturalism supports some cultural adaptation.[75] But these provisions too tend to be seen as exceptions, as anomalies to be kept strictly within bounds. This has shaped the interpretation of language rights in Canada. There are, in the constitution, specific guarantees regarding the use of English and French before the courts and in the schools.[76] The Supreme Court has had difficulty developing a consistent approach to these measures. It has, for example, suggested that they constitute derogations from equality because

73 For current examples of Canadian opposition to aboriginal self–government on these grounds, see the exchange reported in Benoit Aubin, "A rights discussion", *Gazette* (Montreal), 14 December 1991, B3; Gordon Gibson, "Let's not use racism to tackle native needs", *Globe and Mail* (Toronto), 1 June 1992, A15. Similar arguments were used against aboriginal land rights in Canada, especially in a much–criticized white paper issued by the Trudeau government in 1969, but these arguments have now generally been rejected (with respect to land). See Canada, Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (1969); Sally M Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968–70* (Toronto: University of Toronto Press, 1981). They remain, however, very much alive in Australia. They form a prominent strand in Liberal criticisms of the Keating government's land rights legislation: eg, Laura Tingle et al, "Bishop ups Mabo pressure on Hewson", *The Australian*, 26 October 1993, 1–2. They have provoked a reply from a strong advocate of justice for Aborigines that emphasizes the non–discrimination argument: Hal Wootten, "Share of Australia for all Australians", *Sydney Morning Herald*, 8 November 1993, 11. In New Zealand, the language of equality has often been deployed against aboriginal rights. For early examples see Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 1987), *passim*, eg at 138 and 174–5; for more recent examples, Andrew Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Auckland: Oxford University Press, 1990), 194–204. For a thought–provoking analysis, by a legal academic of aboriginal heritage, of the problems with using the language of rights in the pursuit of aboriginal claims, see Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", (1989–90) 6 *Canadian Human Rights Yearbook* 3.

74 Woehrling, supra, note 69.

75 Constitution Act, 1867, s 91–95, especially 91(24) and 93 (and comparable sections in other constitutional instruments); Constitution Act, 1982, s 25, 27, and 35.

76 Constitution Act, 1867, s 133; Constitution Act, 1982, s 19 and 23.

they confer special privileges on English and French.[77] In other judgments, the majority has held that language rights are "based on a political compromise rather than on principle", and should therefore be narrowly construed.[78] In part because of this, the court has vacillated in its interpretation of language rights, providing a narrow reading of some, although recently it has moved toward a more generous interpretation of others.[79]

The solution is not, it seems to me, to think of regional variation, or administrative discretion, or cultural accommodation as exceptions to the universality of human rights, but rather to refine our conception of rights guarantees (and of equality in particular). Human rights rarely specify precisely what should be done in every situation to which they apply. They are not a code, from which must be derived every detail of a legal system. They are minimum guarantees, expressed in general terms, applicable to diverse circumstances. The values they affirm are almost always compatible with a wide variety of policies. Even the norm of equality can tolerate significant variation. We have to rethink the complex connection between the general guarantees of rights and their practical instantiation, in a manner that is more tolerant of differences of context.[80] This will not be easy, especially given that rights seem to involve, by their very nature, an element of abstraction from context. Moreover, this rethinking will have to occur over the long term; in the meantime, we must continue to struggle with charters of rights' tendency towards uniformity.

Consequence 3: The preference for simple over complex claims

The third bias is related to the last two. It is worth stating separately, however, to draw attention to its more general implications. These implications are especially significant for the use of charters of rights as instruments of social change (and that will be the point of departure of this discussion). But they reach well beyond this concern, limiting charter claims in a manner that is only incidentally related to political ideology.

In the years following the adoption of the Canadian Charter, some advocacy groups devoted considerable energy to the attempted vindication of their "rights" before the courts. For some, this strategy was based on a realistic appraisal of the possible outcome of a Charter challenge, often as part of a broader political struggle.[81] For others, the strategy seemed to be founded on little more than a simplistic belief that because the Charter protected "fundamental rights", it must protect what the members of the group considered fundamental (the right to strike, for example).[82] The results of these efforts have been decidedly mixed. The feminist movement has made some gains: the adoption of the language of "discrete and insular

77 *Mahé*, supra, note 8, at 87–8.

78 *MacDonald v City of Montreal* [1986] 1 SCR 460 at 500–1 (per Beetz J). See also *Société des Acadiens v Association of Parents* [1986] 1 SCR 549 at 578 (also per Beetz J).

79 For examples of narrower interpretations, see the cases cited in note 78; for broader, see *Mahé*, supra, note 8.

80 For attempts, see Webber, supra, note 6, at 234–51; Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice", in Royal Commission on Aboriginal Peoples, ed, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services, 1993), 133.

81 See, for example, the discussion of LEAF's efforts in Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991).

82 See Macdonald, supra, note 3, at 157. See also the discussion of one of the earliest Charter challenges to reach the Supreme Court — an attempt to stop cruise missile testing over Canada — in Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989) at 64–70.

groups'' in *Andrews* was a triumph (although its long–term impact is, as I suggest above, uncertain); the decriminalization of abortion as a result of *Morgentaler* is another, more concrete victory. By and large, however, the efforts have failed.[83] There are many reasons for the failure. I wish to focus on one: the fact that charters of rights are able to respond much more effectively to simple as opposed to complex claims upon a legal order.

That consideration was one of the express grounds for the Supreme Court's decision that the rights to strike and to bargain collectively were not included within the Charter guarantee of freedom of association. The fact that those rights had, in existing legislation, a complex structure, highly qualified and involving obligations as well as rights, contributed to the court's conclusion that they fell outside the Charter.[84] The disposition towards simply structured rights is an additional reason that it will probably be difficult to secure full implementation of aboriginal self–government, as opposed to aboriginal title, through judicial interpretation of the Constitution Act, 1982's guarantee of ''existing aboriginal and treaty rights''.[85] The vindication of property rights — even the unique rights of indigenous peoples — is straightforward in comparison to the establishment of an autonomous sphere of aboriginal government, involving as it would the determination of the appropriate unit of aboriginal government (band, people, federation), the legitimate political structure of that unit (when there are competing structures), and the respective jurisdictions of aboriginal and non–aboriginal institutions. For similar reasons, the courts will find it difficult to include the right to a minimum income within section 7's guarantee of the ''security of the person'' — not because there is no link between the two but rather because to do so would require a set of very difficult and highly contentious subordinate judgements.

The Charter's preference for simple over complex claims is partly the result of the very general language in which the rights are drafted. Those wishing to assert a complex right are faced with a difficult problem of interpolation; they must persuade the court that the ostensibly simple phrasing is really a code for a much more complicated set of rights and obligations. Moreover, the fact that charters of rights are generally conceived as limits on the state means that their provisions are usually interpreted as creating only negative rights — areas of freedom from government interference — rather than more complex positive rights, imposing a duty to act on government.[86]

Above all, however, the preference for simple claims results from the institutional limitations of judges and courts. We have already seen, in the discussion of Wilson J's dissent in *Edward's Books*, how the bilateral structure of a trial can focus attention on the conflict between the parties,

83 See above, discussion accompanying notes 42–45; *Morgentaler*, supra, note 16. For misgivings on the Charter's reformative possibilities, see Fudge, supra, note 57; Kathleen Lahey, ''Feminist Theories of (In)Equality'', in S Martin and K Mahoney, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), 71; Mandel, supra, note 82; Judy Fudge, ''What Do We Mean by Law and Social Transformation'', (1990) 5 Canadian Journal of Law and Society 47.

84 *Re Public Service Employee Relations Act*, supra, note 53, at 391–2 (per LeDain J).

85 Constitution Act, 1982, s 35(1).

86 Note that the guarantees of the Canadian Charter are much more open to interpretation as positive rights than those in, for example, the US Bill of Rights. The substantive rights themselves are rarely expressed in negative terms; nor do the general provisions determine the issue. Nevertheless, the courts have tended to interpret the Charter's provisions as creating negative rights. Indeed, when discussing a set of provisions that unambiguously impose positive obligations on the state (language rights), the Supreme Court has, at least on some occasions, adopted a limited interpretation (see cases cited supra, note 78). It has justified this approach precisely on the grounds that language rights involved positive rather than negative obligations: *Ford*, supra, note 5, at 750–2.

relegating unrepresented third parties to a lower level of concern. The almost complete dependence of judges on the evidence presented by the parties, together with the limitations imposed by pleadings — and indeed the highly structured nature of legal argument generally, tightly tied as it is to the textual basis of the claim — also serves to limit the scope of the court's inquiry. Consequently, in their weighing of rights and limitations, judges attend closely to consequences that are direct and obvious but have much more difficulty evaluating those that are indirect or diffuse. Although attempts have been made (especially in constitutional cases) to compensate by relaxing the rules for standing, intervention and evidence,[87] the success of these measures is partial, the problem too inherent in the adversarial nature of adjudication to be easily resolved. Even if the procedural limitations could be overcome, it is doubtful that judges possess the legitimacy to make the hard choices necessary in many complex claims. To their credit, most judges are fully aware of this and tailor their decision-making accordingly. The scope for potential claims under the Charter remains, however, inevitably limited.

Thus, to the extent that a charter of rights becomes *the* framework for political and social action — and something like this can happen, given charters' symbolic force — an entire set of reforms is disfavoured. Advocacy groups can pour effort into claims that are simply not suited to the forum.

Consequence 4: The tendency towards abstract and symbolic argument

Along with the preference for simple claims goes a tendency towards abstract and highly symbolic argument, especially in the political arena. This too is a consequence of the broad generality of the text of the Charter, which encourages arguments at a similar level of abstraction and can impede the recognition of the ambiguities almost always afflicting specific situations.

Lawyers often approach charters of rights in terms of their function: how they will constrain police or prosecutorial conduct, how they will secure religious liberty from interference, etc. They see charters of rights as another component of the legal system, to be interpreted and applied in particular cases. For many people, however, the primary significance of charters lies in the symbolic declaration of entitlement, perhaps even in the general recognition accorded to a group with which they identify (through, for example, the specific mention of gender, physical disability, or sexual orientation in an anti-discrimination clause).[88] Their primary concern is, in other words, with the affirmation of their rights in the abstract, not with the detail of implementation. These two perspectives, while quite different in orientation, nevertheless focus on the same text. They can come into stark conflict. In the struggle to protect the clarity and the purity of the abstract value, the subtlety of the specific situation can be disregarded.

There were many examples of this in the recent rounds of debate over constitutional reform in Canada. I will focus on one that reveals the problem clearly and poignantly. I use the example because of that clarity, not to

87 See Barry L Strayer, *The Canadian Constitution and the Courts*, 3d ed (Toronto: Butterworths, 1988), at 145–97 and 263–92; and the chapters on standing, intervention, and evidence in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987).

88 See Alan C Cairns, "Constitutional Minoritarianism in Canada", in R L Watts and D M Brown, eds, *Canada: The State of the Federation 1990* (Kingston: Institute of Intergovernmental Relations, 1990), 71; Knopff and Morton, supra, note 66, at 81–90.

demean those involved. On the contrary, the group in issue, often with great courage, raised issues that need desperately to be raised. My concern is that the arguments have not done justice to the problem, and indeed might hinder its resolution.

The example occurred in the debate over aboriginal self–government in Canada. One aboriginal women's group, the Native Women's Association of Canada (NWAC), consistently voiced fears about women's rights within aboriginal communities if the communities became self–governing. NWAC was especially concerned with violence against women, and one of the objects of its concern was the increasing tendency of aboriginal communities and even the general justice system to experiment with alternative methods for trying and sentencing aboriginal offenders. Those experiments usually emphasized discussion, restitution, and reformation as alternatives to incarceration. Most, though regrettably not all, either scrupulously avoided cases of violence towards women or approached them with great caution, precisely because of the problem of protecting victims in communities that are often isolated and very small. In November 1992, NWAC pressed its objections at a Round Table on Aboriginal Justice sponsored by the Royal Commission on Aboriginal Peoples.[89] There, one of its representatives strongly rejected any alternative treatment of aboriginal offenders in cases of violence against women. She said that NWAC favoured a full return to traditional methods of justice, but argued that aboriginal people were still part of the general justice system, and that as long as that was so aboriginal men should be subject to no less and no more than the same terms of incarceration as non–aboriginal men. Imposing more lenient terms would mean, she insisted (and here came the highly symbolic argument), simply that the security of aboriginal women was valued less than that of non–aboriginal women. The problem was therefore converted into one of straight racial prejudice, coloured by sexism and proven by the basic fact of differential sentencing. The rhetorical force of the argument is obvious, but doesn't it drastically oversimplify an extraordinarily difficult situation? It would, for example, prevent, peremptorily, any concession to the specific circumstances of aboriginal communities, to aboriginal cultures, or to the particular prospects for rehabilitating aboriginal offenders (even individual offenders). In fact, it is hard to see how the NWAC representative's professed commitment to traditional methods of justice can survive that argument. The argument short–circuits a tension that needs to be addressed directly and in depth: how does one reconcile the claims of cultural autonomy with the effective protection of individuals. Developing adequate answers may well require precisely the kind of partial, tentative experimentation that NWAC's position excludes.

Now, it may seem that I am reading too much into what was, perhaps, merely an attempt to state a point forcefully to an unreceptive audience. But examples of similar arguments, deployed to real effect, could be multiplied. They were especially common in the discussion of various proposed forms of recognition of cultural difference in Canada's constitutional debates. Many participants treated those proposals as though they were designed to create a rank ordering of groups, to establish (so the phrase went) a "hierarchy of rights" in which Quebec would rank first, aboriginal peoples second, women third, and so on, down to disabled individuals on

89 For the proceedings of this conference, see Royal Commission on Aboriginal Peoples, supra, note 80.

the bottom. Of course, dramatic and highly–misleading simplifications are always possible in political debate. My point is simply that charters of rights provide, almost despite themselves, an invitation to broad symbolic claims as well as a highly effective language in which to express them. Moreover, the oversimplification occurs often without bad faith or deliberate manipulation. Participants are focused so singlemindedly on an abstract vindication of right that other considerations, more subtle and more difficult to express, fall by the wayside.

This particular pitfall is most prevalent in political debate. In judicial decision–making, the need to grapple with principles in a real case imposes some discipline, requiring that judges pay some attention to the richness of the situation. There is, however, an analogous problem in the judicial realm, to which I now turn.

Consequence 5: The encouragement of judicial philosophizing

The need to think about charters of rights in specific circumstances may spare judges much of the temptation to rhetorical overstatement but it does not spare them entirely. In deciding charter cases, judges never limit their reasons to the particular cases before them. They must also speak, directly or indirectly, to a host of situations only imperfectly foreseen. This is true of all judicial decisions, because any reason has normative implications beyond the particular decision in which it is invoked. But it is especially true of charter cases, in which judges' reasoning necessarily begins at the exalted level of abstraction of the statement of rights themselves. There is an enormous temptation when interpreting these rights to make broad assertions of fundamental principle. These assertions become wedded to the language of the charter. They are presented as the implicit content of the guarantees themselves, possessing the attributes of law.

The problem may be stated as follows. Although there may be broad popular agreement within society over the bald statement of the rights — agreement, for example, that freedom of expression is a good thing — there is often healthy disagreement over the philosophical framework in which those rights should be interpreted. Is freedom of expression, for example, founded on the libertarian impulse that anyone should be permitted to say anything that is not harmful (and if so, what counts as harm)? Or is it founded on an appreciation of specific benefits of expression, benefits that may limit the kinds of expression protected? These questions often have to be decided in the course of applying the charter to specific cases, yet that task can quickly take the courts into highly contentious areas of social philosophy, especially when charter rights are given very broad interpretation. When deciding specific cases, courts will also be fashioning an official, enforceable, theory of society, possessing the same conservatism and staying power that judge–made law generally has.

This is troubling, especially if one takes the view that social philosophy is perennially a matter of debate, disagreement, and learning. There is real potential for premature statement, at a high level of generality, without consideration of anything like the full range of situations in which the statement may apply. Indeed, as we saw above, the nature of adjudication actively discourages consideration of matters not directly in issue between the parties. Yet once the philosophical terrain is mapped out, the disposition towards consistency and predictability in the law may make it difficult for judges to resile from their early conclusions. Rather than working out

principles in specific circumstances through time (arguably the forté of judges), judges can end up ruling, in the abstract, on the correctness of doctrines of moral philosophy. Paradoxically, a charter intended to protect differences of opinion can itself become the agent of a new orthodoxy, an orthodoxy whose definition is entrusted to an unrepresentative forum largely isolated from the democratic process.

Consequence 6: The nationalistic aims of Charters of Rights

These concerns become all the more acute when one considers that there is often an unconscious blurring of aims in charters of rights. Their interpretation, their symbolism, and their hegemony are often devoted not merely to the service of liberty and equality, but to significant nationalist aims, as the origin of the Canadian Charter suggests.[90] This is not wrong in principle. After all, notions of citizenship are inevitably linked to conceptions of rights. The problem lies in the tendency to confuse the two so that national purposes come to masquerade as arguments of rights. This can lead to expansive interpretations of guarantees that are not justified on human–rights grounds. Legislatures are thus constrained without sufficient reason, the pursuit of nationalist aims feeding off the legitimacy of human–rights claims. It can lead to the preferment of conceptions of national identity that remain highly controversial, often without proper discussion or deliberation because their presence was masked by the language of rights.[91]

This tendency is most evident in the invocation of equality, especially in political debate. Many would agree that an underlying value of a charter of rights, captured most clearly in a prohibition on discrimination, is that all citizens should be in the same position with respect to the state. This can reflect a very real concern with human liberty. That was true, for example, of the reliance on the idea of equal citizenship in the struggle for black emancipation in the United States. But it can also serve as an argument of nation, an argument that one does not have a real country unless all citizens are incorporated into the country in precisely the same way. Here the perceived evil is not oppression, but the simple fact of different treatment. The aim is not equity, but uniformity. In Canada, this sentiment is common and influential. It was a major reason for the English–Canadian public's refusal to recognize Quebec as a "distinct society" in recent constitutional negotiations. It contributes to the opposition to aboriginal rights. Some draw on similar sentiments to oppose the use of French in public services, or the federal government's policy of multiculturalism.[92]

Perhaps the problem comes down to this: Nationalism involves the celebration of what members of a country share. But there often is, regrettably, a strong tendency to overdefine what they should share — to insist, for the sake of national cohesion, on an unnecessary and constraining degree of uniformity. One thinks, for example, of the insistence of 19th–century nationalism on single national languages, or, still more troubling,

90 See the works cited supra, note 6.

91 I explore this phenomenon at length in Webber, supra, note 6.

92 See Webber, supra, note 6, at 141–4. For examples of the blurring of arguments of nation and equality in Maori/non–Maori relations in New Zealand, see Sharp, supra, note 73, at 43–4, 195–204. Australians will recognize a similar blurring in the *Mabo* debate. See also the popular objections to the recognition of aboriginal customary law noted in Australian Law Reform Commission, supra, note 72, at 123–5.

of attempts to create uniform national ethnicities.[93] As we have seen, charters of rights have their own tendency towards uniformity (although one that is certainly more legalistic and less insistent on substantive similarity than the grosser forms of nationalism). Charters are, in addition, often promoted specifically as means of enshrining the common values of the nation. This juxtaposition means that charters of rights can, sometimes unwittingly, become the new vehicle for nationalism's drive for uniformity, leaving behind their principal vocation as the guarantors of human rights.

IV. Concluding Reflections

The Supreme Court of Canada has, as I have said, avoided many of these pitfalls. It has generally eschewed simplistic interpretations of the Charter and has allowed a multitude of other considerations to be weighed in the balance against the rights themselves. It has, as we have already seen, upheld legislation establishing a weekly day of rest, even though the act in question embodied a clear preference for Sunday.[94] It has held that mandatory retirement is a justifiable limitation on the Charter's guarantee of equality, even though the latter specifically prohibits discrimination on the basis of age.[95] It has refused to strike down obscenity laws, holding that they are a reasonable response to the suspicion, as yet unproven (according to the court), that there is a causal relationship between certain types of pornography and harm to women.[96] It has accepted the presence of inter-provincial variation in alternative measures for young offenders (some provinces having no such measures), even though this results in differences in the application of the criminal law (which in Canada is primarily federal).[97] It has held that Quebec could require the "marked predominance" of French on commercial signs in order to maintain that province's *visage linguistique* (although it struck down a law requiring the exclusive use of French).[98] It has maintained the existence of very great differences in the size of urban and rural electoral districts, expressly permitting considerations such as geography to be balanced against representation by population.[99]

All of these demonstrate a rejection of purely abstract reasoning and a willingness to let legislatures fashion outcomes in which Charter rights are balanced against other considerations. This has not only permitted sensitivity to context; it has also allowed the court to avoid tying itself too firmly to a particular social philosophy, since a range of philosophical objectives can be accommodated through the analysis of limitations on rights. This flexibility has, however, been achieved at a cost. First, many of the Supreme Court's critics have argued that its judgements are insufficiently devoted to rights and too tolerant of legislative choice. While the court itself has been modest in its claims to philosophical infallibility, its critics (especially its academic critics) have been less so, often castigating the court for failing to adopt (in their view) the correct philosophy, or for failing to articulate a

93 For a summary account, see E J Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge: Cambridge University Press, 1990).
94 *Edwards Books*, supra, note 52. It has, however, struck down Sunday observance legislation that was motivated by a religious purpose: *Big M Drug Mart*, supra, note 31.
95 *McKinney*, supra, note 36.
96 *Butler*, supra, note 30, especially at 482–4.
97 *R v S(S)*, [1990] 2 SCR 254. See also *R v Turpin* [1989] 1 SCR 1296.
98 *Ford*, supra, note 5; *Devine*, supra, note 5.
99 *Re Prov Electoral Boundaries (Sask)* [1991] 2 SCR 158.

sufficiently consistent theory. There is considerable self–righteous invective hurled at the court, invective that expresses little understanding of the central difficulty of Charter adjudication: the problem of developing appropriate principles on a very contested terrain. Second, much of the flexibility has been achieved by easing the standard of justification in section 1. This may well be necessary, but its effect has been to obscure the distinction between values that are worthy of special judicial scrutiny and those that can be left to the political process.

Indeed, perhaps the court's approach, and the criticisms, should reinforce reservations about the entire exercise. Charters are intended, above all, to give certain values peremptory force. This is what justifies the entrenchment of those values in the constitution, thereby constraining the power of the people's elected representatives. It is also what encourages us to entrust those values to courts: it is precisely because they seem to be so overwhelming in their importance, so clear in their implications, that we feel comfortable leaving them to judges. But what if courts now find themselves unable to give them such force? What if they find themselves inevitably engaging in a complex balancing of interests, so that their reasoning echoes that of legislatures? Are we further ahead? Perhaps we are, especially when the courts' balancing prevents an imperfect political process from losing sight of the values in the charter. A charter of rights may, in other words, require the legislature to pay some threshold level of attention to the values it enshrines. It may also reinforce concern with those values in society as a whole. A primary role of charters may, in other words, be educative. One has to ask, however, how helpful that education will be, given the tendencies of charter reasoning, especially in popular debate, to overemphasize the state, overemphasize rights, oversimplify, and confuse nationalist and human–rights concerns. Perhaps there are better ways to pursue rights education, especially in societies like Canada, Australia or New Zealand that already have a healthy human–rights tradition.

Does this mean that we should give up on charters of rights? It might. At least it argues for a more sceptical approach to constitutionalized charters and a greater appreciation of their strengths and weaknesses in comparison to other methods of rights protection. Charters are merely one mechanism among many. Their value depends heavily on the particular needs of the societies into which they are introduced. There may, for example, be good reason for insisting on a clear, constitutionalized commitment to human rights and social justice in the current South African discussions, given that country's abysmal human rights record and the need to proclaim the founding principles of what will be a very different polity. I am not sure that the same is true of Australia or New Zealand. In any case, if those countries do opt for a constitutionalized charter, the Canadian experience offers some useful lessons.

First, it suggests that rights should be defined more narrowly than they have been in Canada.[100] The Supreme Court's tendency to interpret rights very generously is, in retrospect, unfortunate. Many of the concerns raised here are most serious when rights are defined broadly. A less expansive definition would permit the courts to focus on the central concerns of human rights, limiting the courts' involvement in social issues for which they are not designed and restricting the scope for erecting the often amateur philosophies of lawyers, judges, and law professors into law.

100 See also the argument of Hogg, supra, note 11, 811–5.

Moreover, when thus constrained, courts would be able to maintain a consistent and robust interpretation of the rights they do enforce, with much less risk of imposing uniformity in areas where it is not warranted. A more restrictive interpretation might, in other words, confine human-rights discourse to areas in which it is most appropriate, at the same time enabling it to maintain more fully its peremptory character.

The Canadian courts may in fact be working towards a more limited definition of some rights — one that is achieved, however, by the back door, through the application of section 1 rather than the interpretation of the principal guarantees themselves. One can imagine, for example, that over time the courts may, through the interaction of freedom of expression and section 1, develop stable categories of expression, some (such as the content of commercial advertising) being so easy to limit that they virtually disappear from the scope of the guarantee, others (such as political speech) being much more difficult to restrict.[101] This may eventually lead to the crystallization of different standards of review, effectively confining the Charter's reach to matters at the heart of the rights. An advantage of this way of proceeding is that the courts are able to define rights incrementally, using the space created by section 1 to examine the rights in specific circumstances, minimizing the risk of rash over-generalization. Its principal disadvantage is that it sits uncomfortably with the current understanding of the relationship between the substantive rights and section 1. This understanding posits a simple dichotomy between the fundamental rights on the one hand and the state-justified exceptions on the other, a dichotomy underlying (among other things) the strictness of the *Oakes* test.[102] The adoption of multiple standards in section 1, of greatly varying stringency, would threaten this fundamental organizing principle of Charter jurisprudence.

The second lesson is that if a constitutionalized charter of rights is adopted, there should be a conscious attempt to re-understand other aspects of the constitution, such as federalism or the rights of indigenous peoples, in relation to individual rights.[103] I am convinced that the various elements can be reconciled, but the reconciliation requires much careful work. At present, they tend to be treated (at best) as utterly separate categories, addressing independent aspects of the constitutional order, or (at worst) as contradictory principles, reflecting an allegedly irreconcilable opposition between individual and collective rights. Neither approach is helpful.

101 See, for example, the use of language suggesting there is a core and a penumbra of kinds of expression covered by the Charter's guarantee. In *Reference Re Criminal Code (Man)*, supra, note 30, at 1136, Dickson, C J introduced the section 1 discussion by noting, "It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression". Not surprisingly, the section 1 justification succeeded. The majority of the court adopted the same approach in *Butler*, supra, note 30, at 481-2.

102 *Oakes*, supra, note 32, at 135-40. This relationship of the substantive rights to section 1 was also important to the definition of equality; see *Andrews*, supra, note 20, at 177-82.

103 Whenever an academic argues that there is a desperate need for a particular kind of scholarship, beware: he probably thinks he has begun the task already! This (I confess) is no exception. See Webber, supra, notes 7 and 81. See also, in the Canadian context, Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989); Turpel, supra, note 73; Nitya Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity", (1990) 38 Buffalo Law Review 325; Roderick A Macdonald, "... Meech Lake to the Contrary Notwithstanding", (1991) 29 Osgoode Hall Law Journal 253 and 483; Brian Slattery, "First Nations and the Constitution: A Question of Trust", (1992) 71 Canadian Bar Review 261; Charles Taylor, *Reconciling the Solitudes* (Montreal: McGill-Queen's University Press, 1993); James Tully, "Diversity's Gambit Declined", in Curtis Cook, ed, *Canada's Constitutional Crisis and the Referendum of October 26, 1992* (Montreal: McGill-Queen's University Press, 1993). For similar explorations in Australasian scholarship, see Australian Law Reform Commission, supra, note 72; Sharp, supra, note 73.

Whether we like it or not, the various elements of the constitution will interact. If we do not want to stumble from one clumsy misunderstanding to another, we must think carefully about their interrelationship. The adoption of a charter of rights not only demands careful elaboration of its terms, but also active consideration of its place within the constitutional order as a whole.

Finally, great attention must be paid, in the academic literature, not just to substantive rights and their theoretical underpinnings (although this is important), but also to developing an ethic of judicial decision–making in situations of profound social controversy.[104] A charter of rights cannot simply be a licence for law professors and judges to read their theories of society into the constitution. Judges must take seriously the fact that there is legitimate disagreement over many rights and rights philosophies, and think carefully about how that should influence their process of decision–making. In this endeavour, they require the support and assistance of the community of legal scholars. Judges and legal academics must direct their attention, in other words, to the problem of *how* to give content to rights guarantees in the presence of legitimate disagreement over social philosophy.

This brings me to the end of my reflections on the Canadian experience. Many of you may have found them surprisingly ambivalent. I, like most legal academics, do appreciate the ability under the Charter to address human–rights issues directly and frankly, without having to approach them sideways through (for example) strained interpretations of the division of powers. As one devoted both to individual dignity and to the need, in a democracy, for open discussion and justification of public institutions, I have even enjoyed (although, I admit, with some trepidation) the invigorating effect of the Charter on the discussion of a host of public issues, including, for example, the meaning of equality. At the same time, I have been distressed by the tendency of that discussion to veer towards high abstraction, to lose touch with other important elements of the Canadian experience, to become preoccupied with the pronouncements of superior courts rather than more prosaic but in the end more effective means of achieving equality. I especially regret the confusion of human rights and nationalistic ends in the adoption and application of the Charter.

The effects presented here, though discussed in a distinctly Canadian vernacular, are the result of the structure of constitutionalized charters generally. They are likely to reappear, in local variations, if New Zealand or Australia moves toward a constitutionalized charter of rights. They bear serious consideration when evaluating the best of the many means for pursuing the ends of human rights. Perhaps this paper might therefore be called, "Cautionary Tales for Australasian Lawyers Contemplating an Entrenched Bill of Rights".

104 Again, *mea culpa*. For a first attempt to sketch such an ethic, see Webber, "The Adjudication of Contested Social Values: Implications of Attitudinal Bias for the Appointment of Judges", in Ontario Law Reform Commission, ed, *Appointing Judges: Philosophy, Politics and Practice: Papers Prepared for the Ontario Law Reform Commission* (Toronto: OLRC, 1991), 3. A more extended treatment is in preparation under the title, "Adjudicating Between Visions of Society: Transcending Gender Bias, Class Bias, Cultural Bias in Judicial Decision–making".