

EXEMPLARS OR EXCEPTIONS:  
IMAGINING CONSTITUTIONAL COURTS IN A RELIGIOUSLY DIVERSE SOCIETY

by

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B.A., Bishop's University, 2002  
B.C.L., LL.B., McGill University, 2007

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## **Supervisory Committee**

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**Co-Supervisor**

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## Abstract

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*Despite being similarly concerned with the legitimacy of law under conditions of diversity, political and legal theorists currently seem to differ significantly in the role they would reserve for religious reasons in public decision-making processes. Religious arguments that would generally be considered inappropriate if not inadmissible in a courtroom are increasingly viewed as acceptable and even desirable contributions to debate in the political public sphere. The author argues that the existence of this disconnect can be explained by the special challenges that religion poses for constitutional adjudication which in turn should inform our understanding of the judicial decision-making function. Constraints inherent to constitutional courts that make them effective institutions for concrete dispute resolution significantly limit their ability to engage seriously with the normative challenges posed by religious diversity. We should thus properly understand the role of constitutional adjudication as peripheral in matters of public policy that intersect with questions of religious difference.*

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## Introduction

Different countries draw the line between religion, politics, law and the state in very different places. In Islamic countries such as Iran, religion, politics and law can be so interwoven as to be practically indistinguishable. The French Republic, seemingly at the other extreme, insists on a strict *laïcité* principle in which expressions of religious belief and affiliation are not even permitted in the public sphere. Somewhere in middle, in the United States, the First Amendment prohibits state support for religion but politicians – including Presidents – freely invoke their God’s support for American public policy. Here at home in Canada, we find ourselves in a similarly ambivalent position. Our *Canadian Charter of Rights and Freedoms* protects freedom of religion with one hand but with the other recognizes the supremacy of God,<sup>1</sup> while the *Constitution Act, 1867* entrenches state support for denominational Catholic and Protestant schools.<sup>2</sup> Where these dividing lines are drawn in turn impacts upon the degree to which citizens, legislators and judges are expected and even obligated to rely, or to avoid relying, on religious considerations when they make decisions in matters of public concern in our culturally diverse society.

The relatively recent case of *Chamberlain v. Surrey School District No. 36* put this issue squarely before the Supreme Court of Canada in the context of administrative decision-making.<sup>3</sup> Should members of a public school board be entitled to draw on their religious beliefs when deciding whether instructional materials and textbooks should be approved for use in elementary schools? What weight should a judge, sitting in judicial review of a school board decision to

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [**Charter**] in its preamble and at s. 2(a).

<sup>2</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 at s. 93.

<sup>3</sup> *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 [**Chamberlain**].

exclude materials depicting gay and lesbian couples from use in a kindergarten class, give to the religious beliefs of the board members? Despite recognizing the essential aspect that religion plays in many people's lives, the majority of the Court found that the Surrey School Board was wrong to allow the religious views of some members of the community to influence its decision, when those views were perceived to deny equal recognition to gays and lesbians. The dissent, on the other hand, reasoned that the "secular" and "non-sectarian" nature of the public school system did not prevent persons with religiously based ethical positions from participating in, and ultimately determining the outcome of, deliberations of the Board concerning the appropriateness of school instructional materials, even if their views might be construed as an expression of intolerance towards gays and lesbians in our society.

The answers given by the Court in *Chamberlain* reflect only two out of a number of possible approaches to the place of religion in public decision-making in a culturally diverse society. Seemingly intent upon matching the complexity and variety of church-state relations, political and legal philosophers have differed widely in the theories they have developed to deal with this issue. The differences in their approaches concern not only the considerations that are relevant to decisions but also the decision-making fora to which these theories apply. John Rawls, the late American political philosopher, devoted a great deal of his considerable intellectual energy to precisely this problem. As Rawls described in *Political Liberalism*,<sup>4</sup> the fact that there exists, in modern democratic societies, a diversity of reasonable yet incompatible and irreconcilable philosophical and religious worldviews – what he described as "comprehensive doctrines" – poses a significant challenge to the legitimacy of coercive law and

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<sup>4</sup> John Rawls, *Political Liberalism*, paperback ed. (New York: Columbia University Press: 1996) [Rawls, *Political Liberalism*].

the stability of a well-ordered society.<sup>5</sup> In order to address that challenge, Rawls pointed to the kinds of reasons people offered each other to justify state action. He maintained that people, following the example of constitutional courts, should avoid relying on arguments having their foundations in specific religious (or philosophical) worldviews when deliberating in public. Under conditions of pluralism, the way in which a constitutional court reasoned should be a guiding light for other branches of government, and citizens generally, to emulate as they reasoned with each other in the public sphere on controversial matters of public policy. As Rawls put it, the Supreme Court should serve as the “exemplar of public reason.”<sup>6</sup>

Rawls’s influential theory of legitimate decision-making closely linked constitutional adjudication with other sources of coercive law in culturally diverse societies, and reflects the central role that constitutional courts play in shaping public policy where they exercise powers of judicial review. However, since the publication of *Political Liberalism*, the applicability of his approach to branches of government other than the judiciary, not to mention civil society more broadly, has been met with mounting scepticism. Despite being similarly concerned with legitimacy in the face of diversity, political and legal theorists now seem to differ significantly in the role they would allow religious reasons to play in public decision-making processes. Religious arguments that would generally be considered inappropriate if not inadmissible in a courtroom are increasingly viewed as acceptable and even desirable contributions to debate in the public sphere.

The *Chamberlain* case is illustrative of the implications of this disconnect between approaches to legal and political decision-making. Indeed, part of the tension between the majority and dissenting opinions can be understood as stemming from the way in which the

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<sup>5</sup> Rawls, *Political Liberalism*, *ibid.* at xviii-xix.

<sup>6</sup> Rawls, *Political Liberalism*, *ibid.* at 231.

decision of the school board under review straddled the divide between the political and legal arenas. On the one hand, the Board is a quasi-legislative body, its members being democratically elected. On the other, the Board is an administrative body that exercises delegated legal authority, and its decisions are subject to judicial review.<sup>7</sup> When cast in the former light, it may, as Chief Justice McLachlin suggests, seem reasonable to allow members of the Board to draw on their own peculiar metaphysical perspectives, including religious ones, when arguing for or against the inclusion of the instructional materials. As she goes on to point out, though, cast in the latter light, the converse is plausible. In their capacity as “secular” decision-makers exercising legal authority akin to that of a court, it may seem equally *unreasonable* for the members of the Board finally to determine the controversy by relying on Christian worldviews that are not shared by all their diverse constituents.<sup>8</sup> The matrix within which the school board’s decision is assessed is thus pivotal to our judgment of whether or not relying on religious reasons is appropriate – and the decision legitimate.

My intention in this work is to investigate this apparent disconnect between the bases of legitimate legal and democratic decision-making, and consider how that disconnect should impact the way in which we perceive and locate the role of constitutional adjudication in a religiously diverse society. Indeed, judicial decision-making in our constitutional courts, formerly portrayed by Rawls to be the ideal against which all debate should be measured, now seems to exhibit an exceptional mode of reasoning when it comes to deciding questions having a religious dimension, despite its considerable and continuing political influence. Under conditions of cultural and religious pluralism, then, what function should constitutional adjudication fulfil in our overall efforts to manage claims of justice connected to religious

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<sup>7</sup> See generally *Chamberlain*, *supra* note 3, e.g. at paras. 27-28.

<sup>8</sup> *Ibid.* at paras. 27-28.

difference? In short, my aim is to shed light on our understanding of the adjudicative function in Canada, and explore the implications of that understanding on the ability of Canadian lawmaking institutions to engage seriously with the normative challenges posed by religious diversity.

In order to accomplish that goal, the approach I intend to adopt in my thesis is as follows. In Chapter 1, I will draw out the detail of the conceptual and practical divide that has opened up between legal and democratic decision-making since Rawls published *Political Liberalism*, notwithstanding the juridification of politics that has continued apace at the same time. In particular, I will trace the expanding understanding of the role that religious reasons should be allowed to play in political discourse in liberal democracies, the reasons for that shift, and the separation that understanding seems to have created from classical theories of constitutional adjudication. Against the backdrop of that shift, I will then highlight the increasingly interdependent relationship that exists between courts and legislatures in matters of public policy. In Chapter 2, after setting up the problem in this way, I will turn my attention specifically to the special conceptual difficulties and stresses that religion, owing to some of its distinct features, poses for adjudication. As a result of those difficulties, not only do encounters between religion and law have the potential to uncover much that is interesting in the nature of judicial decision-making, they also may help us to explain why a gap seems to have opened between political theory and theories of adjudication as they relate to religion.

In Chapter 3, I will examine the recent case law of Supreme Court of Canada, turning first to cases involving specific claims to religious accommodation, and then to cases revolving around the religiously charged issue of sexual orientation equality, including *Chamberlain*. As I will demonstrate, owing to the challenges of religion identified in Chapter 2 and the constraints associated with judicial decision-making, when called upon to adjudicate questions relating to

religion, our courts tend to avoid addressing the intrinsically religious aspect of the dispute. Finally, in Chapter 4, I intend to consolidate the insights gained in the first three chapters. In view of the disconnect that has arisen between theories of political and judicial decision-making, and the reasons that underpin that separation, Rawls's vision of constitutional courts as the exemplars of public reason in modern liberal democracies should be revisited. Constraints associated with the adjudicative forum that make it effective as an institution for concrete dispute resolution significantly limit the ability of constitutional courts to take religious diversity seriously, so to speak. We would thus be better served understanding the role of constitutional adjudication as peripheral in matters of public policy that intersect with questions of religious difference.

## Chapter 1

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### Law v. Democracy: Taking Religious Difference Seriously in Public Decision-Making

Western societies are increasingly characterized by deep cultural diversity. Universal citizenship, high rates of immigration, the so-called “ethnic revival,” multicultural government policies, a politics of recognition: all these factors have contributed to or brought into clearer focus the fact of cultural difference at the beginning of the 21<sup>st</sup> century. Liberal democratic states that were once relatively homogeneous – or were at least perceived as such – are now recognized as comprising a plurality of cultural communities, themselves heterogeneous. Often, the worldviews of those communities, not to mention those of the individual members of which they are made up, are in deep contradiction with one another. In many cases, the roots of those contradictions can be traced to irreconcilable religious beliefs or practices. One need only recall some of the issues that have grabbed Canadian headlines in recent years – the public stance towards same-sex relationships generally, as in *Chamberlain*, and same-sex marriage in particular; the so-called code of conduct for immigrants adopted in Hérouxville, Québec; polygamy in Bountiful, British Columbia; the kirpan controversy; the banning of the niqab in Québec – to realize that religious difference often constitutes a flashpoint for social, political and legal controversies.

One such challenge (although admittedly not the sort of thing that makes for front-page news in *The Globe and Mail*) has been levelled at the legitimacy of contemporary law in Western liberal democracies. Legal, political and social scholars have long been preoccupied with the idea that the authority of law, and indeed the long-term viability of a liberal democracy, requires that, for one reason or another, the majority if not the entirety of its population consider laws as

standards it *ought* to follow.<sup>9</sup> In countries felt to have a common history, political heritage, and shared cultural and religious values, the public justification of state action to all citizens of the community was often taken for granted. National laws were formerly grounded in shared conceptions about the truth of the world, often interwoven with questions of religious faith. In many European nation-states of the 18<sup>th</sup>, 19<sup>th</sup> and early 20<sup>th</sup> centuries, for example, an all-encompassing pneuma<sup>10</sup> named Christianity – adopting the guise of Anglicanism in England, Catholicism in France and to a lesser extent Protestantism in Prussia and Germany – breathed collective metaphysical meaning into citizens’ lives, and life into national legal systems.<sup>11</sup>

That homogenous conception of society no longer exists. The realization that there now exists – within single political entities – a diversity of reasonable but *irreconcilable* religious and philosophical worldviews has shattered the assumption that the legitimacy of law can be found in a shared conception of metaphysical truth.<sup>12</sup> As alluded to in the introduction, democratic theorists such as Rawls as well as Jürgen Habermas, among others, have thus been compelled to ask: in plural constitutional democracies characterized by deep cultural and religious diversity, how can the state justify policies, and specifically coercive laws, on terms that all citizens can reasonably accept? More generally still, how can law in a plural society sustain its authority in the face of deep metaphysical and religious disagreement?<sup>13</sup>

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<sup>9</sup> William Rehg, “Translator’s Introduction” in Jürgen Habermas, *Between Facts and Norms*, trans. by William Rehg (Cambridge, Mass.: MIT Press, 1996) at xi; see also Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot, UK: Ashgate, 2006) at 23-26.

<sup>10</sup> This reference to “pneuma” is taken from Max Weber, “Science as a Vocation” (1958) 87 *Daedalus* 111 at 134, translated from ‘Wissenschaft als Beruf,’ from *Gesammelte Aufsätze zur Wissenschaftslehre* (Tubingen, 1922), p. 524-55. The text was originally delivered by Weber as a speech at Munich University, 1918; it was first published in 1919 by Duncker & Humblot, Munich.

<sup>11</sup> For a discussion of the interaction between Christianity and Western legal systems, see Harold J. Berman, *The Interaction of Law and Religion* (Nashville: Abingdon Press, 1974), at chap. 2 “The Influence of Christianity on the Development of Western Law”.

<sup>12</sup> Rawls, *Political Liberalism*, *supra* note 4 at xviii; Jürgen Habermas, *Between Facts and Norms*, trans. by William Rehg (Cambridge, Mass.: MIT Press, 1996) [**Habermas, BFAN**] at 26.

<sup>13</sup> Both *Political Liberalism* and *Between Facts and Norms*, although works of sweeping scope, are in large part animated by this line of inquiry.

Legal and political philosophers have variously propounded different answers to these questions. In the last several decades, however, the contrasting answers they have proposed suggest the existence of a conceptual divide between their two disciplines – roughly speaking, between law and democracy. Largely in reaction to the theory of legitimate law in a plural society developed by John Rawls in *Political Liberalism*, an evolution in thought has occurred that has culminated in an apparent disconnect between political theory and theories of adjudication as they relate to the role reserved for religious reasons in public decision-making. It is the history of these ideas that will be the primary focus of my attention in this chapter.

Briefly, my argument will proceed as follows. In Part I, beginning with the work of John Rawls, I will track the evolution in thinking that has marked deliberative democratic theory under conditions of pluralism, specifically with respect to the public justification of coercive law. As a way of reconciling the legitimacy of law with a plural society, Rawls was a strong proponent of public reason in a *substantive* sense, which he argued should underpin both judicial and legislative decision-making. However, subsequent political philosophers tackling the challenges of cultural and religious diversity have tended gradually to jettison such a thick conception of public reason, favouring instead a *procedural* model in which legitimacy is connected to the ability of diverse constituents to participate in public decision-making on their own terms. In Part II, I will show how this procedural model of public reason, which has emerged as a response to concerns germane to the legislative branch, has opened up a conceptual distance between theories intended to justify the legitimacy of public decision-making in the legislative and judicial arenas. Despite their persuasiveness, the arguments that have emphasized the need to shift towards a procedural account of legitimacy in the political public sphere have largely ignored their implications for constitutional adjudication. Finally, in Part III, I will

contrast the development of this gap with the trend towards the juridification of politics that is currently under way in most Western liberal democracies. More than ever, judges on constitutional courts are political actors, who play a decisive role in the process of governing; given this rapprochement, the disconnect that has arisen between theories of political as opposed to judicial decision-making appears all the more puzzling.

My intention in this chapter, overall, is thus to trace the contours and illustrate the breadth of the curious conceptual gap that seems to have emerged between political theory and theories of adjudication when it comes to the legitimacy of public decision-making. Whereas constitutional courts were viewed by Rawls to be the exemplars of public reason in a plural society, the turn towards a procedural model of public reason – a turn that was largely driven by critiques sensitive to the inclusion of religious-minded citizens in public decision-making – has produced a theoretical misfit between public reason generally and the reasoning of constitutional courts.

## **I. Religious Discourse in Public Decision-Making**

### **a. Introducing Public Reason**

Contemporary liberal democratic states, including Canada, are increasingly marked by deep cultural and religious diversity. French Canadians, English Canadians, Québécois, indigenous peoples, Métis; heterosexuals, gays, lesbians, transsexuals; Christians, Catholics, Protestants, Sikhs, Muslims, Sunnis, Shiites, atheists – not only is the vocabulary we use to describe and understand people’s cultural attachments constantly expanding, but the words themselves are ceasing to properly capture the “strange multiplicity”<sup>14</sup> of cultures to which individuals today belong. As cultures overlap, interact, and are negotiated internally, cultural

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<sup>14</sup> The term is borrowed from James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995).

identity becomes fractured and individuated.<sup>15</sup> Within individual political entities, different individuals have vastly different cultural attachments and adhere to radically different and at times incommensurable worldviews. Many of these are comprehensive not only in their scope, but also in the responsibilities and demands that they place on their adherents. Shared metaphysical truth has given way to conditions of deep and pervasive doctrinal conflict.

The existence of cultural pluralism within the boundaries of the state poses a significant challenge to legitimate law-making. As the Supreme Court of Canada hinted at in its reasons in *Chamberlain*, efforts to reconcile the legitimacy of state action with the existence of diversity lie at the root of the controversy surrounding the way people should reason and make decisions in the public sphere in a liberal democracy. In contemporary liberal democratic political theory, the idea of public justification suggests that no regime, and no decision of that regime, is legitimate unless it is potentially reasonable from every individual's point of view.<sup>16</sup> But when the citizens of a contemporary liberal democratic state no longer share a common culture, how can a government provide a common set of reasons to them that they can all accept? In a plural constitutional democracy, how can coercive laws and policies be properly justified, in keeping with the liberal principle of legitimacy?

Political philosopher John Rawls famously proposed an answer to this conundrum: public reason. Intrinsically connected to the idea of public justification, the concept of public reason was notably introduced by Rawls in his work *Political Liberalism*. Rawls's suggestion, later taken up in similar form by Jürgen Habermas, was simple yet novel. In the face of deep normative disagreement, why not simply set aside our irreconcilable metaphysical differences when dealing with matters of public policy? Instead of invoking metaphysical premises that

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<sup>15</sup> *Ibid.* at 10-13.

<sup>16</sup> Fred D'Agostino, "Public Justification" in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition), URL = <<http://plato.stanford.edu/archives/fall2010/entries/justification-public/>>.

people having divergent religious worldviews would never accept, Rawls argued, we should agree to deliberate and reason with each other in matters of essential public concern only on the basis of the principles and values that we actually do hold in common.<sup>17</sup>

In Rawls's terms, public reasons were reasons that aspired "to explain the basis of [peoples'] actions in terms that [they] could reasonably expect that others might endorse as consistent with their freedom and equality."<sup>18</sup> Put otherwise, in order to justify actual or possible courses of state action, Rawls suggested that citizens, legislators and state actors of all kinds, including the judiciary, should only invoke reasons for their positions in public that they sincerely believed all citizens could accept, despite those citizens having different cultural attachments and espousing vastly divergent worldviews.<sup>19</sup> Public reasons were thus public in the sense that they should be equally accessible to all, and not contingent upon value judgments particular to religious and metaphysical doctrines that have different conceptions of the good.<sup>20</sup> The original decision of the public school board in *Chamberlain*, for instance, relying as it did upon the particular religious views of certain members of the community, would not have met Rawls's standard.

Given that Rawls's conception of public reason distinguished between acceptable and unacceptable reasons based on their *content*, it included an important substantive component. For Rawls, that substantive content would be derived from the public political culture that all democratic societies supposedly share: a commitment that citizens should be regarded as free

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<sup>17</sup> Rawls, *Political Liberalism*, *supra* note 4 at 100.

<sup>18</sup> *Ibid.* at 218.

<sup>19</sup> For a slightly different expression of the principle, see Jürgen Habermas, "Religion in the Public Sphere" (2006) 14 *Eur. J. Philos.* 1 [**Habermas, "Religion"**] at 5; for the sake of precision, it should further be pointed out that Rawls limited the scope of application of public reason to "matters of constitutional essentials and basic justice," apparently those matters that he considered to be the fundamental political questions at issue in a liberal democracy. See on this point Rawls, *Political Liberalism*, *supra* note 4 at 214, 227-228. As critics have pointed out, however, this limitation advocated by Rawls matters little to the analysis. Further, it is not a limitation that Habermas has endorsed.

<sup>20</sup> Rawls, *Political Liberalism*, *supra* note 4 at l-li, 224; Habermas, "Religion", *supra* note 18 at 5.

and equal members of a society understood as a fair system of cooperation. From these abstract liberal foundations of liberty, equality and fair social cooperation, Rawls suggested that a conception of justice confined to the political structure of society, and concrete principles of justice associated with that conception, could be elaborated that would cut across sectarian lines and form the object of an overlapping consensus among all citizens within a particular political culture.

Specific conceptions and associated principles of justice might vary. However, the foundational commitments to liberty, equality and fairness implicit in the liberal democratic tradition, Rawls argued, would lead to the conclusion of an overlapping consensus that would share common characteristics: invariably, citizens would be endowed with familiar individual rights and liberties that would be assigned a special priority (e.g. the Bill of Rights<sup>21</sup> in the United States or the *Charter* in Canada); further, citizens would be assured sufficient all-purpose means to make effective use of their freedoms.<sup>22</sup> Finally, all political conceptions of justice would stipulate guidelines of inquiry and rules of evidence in light of which citizens are to decide whether, when and how substantive principles of justice apply to their society, and how best to formulate that society's concrete laws and policies.<sup>23</sup> These self-consciously liberal principles and values would constitute the common terms or pool of reasons according to which citizens would agree to deliberate in public.<sup>24</sup> Rawls's public reason thus at once comprised substantive principles of justice and a particular approach to reasoning, which combined to

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<sup>21</sup> U.S. Const. amend. I-X.

<sup>22</sup> Rawls, *Political Liberalism*, *supra* note 4 at 223; Leif Wenar, "John Rawls" in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, URL = <<http://plato.stanford.edu/archives/fall2008/entries/rawls/>> at 3.4.

<sup>23</sup> Rawls, *Political Liberalism*, *supra* note 4 at 224.

<sup>24</sup> Cristina Lafont, "Religion and the Public Sphere: What Are the Deliberative Obligations of Democratic Citizenship?" (2009) 35 *Philos. & Soc. Crit.* 127 at 130.

ensure that reasons offered would be public in the sense of being generally accessible to all reasonable citizens, regardless of their peculiar cultural attachments.

**b. The Supreme Court: The Exemplar of Public Reason**

Practically speaking, what would public reasons of the kind contemplated by Rawls actually look like? As an illustration of pure public reason at work, Rawls pointed to the legal system, and in particular in the direction of the United States Supreme Court. A constitutional court, Rawls said, was the “exemplar” of public reason.<sup>25</sup> This is so because the justices of a supreme court in a constitutional democracy must, by definition, “explain and justify their decision as based on their understanding of the constitution and relevant statutes and precedents” in a way that the legislative branch does not.<sup>26</sup> In so doing, they are to appeal to the political values that they think belong to the most reasonable understanding of the public conception of justice – values that they believe that all citizens as reasonable and rational might reasonably be expected to endorse.<sup>27</sup>

As originally framed by Rawls, public reason thus very much mimicked the types of reasons that are operative within the legal system. In fact, Rawls specifically remarked that public reason and the reason of the constitutional court essentially overlap: “in a constitutional regime with judicial review, public reason *is* the reason of its supreme court” [emphasis added].<sup>28</sup> So-called universal rational arguments based on commonly recognized legal and constitutional principles are in; reasons that issue from specific moral, religious or political viewpoints that are peculiar to the decision-maker in question, and are not embodied within the law or the constitution, are out. As it turns out, the United States Supreme Court’s own perception of its

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<sup>25</sup> Rawls, *Political Liberalism*, *supra* note 4 at 231-235.

<sup>26</sup> *Ibid.* at 216.

<sup>27</sup> *Ibid.* at 236.

<sup>28</sup> *Ibid.* at 231.

judicial role is almost perfectly in sync with Rawls's vision of the court as the exemplar of public reason. In *Planned Parenthood v. Casey*, its controversial 1992 decision upholding the constitutionality of abortion, a debate with important religious overtones, the Court discussed the bases of its legitimacy at length.<sup>29</sup> Emphasizing the principled justification necessary for any judicial act, it echoed Rawls:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. *Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.*<sup>30</sup>

[Emphasis added]

True to Rawls's public reason, in order to be legitimate, the Court stressed that its decision must be based on legal principle, not influenced by social, political (or religious) pressures, and supported by reasons that the country as a whole will find plausible. In other words, its decision must be justified by "reasons all can accept."

Finding its paradigmatic expression in judicial reasoning, Rawls's public reason consequently represented a one-size-fits-all model for justifying the legitimacy of public decision-making in plural societies. Conceived of as a substantive, reason-based construct – but one whose substantive breadth was considerably and artificially narrowed in order to avoid reliance on contested metaphysical premises – it had the benefit of being able to apply uniformly to public political debate, the deliberations of the legislative branch, and constitutional adjudication. That versatility, however, was acquired partially at the cost of limitations it imposed on the substantive reasons that should be offered in the public sphere. In order to

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<sup>29</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) at 864-869.

<sup>30</sup> *Ibid.* at 865-866.

reconcile the need for public justification with the realities of religious pluralism, diverse perspectives were to be excluded from public discourse altogether.

Religious reasons, in particular, are typical of the types of reasons that are excluded from the consideration of constitutional courts in a liberal democracy, and were accordingly to be kept out of all public decision-making fora. Not all citizens share the same religious commitments, and the prospects for bringing about agreement by rational means on such matters are, history tells us, poor, to say the least.<sup>31</sup> As Richard Rorty has famously described it, religion can often be perceived as a “conversation stopper.”<sup>32</sup> Thus, religious reasons cannot form the basis for public policy decisions, as they did for the school board in *Chamberlain*, or provide the necessary justification for coercive laws. More problematic still for religious believers, since public reasons are ultimately the *only* reasons that can support legitimate public policy decisions and other coercive action by the state, religious reasons are considered by Rawls to be neither desirable nor constructive contributions to public discourse generally. To the extent that their proffered arguments are based on religious premises, citizens fall afoul of the obligations they owe each other in the public forum.

Rawls subsequently amended his position in this regard, allowing that arguments grounded in reasonable religious and philosophical doctrines that buttressed or complemented his political conception of justice could be introduced in the public sphere at any time, provided that in due course public reasons (grounded specifically in his political conception of justice)

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<sup>31</sup> Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004) at 68. For examples of the religious strife and bloodshed that transpired during the Reformation, for instance, see generally Diarmaid MacCulloch, *The Reformation*, 1st American ed. (New York: Viking, 2004) especially at 327-329, 469-484, 503ff. and 646-649.

<sup>32</sup> Richard Rorty, “Religion as a Conversation Stopper” in Richard Rorty, ed., *Philosophy and Social Hope* (London: Penguin, 1999).

would be presented to support the position advocated for with the initial arguments.<sup>33</sup> Nonetheless, and in spite of this so-called proviso, it remains that for Rawls, only reasons meeting his standard of public reason really count in public policy debate, as those are the only ones that can support the requirements of public justification. Just as judges are foreclosed from invoking their own moral and religious viewpoints in order to decide the cases before them, so too should other decision-makers be similarly restricted.<sup>34</sup> Accordingly, public decisions that rest on religious reasons undermine their own legitimacy and alienate people with different spiritual convictions (or none at all). Such reasons should be confined to the private realm, since decisions there do not bind fellow citizens. Although the aim of Rawls's political liberalism was to reconcile his theory of justice with the fact of reasonable pluralism within modern liberal democracies, the means by which Rawls would see that goal achieved thus had the effect of excluding religious perspectives from public discourse altogether.

### **c. Critiques of Rawls's Public Reason: Excluding Religious Voices**

As one might expect, this profoundly secular and exclusionary conception of public reason, first expressed by Rawls in *Political Liberalism*, sparked tremendous controversy. Religion continues to play a fundamental role in many citizens' lives. Largely informed by the perspective of religiously minded citizens, Rawls's public reason has been met with stout opposition, generally focused on its implications for political discourse and legislative decision-making. The tenor of these critiques, which have mostly ignored the identity Rawls observed between public reason and the constitutional reasoning of judges, can loosely be classified into

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<sup>33</sup> Rawls, *Political Liberalism*, *supra* note 4 at li-llii; John Rawls, "The Idea of Public Reason Revisited" (1997) 64 U. Chi. L. Rev. 765 [Rawls, "Idea"] at 783-787. Rawls's position in this regard reflects his portrayal of the political conception of justice as "a module, an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it." Rawls, *Political Liberalism*, *supra* note 4 at 12.

<sup>34</sup> Rawls, *Political Liberalism*, *supra* note 4 at 236.

four categories: historical/social arguments, arguments from fairness, cognitive/epistemological arguments, and arguments of viability.<sup>35</sup>

### Historical/Social Arguments

To begin with, pointing to the important historical role that religious premises have played in advancing social justice, critics such as Jeffrey Stout have argued that the exclusionary consequences that flow from Rawlsian public reason simply cannot be defended in the political sphere. Even Rawls's so-called "wide" version of public reason (further to his previously mentioned proviso) would barely make room, if at all, for historically important contributions to public political debate.<sup>36</sup> In the United States, for instance, Christian values and speech informed by them lay at the foundation of both the 19<sup>th</sup> century fight against slavery and the civil rights movements in the 1950s and 1960s, the salutary effects of which are widely recognized by religious and secular citizens alike. Referring to the "off-sides" designation that Rawls's public reason would assign to the political advocacy of Abraham Lincoln, Martin Luther King Jr. and 19<sup>th</sup> century American abolitionists such as Frederick Douglass, Stout puts the point as follows:

Something is deeply wrong here. The speeches of King and Lincoln represent high accomplishments in our public political culture. They are paradigms of discursive excellence. The speeches of the abolitionists taught their compatriots how to use the terms "slavery" and "justice" as we now use them. It is hard to credit any theory that treats their arguments as placeholders for reasons to be named later.<sup>37</sup>

Stout's references to King, and the American civil rights movement more generally, are interesting in that they highlight once more the distinguishing features that tend to separate

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<sup>35</sup> I acknowledge the debt I owe to Simone Chambers for elaborating the first 3 categories in this classification, in an as yet unpublished paper she presented at the *Victoria Colloquium in Political, Social and Legal Theory* on October 3, 2010.

<sup>36</sup> Nicholas Wolterstorff, "The Role of Religion in Decision and Discussion of Political Issues" in Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham: Rowman & Littlefield, 1997) at 80; Stout, *supra* note 31 at 70-71.

<sup>37</sup> Stout, *supra* note 31 at 70.

political from legal decision-making. Christian discourse in the public political sphere may have been influential in raising public consciousness and promoting social justice for blacks in the United States in the 1950s and 1960s, and even underpinned government policy initiatives. However, it was altogether lacking from the reasons that supported probably the most famous legal judgment of the civil rights movement: the 1954 decision of the United States Supreme Court in *Brown v. Board of Education* that struck down racial segregation in public schools as unconstitutional.<sup>38</sup> In *Brown*, the justices of the court adhere closely to the Rawlsian school of public decision-making; rather than allowing the religious views of some members of the community to influence their decision (at least as that decision was portrayed in the Court's reasons), as the local school board did in *Chamberlain*, the judges eschew any Christian rhetoric and instead appeal to the constitutional value of equality, common sense, and the conclusions of (social) science.<sup>39</sup> Notwithstanding this discrepancy, and whatever basis (or lack thereof) this critique might have in historical legal discourse, critics such as Stout see the existence of a moral obligation to refrain from relying on religious reasons in public as counter-intuitive and counter-productive.<sup>40</sup>

### Fairness

Second, in a liberal democratic society in which citizens are taken to be free and equal participants in the democratic process, as Rawls would have them, the right to make religious contributions to public discourse appears to be constitutionally protected three times over – by

<sup>38</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954) [**Brown**] at 494.

<sup>39</sup> *Ibid.* at 493-495. For an expression of the contents of public reason that is striking similar to the factors invoked by the Court, see Rawls, *Political Liberalism*, *supra* note 4 at 223-225; see also Section I(a) above.

<sup>40</sup> Wolterstorff, *supra* note 36 at 80; Stout, *supra* note 31 at 70-71; for a detailed discussion of Frederick Douglass's abolitionist oratory and its relationship to public reason, see Linda Zerilli, "Value Pluralism and the Problem of Judgment: Farewell to Public Reason," unpublished paper presented at the *Victoria Colloquium in Political, Social and Legal Theory* on December 3, 2010, archived at URL = <[http://law.uvic.ca/demcon/victoria\\_colloquium/Colloquium2010-2011.htm](http://law.uvic.ca/demcon/victoria_colloquium/Colloquium2010-2011.htm)>. Rawls himself appeared to acknowledge that any serious account of public reason would need to allow for historically important reasons of this kind: see Rawls, *Political Liberalism*, *supra* note 4 at li-iii.

the rights to freedom of expression, freedom of religion and equality. To advocate for even a moral obligation upon religious believers to censor their views seems not only disenfranchising, but also grossly unfair and at odds with the fundamental precepts of democracy. Focusing on the role of an ordinary citizen participating in the democratic process, rather than a judge, Nicholas Wolterstorff emphasizes the contradiction inherent in this position by contrasting the implications of a restraint on the use of religious reasons with the “Idea” of liberal democracy:

[O]n the face of it, there is something profoundly paradoxical about the suggestion that the role of a citizen in a liberal democracy includes this restraint. ...[For some citizens,] [u]sing their religious convictions in making their decisions and conducting their debates on political issues is part of what constitutes conducting their lives as they see fit. What is going on here? The liberal [Rawlsian] position – restraint on religious reasons – appears to be in flagrant conflict with the Idea of liberal democracy.<sup>41</sup>

Wolterstorff makes a convincing point, as such a burden would represent a severe limitation on the liberty and equality of religious believers by restricting their ability to engage in public debate on their own terms, as other citizens are permitted to do.<sup>42</sup> This is all the more true given that Rawls’s public reason applies in particular to the most fundamental political issues facing liberal democracies: matters of constitutional essentials and basic justice. From a consequentialist standpoint, the translation requirement imposed on religious believers – to which citizens having no religious faith would in practice not be bound – would importantly have negative effects on the robustness of our deliberative democratic processes. Forcing religious citizens to conceal the most important reasons for their political positions and offer instead reasons grounded in the overlapping consensus would not only be dissembling but would

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<sup>41</sup> Wolterstorff, *supra* note 36 at 77.

<sup>42</sup> *Ibid.*; Stout, *supra* note 31 at 68.

also significantly impoverish public debate.<sup>43</sup> The seemingly absurd result would be that the most important political issues of our day would have to be decided without regard for the concerns most important to us. On such important issues, deliberative democracy would appear to be enhanced, not hindered, by allowing citizens to explain the convictions underlying their positions in the greatest depth and detail possible – regardless of whether those reasons are secular or religious in nature.<sup>44</sup>

### Epistemological/Cognitive Arguments

Third, viewed from both epistemological and cognitive standpoints, the requirement that religious believers substitute public reasons for their true religious motivations rests on a number of dubious premises. It presupposes that religious reasons can be readily identified, that equivalent public reasons are available to the believer that can do the work of their religious reasons, and that religious believers should be able and willing to closet their religious convictions while engaging in public discourse. All of these assumptions merit closer scrutiny.

As regards the identification of religious reasons, religion – and Christianity in particular – is so interwoven with other facets of the Western legal, political, social and cultural tradition that drawing the line between public reasons and religious reasons rapidly becomes an exercise in futility. This difficulty is compounded when one considers that references to religious sources are very much context and purpose specific.<sup>45</sup> It might be uncontroversial to state that, on one end of the spectrum, reliance on a passage from the biblical book of Leviticus directly to support the criminalization of homosexuality counts as a religious reason while, on the other end of the spectrum, mere reference by a legislative representative to the importance of the Catholic Church

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<sup>43</sup> Wolterstorff, *supra* note 36 at 78-79.

<sup>44</sup> Stout, *supra* note 31 at 70-71.

<sup>45</sup> On this point, see generally Kent Greenawalt, “What Are Public Reasons” (2007) 1 J.L. Phil. & Culture 79.

in Quebec prior to the Quiet Revolution does not. In between, however, lies a vast grey area of rhetorical flourishes, cultural references, inspirational appeals and historical contextualizations.

When are those reasons properly deemed public, and when are they properly deemed religious?

Moreover, even if religious reasons were readily identifiable, it would not mean that citizens would necessarily be able to forgo those reasons and still be able to communicate the same argument in the public forum using the common secular terms characteristic of public reason. Given the unique epistemological dimension of religion – some persons' knowledge and understanding of the world being fundamentally connected to a belief in the existence of God – not all religious reasons can be translated into public reason. Moreover, a religious citizen may not want or feel prepared to forgo reliance on religious convictions when debating matters of public concern. Such a proposition gives short shrift to the cultural aspect of religion and trivializes the importance that religious convictions play in some citizens' lives. Wolterstorff again puts it eloquently:

It belongs to the *religious convictions* of a good many religious people in our society that *they ought* to base their decisions concerning fundamental issues of justice *on* their religious convictions. They do not view it as an option whether or not to do so. It is their conviction that they ought to strive for wholeness, integrity, integration, in their lives: that they ought to allow the Word of God, the teachings of the Torah, the command and example of Jesus, or whatever, to shape their existence as a whole, including, then their social and political existence. Their religion is not, for them, about *something other* than their social or political existence; it is *also* about their social and political existence.<sup>46</sup>

[Emphasis in original]

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<sup>46</sup> Wolterstorff, *supra* note 36 at 105.

This misconception arises essentially from a failure to recognize that religious belief is not merely a matter of choice, but indeed intrinsically tied to a person's identity.<sup>47</sup> When the importance of religion as a fundamental aspect of a person's cultural and social identity is properly appreciated, it is the Rawlsian conception of public reason rather than the reliance on religious reasons in the public sphere that is deeply alienating. If a religious citizen cannot or will not express her viewpoint without relying on religious premises, she is left with little choice but to suffer exclusion from full political participation. For religious believers, public reason can thus be perceived as an outright rejection of not only their beliefs, but also of their right to participate as equal citizens in a shared democratic project.<sup>48</sup> From this perspective, public reason may thus have the perverse and undesirable effect of ostracizing cultural and religious minorities and causing them to withdraw from the political process.<sup>49</sup>

Be that as it may, critics appear unconcerned with, or at least inattentive to, the substitution of reasons that religious litigants might be forced to undertake when engaging in the legal process, or the secular posture that judges are expected to adopt when deciding cases, notwithstanding any private moral or religious motivations. Again the example of the United States Supreme Court's milestone decision in *Brown* is thought provoking in this regard. As mentioned above, despite the importance of Christian discourse to the American civil rights movement, the Court preferred to rest its holding on firmly secular ground, and at least partly on controversial but ostensibly culturally neutral social science evidence suggesting that racial segregation of schools had a "detrimental effect upon" and tended to "[retard] the educational

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<sup>47</sup> Richard Moon, "Government Support for Religious Practice" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 217 [Moon, "Government Support"] at 233-234. Religion as an aspect of identity will be discussed in further detail in Chapter 2 below.

<sup>48</sup> *Ibid.* at 233-234.

<sup>49</sup> Stout, *supra* note 31 at 75; Paul J. Weithman, *Religion and the Obligations of Citizenship* (Cambridge, UK: Cambridge University Press: 2002) at 132-142.

and mental development of” black children.<sup>50</sup> The decision to strike down racial segregation in public schools may or may not have been inflected by the justices’ sense of Christian love for one’s fellow man. What is certain, however, is that true to Rawlsian public reason, the thick conception of justice later invoked in Martin Luther King’s political oratory is nowhere to be found in the reasons of the court.

### Viability

Fourth, in terms of viability, critics have argued forcefully that the consensus contemplated by Rawls on common principles and values that would underpin public reason is neither achievable nor desirable. It thus constitutes an arbitrary and unproductive standard against which to assess the legitimacy of public decisions and the discourse that underlies them, and an arbitrary basis on which to exclude religious reasons. As described above, Rawls takes as his starting point that reasonable people will ascribe to different reasonable comprehensive doctrines, and will accordingly disagree on conceptions of the good. Given those premises, it is further reasonable to suppose that those same reasonable people might disagree on the principles that should form the basis for social cooperation in society, or even whether such a common basis is necessary.<sup>51</sup> As Stout suggests:

What I can reasonably reject depends in part on what collateral commitments I have and which of these I am entitled to have. But these commitments vary a good deal from person to person, not least of all insofar as they involve answers to religious questions and judgments about the relative importance of highly important values. It is naïve to expect that the full range of political issues that require public deliberation...will turn out to be untouched by such variation. *The question is why constitutional essentials and matters of basic justice are not also affected, for it is reasonable to suppose, when discussing such elemental issues, that the relative importance of highly important values – a matter on which*

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<sup>50</sup> *Brown, supra* note 38 at 494.

<sup>51</sup> Stout, *supra* note 31 at 70-71, 73; Weithman, *supra* note 49 at 142-143.

*religious traditions have much to say – is a relevant consideration.*<sup>52</sup>

[Emphasis added]

Given peoples' real collateral commitments, there appear to be sound reasons to reject the social contractarian project to establish a universal and common basis of principles upon which to structure a society.<sup>53</sup>

James Tully considers such a quest for universal principles, or even for shared norms that are implicit in practice in a given society, to be a fatal vice of so-called modern constitutionalism.<sup>54</sup> For one, this fixation with uniformity – of which Rawls's conception of public reason is certainly guilty – misstates the goal of constitutionalism, which is not to deduce and identify universals, but rather to “reach agreement on a form of association that accommodates...differences in appropriate institutions and...similarities in shared institutions.”<sup>55</sup> In addition, it suggests that a consensus on shared basic norms is possible in practice, a possibility that would appear to be manifestly false in a culturally diverse society.<sup>56</sup> A substantive conception of public reason thus fails even as a regulative ideal; in its diversity blindness, as Tully might say, it holds out as a standard a consensus on basic principles that does not exist. Once the illusory nature of the consensus on the principles underlying public reason becomes clear, the basis for excluding religious perspectives from public discourse appears to make little sense and takes on an arbitrary character. Theorists in the agonist school press the matter further, arguing that the exclusion of diverse perspectives from public discourse, in addition to being arbitrary, is actually counter-productive to effective decision-making. Chantal Mouffe, for instance, takes the position that fundamental disagreement is not only reasonable and

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<sup>52</sup> Stout, *supra* note 31 at 70-71.

<sup>53</sup> *Ibid.*

<sup>54</sup> See Tully, *supra* note 14, *inter alia* at 131-132, 135-136.

<sup>55</sup> *Ibid.* at 131.

<sup>56</sup> *Ibid.*

to be expected in a diverse society, but indeed essential for a democracy to function properly.<sup>57</sup> For that reason, public reason as a substantive concept along the lines developed by Rawls is undesirable as well as being unrealistic.

Interestingly, in these respects the indictment of public reason emanating from the political sphere is focused essentially on the qualities of public reason that make it characteristic of law: the existence of a set of common terms through which to reason and decide matters of constitutional controversy. Whereas political philosophers such as Stout, Tully and Mouffe view such a constrained decision-making framework as inimical to effective deliberative democracy and meaningful constitutional dialogue, constraints of that sort seem to be a reality inherent in constitutional adjudication.

**d. Towards Procedural Public Reason: An Attitude of Respect**

As a result of these criticisms, many liberal political philosophers and deliberative democrats that had initially been sympathetic to the Rawlsian conception of public reason were forced to reconsider their positions. As mentioned above, Rawls himself, subsequent to the original publication of *Political Liberalism*, amended his view to embrace what he termed a “wide” version of public reason, further to his proviso, which allowed for the introduction of comprehensive doctrines into the public sphere, provided those arguments were ultimately redeemed by public reason. Habermas, a self-described admirer of Rawls’s project<sup>58</sup> and perhaps the most vocal continuing supporter of the public use of reason, similarly found certain of the criticisms that issued from religious perspectives to be compelling. Like Rawls, Habermas was

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<sup>57</sup> Chantal Mouffe, “Religion, Liberal Democracy, and Citizenship” in Hent de Vries & Lawrence E. Sullivan, eds., *Political Theologies: Public Religions in a Post-Secular World* (New York: Fordham University Press, 2006) 318 (“far from jeopardizing democracy, agonistic confrontation is its very condition of possibility” at 324).

<sup>58</sup> See Jürgen Habermas, “Reconciliation through the Public Use of Reason: Remarks on John Rawls's *Political Liberalism*” (1995) 92 *J. Phil.* 109 at 110.

initially inclined to support a complete bar on the use of religious reasons in the public sphere. However, also like Rawls, his position evolved. As Habermas himself might say, the unforced force of the better argument, in particular the epistemological and fairness critiques levied by Wolterstorff against public reason – that faith goes to the core of religious citizens’ existence, who may feel compelled and even find it necessary to base their decisions in political matters on their religious convictions – convinced him that such a position imposed an unfair burden on religious believers.<sup>59</sup> Most recently, Habermas has suggested that, in political discussion and debate that takes place outside of state institutions, reasons of all stripes, religious or otherwise, should be considered acceptable and constructive contributions to public discourse. However, Habermas’s concession in this regard would extend only to the doors of the legislature and no further. Inside institutions charged with formal law-making power, the conception of legitimacy endorsed by Habermas would continue to mean that only reasons derived from a perfected, universal rationality, uncoupled from any particular metaphysical perspective – in other words reasons that all can accept – could underpin coercive law.<sup>60</sup>

The allowances made by Rawls and Habermas towards a less exclusive conception of public reason, although limited, are indicative of a broader trend. A subtle yet discernible shift in views has occurred amongst participants in the public reason debate in recent years, even amongst secular deliberative democrats firmly rooted in the Habermasian or Rawlsian schools, towards the positions canvassed above and advocated by religious-minded philosophers such as Wolterstorff, Stout and Paul Weithman. The most salient characteristic of this trend has been a tendency to do away with any *substantive* constraint on the types of reasons that can be put

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<sup>59</sup> Habermas, “Religion”, *supra* note 19 at 8, in which he cites and explicitly endorses Wolterstorff’s criticism in this regard.

<sup>60</sup> Habermas, “Religion”, *supra* note 19 at 8-10.

forward in public in support of state policies.<sup>61</sup> Instead, scholars preoccupied with the legitimacy of public decision-making in a diverse society and any associated conditions imposed on public deliberation have generally shifted their attention towards a *procedural* model of public reason, a model that stresses the duty upon citizens to adopt an attitude of respect towards each other in the public forum.

As a part of that duty, citizens should only advocate policies that they sincerely believe would be justified for all concerned. Perhaps more importantly, however, they should be committed and willing to take other peoples' objections seriously and honestly seek to address them. Indeed, intrinsic to the requisite attitude of respect is an inward posture of humility and modesty towards a person's own ethical commitments and an outward posture of charity towards those of others.<sup>62</sup> So-called dialogue that is unabashedly aimed at "bringing along" people to a predetermined, correct, outcome is in fact no dialogue at all, and would fall afoul of the attitude of respect associated with a procedural model of public reason. In order to truly engage in a meaningful and respectful cross-cultural encounter, participants must enter the conversation remaining open to the possibility that they might actually be wrong.<sup>63</sup>

Coupled with those deliberative duties, citizens should where possible attempt to avoid relying on so-called authoritarian modes of reasoning. Although fellow citizens may not share or accept the fundamental premises on which an argument is founded, those bases should remain transparent and thus the argument they support contestable. This allows, for instance, for the use

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<sup>61</sup> The majority of recent commentary on the place of religious reasons in public political debate has been along these lines. See in particular Maeve Cooke, "A Secular State for a Postsecular Society? Postmetaphysical Political Theory and the Place of Religion" (2007) 14 *Constellations* 224; Lafont, *supra* note 24; James Bohman & Henry Richardson, "Liberalism, Deliberative Democracy and 'Reasons All Can Accept'" (2009) 17 *J. Polit. Philos.* 253.

<sup>62</sup> Stout, *supra* note 31 at 233-234.

<sup>63</sup> Benjamin L. Berger, "The Cultural Limits of Legal Tolerance" (2008) 32 *Can. J. L. & Jur.* 245 [Berger, "Cultural Limits"] at 272; Jennifer Nedelsky & Roger Hutchison, "Clashes of Principle and the Possibility of Dialogue: A Case-Study of Same-Sex Marriage in the United Church of Canada" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 41 at 50-51.

of respectful immanent criticism – showing why the particular premises that a given citizen espouses might support or call into question the result being advocated.<sup>64</sup> Bohman and Richardson summarize the difference between Rawls’s substantive conception of public reason and this more recent procedural conception as follows: “the aspirations here concern not a reason of some ideal type, but the practical norms governing the conduct and expectations of citizens engaged in mutually respectful, civil, and cooperative processes of deliberation.”<sup>65</sup>

It is important to note that the democratic theorists who have persuasively made the case for a procedural conception of public reason based on a reciprocal attitude of respect have for the most part not attended to the distinction drawn by Habermas between discourse taking place in the informal public sphere and discourse engaged in by politicians within state institutions. On their view, to the extent that there are compelling reasons not to deprive religious citizens of the right to reason and deliberate in public on their own terms – relying as they must on their own epistemological bases and distinctive cognitive and moral outlooks – those reasons are effectively *enhanced* when formal decision-making processes are at stake in the political sphere. For them, Habermas’s concern that coercive laws should formally be justified by a single ideal reason that is accessible to all citizens – if such a thing is possible at all, even under ideal conditions and bearing in mind the possibility of “translating” arguments from secular to religious terms and vice versa<sup>66</sup> – must yield to the openness of the discursive process.<sup>67</sup> Instead

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<sup>64</sup> Jeffrey Stout in particular has forcefully made this point, see e.g. Stout, *supra* note 31 at 69, 72-73. This position has lately been taken up in various forms by others such as Lafont, *supra* note 24 at 132 and Bohman & Richardson, *supra* note 61 at 271-272.

<sup>65</sup> Bohman & Richardson, *ibid.* at 273.

<sup>66</sup> Cooke most clearly expresses her position that no reason can meet this test under conditions of religious pluralism: see Cooke, *supra* note 61 at 226-227. Lafont for her part suggests that reasons exist that are “generally acceptable to democratic citizens” but seems to contemplate that no reasons may be strictly acceptable to all citizens: see Lafont, *supra* note 24 at 138, 143-144. Bohman & Richardson come closest to arguing that such a reason exists, but do not seem to believe that it can constitute a workable standard for restricting contributions to political deliberation: see Bohman & Richardson, *supra* note 61 at 35.

<sup>67</sup> Lafont, *supra* note 24 at 134-135, 141; Cooke, *supra* note 61 at 226-227, 234; Bohman & Richardson, *supra* note 61 at 268-273.

of being premised on the identification of reasons that all can accept, the legitimacy of political decision-making is conceived as a function of the ability of diverse constituents to participate fully in the process of decision. It is thus the nature of the reason-giving *process*, rather than the *content* of the reasons themselves, that invests public political decisions with legitimacy in a diverse society. To put the point sharply, political theorists seem to have come to the realization that if democratic decision-making processes truly aspire to legitimacy in the face of deep religious pluralism, the public use of reason must itself become pluralized. The judiciary, however, seems to have remained insulated from this shift.

## **II. Law and Democracy: The Conceptual Divide**

This tendency towards the pluralization of public reason in processes of democratic decision-making appears to have cemented a conceptual gap between judicial decision-making and its legislative counterpart that Rawls would have seen closed. For Rawls, it must be recalled, public reason was applicable not only to citizens and legislators, but to all state actors, including the judiciary. Rawls argued that public reason applied “above all” to a supreme court in a constitutional democracy, as such a court is called upon to justify its decisions to its citizens in a special way that the legislative branch is not.<sup>68</sup> As noted previously, while being careful to specify that his remarks were not a definition, Rawls remarked further that public reason and the reason of the constitutional court essentially overlap: “in a constitutional regime with judicial review, public reason *is* the reason of its supreme court” [emphasis added].<sup>69</sup> Rawls’s uniform approach to public reason thus inextricably linked legal and political discourse. The source of coercive law was of little importance; what was legally legitimate was the condition for what was politically legitimate and vice versa.

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<sup>68</sup> Rawls, *Political Liberalism*, *supra* note 4 at 216.

<sup>69</sup> *Ibid.* at 231.

The transformation that public reason has since undergone in the political sphere, in the face of considerable criticism, from reasoning on common terms to a way of reasoning that embodies respect for fellow citizens without implying any specific substantive content, marks a transition away from the commonality Rawls perceived between various loci of public decision-making that contribute to the law-making process. The concept of public reason has given rise to a wealth of commentary in the literature. However, as the above review suggests, an overwhelming amount of the ink spilled has been devoted to the consequences that public reason entails for the use of religious reasons purely in the political arena – both by regular citizens and legislative representatives. Despite the fact that the features of public reason that are characteristic of classical judicial decision-making are precisely those that have drawn fire from political theorists in their application to the democratic realm, the same shift in thinking about the legitimacy of law has not taken place as regards the judiciary. To the contrary, the critiques formulated by philosophers and political theorists concerned with the exclusionary consequences that a substantive understanding of public reason could have on members of religious groups and cultural minorities, which critiques have generally been found persuasive, have scarcely addressed the associated use of public reason by the courts. With their focus firmly trained on the public debate issue, political commentators have introduced a gap between judicial decision-making and decision-making in the public sphere generally. Far from being the exemplars of all public reasoning, as Rawls would have them, constitutional courts now appear to constitute a peculiar exception to a model of public reason that most political philosophers would see applied to decisions made by actors in the formal and informal political spheres, whether ordinary citizens, legislative representatives, or members of the executive.

It is true that some legal commentators have devoted scholarly attention to Rawls's conception of the Supreme Court as the exemplar of public reason, and the resulting parallels between a substantive conception of public reason and legal discourse.<sup>70</sup> Some have also adopted a critical posture in that regard (Ronald Dworkin has for instance suggested that Rawls's account is inadequate in that some moral values that Rawls might properly describe as belonging to a comprehensive doctrine are necessary ingredients in the process of legal judgment).<sup>71</sup> However, even amongst those who have voiced such criticism, virtually all have taken for granted that – in keeping with the United States Supreme Court's own orthodox view that the law is a forum of principle in which to apply legal rules – the courtroom is not a place where religious reasons should generally be admitted.<sup>72</sup> This seems to be consistent with prevailing judicial attitudes. As Kent Greenawalt has observed with regard to the United States:

[W]ithin the vast majority of judicial opinions, religiously grounded convictions of the judges themselves...are excluded. The reasons that are given are ones that are claimed to be available to all judges, reasons deriving directly from the legal materials themselves, or from shared cultural values, or from modes of making judgments that do not depend on special or personal insight.<sup>73</sup>

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<sup>70</sup> Kent Greenawalt, in Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995) [Greenawalt, *Private Consciences*], has perhaps devoted his attention to this issue in the most detail, at 141-150; see also the articles presented at the symposium held at Fordham University's School of Law entitled "Rawls and the Law," at (2004) 72 Ford. L. Rev. 1387ff, and in particular the following: Ronald Dworkin, "Keynote Address: Rawls and the Law" (2004) 72 Ford. L. Rev. 1387 [Dworkin, "Rawls and the Law"] at 1396-1399; Samuel Freeman, "The Idea of Public Reason Revisited: Public Reason and Political Justifications" (2004) 72 Ford. L. Rev. 2021 at 2065-2070; and Dennis F. Thomson, "Public Reason and Precluded Reasons" (2004) 72 Ford. L. Rev. 2073. Other scholars who have recently touched on this area are Lawrence Solum and George Rutherglen. See Lawrence Solum, "Public Legal Reason" (2006) 92 Va. L. Rev. 1449; Lawrence Solum, "Pluralism and Public Legal Reason" (2006) 15 Wm. & Mary Bill Rts. J. 7; George Rutherglen, "Private Law and Public Reason" (2006) 92 Va. L. Rev. 1503.

<sup>71</sup> See e.g. Dworkin, "Rawls and the Law", *supra* note 70 at 1396-1399.

<sup>72</sup> See e.g. Dworkin, "Rawls and the Law", *supra* note 70 at 1398-1399; Greenawalt, *Private Consciences*, *supra* note 70 at 149-150; For a recent (and isolated) argument to the contrary i.e. that judges should be able to rely on religious-based reasoning in certain particular cases, see David Blaikie & Diana Ginn, "Judges and Religious-Based Reasoning" (2011) 19 Const. For. Const. 53.

<sup>73</sup> Greenawalt, *Private Consciences*, *supra* note 70 at 142-143.

Without having conducted an exhaustive review of the situation in Canada, it is nonetheless safe to say that the same is true in this country, as anecdotal evidence of judicial practice bears this out. For instance, in a recent Supreme Court of Canada case dealing with criminal evidence, Justice Morris Fish made only a passing reference to the biblical book of Deuteronomy in order to point out the enduring historical concern people have had for criminal convictions based on the testimony of a single witness. Although Justice Fish was clearly not relying upon the biblical reference to support a legal conclusion, and thus not giving reasons in the sense contemplated by Rawls, his mere mention of religion was vehemently and roundly criticized by fellow Justice Marie Deschamps, who stated that “courts are...neutral and the criminal law does not need support from religion.”<sup>74</sup> In *Chamberlain*, meanwhile, the dissent’s deference to the school board’s decision to rely on religious reasons rested partly on its perceived democratic role.<sup>75</sup> The majority, on the other hand, having firmly situated the function of the board within an operative legal/administrative framework,<sup>76</sup> was categorical in its conclusion that the board’s reliance on religious viewpoints of some parents was not only inappropriate but illegal. Both the majority and the dissent, in keeping with the judicial role, were of course careful not to themselves weigh any religious reasons that might be relevant to the broader debate in order to determine the reasonableness of the school board’s decision.

When the theory and practice of judicial decision-making is contrasted with the forceful and persuasive criticism to which Rawls’s public reason has been subjected in the political sphere, the conceptual gap that exists between the legitimacy of these two sources of coercive law could not be more apparent. The responses that Rawls’s conception of public reason engendered amongst political theorists concerned with its exclusionary consequences has not led

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<sup>74</sup> *R. v. Khela*, [2009] 1 S.C.R. 104 at paras. 1, 101.

<sup>75</sup> *Chamberlain*, *supra* note 3, in particular at paras. 147-150.

<sup>76</sup> *Ibid.*, in particular at paras. 25, 41.

to a reworking of the whole concept in order to maintain its embrace on all levels of public decision-making. Instead, out of those responses have emerged two very different models of public reasoning: the one, *procedural*, pluralized and open to a diversity of perspectives, applicable in the political sphere; and the other, *substantive*, consciously constrained in content, applicable in the legal sphere. In and of itself, this disconnect is interesting, suggesting as it does that Rawls, or his contemporary critics, have overlooked either significant distinctions or important similarities between different state institutions that act as autonomous sources of coercive law. The disconnect would not be so surprising though were it not for a parallel and simultaneous trend that has seemingly been pushing the legal and political spheres closer together, not pulling them apart: the juridification of politics.

### **III. Law and Politics: A Marriage Made in Heaven?**

Any attempt to further our understanding of the judicial function – especially one concerned with an apparent disconnect between theories of legitimate decision-making in law and politics – must be cognizant of the current place that constitutional adjudication occupies within the broader framework of government. It would not be unreasonable to presume that the increasing tendency to apply differing conceptions of legitimacy to the judicial and political arenas, notwithstanding that they are both sources of coercive law in a diverse society, would be associated with and explained by an increasing tendency to conceive of their institutional roles as distinct and well-defined when it comes to developing public policy. However, current practice and scholarship in Western liberal democracies points generally towards an opposite trend. Owing to a combination of factors, including in particular the increasing prevalence of constitutional human rights documents since World War II, judging and legislating – law and

politics – are increasingly interwoven to the point where, in many liberal democracies, their impact and scope of influence on public policy has become almost indistinguishable.

As many scholars have observed, perhaps most notably Habermas, Western societies are characterized by the increasing prevalence of rights discourse in an era of (albeit waning) welfare state interventionism, jointly resulting in the juridification of spheres of activity that were formerly insulated from state regulation and judicial oversight.<sup>77</sup> On one end of the spectrum, private family relations, and on the other end, public political activity, are increasingly legalized as the dominion of the rule of law expands its reach. The march of law's rule in the public sphere, as in the private, is fast and steady.<sup>78</sup> As Paul Kahn has observed, “the juridification of politics is the leading idea of the Western European political order today.”<sup>79</sup> With the possible exception of the United States, the same could reasonably be said for most of the Western world, including Canada.<sup>80</sup>

The broadening ambit of the rule of law, the consequent juridification of political questions, and the associated expansion of the role of the judge in the modern constitutional state is in many ways typified in the philosophy of judging of Aharon Barak, formerly President of the

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<sup>77</sup> See generally Jürgen Habermas, “Law as a Medium and Law as an Institution” in Gunther Teubner, ed., *Dilemmas of Law in the Welfare State* (Berlin: Walter de Gruyter, 1986) 203 [**Habermas, “Law”**]; see also Paul W. Kahn, *Putting Liberalism in its Place* (Princeton: Princeton University Press, 2005) [**Kahn, Liberalism**] at 123-125.

<sup>78</sup> For a specific consideration of the impact that the *Charter* has had on the legalization of political activity in Canada, see Andrew Petter, “Legalise This: The *Chartering* of Canadian Politics” in James B. Kelly & Christopher P. Manfredi, eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 33.

<sup>79</sup> Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011) [**Kahn, Political Theology**] at 16.

<sup>80</sup> Kahn argues, in *Political Theology, ibid.*, that the United States has been somewhat insulated from this prevailing trend. It may be true, as Kahn argues, that the application of the rule of law is more bounded in the United States when it comes to the use of force in international affairs, for instance as regards the conduct of the war on terror, or the detention of enemy combatants at Guantanamo Bay. However, in questions of domestic politics, the United States Supreme Court plays a pivotal role; it is arguably the most politicized constitutional court in the Western world. The crucial, and often controlling, role that constitutional law and the USSC plays in American politics is particularly evident with respect to the debate on abortion, the death penalty and, more recently, the outcome of the 2000 presidential election between George Bush and Al Gore.

Supreme Court of Israel. Barak, whose academic and judicial writings on the role of a constitutional court in a democracy, the scope of the rule of law, and the proper approach to proportionality review have variously and of late been cited with approval by the Supreme Court of Canada,<sup>81</sup> has described his outlook on the comprehensiveness of law as follows:

In my opinion, every dispute is normatively justiciable. Every legal problem has criteria for its resolution. There is no “legal vacuum.” According to my outlook, law fills the whole world. There is no sphere containing no law and no legal criteria. Every human act is encompassed in the world of law. Every act can be “imprisoned” within the framework of the law. Even actions of a clearly political nature, such as waging war, can be examined with legal criteria. . . . The mere fact that an issue is “political” – that is, holding political ramifications and predominant political elements – does not mean that it cannot be resolved by a court. Everything can be resolved by a court, in the sense that law can take a view as to its legality.<sup>82</sup>

The degree to which the rule of law can, on this view, come to encompass and even dictate solutions to questions seemingly of a political nature can be surprising. Barak, in his influential book *The Judge in a Democracy*,<sup>83</sup> recounts how during his tenure the Supreme Court of Israel was seized of a petition challenging the legality of the Prime Minister’s decision not to dismiss a cabinet minister and a deputy minister. Both had been indicted but not yet tried on charges of financial improprieties. In spite of the pending charges, they refused to resign their positions. Assessing the Prime Minister’s actions against a standard of reasonableness, the Israeli court found that the Prime Minister had acted *illegally* in failing to exercise his power of dismissal and ordered that he do so. Moreover, it did do despite expressly acknowledging the

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<sup>81</sup> See e.g. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 [**Wilson Colony**] at paras. 54, 76 and 151; *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 [**Bruker**] at para. 73; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 at para. 20; and *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248 at paras. 5 and 7.

<sup>82</sup> Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) [**Barak, The Judge**] at 179.

<sup>83</sup> *Ibid.*

executive discretion that resides in the highest political office in the country, and the possible political consequences attendant to the Prime Minister's decision.<sup>84</sup>

Direct echoes of Barak's approach can be heard in the jurisprudence of the Supreme Court of Canada. Called upon to determine the constitutionality of closed judicial investigative hearings contemplated by Canada's anti-terrorism legislation, Justices Iacobucci and Arbour, who authored the plurality decision that was at least partly endorsed by 6 of the 9 judges hearing the case, prefaced their reasons as follows:

The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed, *a democracy cannot exist without the rule of law. So, while Cicero long ago wrote "inter arma silent leges" (the laws are silent in battle) (Pro Milone 14), we, like others, must strongly disagree: see A. Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002), 116 Harv. L. Rev. 16, at pp. 150-51.*

[...]

[T]he challenge for a democratic state's answer to terrorism *calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law.* In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.<sup>85</sup>

[Emphasis added]

The Court's allusion to balancing in the second paragraph hints at another way in which the judiciary has, in recent years, become intertwined with the political sphere. The prevalence of proportionality analysis as a tool for constitutionality review in Canada, Europe and much of the

<sup>84</sup> *Ibid.* at 242-243; the case in question is reported as *Amitai—Citizens for Proper Admin. & Integrity v. Prime Minister of Isr.*, 47(5) P.D. 441, H.C. 4267/93.

<sup>85</sup> *Application under s. 83.28 of the Criminal Code (Re)*, *supra* note 81 at paras. 5 and 7.

Western world (and the notion of balancing which lies at its core) has meant not only that courts tend to weigh in more and more on socio-political questions, but also that the means by which they do so are in many ways characteristic of the decision-making processes of the political sphere. Although I will discuss the concept in considerably more detail in Chapter 2, suffice it for the moment to point out that proportionality review – one example being the test originally formulated by the Supreme Court of Canada in *R. v. Oakes*<sup>86</sup> – requires courts to engage, roughly speaking, in an all-things-considered approach to judicial review, which is precisely the type of judgment that one normally associates with the legislature.<sup>87</sup> Considering a claim to freedom of religion in the context of a husband’s refusal to consent to a *get* (a Jewish divorce), Justice Abella provided an example of what is required in the balancing exercise:

Other jurisdictions have similarly concluded that the invocation of freedom of religion does not, by itself, grant immunity from the need to weigh the assertion against competing values or harm. Two examples suffice. In H.C. 292/83, *Temple Mount Faithful v. Jerusalem District Police Commander*, 38(2) P.D. 449, the Israeli Supreme Court allowed a petition from some Jewish worshippers seeking to pray in a location where a clash with Muslim worshippers appeared inevitable. Barak J. warned:

Freedom of conscience, belief, religion and worship is a relative one. It has to be balanced with other rights and interests which also deserve protection, like private and public property, and freedom of movement. One of the interests to be taken into consideration is public order and security.<sup>88</sup>

In Europe, given the discourse of legality that has occupied vast tracts of the political landscape, and the prevalence of proportionality review, some scholars have gone so far as to describe the law-making process there as “governing with judges.”<sup>89</sup>

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<sup>86</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

<sup>87</sup> Kahn, *Political Theology*, *supra* note 79 at 13.

<sup>88</sup> Bruker, *supra* note 81 at para. 73.

<sup>89</sup> Kahn, *Political Theology*, *supra* note 79 at 13, citing Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).

In Canada, there is no shortage of examples of the expansion of law's reach into domains that were formerly considered socio-familial-political. This trend is manifest in incursions of constitutional law into disputes as varied as those surrounding the possible secession of Quebec from the rest of Canada,<sup>90</sup> the propriety of spanking children,<sup>91</sup> the hiring and firing of ecclesiastical authorities,<sup>92</sup> and, just recently, the continued operation of a safe-injection site for intravenous drug users in Vancouver.<sup>93</sup>

*Chamberlain*, discussed above, is in many ways emblematic of this tendency towards the judicialization of the socio-political. A controversy that originated as a form of policy debate – whether or not it would be *appropriate* for kindergarten materials used by a specific school board to include images of same-sex partners – was transformed into a dispute as to constitutionality – whether it was *legal* for the school board to exclude images of same-sex partners from instructional materials. Although the majority of the Court in *Chamberlain* nominally remanded the question of whether the instructional materials should be included, back to the Surrey School Board for reconsideration, their conclusion as to legality for all intents and purposes vacated the discretion of the Board. Having considered the competing interests of freedom of religion and sexual orientation equality, the Court determined essentially that the Board had no choice but to include the proposed books in its curriculum, despite the decentralized structure adopted by the legislature of British Columbia, which delegated decision-making authority as to the inclusion of supplementary instructional materials to the local boards. Moreover, it arrived at this conclusion notwithstanding that no other school boards in the

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<sup>90</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

<sup>91</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.

<sup>92</sup> On this issue, see generally Alvin Esau, “Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 110.

<sup>93</sup> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [not yet reported in printed reporter] [*PHS*].

province might be so forced, as the provincial ministry of education had not included the books at the centre of the controversy in its own catalogue of approved learning resources.

The case of *Chaoulli v. Quebec (Attorney General)*<sup>94</sup> provides another striking example of the constitutionalization of politics, this time in the domain of public health. The Supreme Court of Canada was called upon to determine whether the Quebec government should allow a parallel private health care system to deliver medically necessary services. A provincial prohibition on the provision of private health services, imposed in an effort to protect the integrity of the universal public system, was constitutionally challenged on the basis that it violated the claimants' rights to life, liberty and security of the person. The claimants argued that the prohibition foreclosed the possibility of obtaining medical services that the public system was not in a position to offer in a timely fashion.<sup>95</sup> As with *Chamberlain*, a controversy that originated as a policy debate – whether, in the interest of the public good, the government *ought* to prevent individuals from purchasing faster and/or higher quality care on the private market – was transformed into a dispute as to constitutionality – whether or not the government *could* legally prevent individuals from purchasing care on the private market. And as in *Chamberlain*, the Court's judgment that the contested prohibition was unconstitutional vacated the legislature's discretion to implement the policy that it sought fit, removing as it did one of two options from the realm of legal possibility. The ruling was thus largely decisive of the policy debate in question.

The very same observations apply to the recent judgment of the Supreme Court in *Canada (Attorney General) v. PHS Community Services Society*.<sup>96</sup> The question of whether or not it was in the public good to allow for the continued operation of a safe-injection site for

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<sup>94</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 [*Chaoulli*].

<sup>95</sup> *Ibid.* at para. 3.

<sup>96</sup> *PHS*, *supra* note 93.

intravenous drug users, despite existing laws criminalizing the possession of narcotics, was transformed into a question of constitutionality – whether or not the government could legally withhold authorization to operate the site. The Supreme Court ruled that it could not, finding the government’s decision to be both arbitrary and grossly disproportionate in its effects.<sup>97</sup> Not content to refer the matter back to the minister for reconsideration, the Court thus ordered the health minister to grant the sought after authorization, essentially exercising the government’s political discretion in its place: “[t]he Minister is bound to exercise his discretion under s. 56 in accordance with the *Charter*. On the facts as found here, there can be only one response: to grant the exemption.”<sup>98</sup>

At the same time as judicial decision-making has assumed an increasingly political vocation, courts being as they are seized with more and more controversies relating to socio-political issues, political decision-making proper seems to have gravitated in the opposite direction, and become increasingly legalized. This can be explained by the fact that the juridification of political decision-making is not merely restricted to instances in which statutory laws, executive decisions, or administrative acts are formally challenged. As Andrew Petter has observed, the mere spectre of judicial review tends to subsume political decision-making within a discourse of legality.<sup>99</sup> Since the dawn of the *Charter* era in Canada, an important bureaucratic apparatus has been established at all levels of government that has as its purpose to subject potential policy alternatives to a pro forma *Charter* review. Considering the possible cost in time, expense and public embarrassment, governments are reticent to put forward and implement policy options that may fall afoul of the *Charter*; as a result, the attractiveness and viability of various courses of political action are in many cases assessed having regard to their probability

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<sup>97</sup> *Ibid.* at paras. 133-134.

<sup>98</sup> *Ibid.* at para. 150 [emphasis in original].

<sup>99</sup> Petter, *supra* note 78 at 34-36, 41.

of surviving a constitutional challenge. The legal/illegal discourse becomes an operative one even in the legislative and executive branches, as the issue of whether legislation is politically justifiable becomes conflated with the issue of whether it is constitutionally acceptable.<sup>100</sup>

Commenting on the effects of the judicialization of politics in Europe, Alec Stone Sweet perhaps sums it up best:

[L]egislators absorb the behaviour norms of constitutional adjudication, and the grammar and vocabulary of constitutional law, into those repertoires of reasoning and action that constitute political agency. In judicialized politics, legal discourse... structures the exercise of legislative power.<sup>101</sup>

The shape that the same-sex marriage controversy took on in Canada is illustrative of the pre-emptive influence that the rule of law and constitutional review can have on political decision-making. As Petter points out, from 2000 until 2003, the federal government was able to avoid dealing with the issue in the political arena by stating that the matter was before the courts. Finally, faced with successive decisions of provincial appeals courts determining that civil marriage rights should be extended to same-sex couples, the Liberal government drafted legislation proposing to recognize the union of same-sex couples. However, instead of submitting the bill directly to Parliament for legislative debate, it was referred to the Supreme Court for review as to constitutionality.<sup>102</sup> Through its decision to forgo legislative debate on the topic until after the Court weighed in on the topic, a process which took several years, the government was successfully able to postpone a legislative discourse that it desperately wanted to avoid. Moreover, once the Court had issued its ruling,<sup>103</sup> the room for democratic debate was seriously constricted in practice. The Court's judgment determined that the government's

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<sup>100</sup> *Ibid.* For a similar point in the European context, see Stone Sweet, *supra* note 89 at 196-197.

<sup>101</sup> Stone Sweet, *supra* note 89 at 203.

<sup>102</sup> Petter, *supra* note 78 at 36.

<sup>103</sup> *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 [*Marriage Reference*].

proposed legislation to recognize same-sex marriage was constitutional. Considering the issue to be essentially moot, the Court declined to consider whether or not an opposite-sex definition of marriage would be unconstitutional.<sup>104</sup> The legislative debate that did thereafter take place, with a view to enacting the draft bill into law, was thus coloured by the declaration of constitutionality of the proposed legislation, contrasted with the spectre of unconstitutionality of other alternatives. As Petter notes, “by seeking a constitutional reference, the government succeeded both in delaying and [defusing] a contentious political issue and in garnering constitutional legitimacy for its decision.”<sup>105</sup> Under the circumstances, and despite considerable opposition in the context of a minority parliament, the draft bill was enacted into law without substantial changes from the version that had been submitted to the Supreme Court.

My goal at this stage is not to take a normative position as concerns the juridification of politics, but is instead limited to the descriptive; the point is not whether the constitutionalization of politics is good or bad, but merely to show that the advent of constitutional human rights protection in the aftermath of World War II, and the concurrent broadening scope of the rule of law, has inexorably led to a rapprochement in the vocations of the judiciary and the legislature. When the transition away from a uniform justification for legitimate law, discussed above in Parts I and II, is considered against the backdrop of the juridification of politics, that transition becomes altogether puzzling. Law and politics are increasingly joined at the hip. Constitutional human rights documents, a comprehensive view of the rule of law, the rise of the welfare state – these are all factors that have resulted in a more robust role for the judiciary in the overall process of governance in contemporary liberal democratic states such as Canada. Especially under those circumstances, the readiness with which law and democracy, respectively, appear

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<sup>104</sup> *Ibid.* at paras. 61-71.

<sup>105</sup> Petter, *supra* note 78 at 36.

ready to deal differently with the role of religion in public decision-making, *contra* Rawls, merits closer attention.

#### **IV. Exploring the Divide**

In the sphere of political philosophy, reasoning on the basis of common but restricted terms – modelled on legal discourse – has been found wanting in the face of the challenges posed by religious pluralism in the post-metaphysical era. Such a model has given way to substantively unconstrained yet fair, open and respectful deliberation characterized by a sincere readiness to meet the objections of fellow citizens on their own terms, coupled with a willingness to revise one's position in the face of better reasons. Once tightly lashed together by Rawls, adjudication and political discourse have slowly drifted apart in the storm of debate that has arisen around public reason. Why is this, and what does it tell us about constitutional judgment? At first blush, many of the factors invoked to justify the transformation of public reason would appear to have currency within the adjudicative realm: consideration for the rights to free expression and freedom of religion; the opportunity for religious citizens to engage in matters of public concern as equals and on their own terms; a desire to increase the richness of public discourse through diversity; the elusiveness of terms that would be acceptable to all citizens. When considered against the backdrop of the juridification of politics, and the concordantly central role of judicial decision-making as a source of law and government policy in Canada and throughout the Western world, these factors only seem to gain in relevance. And yet, religious reasons are considered generally, both in theory and in practice, to be antithetical to modern legal discourse and judicial decision-making. A significant and unexplained conceptual disconnect has arisen between theories of decision-making in the political and legal spheres.

As I disclaimed at the outset, my interest in this disconnect lies in particular with the adjudicative side of the equation. Specifically, how does the apparent lack of fit between an expansive, proceduralist notion of public reason designed to accommodate religious pluralism and the requirements of constitutional adjudication inform our understanding of the adjudicative function? And what does that understanding suggest about the capacity of Canadian law-making institutions to manage claims connected to religious difference? It is to these questions that I will shortly turn.

## Chapter 2

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### Balancing the Ineffable: Religion and Adjudication

As discussed in Chapter 1, the debate on the public use of reason in a diverse society engendered by the publication of *Political Liberalism* has been overwhelmingly concentrated on the political sphere. As the debate has unfolded, relatively little attention has been paid to its implications for the theory and practice of judicial decision-making. Given that Rawls's theory of public reason was developed as a response to the challenge that diversity poses to the legitimacy of coercive law generally, and given the centrality of constitutional adjudication to contemporary Western legal and political orders, as I also discussed in Chapter 1, this omission is striking.

In the context of his treatment of the legitimate exercise of political power through the public use of reason, Rawls reserved a special place for adjudication. He portrayed the judicial forum as the site *par excellence* for the application of public reason;<sup>106</sup> he seemed to take for granted that the requirements of legitimacy impose the greatest burdens on constitutional courts. Habermas, too, has specifically turned his mind to the important role that courts play in the generation and application of legitimate law, although he has not done so explicitly in his discussion of the place of religion in the public sphere.<sup>107</sup> In *Between Facts and Norms*, his ambitious attempt to account for the legitimacy of law in what he terms our “post-metaphysical” modern era (i.e. one characterized by deep religious and metaphysical pluralism), Habermas

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<sup>106</sup> Rawls, *Political Liberalism*, *supra* note 4 at 215-216.

<sup>107</sup> As discussed in Chapter 1, Habermas makes an important distinction between the formal and informal public spheres, advocating for what might be described as an institutional firewall beyond which religious reasons cannot be invoked to justify state action. Implicit in that position lies an objection to the admissibility of religious argument in the judicial context. Be that as it may, his explicit discussion of the institutional setting is limited to the political milieu. See on this point Habermas, “Religion”, *supra* note 19.

takes pains to demonstrate how his general theory of communicative action might underpin the legitimate exercise of state power, not only in the legislative branch but also in the judicial.<sup>108</sup>

At first blush, then, any attempt to explain the legitimacy of law through the public use of reason would appear to require a discussion of how the concept of public reason operates in the judicial branch. The readiness with which post-Rawlsian political philosophers have neglected to attend to the adjudicative realm in their accounts of public reason suggests either that something is lacking in those accounts or, perhaps more likely, that they – and we – may be overlooking distinct characteristics of the adjudicative function that are salient in conditions of cultural pluralism. Regardless, if public reason and constitutional adjudication are to be the twin focuses of our attention, the way in which courts and judges address the challenges of cultural and religious diversity merits a closer look. It is to this that I will turn in Chapter 3.

Prior to doing so, however, it will first be necessary to consider what exactly those challenges are. With that mind, in this chapter I will explore the nature of religion as a social and cultural phenomenon, with a view to understanding the special types of challenges that religious diversity can pose for constitutional adjudication. In so doing, I should point out that I am consciously constraining my focus, within *cultural* diversity in general, to *religious* diversity in particular. That focus, which was likely already evident in Chapter 1, is far from accidental. Although not always explicit, religion undeniably lies at the root of scholarly thought on the public use of reason in a diverse society. Rawls's (and Habermas's) preoccupation with the legitimacy of coercive law was largely stimulated by the social and political challenge posed by religious pluralism. Moreover, as I showed in Chapter 1, the evolution in thinking that has characterized the ongoing debate on public reason in the political sphere was primarily driven by and continues to bear the indelible mark of critiques sensitive to the need to include religious

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<sup>108</sup> See generally Habermas, *BFAN*, *supra* note 12, especially at chapters 5-6.

believers in a common political project. Given the degree to which religion has shaped the debate, it is reasonable to suspect that part of the explanation for the conceptual gap between theories of adjudication and theories of political decision-making might lie in the very nature of religious faith.

In fact, as I will show in this chapter, the natures of religion on the one hand and constitutional adjudication on the other are such that encounters between these two phenomena raise the spectre of very difficult challenges for judicial decision-makers in a religiously diverse society. The Jewish theologian Abraham Joshua Heschel once sought to convey the essence of religion by evoking a sense of the ineffable – “that which is but cannot be put into words.”<sup>109</sup> It is a useful metaphor for my purposes. Religious significance is not easy to capture within the constraints of the judicial decision-making paradigm. The identity-based, deeply cultural yet personal aspect of religion, coupled with its potentially comprehensive and pervasive normative force, are such that a full appreciation of religious meaning can easily elude the adjudicative vocabulary. In a diverse society, this “ineffable” character of religion has the potential to push the boundaries of judging to its limits. The challenges of religious diversity thus offer a particularly well-placed perspective from which to examine the nature of the contemporary adjudicative function, and a promising avenue by which to explore the surprising disconnect observed in Chapter 1 between theories of legitimate political and legal decision-making.

## **I. Religious Freedom: Democratic Ideal or Pragmatic Necessity?**

In Canada, adjudication most often engages with issues of religion in the context of religious freedom litigation. Indeed, the particular stresses that religion poses for judicial

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<sup>109</sup> Abraham Joshua Heschel, *Man Is not Alone: A Philosophy of Religion* (New York: Farrar Straus and Giroux, 1976) at 4; see also chapter 1 generally: “The Sense of the Ineffable”.

decision-making arise first and foremost from the paradoxical position that freedom of religion occupies within liberal democracies, including in Canada.

Tracing its roots back to the bitter sectarian struggles of Reformation-era Europe, and the idea of religious toleration which then began to garner intellectual and public support,<sup>110</sup> freedom of religion is often considered to be a cornerstone human freedom, the protection of which is fundamental to modern democracy. This special weight accorded to the free exercise of religion is manifest in the very structure of constitutional rights documents in Canada and the United States. American constitutional scholarship and jurisprudence has long stressed that the “firstness” of the First Amendment<sup>111</sup> is not accidental, and that the rights protected therein – including the wall of separation erected between church and state through the establishment clause, and the right to the free exercise of one’s religion – are primordial in a democratic political system.<sup>112</sup> Similarly, in Canada, freedom of religion is the first right guaranteed in the *Charter*, and one of four such rights characterized as “fundamental.” The foundational importance of religious freedom to our democratic political tradition was recognized by the Supreme Court of Canada in its first, and still seminal, treatment of freedom of religion in *R. v. Big M Drug Mart*, in which the Court considered the constitutionality of, and ultimately struck down, mandatory Sunday observance legislation:

[A]n emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy

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<sup>110</sup> See e.g. John Locke, “A Letter Concerning Toleration” in Mark Goldie, ed., *John Locke: A Letter Concerning Toleration and Other Writings* (Indianapolis: Liberty Fund, 2010) [originally published in 1689], URL = [http://oll.libertyfund.org/index.php?option=com\\_staticxt&staticfile=show.php&title=2375](http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php&title=2375); on the origins of religious toleration, see e.g. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 [**Big M**] at paras. 118-119 and Rawls, *Political Liberalism*, *supra* note 4 at xxiv-xxviii.

<sup>111</sup> U.S. Const. amend. I.

<sup>112</sup> See e.g. Edmond Cahn, “The Firstness of the First Amendment” (1956) 65 *Yale L.J.* 864; see also *Big M*, *supra* note 110 at paras. 121-123.

of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*.<sup>113</sup>

[Italics in original; underlining added]

Cast in this light, the protection of religious freedom, including the right to hold, express, manifest and act on religious beliefs, is intimately bound up with the judge's role as a protector of the constitution and of democracy.<sup>114</sup> This link between democracy and religion is at work in the debate on the place of religion in the public sphere. As I explained in Chapter 1, the vocal opposition to Rawlsian public reason in large part issues from a recognition of the important role that religion can play in forming political convictions and motivating political action.

However, the narrative of convergence between religious belief, freedom of conscience and democracy recounted by the Court in *Big M* leaves a large part of the story about religion and its protection untold. Yes, the centrality of individual conscience, which plays a fundamental role in our democratic political tradition, does buttress the protection of freedom of religion and vice versa. But when one scratches beneath that mutually supportive exterior, one finds a story

<sup>113</sup> *Big M*, *supra* note 110 at paras. 122-123.

<sup>114</sup> Barak, *The Judge*, *supra* note 82 at chapter 2: "Protecting the Constitution and Democracy".

about religion and conscience that fits less well with our democratic rhetoric than one might initially imagine. In order to appreciate the subtlety of the relationship between religion, conscience and democracy, the Reformation era and its aftermath briefly alluded to in *Big M* – the historical context in which respect for individual conscience gained credence – merits more detailed consideration.

From the time that Martin Luther, as legend would have it, nailed his *Ninety-Five Theses* to a church door in Germany in 1517, the fracture of the Roman Catholic Church, and the disparate nature of religious belief that resulted, pressed the question of the appropriate scope for state involvement in the “salvation of souls.”<sup>115</sup> As religious discord, persecution and war raged across Europe, the uncertainties posed by religious difference, coupled with the intractability of religious conflict, led Enlightenment philosophers to attempt to work out the boundaries of individual conscience and the concomitant limits on the legitimate use of state power to coerce religious belief.<sup>116</sup> In the work of John Locke, for instance, these uneasy first steps coalesced in the idea of separate spheres of authority for church and state – the former concerned with spiritual matters, the latter with temporal ones.<sup>117</sup> Just as a person’s body was not to be violated by the state, so too a person’s mind was a realm that should be free from external interference. The power of civil government was to be exercised solely in relation to the care of the things of the world. Religious heterodoxy, however foolish and whatever its personal consequences might be for the heretic, was to be tolerated by the state, up to a point.

But Locke’s conclusion in this regard resulted as much from the ineffectiveness of outward force on inward persuasion, and from religious agnosticism, as from any positive

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<sup>115</sup> See e.g. Locke, *supra* note 110 at 12.

<sup>116</sup> For a thorough canvassing of post-Reformation thought on the relationship between church, state, and citizen, see Mark Lilla, *The Stillborn God: Religion, Politics and the Modern West* (New York: Alfred A. Knopf, 2007).

<sup>117</sup> Locke, *supra* note 110 at 12.

valuation placed on independence of conscience. Indeed, while toleration might well be considered the most significant contribution of the Reformation, such a contribution might equally be termed reluctant and inadvertent.<sup>118</sup> The granting of religious tolerance and freedom were above all political responses to religious conflict and its destructive consequences, a basic social reality that in turn stemmed from the dogged and tenacious way in which people held to their religious beliefs.<sup>119</sup> Despite persistent efforts by 16<sup>th</sup> and 17<sup>th</sup> century kings and queens with spiritual tastes that frequently alternated between the lavishness of Roman Catholicism and the subdued austerity of Protestantism, compulsion of religious belief proved to be nearly impossible:

This dismal record [of Christian intolerance] began to change in the Reformation, though once more in the first instance through the force of circumstances, as the rival bidders for a monopoly on the expression of Christianity found that they could not impose that monopoly.<sup>120</sup>

Paraphrasing Diarmaid MacCulloch, the Reformation historian, Jeremy Webber puts the point bluntly: “[g]overnment realized – after murderous religious warfare – that the cost of imposing religious conformity was very high, perhaps not even possible let alone desirable.”<sup>121</sup>

Toleration of religious freedom gradually gained credence as an essential component of civil government, but the critical place it occupied was not in furtherance of democracy. Rather, toleration of religious freedom was something that quite simply could not be avoided if political stability was to be procured. Accordingly, when the idea of the toleration of religious freedom surfaced in the wake of the wars of Reformation in early modern Europe, eventually to be embodied first and most famously in the American Constitution, it emerged not so much as an

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<sup>118</sup> MacCulloch, *supra* note 31 at 652-653.

<sup>119</sup> Jeremy Webber, "Understanding the Religion in Freedom of Religion" in Peter Cane, Carolyn Evans & Zöe Robinson, eds., *Law and Religion in Theoretical and Historical Context* (Cambridge, UK: Cambridge University Press, 2008) 26 [J. Webber, "Understanding"] at 27.

<sup>120</sup> MacCulloch, *supra* note 31 at 653.

<sup>121</sup> J. Webber, "Understanding", *supra* note 119 at 39-41.

aspirational democratic ideal, but rather as a pragmatic necessity driven by the bloodshed, civil unrest and misery associated with violent (and failed) attempts to coerce people in matters of religion.<sup>122</sup> Religious difference had to be protected because it could not be eliminated.

## II. The Constitutional Entrenchment of Freedom of Religion: Protecting Personal Normativities

Acknowledging this branch of religious freedom's genealogy is not to deny the degree to which religious convictions are in many ways emblematic of conscientiously held beliefs, the exchange of which constitutes the lifeblood of our democratic political tradition. However, this historical provenance of freedom of religion does suggest that the overlap between religion, conscience and democracy is only part of the picture. What this brief historical foray hints at is the unique space that freedom of religion occupies within the landscape of human rights protection. One might say that, to the extent that the free practice of religion is not merely coextensive with freedom of conscience, it is functionally ademocratic. Beyond being a necessary condition for avoiding civil unrest, the freedom to actually *practice* religion, as opposed to merely holding religious beliefs, serves no apparent institutional democratic ends. As I will return to later, its value in a democracy is derived from some intrinsic quality, rather than a utilitarian one.

In this, the qualitative character of religious freedom could not be more different from the other rights characterized as fundamental in the *Charter* and protected in its s. 2. The right to free thought, expression and opinion, the freedom to associate and the freedom to assemble are instrumentally democratic in a way that the right to hold, manifest and act on religious beliefs is not. Whereas the former rights aim to secure the *conditions* under which a citizen is able to make

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<sup>122</sup> For examples of the religious strife and bloodshed that transpired during the Reformation, see generally MacCulloch, *supra* note 31, especially at 327-329, 469-484, 503ff. and 646-649; see also Stout, *supra* note 31 at 126-127. On the transformation of the idea of toleration from a necessity to a valued ideal, see MacCulloch, *supra* note 31 at 654.

informed, rational choices – and under which other citizens’ choices will themselves be informed and rational – the nature of religion is such that freedom to practice religion tends towards the protection of the *actual* choice made. Whereas the former rights protect procedural vehicles that contribute to enhance democratic decision-making, by securing mechanisms by which a citizen may reflect upon, discuss, decide about, advocate for and seek to achieve political and social goals, freedom of religion can easily imply the protection of ends in themselves: a religious way of life that may or may not be compatible with liberal democratic principles. Pushed to its logical extreme, the constitutional enshrinement of religious freedom could thus imply the protection of an alternative normative order, capable of undermining the whole state legal system. It was precisely the spectre of a parallel religious jurisdiction within the boundaries of the state that prompted Locke to argue that toleration for Catholics should be withheld in 17<sup>th</sup> century England;<sup>123</sup> 400 years later, it was the same fear that Justice Antonin Scalia of the United States Supreme Court invoked to justify withholding exceptions from criminal prosecution from indigenous persons who had used peyote in the context of a religious ritual:

Laws...are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.<sup>124</sup>

Several features of religion help to lend weight to this possibility. These features in turn suggest that normativity of religion has a particularly “ineffable” character, one that would seem to make it difficult for courts to take appropriate stock of the religious commitments of litigants and the religious implications of the claims before them. I will now review those features in detail.

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<sup>123</sup> Locke, *supra* note 110 at 50-52.

<sup>124</sup> *Employment Division (Oregon) v. Smith*, 494 U.S. 872 (1990) at 879, citing *Reynolds v. United States*, 98 U.S. 145 (1878) at 167.

**a. A Matter of Identity**

First, let us consider the relationship between religion and identity. The right to freedom of religion certainly encompasses a person's right to decide what spiritual commitments he or she will hold. However, to the extent that religion entails a choice, it is a choice unlike any other, both in terms of the faculty of choosing and, as will be examined in the subsequent sections, the consequences that flow from it. As discussed above, religious tolerance and the protection of freedom of religion arose in large part in recognition of the stubbornness with which people clung to their religious beliefs, despite conditions of religious pluralism.<sup>125</sup> Here was a "choice" that was largely determined by a person's upbringing and that, in the great majority of cases, could be influenced neither by rational means nor by the threat or use of force.<sup>126</sup> Like other defining characteristics that people consider fundamental to their self-conception and self-understanding, religious affiliation was and remains a consummate marker of identity. Inasmuch as religion reflects an individual's volition concerning conceptions of the sacred, it is also in many cases a vital component of "who we are, 'where we're coming from.'"<sup>127</sup> It signals an attachment to particular beliefs, practices and communities that can be exchanged, if at all, only at tremendous personal cost,<sup>128</sup> and it thus has the potential to be a powerful symbol of cultural belonging or exclusion.

The architecture of religious rights protection in Canada is suggestive of this peculiarly amorphous character of religion, entwined as it is with questions of both autonomy and identity. On the one hand, freedom of religion is formally enshrined, along with freedom of conscience, at s. 2(a) of the *Charter*. In this iteration, beginning with *Big M*, the Supreme Court elaborated a

<sup>125</sup> J. Webber, "Understanding", *supra* note 119 at 27.

<sup>126</sup> Stout, *supra* note 31 at 126-127.

<sup>127</sup> Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25 at 33.

<sup>128</sup> Avigail Eisenberg, *Reasons of Identity, A Normative Guide to the Political and Legal Assessment of Identity Claims* (Oxford: Oxford University Press, 2009) at 18-19.

conception of freedom of religion in which the autonomy of the individual as a free and rational chooser in spiritual matters was paramount:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

[...]

If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.<sup>129</sup>

Building on the foundations laid in *Big M*, which interestingly was decided before the equality protections of the *Charter* had come into force,<sup>130</sup> the particular construction of freedom of religion adopted by Canada's Supreme Court has remained constantly faithful to its basis in the autonomy and liberty of the individual.<sup>131</sup> In the Court's most recent case dealing with a claim of religious freedom, *Alberta v. Hutterian Brethren of Wilson Colony*,<sup>132</sup> it similarly emphasized the autonomy interest underlying the protection of freedom of religion in the *Charter*. The Court was called upon to determine whether a mandatory requirement to have your photo taken – which is considered by Hutterites to be prohibited by the Second Commandment – in order to obtain an Alberta driver's licence violated the Hutterite claimants' right to freedom of religion. The majority's conclusion regarding the reasonableness of the limits imposed by the

<sup>129</sup> *Big M*, *supra* note 110 at paras. 94-95.

<sup>130</sup> Section 32(2) of the *Charter* delayed the coming into force of s. 15 for three years after the coming into force of the *Charter*. The purpose of the delay was to allow time for the federal government and each province to review its body of laws and make any necessary amendments to bring those laws into conformity with s. 15. The constitutional challenge to the Sunday observance legislation in *Big M* was made before the 3-year delay had expired, and thus s. 15 could not be invoked at that time. See Peter Hogg, *Constitutional Law of Canada*, 2010 student ed. (Toronto: Carswell, 2010) at s. 55.4 (p. 55-10).

<sup>131</sup> Benjamin L. Berger, "Law's Religion: Rendering Culture" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 264 [Berger, "Law's Religion"] at 272-278.

<sup>132</sup> *Wilson Colony*, *supra* note 81.

licensing scheme, and its consequent decision to uphold the impugned legislation, hinged on the primacy of choice that undergirds freedom of religion:

[I]t is impossible to conclude that Colony members have been deprived of a *meaningful choice* to follow or not to follow the edicts of their religion.

[...]

[The] costs [involved] are not trivial. But...they do not rise to the level of seriously affecting the claimants' right to pursue their religion. *They do not negate the choice that lies at the heart of freedom of religion.*<sup>133</sup>

[Emphasis added]

Despite occasional equivocations,<sup>134</sup> the consistent message coming from the Supreme Court in its s. 2(a) jurisprudence has been that religion is deserving of constitutional protection because it is an expression of a person's autonomy and choice.<sup>135</sup>

This jurisprudential emphasis tends to obscure religion's character as a potentially fundamental and often ascriptive aspect of a person's identity, which is otherwise constitutionally recognized. The inclusion of religion as a prohibited ground of discrimination in s. 15 of the *Charter* is an explicit acknowledgement of this aspect of religion and the depth of peoples' attachment to faith or, if you will, faith's attachment to people. Although the Supreme Court has been somewhat equivocal in its treatment of claims involving religion under this branch of the *Charter*, it has implicitly recognized the unique nature of religious affiliation by emphasizing the commonality that the grounds of discrimination enumerated in s. 15 share –

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<sup>133</sup> *Ibid.* at paras. 98-99.

<sup>134</sup> For a reading of Canadian freedom of religion jurisprudence that places less emphasis on the centrality of autonomy, see Moon, "Government Support", *supra* note 47.

<sup>135</sup> Berger, "Law's Religion", *supra* note 131 at 278.

namely that they are all personal characteristics that are “immutable, or changeable only at unacceptable cost to personal identity.”<sup>136</sup> Richard Moon puts the point as follows:

The requirement that the state treat different religious belief systems in an even-handed way must rest on the view that religious commitment is an aspect of identity rather than the outcome of choice or judgment that it is, in this respect, different from non-religious beliefs and practices.<sup>137</sup>

This cultural, identity-based aspect religion is also implicit in the treatment reserved for denominational schooling in s. 93 of the *Constitution Act, 1867*. Separate schools for Catholic and Protestant minorities in Ontario and Quebec respectively constituted a fundamental part of the Confederation compromise because they were considered essential to the survival of minority religious communities.<sup>138</sup> Religious belief, sustained and reaffirmed over generations through the public school system, was considered the defining marker of cultural identity.

Ultimately, whether religion is considered ascriptive or entirely of a person’s own making is likely of little concern; like other features of identity, it is invariably formed dialogically.<sup>139</sup> What is important to understand is that, once formed, the attachments that go along with it become easily and deeply interwoven with a person’s self-conception and are exceedingly difficult to exchange for others. Even when construed as a function of a person’s autonomy, religious belief and affiliation, insofar as they play an important role in a person’s understanding of herself, tend to become inextricably linked to a person’s identity since the authenticity of any person’s choice in that regard is essential to her self-realization. As Charles Taylor has observed:

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<sup>136</sup> See e.g. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13.

<sup>137</sup> Moon, “Government Support”, *supra* note 47 at 232.

<sup>138</sup> See e.g. *Adler v. Ontario*, [1996] 3 S.C.R. 609 at paras. 41-46.

<sup>139</sup> Taylor, *supra* note 127 at 32-34; K. Anthony Appiah, “Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction” in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 149 [Appiah, “Multicultural Societies”] at 161.

There is a certain way of being human that is *my* way. I am called upon to live my life in this way, and not in imitation of anyone else's life. But this notion gives a new importance to being true to myself. If I am not, I miss the point of my life; I miss what being human means for *me*.<sup>140</sup>

[Emphasis in original]

Taylor's emphasis on authenticity helps to underscore why it is that people tend to have such a profound attachment to religion. To put the point simply, religion tends to have lots to say about the good life. And as Will Kymlicka has pointed out, while perhaps possible, "it is not easy or enjoyable to revise one's deepest ends."<sup>141</sup> Such a revision – premised on the recognition that I have, so to speak, missed the point of my life – entails very real and significant damage to oneself. Recognizing this character of religion is more consistent with the historical roots of religious toleration. As discussed above, while religious belief certainly involves choice, it is a choice that in many instances flirts with the irrevocable, insulated as it has so often proven to be from compulsion by reason or threat of force. Closely interwoven with people's sense of who they are, religious attachments, like other cultural ties, "are normally too strong to be given up,"<sup>142</sup> and the costs associated with doing so exceedingly high.

#### **b. From Belief to Action: Religion as a Way of Life**

Insofar as religion is closely linked to identity, it is not surprising that the path that each person takes in spiritual matters can entail consequences that reverberate well beyond the four walls of a person's church, to the four corners of a person's existence. Although Canadian law has often cast religion as a phenomenon that is coextensive with private belief, and which is thus easily compartmentalized, one need only consider the manifestations of religious commitment

<sup>140</sup> Taylor, *supra* note 127 at 30.

<sup>141</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 91.

<sup>142</sup> Rawls, *Political Liberalism*, *supra* note 4 at 277. Will Kymlicka also relies heavily on this statement of Rawls to build his argument regarding the value of cultural membership and the importance of cultural identity: see Kymlicka, *supra* note 141 at 84-93 and in particular at 87, 90.

that in recent years have led to constitutional challenges before the Supreme Court to realize that faith is much more than that.<sup>143</sup> Not simply a set of personal and private beliefs, religion in many cases implies a way of life. Put otherwise, there is a close connection between religious faith and the lived reality of peoples' lives – between belief and action.

This connection between religious belief and action is most evident in cases involving the right to manifest religious faith through religious practices and rites. In *Syndicat Northcrest v. Amselem*,<sup>144</sup> for instance, several Jewish condominium owners erected succahs on their balconies in celebration of the religious festival of Succot, but in contravention of the building's by-laws. In *Multani v. Commission scolaire Marguerite-Bourgeoys*,<sup>145</sup> a boy's Sikh faith required that he should at all times wear a kirpan, despite the school board's protests that it constituted a weapon that should be prohibited on school grounds out of concern for the other children's safety. In each case, what triggered the constitutional challenge was the way in which rules existing for the general welfare of the relevant community impinged upon the religiously motivated actions of religious believers.<sup>146</sup> The cases of *Multani* and *Amselem* are representative of one type of link between religious belief and action: situations in which the challenged action was intrinsically religious. Indeed, the erection of the succah and the wearing of the kirpan are both acts of worship specifically intended to manifest a person's religious devotion.

The connection between religious belief and action, however, extends far beyond simple acts of worship. Two recent cases decided by the Supreme Court of Canada are illustrative of the degree to which religious commitment can permeate every aspect of a person's life, in contexts wholly removed from religious ritual, from the grave to the mundane. In *A.C. v. Manitoba*

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<sup>143</sup> For a discussion of the way in which Canadian law constructs religion, see Berger, "Law's Religion", *supra* note 131.

<sup>144</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 [*Amselem*].

<sup>145</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 [*Multani*].

<sup>146</sup> Of course, in *Amselem*, the operative community comprised only the members of a private condominium association, with the rule of general welfare applying only to those members.

(*Director of Child and Family Services*),<sup>147</sup> religious belief manifested itself as action in the refusal of a teenaged patient to accept a blood transfusion. The objection of the patient, a Jehovah's witness, stemmed from her religious conviction that she should abstain from receiving blood, even in the case of a medical emergency. In *Wilson Colony*, decided at about the same time, and as discussed above, the action in issue was a refusal to submit to the seemingly commonplace photo requirement for Alberta drivers' licences. Both examples are indicative of the degree to which belief and action tend to coalesce for religious believers in a way of life that is irreducibly religious. An excerpt from the legal brief of the Amish respondents in the landmark American case of *Wisconsin v. Yoder*,<sup>148</sup> in which members of the Anabaptist community challenged the compulsory nature of the public school system on the basis of freedom of religion, successfully captures this dynamic:

There exists no Amish religion apart from the concept of the Amish community. A person cannot take up the Amish religion and practice it individually. The community subsists spiritually upon the bonds of a common, lived faith, sustained by "common traditions and ideals which have been revered by the whole community from generation to generation."<sup>149</sup>

The unity among religion, life and community existence emphasized in the above passage is reminiscent of the tone of argument advanced by religious critics of Rawls's public reason that I considered in Chapter 1 above. A religious mode of believing can infuse the very pores of daily life, constituting "a source of energy that the person who has a faith taps performatively and thus nurtures his or her entire life."<sup>150</sup> It is precisely this totalizing trait of religious belief – which

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<sup>147</sup> *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 [A.C.].

<sup>148</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972) [*Yoder*].

<sup>149</sup> Brief for Respondent in *Yoder*, *supra* note 148, cited in Robert M. Cover, "Foreword: Nomos and Narrative" (1983-1984) 97 Harv. L. Rev. 4 at 29; of course, the emphasis on collective community traditions invites the risk of elite manipulation, for instance by religious elites within a religious community, which can lead to serious forms of conflict and political instability. My point here, however, is simply that religion can come to be synonymous with a whole way of life.

<sup>150</sup> Habermas, "Religion", *supra* note 19 at 8.

ironically forms the basis for such a persuasive argument for the inclusion of religious discourse in public decision-making – that contributes to the difficulty that religion as a phenomenon poses for adjudication. For religion not only maintains a firm grip on its believers that goes to the very core of a person’s identity, in turn exercising a comprehensive influence on all aspects of a person’s existence. In so doing, it also posits an alternative normativity to its believers that competes with the state-sanctioned normativity of positive law.

**c. Religion as a Comprehensive and Personal Normative System**

In his work on religion, Clifford Geertz explores the mutually dependent relationship between the existential aspect of religion – its ability to accurately express the fundamental nature of reality – and religion as a normative force that commands action. The opening lines of Geertz’s *Ethos, World View and the Analysis of Sacred Symbols* are illustrative of the significant normative dimension of his theory of religion, and its relationship to a conception of the world that is particular to a specific cultural context:

Religion is never merely metaphysics. For all peoples the forms, vehicles, and objects of worship are suffused with an aura of deep moral seriousness. The holy bears within it everywhere a sense of intrinsic obligation: it not only encourages devotion, it demands it; it not only induces intellectual assent, it enforces emotional commitment. ...Never merely metaphysics, religion is never merely ethics either. ...The powerfully coercive “ought” is felt to grow out of a comprehensive factual “is,” and in such a way religion grounds the most specific requirements of human action in the most general contexts of human existence.<sup>151</sup>

For Geertz, religion is thus a cultural system that plays a dual, and dialectical, function in peoples’ lives.<sup>152</sup> First, as worldview,<sup>153</sup> it describes the world in which people live, providing

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<sup>151</sup> Clifford Geertz, “Ethos, World View, and the Analysis of Sacred Symbols” in Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) 126 [Geertz, “Ethos, World View”] at 126.

<sup>152</sup> See also on this point Clifford Geertz, “Religion as a Cultural System” in Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) 87 [Geertz, “Religion”].

them with a conception of the reality they inhabit. Second, as ethos – and on the strength of the authenticity of that description – it imbues in people the values necessary to judge action and direct human conduct.”<sup>154</sup> The relationship between ethos and worldview is mutually sustaining: the congruence between the values generated on the one hand and the way of life so depicted on the other reinforces both the perceived accuracy of the worldview the religion presents and the naturalness of the normative commitments embodied in the religion’s ethos.<sup>155</sup> Together, ethos and worldview combine in a religion to provide people with a system of ultimate meaning.<sup>156</sup> Religion is not merely then a way of life; it is also a way of understanding the world that invests normative significance to the way we live our lives.

The concept of identity is not explicitly addressed in Geertz’s work on religion, nor would he likely have considered his own work on religion to be relevant to questions of identity. While that may be so, the emphasis in Geertz’s writing on the contextual cultural dimension of religion and the sacred, and the way it invests meaning and significance to the reality people inhabit, can be understood to have significant linkages with conceptions of identity. “A French ethic in a Navaho world, or a Hindu one in a French world would seem only quixotic, for it would lack the naturalness and simple factuality which it has in its own context,”<sup>157</sup> Geertz says, illustrating the necessary equivalence between style of life and fundamental reality, between ethics and metaphysics. Notwithstanding Geertz’s seeming inattention to the realities of cultural and religious diversity within individual polities, the importance he places on the degree of fit between ethos and worldview suggests that religion as a system of cultural meaning bears

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<sup>153</sup> Although Geertz himself used the phrase “world view,” it is commonly today written as a single word. As a matter of style, I will follow the latter usage, except when quoting directly from Geertz’s work or referring explicitly to its title.

<sup>154</sup> Geertz, “Ethos, World View”, *supra* note 151 at 126.

<sup>155</sup> Daniel L. Pals, *Seven Theories of Religion* (New York, Oxford: Oxford University Press, 1996) at 255.

<sup>156</sup> *Ibid.* at 245; Geertz, “Religion”, *supra* note 152 at 125.

<sup>157</sup> Geertz, “Ethos, World View”, *supra* note 151 at 130.

important similarities to what K. Anthony Appiah sometimes refers to as scripts provided by collective identities.<sup>158</sup> For Geertz, religion “represents the power of the human imagination to construct an image of reality in which...events are not just there and happen, but they have a meaning and happen because of that meaning.”<sup>159</sup> Appiah, writing on the fundamental role played by identity scripts in structuring possible narratives of a person’s life, makes a strikingly similar point:

One thing that matters to people across many societies is a certain narrative unity, the ability to tell a story of one’s life that hangs together. The story – my story – should cohere in the way appropriate to a person in my society.<sup>160</sup>

Similarly, Charles Taylor writes that identity is “the background against which our tastes and desires and opinions and aspirations make sense.”<sup>161</sup> This goes not only for our actions, but for those of others too. Indeed, the crucial importance we place on narrative unity in our own lives – the sense of fit between the reality we inhabit and the norms that guide and lend meaning to our actions – tends to make the form of our narrative seem similarly appropriate for understanding the lives and judging the actions of others.<sup>162</sup> It becomes an epistemology onto itself. Whether couched in terms of culture as Geertz would have it, or identity as Appiah or Taylor would, religious commitment is deeply connected to the way in which a person understands and makes sense of her world and her place in it; in turn it structures the way in which a person judges the appropriateness of her own behaviour and that of others.<sup>163</sup> Viewed in this light, latent in Geertz’s characteristically insightful observations is a fusion of religion,

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<sup>158</sup> See K. Anthony Appiah, *The Ethics of Identity* (Princeton: Princeton University Press, 2005) [Appiah, *Ethics*] at 21-23; and Appiah, “Multicultural Societies”, *supra* note 139 at 159-160.

<sup>159</sup> Geertz, “Ethos, World View”, *supra* note 151 at 131.

<sup>160</sup> Appiah, *Ethics*, *supra* note 158 at 23.

<sup>161</sup> Taylor, *supra* note 127 at 33-34.

<sup>162</sup> Appiah, *Ethics*, *supra* note 158 at 22.

<sup>163</sup> Geertz, “Ethos, World View”, *supra* note 151 at 130.

identity, epistemology and, crucially, comprehensive normative ordering that lies at the heart of the difficulty religion tends to cause for adjudicators.

Robert Cover in turn makes the fusion between religion and normative ordering explicit in *Nomos and Narrative*, arguing that the role of adjudicators is expressly to arbitrate between competing normativities, or “nomoi,” that are generated organically out of the narratives recounted in different cultural communities. His vision of the relationship between nomos and narrative is conspicuously reminiscent of Geertz’s discussion of ethos and worldview:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.<sup>164</sup>

Interestingly, as his reference to the decalogue suggests, Cover views normative commitments embodied in religion as exemplary of nomoi. He relies primarily on biblical material in order to illustrate the collective social basis – what Geertz might properly term cultural – for the creation of legal meaning within a distinctive community.<sup>165</sup> The mere fact that a nomos based in religious narrative is ultimately not sanctioned by state law does not suggest that it is less deserving of recognition as a normative force that provides meaning to people’s lives. Rather, it is merely reflective of the jurisprudential office of judges: “confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest” [emphasis in original].<sup>166</sup>

To say that religion has a normative dimension is certainly not a novel proposition. However, the work of Cover and Geertz powerfully conveys the depth and the

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<sup>164</sup> Cover, *supra* note 149 at 4-5.

<sup>165</sup> *Ibid.* at 11-25.

<sup>166</sup> *Ibid.* at 53.

comprehensiveness of normative commitments driven by religious faith. Those commitments are interwoven into the very fabric of a person's existence, and in turn animate all aspects of a person's life, making their significance especially difficult for another person to understand. For the religious believer, religion may be the defining feature of her life. It may be at once the language in which she understands herself, the lens through which she gazes upon of the world, and the signpost that guides her conduct. As Taylor suggests, conceived of as a fundamental aspect of a person's identity, religion can constitute the background against which a person's life quite simply "make[s] sense."<sup>167</sup> Stripped of her nomos and narrative, of her ethos and worldview, a person is no longer the same person. Conversely, when divorced from a person's experiential baggage and the unique social and cultural space that each individual occupies, nomos and narrative, ethos and worldview, may cease to be meaningful or even intelligible. Given the profound attachment between a person's identity, way of life and religion, and the latter's completeness as a normative system, the constitutional protection of religion within the state legal order creates immense potential for conflict between those systems, and suggests further that those conflicts will be difficult for a third party to resolve.<sup>168</sup>

**d. Religion and Diversity: From Normativity to Normativities**

Conditions of religious pluralism turn that potential for conflict into reality. In countries felt to have a common history, political heritage, and shared cultural and religious values, religious normativity complemented and strengthened the legitimacy of the legal and political order. As Habermas has pointed out, national laws were formerly grounded in a shared religious conception about the truth of the world:

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<sup>167</sup> Taylor, *supra* note 127 at 34.

<sup>168</sup> On the potential for conflict, see generally Beverley McLachlin, "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill-Queen's University Press, 2004) 12.

Against the background of acknowledged religious worldviews, the law initially possessed a sacred foundation; this law...was widely accepted as a reified component of a divine order of salvation or as a part of a natural world order....<sup>169</sup>

In the particular case of the West, Christianity not only profoundly influenced but also undergirded law.<sup>170</sup> Alternately echoing and presaging the respective work of Geertz and Cover, Harold Berman argues that in Western Europe, allegiance to law was secured as a result of the belief that it represented a sacred, higher Christian truth. Further, this perceived identity between transcendent reality and law was more than just fortuitous; it was and remains necessary. According to Berman, the very life and sustainability of law is dependent upon people attaching to it a universal and ultimate meaning. G. W. F. Hegel's conception of the relationship between religion and the state is reflective of just such an understanding. As Mark Lilla has suggested, Hegel's *Lectures on the Philosophy of Religion* are premised on the guiding assumption that "religion makes up the substance of each nation's ethical life and therefore of its political and social order."<sup>171</sup> Despite writing in the context of the relative liberalization of the 19<sup>th</sup> century Prussian state, it is for this reason that Hegel maintained that "the state rests upon religion."<sup>172</sup>

[R]eligion stands in the closest connection to the idea of the state. ...Secular reality is justified only insofar as its absolute soul, its principle, is justified absolutely; and it receives this justification only by being recognized as the manifestation of the existence of God.<sup>173</sup>

Where a common faith animates a nation, the strength and depth of peoples' commitment to that faith successfully supports legal and social norms and binds together its citizens under a

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<sup>169</sup> Habermas, *BFAN*, *supra* note 12 at 145-146; see also Stefan Rummens, "The Semantic Potential of Religious Arguments: A Deliberative Model of the Postsecular Public Sphere" (2010) 36 *Soc. Theory Pract.* 385 at 385, 390-391.

<sup>170</sup> Berman, *supra* note 11 at chapter 2.

<sup>171</sup> Lilla, *supra* note 116 at 186.

<sup>172</sup> G. W. F. Hegel, *Introduction to The Philosophy of History: with selections from The Philosophy of Right*, trans. by Leo Rauch (Indianapolis: Hackett Publishing, 1988) at 53.

<sup>173</sup> *Ibid.*

common political order.<sup>174</sup> Under conditions of homogeneity, religion thus constitutes the ultimate social glue. Under conditions of religious pluralism, it can, for the very same reasons, act as the ultimate social wedge, potentially undermining social cohesion and a shared ethical commitment to avowed liberal democratic ideals.

Cover focused precisely on such a state of affairs. His emphasis on the process of jurisgenesis at work in insular Amish and Mennonite communities highlights the diffuse normative pluralism that stems from the existence of a multiplicity of religious groups within a single state. Each community will generate its own *nomos* that may potentially enter into conflict with the normative order supported by the state. Moreover, given the diversity of religions practiced in Western societies, and the idiosyncratic and personal ways in which different people manifest religious faith, it is exceedingly difficult to predict in advance when state legal norms may interfere with religious ones. It is precisely religious pluralism – and the consequently diffuse, varied, and variable nature of religious normativity – that places religion squarely on a collision course with law. While the powerful, identity-based extra-legal normativity at work within religion may give to the encounter its explosive potential, religious diversity is what sets the wheels in motion. Judges are given the difficult task of putting the brakes on – or salvaging the wreckage.

The potential frequency of conflicts resulting from religious pluralism is increased in the contemporary liberal democratic state by the ongoing process of juridification of public and private spheres of activity discussed in Chapter 1.<sup>175</sup> Many of the cases detailed previously in this chapter – *Big M*, *Multani*, *Wilson Colony*, *A.C.* – offer up concrete examples of the regulatory

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<sup>174</sup> See generally Berman, *supra* note 11, especially at 73-74.

<sup>175</sup> See generally Habermas, “Law”, *supra* note 77; and Kahn, *Liberalism*, *supra* note 77 at 123-125; for a specific consideration of the impact that the *Charter* has had on the legalization of political activity in Canada, see Petter, *supra* note 78.

minefield that the modern state poses for religion. Sunday closing legislation, public school safety codes, driver's licensing regulations, state oversight of medical treatment decisions – these are but a few examples of the diversity of situations in which religious belief and action butt up against other legal rules, not to mention the diversity of religious faiths that can trigger constitutional litigation. The possibilities are virtually endless.

**e. Coming Full Circle: Constitutionalizing Personal Normatives**

Let us pause for a moment to consolidate these insights. Religion is a very special and powerful cultural phenomenon. Religious commitment is intrinsically connected to a person's identity. It is a cultural system that not only provides a horizon of meaning to believers but also guides their conduct. Further, it tends to suggest a set of normative obligations that are implicit in the particular reality of each person's life, and that can touch upon all aspects of it. These features are at once explained by, but also help to explain, the story that history tells us about religious belief and its toleration: that religion tends to exercise a powerful and unrelenting grip on believers, making the normative commitments that go along with it difficult for others to grasp, and not readily amenable to compulsion by either outward force or rational persuasion. Under conditions of religious pluralism, the state legal system is in turn confronted with a multiplicity of competing, diffuse and pervasive normative systems, embedded in the lived realities of its different citizens and the communities of which they form a part. From the perspective of third-party adjudicators, religion can easily assume an ineffable quality.

When a phenomenon having these characteristics is granted constitutional protection in the form of freedom of religion, the challenges that become visible on the horizon for adjudicators are great indeed. If religion and law are recognized as constituting separate but rival comprehensive normative orders, each accorded a degree of constitutional status and comprising

conflicting norms, those norms begin to take on an air of incommensurability. There is something inherently messy about any attempt to protect one comprehensive normative system within another, especially so when a full appreciation of the meaning, importance and force of one set of those norms lies almost exclusively within the purview of the individual believer. At first blush, the task of reconciling the inevitable conflicts that will arise between law and religion in a principled and even-handed way would thus appear to be a difficult one for judges.

### III. **Adjudicating Between Competing Normativities: Weighing the Merits of Proportionality**

In order to navigate these difficult waters, both academic commentators and members of the judiciary around the world have increasingly favoured recourse to proportionality review, to which I briefly alluded in Chapter 1. In the past several decades, the theory and practice of constitutional law around the world has been characterized by the ascendance of proportionality as its controlling idea, especially when it comes to adjudicating constitutional rights claims.<sup>176</sup> From its beginnings in the jurisprudence in the German Federal Constitutional Court in the 1950s, proportionality has seen its intellectual influence spread across continental Europe and beyond, including to common law countries such as Israel, New Zealand, South Africa and Canada. That judges should balance rights and other constitutional principles so as to arrive at fair and legitimate constitutional decisions – an idea that is synonymous with proportionality review – has become almost trite. As one academic commentator has noted, it is no exaggeration to say that constitutional law has firmly entered the age of balancing.<sup>177</sup> Despite its prevalence and the enthusiasm of its proponents, proportionality is far from a magic bullet for the difficulties that religion poses to judges. As I will show in this part, the ineffability of religion discussed

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<sup>176</sup> David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 159-161.

<sup>177</sup> Gregoire C. N. Webber, “Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship” (2010) 23 Can. J. Law & Juris. 179 [G.C.N. Webber, “Proportionality”] at 179.

above puts considerable strain on the theory of proportionality analysis. Questions of religious faith would appear to be decidedly difficult to weigh and balance in the way that proportionality requires.

**a. Proportionality Review in Academic Literature**

If proportionality is now the dominant concept in theories of constitutional adjudication, surely Robert Alexy is the dominant intellectual figure behind its ascendance. According to Alexy, the original goal of his work was simply to provide a rationalized theory of the constitutional rights of Germany's Basic Law, as developed in the jurisprudence of the country's Federal Constitutional Court.<sup>178</sup> However, since the publication of his *Theorie de Grundrechte* in 1986, eventually translated into English in 2003 as *A Theory of Constitutional Rights*, Alexy has effectively led a worldwide revolution in academic thought concerning the adjudication of constitutional rights disputes. A brief examination of his intellectual legacy will thus help to bring the concept of proportionality into clearer focus, and in turn help us to better understand what it is about the theory of proportionality analysis that breaks down when faced with questions involving religious pluralism.

The conception of constitutional norms as principles rather than rules is central to Alexy's proportionality thesis. According to Alexy, most constitutional norms, whether individual rights or otherwise, should be understood as principles that require something to be achieved to the greatest extent possible.<sup>179</sup> Principles of this kind permeate the entire legal system:<sup>180</sup> the rule of law, freedom of religion, the right to life, liberty and security of the person, or the preservation and enhancement of the multicultural heritage of Canadians, to name but a

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<sup>178</sup> Robert Alexy, *A Theory of Constitutional Rights*, trans. by Julian Rivers (Oxford: Oxford University Press, 2002) [Alexy, *Theory*], at 5-10.

<sup>179</sup> *Ibid.* at 47-48, 80-81; Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16 *Ratio Juris* 131 [Alexy, "Constitutional Rights"] at 135.

<sup>180</sup> See generally Alexy, *Theory*, *supra* note 178 at 351-365.

few concepts found in the *Charter*, are examples of the types of principles-as-optimization-requirements that could conceivably be engaged in the constitutional adjudication of rights disputes.

The central importance of proportionality, and accordingly of balancing, in the theory and practice of constitutional adjudication flows directly from this understanding of most constitutional norms as principles rather than rules. For Alexy, the answer to constitutional rights disputes does not lie in arriving at the “correct” interpretation of constitutional provisions. Judges who ask themselves whether state support for religious education constitutes an infringement of the *Charter* guarantee of freedom of religion, properly construed, are asking the wrong question. Rather, courts must reconcile themselves to the idea that principles cannot be fulfilled in an absolute sense. Rights interferences will normally occur and such interferences are in fact intrinsic to the act of governing.<sup>181</sup>

Most...collisions of reasons have to be resolved by means of balancing. ...If the constitution guarantees constitutional rights, then many or even all legal decisions restricting the freedom of individuals have to be understood as interferences with constitutional rights.<sup>182</sup>

When called upon to determine the legality of prima facie rights interferences, a court’s obligation is thus to ensure that all constitutional principles at issue in a given case – be they individual rights, or principles embodied in countervailing legislative goals – are realized to the fullest extent possible given the legal and factual possibilities.<sup>183</sup> Rephrased in terms of minimization rather than optimization, the overriding preoccupation of judges is to decide the case in such a way that the concrete interferences with the principles implicated are minimized.

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<sup>181</sup> Robert Alexy, “On Balancing and Subsumption: A Structural Comparison” (2003) 16 *Ratio Juris* 433 [Alexy, “On Balancing”] at 436.

<sup>182</sup> *Ibid.*

<sup>183</sup> Alexy, “Constitutional Rights”, *supra* note 179 at 135.

This responsibility of judges to optimize constitutional principles (or minimize interferences with those principles) is given a systematic structure by the three discrete components of proportionality analysis: suitability, necessity and proportionality in the narrow sense. At a general level, and taken together, these stages reflect the timeless preoccupation of law with the legitimacy of ends and the reasonableness of means. At the first two stages – suitability and necessity – judges must consider, first, whether or not the means chosen are suitable given the desired ends and, second, whether those means that interfere least intensively with constitutional rights (and principles) have been chosen.<sup>184</sup> It is only if the impugned legislation has passed constitutional muster as regards suitability and necessity that one need advance to the third and final stage: proportionality in the narrow (or strict) sense. At that final step, judges must consider whether the concrete interference with the constitutional right is justified overall when compared against the importance of the desired ends.<sup>185</sup> As will be discussed below, it is the application of this final step in the analysis that seems to pose the biggest challenge to judges dealing with claims involving religion.

At the heart of this third stage, and Alexy's overall conception of constitutional adjudication, is the notion of balancing.<sup>186</sup> Rights interferences being intrinsic to government, balancing is ubiquitous. Only by weighing the relative severity of the interference with constitutional principles will judges be in a position to determine what and what is not constitutional. Alexy recognizes that the abstract importance of constitutional principles may be difficult to assess. However, he contends that balancing can be performed rationally if judges

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<sup>184</sup> *Ibid.* For a general discussion of the principles of suitability and necessity, see Alexy, *Theory*, *supra* note 178 at 397-401.

<sup>185</sup> Alexy has formulated a so-called Law of Balancing in order to describe the decision-making rule to be followed at the strict proportionality stage: "The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other." In other words, the judge is called upon to decide whether the importance of satisfying one principle justifies the detriment to or non-satisfaction of the other principle: see Alexy, "On Balancing", *supra* note 181 at 436-437.

<sup>186</sup> Alexy, *Theory*, *supra* note 178 at 66-67.

attend closely to the *concrete* severity of the interferences with constitutional principles involved *on the facts of a given case*. By assessing the severity of the interferences using a common triadic scale of light, moderate, or serious, and balancing the importance of those various interferences against one another from the common point of view afforded by the constitution, the different variables being balanced at the strict proportionality stage are rendered commensurable.<sup>187</sup> Buttressing his claim with mathematical formulae and jurisprudential examples taken from the German Federal Constitutional Court, Alexy argues that judges can make cogent comparisons between various interferences with constitutional principles, and adjudicate claims in a rational and principled manner.<sup>188</sup> As I will shortly discuss, however, such an exercise, premised as it is on the ability of judges to accurately compare the intensity of often very dissimilar constitutional interferences,<sup>189</sup> may not be quite so simple as Alexy makes it out to be.

In Canada, David Beatty has positioned himself as the academic champion of proportionality review as a means of resolving constitutional rights disputes. In his book entitled *The Ultimate Rule of Law*, Beatty takes up Alexy's sword and attempts to systematically assess the performance of constitutional courts around the world in light of the rule of proportionality, which for him constitutes the ultimate rule of law.<sup>190</sup> Largely echoing Alexy, Beatty argues that all constitutional rights disputes, whether involving religious liberty, gender equality, social welfare or otherwise, can be properly and objectively resolved only using the principle of proportionality.<sup>191</sup>

Like Alexy, Beatty eschews the traditional explanations of constitutional adjudication as an essentially interpretive or semantic task, in which judges attempt to distil the true meaning of

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<sup>187</sup> Alexy, "On Balancing", *supra* note 181 at 441-443.

<sup>188</sup> Alexy, *Theory*, *supra* note 178 at 397-414; see also Alexy, "Constitutional Rights", *supra* note 179.

<sup>189</sup> Alexy, "Constitutional Rights", *supra* note 179 at 136.

<sup>190</sup> Beatty, *supra* note 176.

<sup>191</sup> *Ibid.* at 171.

constitutional provisions and then apply those provisions to the factual situation before the court. For Beatty, any attempt to resolve the interpretive ambiguities inherent in the broad, all-encompassing language in which constitutional rights norms are invariably cast will result in judges importing their personal preferences and subjective value-ordering into the exercise, thereby compromising the legitimacy of the judicial forum. Proportionality review, on the other hand, ensures objectivity in constitutional adjudication because it involves a close and considered attention to the facts of the case:

Proportionality transforms judicial review from an interpretive exercise, giving meaning to the words of a constitutional text, into a very focused factual inquiry about the good and bad effects of specific acts of the state. Cases are decided on their individual merits, one at a time, rather than on the basis of categorical definitions divined by textual exegesis.<sup>192</sup>

Beatty never fails to stress the conclusive role that the evidentiary record can and should play in means-ends proportionality analysis. At the balancing stage of proportionality, he explains that the straightforward job of the judge is simply “to assess whatever hard empirical evidence throws light on the question of how significant the law under review is to those it affects the most.”<sup>193</sup> Once appropriate attention is paid to their facts, cases that would otherwise have a perplexing character come suddenly into focus, and proportionality clearly points judges to the correct decision. For instance, despite the apparent complexities involved in adjudicating the constitutionality of same-sex marriage, given countervailing claims of religious and equality rights infringements, Beatty suggests that a pragmatic judicial approach centred upon proportionality analysis effectively eliminates any doubt as to the correct outcome:

Judges who apply the analytical framework that was used in *Dudgeon* and *Smith* [proportionality] to the issue of same-sex marriage will find it a straightforward and relatively easy case.

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<sup>192</sup> *Ibid.* at 182-183.

<sup>193</sup> *Ibid.* at 93.

...As a matter of fact, laws that allow only heterosexual couples to get married have much more significance for the lives of those who are excluded than they do for those who are privileged to partake of the pleasures of matrimonial bliss as often as they like.

[...]

The fact that a majority of people feel that allowing gays and lesbians to marry defiles the ideals and values that underlie the institution can't be enough to tip the scales in their favour if there are no other harmful effects.<sup>194</sup>

[Italics in original; underlining added]

According to Beatty, the facts essentially speak for themselves when it comes to constitutional judging within a proportionality framework. Unfortunately, Beatty generally ignores the role of interlocutors in ascribing meaning to the facts being spoken. As my review of Cover and Geertz's work suggests, our normative judgments are tightly interwoven with the narratives and worldviews that we rely on to make sense of our factual reality. The import of Beatty's omission will be made plain when I turn to the application of this adjudicative model to constitutional claims having religious significance.

#### **b. Beyond Academia: Proportionality as a Judicial Rule**

Whatever one thinks of Alexy's and Beatty's arguments in favour of proportionality analysis, there is no denying the influential place that proportionality now occupies within the judiciary, in both common law and civil law countries. Aharon Barak, formerly President of the Supreme Court of Israel, has helped to spread the gospel of proportionality to constitutional courts around the world, both by his judicial example and through contributions to legal literature,<sup>195</sup> and judges across continents and jurisdictions readily turn to proportionality

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<sup>194</sup> *Ibid.* at 114-115.

<sup>195</sup> See e.g. Barak, *The Judge*, *supra* note 82, in which Barak expounds his theory of judicial decision-making, including recourse to proportionality review, largely relying on the extensive body of jurisprudence he authored while sitting as a member of the Supreme Court of Israel. See also Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 U.T.L.J. 369.

analysis to resolve constitutional disputes.<sup>196</sup> The Supreme Court of Canada has certainly not been insulated from this legal trend. Since *Oakes* was decided in 1986, proportionality analysis has served as the guiding light of the Court when it comes to judicial review on *Charter* grounds. As Chief Justice Dickson (as he then was) himself recognized at the time it was developed, the second prong of the *Oakes* test is a form of means-ends proportionality review aimed at assessing the reasonableness of the means in light of the importance of the ends.<sup>197</sup> Pursuant to *Oakes*, to the extent that it is found to have been enacted for a pressing and substantial objective, an impugned Canadian law will ultimately be deemed constitutional if (1) the means adopted are rationally connected to the legislative objective (“rational connection”); (2) those means impair the right in question as little as possible (“minimal impairment”); and (3) the benefits of the law outweigh its deleterious effects as measured by the values underlying the *Charter* (“proportionality” in the strict or narrow sense). These steps of the *Oakes* test closely replicate the suitability, necessity and strict proportionality stages of proportionality analysis originally developed by the German Federal Constitutional Court and subsequently elaborated by Alexy, as discussed above. Without fail, in cases involving the constitutional right to freedom of religion – *Amselem*, *Multani*, *Wilson Colony*, *A.C.* to name only some of the most recent – the Supreme Court of Canada in practice turns to proportionality review in order to determine how to reconcile the competing normative claims made by religion and state law respectively.

The recent *Wilson Colony* case provides an excellent illustration of the central role that means-ends proportionality analysis generally, and balancing in particular, plays in Canadian religious freedom litigation. Despite fundamental disagreement in the result, the three judges

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<sup>196</sup> See generally Beatty, *supra* note 176; Stone Sweet, *supra* note 89 and G.C.N. Webber, “Proportionality”, *supra* note 177.

<sup>197</sup> *Oakes*, *supra* note 86 at para. 74; see also *Big M*, *supra* note 110 at 139 and *Wilson Colony*, *supra* note 81 at paras. 184-185.

who authored substantively distinct opinions<sup>198</sup> – McLachlin C.J., Abella J., and LeBel J. – were consistent and relatively uniform in the general approach they adopted in their efforts to reconcile the lived normative force of Hutterian religious precepts with the asserted, and conflicting, normative purchase of provincial statutory law. Despite making important distinctions with respect to the mechanics of the test, each judge faithfully followed the overall proportionality model dictated by *Oakes*, which enshrined proportionality review as a permanent fixture of Canadian constitutional jurisprudence.

More to the point, however, each opinion stressed that the crux of matter, and of constitutionality review more generally, lay in the balancing exercise dictated by the final step of the *Oakes* test, in which the benefits accruing from the limitation must be measured overall against its deleterious effects. Justice Abella, writing in dissent but not on this point, emphasized that “most of the heavy conceptual lifting and balancing ought to be done at the final step — proportionality. Proportionality is, after all, what s. 1 is about.”<sup>199</sup> According to Chief Justice McLachlin, writing for the majority, this emphasis on the proportionality in the narrow sense is justified because the “the final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation” [emphasis in original].<sup>200</sup> Where no alternative measure allows for the realization of the government’s objective, “the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law.”<sup>201</sup> Although Justice LeBel disagreed with the way in which McLachlin C.J. construed the fixedness of the legislative objective for the purposes of the various stages of the *Oakes* test, he too emphasized the fundamental importance of the balancing component of

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<sup>198</sup> Justice Morris Fish technically authored separate reasons, but they consisted of only the following sentence: “Like Justice LeBel, and for the reasons he has given, I agree with Justice Abella and would dispose of the appeal as they both suggest.” *Wilson Colony*, *supra* note 81 at para. 203.

<sup>199</sup> *Wilson Colony*, *supra* note 81 at para. 149.

<sup>200</sup> *Ibid.* at para. 77.

<sup>201</sup> *Ibid.* at para. 76.

proportionality review: “the crux of the matter lies in what may be called the core of the proportionality analysis, the minimal impairment test and the balancing of effects.”<sup>202</sup> Prior to *Wilson Colony*, the Court had resolved few, if any, cases at the third stage of the Oakes test,<sup>203</sup> and the case thus marks a significant jurisprudential adjustment – if not a full-fledged turn – in Canadian constitutional rights law.<sup>204</sup> It also appears to bring the Court’s thinking closer in line with the currently dominant theory of constitutional adjudication, alternately propounded by Alexy, Beatty and Barak, in which balancing is called upon to play the decisive role.

### c. **Adjudicating Religion: Does Proportionality Measure Up?**

As the currently dominant theory of constitutional adjudication, how well is proportionality in general, and balancing in particular, able to cope with the challenges posed by religion to judicial decision-makers discussed in Parts I and II of this chapter? On the one hand, proportionality analysis offers a promising response to some of those challenges by conceiving of constitutional principles as optimization requirements, rather than hard and fast rules. This approach seems at first blush to dissolve any tension arising from the competing normative character of religion and other constitutional principles. Neither freedom of religion, the normative order which it encompasses, nor other constitutional rights are entitled to absolute constitutional protection. Nor, from Alexy or Beatty’s point of view, would such protection be empirically possible. As discussed above, for these theorists it is intrinsic to the act of governing that constitutional rights and freedoms be interfered with to a certain extent. Depending on the circumstances, and the concrete importance of the interference, a practice falling to be protected

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<sup>202</sup> *Ibid.* at para. 190.

<sup>203</sup> See Hogg, *supra* note 130 at s. 38.12 (p. 38-44 to 38-44.2); *Wilson Colony*, *supra* note 81 at para. 75.

<sup>204</sup> See generally Benjamin L. Berger, “Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*” (2010) 51 Sup. Ct. L. Rev. 25 [Berger, “Section 1”] in particular at 26-27, 30-35; and Sara Weinrib, “The Emergence of the Third Step of the Oakes Test in *Alberta v. Hutterian Brethren of Wilson Colony*” (2010) 68 U. T. Fac. of L. Rev. 77 [Weinrib, “Emergence”].

under the auspices of religious freedom will be forced to yield in the face of an interference with another constitutional right, and vice versa. The crux of the matter for judges shifts to measuring the importance of relevant interferences on the facts of a given case. As the judges of the Supreme Court of Canada recognized in *Wilson Colony*, the structure of proportionality review dictates that, by and large, the heavy judicial lifting be done at the balancing stage.

Unfortunately, when it comes specifically to weighing and balancing claims involving religion, the plot thickens considerably. As judges strive to place religion on the scales of justice, the challenges of religion associated with normative contradiction and incommensurability seem quickly to resurface. Proportionality may not consider conflicting norms to be absolutes, but that posture in turn places increased emphasis on the ability of decision-makers to evaluate claims of normative *significance*. As Alexy makes clear, rationality in balancing requires that courts be able to make rational judgments about the intensity of real and hypothetical interferences with constitutional principles, and the relationship between such interferences.<sup>205</sup> “Everything turns” says Alexy, “on the possibility of such judgments.”<sup>206</sup> In both of these respects, religious pluralism tests the boundaries of what is possible within the judicial function. Given the subjective, comprehensive and plural character of religious normativity, which is closely interwoven with a person’s unique way of understanding herself and the world, constitutional adjudicators are likely to have great difficulty, first, measuring the weight of religious interferences and, second, balancing those interferences against countervailing constitutional principles and objectives. The characteristics of religion canvassed previously which tend to bring it into conflict with law, thus placing it before the bar of adjudication so frequently, in turn

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<sup>205</sup> Alexy, “Constitutional Rights”, *supra* note 179 at 136. Although Alexy’s original formulation of the Law of Balancing seems to imply that in addition to these, a further exercise in rational judgment is required concerning the degree of importance of satisfying competing constitutional principles, he subsequently makes clear that the latter judgment is in fact identical to the concept of intensity of interferences: Alexy, “On Balancing”, *supra* note 181 at 437, 441.

<sup>206</sup> Alexy, “Constitutional Rights”, *supra* note 179 at 136.

make it a phenomenon that is particularly ill-suited to weighing and balancing within the proportionality paradigm.

### Weighing Religion

As discussed above, the rationality of balancing is fundamentally predicated on the ability of third-party judges to make informed, justified and objective assessments concerning the absolute intensity of constitutional rights interferences.<sup>207</sup> Prior to engaging in the balancing exercise per se – i.e. *comparing* the relative severity of various interferences with constitutional principles – judges must begin the third stage of proportionality analysis by weighing the severity of the respective interferences *independently*. As Beatty might say, effective balancing depends first and foremost on understanding “how significant the law under review is to those it affects the most.”<sup>208</sup> This ability, which is a necessary precondition for cogent comparisons between interferences with different classes of constitutional principles, is challenging at the best of times and appears to break down altogether in the religious arena. Indeed, the identity-based, subjective and experiential nature of religion, on the one hand, and the cultural unfamiliarity that often goes hand in hand with the constitutional adjudication of religious claims in a society characterized by deep religious pluralism, on the other, means that any judicial assessment of the severity of an interference with a person’s faith in *absolute* terms is fraught with difficulty.

Beatty spends little to no time dealing with this issue. Alexy, on the other hand, leans heavily on the use of his triadic scale in order to invest objectivity in the weighing process, and it is accordingly worth attending briefly to his portrayal of that scale. In short, the labels of “light”, “moderate” and “serious” that Alexy uses to describe the weight of various interferences with constitutional rights are misleading. His triadic scale is a rough but useful tool that can serve to

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<sup>207</sup> *Ibid.*

<sup>208</sup> Beatty, *supra* note 176 at 93.

rank interferences of like kind in relation to each other. Be that as it may, the qualitative descriptors assigned to each of the three stages of the scale obscure the fact that it is essentially a scale of *ordinal* character. This nature is clear from Alexy's reference to an example drawn from a judgment of the German Federal Constitutional Court dealing with the regulation of the tobacco industry, and upon which he relies to describe the proper way to elaborate the scale in a given case:<sup>209</sup>

The Court qualifies the duty of tobacco producers to place health warnings regarding the dangers of smoking on their products as a *relatively* minor interference with freedom of occupation. *By contrast*, a total ban on all tobacco products would count as a serious interference. *Between such minor and serious cases, others of moderate intensity of interference can be found.* In this way, a scale can be developed with the stages "light," "moderate" and "serious."<sup>210</sup>

[Emphasis added]

What the scale succeeds in capturing is the *relative* severity of a family of possible interferences with a particular constitutional principle, in this case freedom of occupation. The designations of "light," "moderate," and "serious" give the scale meaning insofar as they jointly combine to rank interferences in relation to one another. However, one could very well replace those labels with "lesser than," "greater than," and "greater still," with little or no discernible difference in the operation of the scale. A "moderate" interference, like an interference that is "greater than" another, is devoid of meaning when separated from the other referents on the scale. A horseracing analogy, strange as it may seem, is perhaps a useful one here. To know that, in the 1973 Kentucky Derby, Secretariat finished first, Sham finished second, and Our Native finished third tells us nothing about how close the race was, the time each of them ran in the race

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<sup>209</sup> Alexy generally refers to the decision as "the *Tobacco* case." It is reported in the Decisions of the Federal Constitutional Court, *BVerfGE* vol. 95, 179 and cited liberally in Alexy, "Constitutional Rights", *supra* note 179 and in Alexy, "On Balancing", *supra* note 181.

<sup>210</sup> Alexy, "Constitutional Rights", *supra* note 179 at 136.

or, as will be discussed below, whether or not any of them were faster than Cannonade, the horse that won the Kentucky Derby the following year. Likewise for Alexy's triadic scale. Even when applied to a seemingly objective subject matter, such as horseracing, the scale on its own offers little in terms of qualitative information.<sup>211</sup> It is accordingly of little help in making rational judgments about the absolute severity of interferences with constitutional rights, a necessary precondition for rational comparisons with other rights interferences.

Turning to an example somewhat closer to the subject matter of the present work, it is easy for a judge to say, for instance, that a total prohibition on wearing a kirpan in public schools is a serious interference with a person's religious freedom; that, in turn, a prohibition on wearing a kirpan outside of one's clothes at school constitutes a moderate interference; and that, finally, a prohibition on wearing a kirpan at school when it is not safely sheathed constitutes only a light interference. "In this way," to quote directly from Alexy, "a scale can be developed with the stages 'light,' 'moderate' and 'serious'."<sup>212</sup> So it may be. But such a scale hardly leaves our courts further ahead if their aim is to appreciate the significance, in *absolute* terms, that wearing a kirpan, or being so prohibited, has for Gurbaj Singh.

As the kirpan example suggests, the limitations inherent to Alexy's triadic scale – and the difficulties inherent in measuring the absolute weight of any constitutional rights interference – are accentuated in the religious arena for two reasons. First, as discussed extensively above, religion is so bound up with the subjective reality of the individual believer – with her cultural attachments, her worldview, the narratives that she uses to explain the world and give it meaning, her way of life – that it is extremely difficult for a third-party judge to gauge its significance or recognize the force of its normative constraints. Even when compared with other hard cases, the

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<sup>211</sup> As will be discussed further below, this is so in the absence of prior cultural familiarity with the subject matter under consideration.

<sup>212</sup> Alexy, "Constitutional Rights", *supra* note 179 at 136.

difficulties associated with weighing the significance of religious commitments are especially fraught. Although some of the features of religion that give it its ineffability for adjudicators are shared with other aspects of identity such as gender, language, race, ethnic origin or sexual orientation, few if any can lay claim to all such features at once, or to the same degree; moreover, no other aspects of identity benefit from quasi-universal *affirmative* constitutional protection in liberal democracies,<sup>213</sup> which invests the already distinctive power of religious normativity with a constitutional status all its own. The unique epistemological vantage point frequently afforded by religion in turn helps to insulate questions of faith from easy judicial comprehension. Embedded as religious norms tend to be in a special way of understanding the world, conveying their significance to non-believers is particularly difficult and not a task that lends itself easily to the procedural and evidentiary constraints that govern findings of fact in the courtroom.<sup>214</sup>

Second, cases that implicate questions of religious significance in a diverse society are likely to be devoid of a familiar cultural context in which judges can locate religious beliefs and practices. The existence of such a context is more often than not a necessary precondition in order for the facts of a case to speak intelligibly for themselves, as Beatty suggests, or in order to for Alexy's triadic scale to be of any use. The normative judgments that constitutional adjudicators are called upon to make in respect of various rights interferences must inevitably be

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<sup>213</sup> By this I mean that religion is not only constitutionally protected through equality and anti-discrimination provisions, in the way that gender, sexual orientation, or national origin are; rather religion is a positive freedom unto itself.

<sup>214</sup> In a related vein, Jeremy Webber has argued that, owing to the difficulties associated with weighing and balancing religious value and meaning in cases involving claims to religious accommodation, the legislature is best placed to make such determinations. See Jeremy Webber "The Irreducibly Religious Content of Freedom of Religion" in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 178 [J. Webber, "Irreducibly Religious"] at 195.

connected to the particular narratives and worldviews that they rely on to make sense of our factual reality.

A reconsideration of the German Federal Constitutional Court's assessment of the seriousness of the rights interferences at issue in the tobacco regulation case is instructive in this regard. In that case, one might plausibly contend that the label "serious" affixed to a total ban on tobacco products has a certain naturalness about it. Why might it successfully convey the magnitude of the interference represented by a total ban on tobacco products, rather than simply its rank in relation to other interference of like kind? To the extent that labels such as serious and light may in fact ring true to us, and accordingly convey some qualitative information about the character of rights interference, it stems in part from the nature of certain rights which lend themselves better to objective categorizations than others, but above all else to membership in a shared cultural context.

In the tobacco case, the judges of the German Federal Constitutional Court were able to say that a total ban on tobacco products was a serious infringement of a person's freedom of occupation partly because such a ban would effectively eliminate the ability of people to pursue their livelihood as a tobacco producer. But more importantly still, such a categorization on the triadic scale must have seemed natural because the prevailing social and cultural context caused the judges of the court to make a reasonable inference that tobacco production was an occupation unto itself. The importance of social consensus and cultural context is particularly evident in the philosophy of judging expounded by Aharon Barak.<sup>215</sup> Returning to our horseracing example, in Canada or the United States, one might similarly, and without protest, affix the label "fast" to Secretariat, the winner of the 1973 Kentucky Derby, and so begin to elaborate a triadic scale of fast, medium and slow. However, our ability to do so is contingent on our familiarity with a

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<sup>215</sup> Barak, *The Judge*, *supra* note 82 at 107-108, 133, 135.

shared cultural context – our knowledge that the Kentucky Derby is one of the premier horse-racing events in North America, and that Secretariat is considered to be one of the greatest racehorses of all time. These shared social and cultural touchstones are elusive when it comes to gauging the significance of diverse expressions of religious belief of cultural minorities. There is an absence of social consensus from which judges can understand what violating the Second Commandment might mean to Hutterites, or what it means for a Sikh to wear a replica of a kirpan instead of the real thing. Without such common referential benchmarks that might help us to mark out what represents a serious interference with a person's subjective understanding of their religious faith, the triadic scale continues to ring hollow.

### Balancing Religion

Until now, I have focused on the feasibility of making objective judicial assessments of the gravity of various interferences with religious belief and action, as a precondition to embarking on the balancing exercise per se. The problems associated with making such assessments are substantial, and in many ways spill over into the balancing portion of the analysis. Indeed, if the severity of a religious interference cannot be meaningfully weighed by a third-party decision-maker on its own terms, any attempt to balance that interference against the importance of other constitutional values and principles appears doomed from the outset. However, even if judges were able to appreciate the significance of diverse religious commitments, in spite of religion's ineffability, the ability to arrive at rational conclusions remains predicated on the ability to balance the relative severity of the interferences against one another. The very core of the judicial role when it comes to balancing involves *comparing* the importance of interferences with competing and often very distinct constitutional principles.

To return ever so briefly to my horseracing example, determining whether or not Secretariat is a fast or slow horse (i.e. weighing) is only half the battle. Even if a hypothetical

“Supreme Court of Sport” were able to conclude that Secretariat’s performance in the 1973 triple crown was of one of the greatest horseracing accomplishments of all time, the balancing stage of proportionality analysis might require that the Court go on to compare the greatness of Secretariat’s performance with sprinter Usain Bolt’s triple-world-record-setting performance at the 2008 Beijing Olympics or, to pick an example a little closer to my heart, Patrick’s Roy performance in the 1993 National Hockey League playoffs, in which he led the Montreal Canadiens to an unprecedented ten consecutive overtime wins en route to capturing the Stanley Cup. Despite the fact that all of these performances belong broadly to the family of sport, judging them in relation to each other presents significant challenges. Obviously, the sporting analogy is imperfect. However, the point is simply to show that Alexy’s generic vocabulary of “interferences” with constitutional rights and principles or Beatty’s emphasis upon “hard empirical evidence”<sup>216</sup> suggest the existence of a commensurability between matters of faith and constitutional rights and values more generally that may be more illusory than real.

Two features that are specific to the encounter between religion and constitutional adjudication modelled on proportionality analysis make such cross-comparisons particularly difficult. First, the shortcomings associated with Alexy’s scale, canvassed above, are suggestive of a paradoxical problem that arises from the need to fit religion within the proportionality paradigm. Beatty and Alexy respectively stress that the balancing exercise is “case-specific”<sup>217</sup> and turns on the significance of the impugned law for those it “affects the most.”<sup>218</sup> While that may be so, proportionality is invariably concerned with equivalences. To engage in the balancing exercise, a judge must not only be able to appreciate fully the significance of the interferences on their own terms; he must also be able to place commensurable variables on either side of the

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<sup>216</sup> Beatty, *supra* note 176 at 93.

<sup>217</sup> Alexy, “Constitutional Rights”, *supra* note 179 at 137.

<sup>218</sup> Beatty, *supra* note 176 at 93.

scales. Proportionality's professed interest in subjective impacts is accordingly a means to an end. The balancing stage of proportionality requires that the relevant interferences be scrutinized by the court and given an objective weight that is amenable to cross-comparisons and hence divorced from the subjective perception of the parties.

Another case relied upon by Alexy from the German Federal Constitutional Court, in which a paraplegic claimed that his personality rights were breached by a satirical magazine that referred to him as a "cripple," helps to illustrate this point.<sup>219</sup> In that case, for the purpose of the balancing stage, the intensity of the interference with the claimant paraplegic's personality rights turned not on the way in which the wrong was perceived by the claimant, but instead on the *objective* gravity that the court attributes to the alleged wrong, quite apart from the claimant's idiosyncratic personal circumstances:

According to the assessment of the Federal Constitutional Court, this [being called a "cripple"] counted as "*serious* harm to the paraplegic's personality right."...This was justified by the fact that describing a severely disabled person as a "cripple" is generally taken these days to be "humiliating" and to express a "lack of respect."<sup>220</sup>

[References omitted; italics in original; underlining added]

Being called a cripple constitutes a serious interference with the claimant paraplegic's personality rights because the court considers that a general social consensus exists in that regard or, alternatively, because common sense dictates that this is so, notwithstanding the claimant's peculiar perspective. In this, the proportionality approach recommended by Alexy and embodied by the German Federal Constitutional Court is ultimately reminiscent of Rawls's conception of public reason with its emphasis among other things on "presently accepted general beliefs and

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<sup>219</sup> Alexy generally refers to this case as the *Titanic* decision. It is reported in the decisions of the Federal Constitutional Court, *BVerfGE* vol. 86, 1, and cited in Alexy, "Constitutional Rights", *supra* note 179 at 137-139.

<sup>220</sup> Alexy, "Constitutional Rights", *supra* note 179 at 138.

forms of reasoning found in common sense....”<sup>221</sup> When it comes to questions of religious import, however, the perils of so proceeding were made plain by the forceful critiques of a substantive conception of public reason canvassed in Chapter 1.

In short, as seen previously, the nature of religion is such that a judge who fails to appreciate the subjective, personal reality of the believer’s faith will have difficulty grasping the absolute significance that religious observance and interferences have for her. Conversely, in order to fit on the balancing scales, questions of faith must be garbed in sufficiently objective clothes to be able to assume a commonality with other types of constitutional rights interferences. As a result, efforts to make the severity of an interference with a person’s religious freedom amenable to cross-comparison with other interferences with constitutional rights and principles, while at the same time continuing to recognize the unique normative force of that faith owing to the personal experiences have nourished it, seem likely to fail.

Finally, the functionally ademocratic character of religious freedom, discussed at the beginning of this chapter, itself contributes to the problems of incommensurability that arise at the balancing stage of proportionality analysis. It does do by exacerbating the tension between the need to *subjectively* assess questions of religious significance but at the same time *objectively* compare them on a common standard to other legislative goals and constitutional principles. To the extent that freedom of religion is not merely coextensive with freedom of conscience, expression and association, the value of protecting religiously motivated conduct that conflicts with other state norms cannot be justified by recourse to any vital role that such conduct plays in serving our democratic institutions. Because of this, not only is the *significance* of religious commitment inherently subjective and personal, as discussed above. The *value* of protecting free religious practice is also largely subjective and intrinsic, and falls to be assessed on its own

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<sup>221</sup> Rawls, *Political Liberalism*, *supra* note 4 at 224.

merits. In the constitutional architecture of the contemporary liberal democratic state, religious freedom thus occupies a peculiar, and lonely, space. The value of respecting a person's religious freedom – in Alexy's parlance, of minimizing the intensity of interference with the constitutional principle of freedom of religion – lies essentially in the act of toleration itself, and in the protection thereby afforded to the religious believer. The benefit flowing from the protection of a person's religious freedoms thus appears to fit uneasily with the task of the judge engaging in an analysis of proportionality in the strict sense: whether, when assessed having regard to the common point of view of the constitution, the concrete interference with the constitutional right is justified overall when compared against the importance of the desired ends. This is doubly true if one accepts Barak's contention that one of the two fundamental roles of the judge in a democracy is to protect democracy itself.<sup>222</sup> Whereas other constitutional rights, including free expression, freedom of conscience, freedom of association and even equality are directly linked to the promotion of democracy, giving to those rights an important collective and utilitarian dimension, the connection between the free exercise of a person's religion and the collective health of our democratic ideals is more tenuous.<sup>223</sup>

For this reason, although problems of commensurability are often invoked in relation to conflicts of rights cases, when two constitutional norms are in seeming opposition to one another, the difficulties associated with balancing can be most acute when a collective social

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<sup>222</sup> Barak, *The Judge*, *supra* note 82 at 20-23.

<sup>223</sup> I should note here that a conceivable argument could be made, building on the liberal multicultural scholarship of Will Kymlicka, that religious attachment can afford access to a societal culture, access to which is necessary for individuals to enjoy a full context of choice and thus to live a full life in a liberal democracy (see generally Kymlicka, *supra* note 141). This in turn could be construed as a precondition for the meaningful exercise of democratic rights, giving to religion an instrumentally democratic character, albeit a very derivative one. To the extent that such an argument might be plausible, it remains that when compared to the other "fundamental freedoms" protected by the *Charter* the possible relationship between religion and democracy is distant and indirect. It is also uncertain. If religion serves to impart membership in an *illiberal* societal culture, it can easily undermine the exercise of democratic rights and have the effect of defeating liberal democratic ideals.

goal is invoked to justify an interference with an individual right.<sup>224</sup> These cases often arise when rules of general application are perceived to interfere with religious freedom. *Multani*, *Wilson Colony* and *A.C.* are examples of cases in which the right to freedom of religion was weighed against a countervailing social or public policy objective rather than a competing individual or group right. The court's responsibility is to weigh the intensity of the interference with a constitutional right resulting from the implementation of a contested governmental measure against the importance of the sought-after policy objective. In such cases, the absence of a collective, and democratically instrumental, dimension to society's respect for religious freedom means that judges are truly called upon to compare apples and oranges. Can the overall collective social benefit accruing from the enactment of a universal photo requirement for Alberta driver's licences meaningfully be compared against the peculiar and personal harm suffered by the Wilson Colony Hutterites from the imposition of that requirement over and above their religious objections? Can the importance of safety in public schools meaningfully be balanced against the harm done to Gurbaj Singh by preventing him from wearing his kirpan in the way he so desires? The mere fact that all of these situations are framed as interferences with constitutional principles does not automatically provide the necessary commensurability. And neither the obviousness of the facts of these cases, as Beatty might argue, nor the use of a triadic scale, as Alexy might, seem capable of giving to these various interferences the commonality required to draw rational judgments as to their comparative weight while respecting their subjective importance.

#### **IV. Balancing the Ineffable?**

As discussed earlier, religion is a very special and powerful cultural phenomenon. A matter of identity; a way of life; a comprehensive normative order closely connected with a

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<sup>224</sup> Along these lines, see J. Webber, "Irreducibly Religious", *supra* note 214 at 195.

person's way of understanding the world – given these features, Heschel's reference to a sense of ineffability is a particularly apt metaphor by which to capture the difficulties that religion can pose for adjudicators. This is especially true when one considers the deep religious pluralism that characterizes contemporary society in the West, the quasi-universal constitutional protection afforded to freedom of religion, not to mention its functionally ademocratic nature. As a result, religion presents tremendous challenges for a judge seeking to gauge its significance, recognize the force of its normative constraints, and compare its force and significance to the importance of other constitutional rights and principles. It is a phenomenon that would appear to be particularly ill-suited to judicial balancing.

The history of religious toleration in the West since the Reformation and the hesitant recognition of the freedom to practice increasingly different religious traditions – Catholicism and Protestantism, non-conformist Christianity, Islam, Indigenous spirituality, etc. – is a reflection of groping attempts to better understand and respect the significance of diverse religious beliefs.<sup>225</sup> Jeremy Webber describes it thus:

The struggle to define the nature and force of religious experience therefore stands as a paradigmatic example of the hermeneutic circle: we listen to what others have to say about their traditions, attempting to place ourselves as much as possible within their structure of belief, to understand its significance for them; we probe our own religious traditions for analogies and explanations, looking to see if we too have treated as valuable the features that others derive from their beliefs....<sup>226</sup>

One might say that the struggle identified by Webber necessarily requires a process of thick description, in which an appreciation of subjective cultural meaning is paramount. If judges are to be assigned the task of resolving normative conflict between religion and law by way of proportionality analysis, it is difficult to see how they will accomplish that role within prevailing

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<sup>225</sup> *Ibid.* at 191-193.

<sup>226</sup> *Ibid.* at 193.

institutional constraints and in a way that gives due consideration to diverse religious perspectives. With my eye firmly fixed on the surprising disconnect observed in Chapter 1 between political theorists and theories of judicial decision-making, in the next chapter I thus intend turn my attention directly to the following question: given above the conceptual challenges and complexities, how do Canada's premier constitutional adjudicators – the judges of the Supreme Court – contend with issues of religion in their public decision-making?

### Chapter 3

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## Judging Religion: Constitutional Adjudication or Constitutional Avoidance?

The various movements, forces and pressures canvassed so far – legal, political, socio-cultural and philosophical – seem to pull judges in opposite directions when it comes to the justification of their decisions through the public use of reason. Constitutional courts are placed in a difficult position. On the one hand, as discussed in Chapters 1 and 2, political theorists have become increasingly aware that, for coercive law in a diverse society to be legitimate, plural discourses must be given space in decision-making processes and considered in good faith. Further, the balancing of interests required by the theory and practice of proportionality analysis suggests the necessity of an inquiry into the consequences associated with a decision not to endorse the position of the religious believer. On the other hand, as also discussed in Chapters 1 and 2, religious arguments are generally considered to be at odds with contemporary judicial decision-making practices upon which Rawls's conception of public reason was modelled. Moreover, in a society in which cultural identity and belonging is increasingly fractured and individuated, judges do not seem to be well positioned to balance the gravity of claimed interferences with a person's religious freedom against other policy objectives or to otherwise conduct inquiries into matters of faith.

The juridification of public and private space, also discussed in Chapters 1 and 2, only exacerbates the importance and difficulty of the dilemmas faced by the judiciary. Given the increasingly influential role that constitutional courts play in shaping matters of public policy in Canada and elsewhere, not to mention the historically central role played by the courts in the Anglo-Canadian legal tradition, any attempt to explain the legitimacy of law through the public

use of reason would appear to require a discussion of how the concept of public reason operates in the judicial branch.

Indeed, notwithstanding the conceptual challenges that religious diversity poses for the legitimacy of coercive law generally, and constitutional adjudication in particular, judges in Canada are constantly being confronted with constitutional disputes having a religious dimension. These cases generally take on one of two forms. Sometimes, as in *Wilson Colony* or *Multani*, the religious dimension of a case is explicit and lies at the core of the dispute. In such instances, mostly involving claims to accommodation, the question for the court generally centres on conduct that is motivated by a person's religious convictions but that falls afoul of general legal rules; the court must decide whether the conduct in question is or is not protected by a constitutional right to religious freedom and equality. Can the Hutterites of Wilson Colony be exempted from the driver licensing photo requirement owing to their religious convictions? Can Gurbaj Singh Multani be allowed to wear a kirpan, a symbol of his religious faith, in spite of regulations prohibiting weapons and other dangerous objects from school grounds?

At other times, the religious dimension of the case is implicit, or lies at its periphery and provides part of the context in which the controversy arose and is put to the court for resolution. The question for the court in such cases is not, as a rule, directly related to religious faith or practice. Rather, points of view that are informed by religious perspectives are brought to bear on questions of general public concern. Racial segregation, abortion, and capital punishment are all issues that fit this description, and Canadian and American courts have famously been called upon, sometimes repeatedly, to issue judgments on these matters in the second half of the 20<sup>th</sup> century. In the last decade in Canada, though, the state's attitude towards the place of same-sex relationships in society is the issue that has mostly generated cases of this latter type.

*Chamberlain* is one such example. Although the substantive issue before the school board was whether or not certain books should be approved for use in elementary schools, and the substantive issue for the courts sitting in judicial review of that decision was whether or not the decision of the board was legal, the subtext of the debate was squarely focused on religious attitudes towards same-sex relationships. Parents and school board members whose views were informed by particular religious convictions believed that books depicting same-sex couples were not appropriate materials for their children. Parents and school board members who did not disapprove of same-sex relationships on the basis of their religious convictions, on the other hand, considered the use of materials implicitly affirming the value and equality of such relationships to be an unreservedly positive contribution to the educational experience of their children.

Whether their religious dimension is explicit or implicit, but especially so in the latter instance, the issues these cases raise are generally emblematic of the juridified practice of politics that has come to characterize contemporary judging. Although clothed in legal gowns, more often than not the controversy before the court is reflective of a policy debate that is simultaneously being played out, albeit inconclusively, in the political public sphere. Those debates can be controversial and highly charged, with the respective adversarial positions taken in the litigation conveniently, if often oversimply, labelled as “progressive” or “conservative” to reflect existing cleavages along the political spectrum. As I showed in Chapter 1, to decide such questions, constitutional courts are required to engage, roughly speaking, in an all-things-considered approach to judicial review. The legitimate application of coercive law in a diverse society is at issue. Public reason assumes paramount importance.

In practice, then, how have Canadian judges sought to extricate themselves from the countervailing pressures on adjudication that are exposed by cases involving religion? What posture have judges adopted in their reasons as they strive to acquit their responsibilities as adjudicators while justifying the legitimacy of their decisions? These are the questions that will be the subject of my attention in this chapter, drawing on the distinction in types of cases to which I just alluded. In Part I, I will look to the most recent judgments of the Supreme Court of Canada involving specific claims to religious accommodation; these are cases whose religious dimension is overt. In Part II, I will look at a series of cases in which the justices of the Supreme Court of Canada have been forced to consider the position of same-sex relationships under Canadian law; the religious dimension of these cases, although unmistakable, remains implicit.

As I will show, the judgments of the Court, in one and the other instances, lead to the following conclusion: religion and religious diversity present such difficulties for constitutional adjudication to fit within a legal framework that, in practice, judges avoid engaging squarely with the religious dimension of disputes. In cases that specifically involve claims to religious freedom, judges frame the issues, and express the stakes of the litigation, in terms that push questions of religious faith into the periphery. In cases involving public policy choices more broadly, judges tend to view the religious implications of a decision as irrelevant, even when the public political discourse surrounding the question has an important religious component, and their decision stands to have a significant impact upon, if not be decisive, of the underlying controversy. My conclusions in this regard are descriptive rather than critical. For better or for worse, the picture of public reason that we see coming in to view, as used by constitutional adjudicators, is thus one that appears to be fundamentally at odds with the procedural conception of public reason that has been popularized in recent theories of political decision-making.

## I. Taking the Religion Out of Religious Freedom

### a. *Alberta v. Hutterian Brethren of Wilson Colony*

As the most recent judgment issued by the Supreme Court of Canada dealing with a direct claim to religious freedom, *Wilson Colony* is a natural place to begin my examination of the case-law. It also provides an excellent example of the tool of avoidance resorted to by constitutional adjudicators as a response to the complexities of religion. As noted previously, the case arose out of a new licensing scheme set up by the province of Alberta that would require all persons to have their photo taken in order to be issued a driver's licence, with a view to preventing identity theft. The Hutterites of Wilson Colony, believing the Second Commandment to prohibit the taking of their photographs, challenged the constitutionality of the mandatory photo provision on the basis that it violated their freedom of religion.

As discussed in Chapter 2, the various justices of the Court assessed the Hutterites' claim through the lens of proportionality. The sole question for the court, it was agreed by all judges who authored opinions, was whether the universal photo requirement contemplated by the licensing scheme constituted a limit on the Hutterite claimants' freedom of religion that was justified under s. 1 of the *Charter*. Pursuant to the court's own jurisprudence, as well as the theory of proportionality review propounded by Alexy and Beatty, among others, the reasonableness of the limit was accordingly dependent on the degree to which the photo licensing requirement interfered with the Hutterites' freedom of religion. And so the respective judges of the court did indeed proceed to assess that degree of interference. However, the way in which the judges measured the interference is telling and points to the palpable discomfort that they feel when adjudicating disputes involving religion.

Rather than inquiring into the felt significance of the religious norm invoked by the Hutterite claimants, and thus gaining insight into the importance of the infringement of religious

freedom represented by the imposition of a mandatory photo requirement in contravention of that norm, the court takes relatively little notice of the specifically religious implications of the infringement. Despite acknowledging the exceptional and personal place that religious faith often occupies in peoples' lives,<sup>227</sup> Chief Justice McLachlin's reasons as disclosed at the narrow proportionality stage ultimately fail to give due consideration to the "perspective of the religious...claimant."<sup>228</sup> When it comes right down to weighing the gravity of the interference with religious freedom, the majority marginalizes the relevance of the subjective, personal, and culturally specific nature of faith, instead emphasizing the common barometer provided by *Charter* values, and specifically liberty:

The deleterious effects of a limit on freedom of religion requires us to consider the impact in terms of *Charter* values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy.... The most fundamental of these values, and the one relied on in this case, is liberty – the right of choice on matters of religion.<sup>229</sup>

[Italics in original; underlining added]

As a result of this analytical approach, the intrinsically religious character of the right asserted by the Hutterites recedes from view. What is relevant for the court's purposes is not the Hutterites' *religious* freedom; rather, it is their religious *freedom*. Consistent with the centrality of autonomy to the Court's jurisprudence on s. 2(a), liberty, not religion, lies at the core of the analysis.<sup>230</sup>

This way of assessing the claim should not strike us as particularly surprising, given the conceptual challenges associated with weighing and balancing the severity of interferences with religious freedom discussed in Chapter 2. Indeed, the process of thick engagement with the subjective cultural significance of a religious practice, contemplated both by the theory of

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<sup>227</sup> *Wilson Colony*, *supra* note 81 at paras. 89-90.

<sup>228</sup> *Ibid.* at para. 90.

<sup>229</sup> *Ibid.* at para. 88.

<sup>230</sup> Berger, "Law's Religion", *supra* note 131 at 272-278.

proportionality analysis and the very reasons of McLachlin C.J. in *Wilson Colony*,<sup>231</sup> is not only extremely demanding for judges but would also lead to further adjudicative difficulties.

As a preliminary point, judicial efforts to engage meaningfully with the significance of a person's religious commitments run the risk of degenerating into a state-sponsored religious inquiry. The Supreme Court has been alive to the possible dangers of such inquiries at least since the genesis of this country's religious freedom jurisprudence emerged in the Sunday closing cases, exposing as they do "an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting."<sup>232</sup> As the Court has pointed out, this in itself can constitute a threat to the personal liberty interests that are prized above all else by the *Charter*.<sup>233</sup> Moreover, judicial inquiries into questions of faith can result in unwarranted intrusion into sectarian religious affairs, unwittingly turn judges into arbiters of religious dogma, and possibly expose courts to manipulation by religious elites.<sup>234</sup> These types of concerns were precisely what led the Court in *Amselem* to devise a capacious test for making out a prima facie breach of s. 2(a) – a test that most good faith religious claimants will easily meet.<sup>235</sup> As a collateral effect, the analytical core of religious freedom cases becomes even more concentrated in the proportionality model implied by s. 1 of the *Charter*, with its strong emphasis on balancing. Ironically, then, the court's reticence to engage with questions of religious sincerity at the front end of s. 2(a) claims seems only to emphasize the importance of engaging with questions of religious significance at the back end of those claims. The stresses inherent in engagement at that stage, with which I am

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<sup>231</sup> Berger, "Section 1", *supra* note 204 at 38-41.

<sup>232</sup> *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 779.

<sup>233</sup> *Amselem*, *supra* note 144 at para. 55.

<sup>234</sup> *Ibid.* at paras. 43-56.

<sup>235</sup> Berger, "Section 1", *supra* note 204 at 27; see also Berger, "Cultural Limits", *supra* note 63 at 257. The test elaborated in *Amselem* as restated in *Wilson Colony* is as follows: "An infringement of s. 2(a) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial." *Wilson Colony*, *supra* note 81 at para. 32.

primarily concerned, are therefore compounded by the analytical framework followed by the court since *Amselem*, including in *Wilson Colony*.

In that regard, notwithstanding the challenge of actually gaining a subjective appreciation for what it means to the Hutterites to be compelled to sit for a photograph or else suffer the consequences, gaining such an appreciation would notably decentre the adjudicative process. As emphasized in Chapter 2, the balancing stage of proportionality analysis is ultimately concerned not with subjective importance but with equivalences and commensurability. As a result, in keeping with its earliest jurisprudence,<sup>236</sup> the Court is compelled to fall back on the “common barometer” represented by *Charter* values against which it must determine the proportionality between the salutary and deleterious effects of the alleged interference and the importance of the legislative objective. As Benjamin Berger has noted, “when asking if a limit on religious freedom is justified, the question is assessed within the values, assumptions and symbolic commitments of the rule of law itself.”<sup>237</sup>

This reality is manifest in the elements the Court proceeds to consider when assessing the gravity of the interference with the Hutterites’ right. In order to ensure commensurability in balancing – commensurability that would seem to be lacking if the Court sought directly to stack up the culturally specific significance of the restraint on religious freedom with the integrity of the province’s driver’s licensing scheme – the majority’s inquiry concerning the deleterious effects of the interference with freedom of religion is focused on decontextualized and, roughly-speaking, secular indicators that are thus easily generalizable across cultural differences. In other words, reasons all can accept. The inconvenience associated with securing the services of drivers

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<sup>236</sup> See *Oakes*, *supra* note 86 at para. 64: “The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.”

<sup>237</sup> Berger, “Cultural Limits”, *supra* note 63 at 257.

from outside the religious colony; the cost in time, effort and money; the loss of self-sufficiency in terms of transport – these are the decisive factors that the court ultimately relies on to assess the seriousness of the infringement:

This returns us to the task at hand – assessing the seriousness of the limit on religious practice imposed in this case by the regulation’s universal photo requirement for driver’s licences.

[...]

*I conclude that the impact of the limit on religious practice imposed by the universal photo requirement for obtaining a driver’s licence is that Colony members will be obliged to make alternative arrangements for highway transport. This will impose some financial cost on the community and depart from their tradition of being self-sufficient in terms of transport. These costs are not trivial. But on the record, they do not rise to the level of seriously affecting the claimants’ right to pursue their religion.<sup>238</sup>*

[Emphasis added]

Justice Abella’s reasons, offered in dissent, exhibit the same sort of limitations connected to the need for commensurability. Although her opinion demonstrates an increased sensitivity to the particular position of the Hutterite claimants, and in particular to the subjective harm to their community that would result from the imposition of the province’s licensing scheme, similarly absent from her analysis is any attempt to understand the internal significance of the religious prohibition concerned. In fact, Abella J. assesses the deleterious effects of the photo requirement for the purposes of balancing in essentially the same manner as does McLachlin C.J., by reference to the common barometer of *Charter* values that obscures the specifically religious import of the Court’s decision. Aside from a difference over the benefits to be procured from the licensing scheme, her disagreement with McLachlin C.J. stems primarily from the locus of

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<sup>238</sup> *Wilson Colony*, *supra* note 81 at paras. 96, 99.

autonomy against which the severity of the interference is to be measured, and specifically whether the self-sufficiency of the *community* overall is relevant:

To suggest, as the majority does, that the deleterious effects are minor because the Colony members could simply arrange for third party transportation, *fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community*. When significant sacrifices have to be made to practise one's religion in the face of a state imposed burden, the choice to practise one's religion is no longer uncoerced.

[...]

The mandatory photo requirement is a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or *giving up the self-sufficiency of their community*, a community that has historically preserved its religious autonomy through its communal independence.<sup>239</sup>

[Emphasis added]

While this attention to the communitarian aspect of the Hutterites' existence is undoubtedly commendable, the interference with liberty and autonomy simpliciter is nonetheless the determinative factor in her decision. The religious nature of the freedom invoked remains peripheral to her analysis.

**b. *A.C. v. Manitoba (Director of Child and Family Services)***

Decided only a month before *Wilson Colony*, *A.C.* serves as another excellent illustration of the posture of avoidance that the Supreme Court of Canada elects, or is induced, to maintain in the face of the challenges presented by questions of faith, even when those questions form the explicit basis for a litigant's claim before the court. In *A.C.*, the factual background under which the case arose was squarely religious, as the court's majority opinion clearly indicates at the outset:

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<sup>239</sup> *Ibid.* at paras. 167, 170.

## BACKGROUND

A.C. was 14 years and 10 months old when she was admitted to the hospital on April 12, 2006. She suffered an episode of lower gastrointestinal bleeding as a result of Crohn's disease. *A.C. is a Jehovah's Witness who believes that her religion requires that she abstain from receiving blood.*

A few months before her admission to the hospital, A.C. had completed an "advance medical directive" with written instructions that she not receive blood transfusions under any circumstances.<sup>240</sup>

[Emphasis added]

When the medical professionals treating A.C. determined that she would be at risk of dying if she did not receive a blood transfusion, the Director of Child and Family Services of the province of Manitoba sought and obtained an emergency court order directing A.C.'s physicians to proceed with the blood transfusion, notwithstanding her religious objections. After the fact, A.C. challenged the constitutionality of the court order and the enabling legislation, which provided that the court could override the decision of a minor child under the age of 16 to refuse medical treatment if it considered that treatment to be in the child's best interests.

A.C.'s claim was rooted in her religious objection to the blood transfusion that had been ordered for her. As Justice Binnie succinctly observed at the outset of his reasons, A.C.'s fundamental position was that "[t]he *Charter*...gives her the freedom — in this case religious freedom — to refuse forced medical treatment, even where her life or death hangs in the balance" [emphasis in original].<sup>241</sup> The first and second constitutional questions put to the court for resolution were precisely focused on the extent of the guarantee of freedom of religion contained at s. 2(a) of the *Charter*, and the reasonableness of any potential violation of that guarantee.<sup>242</sup>

<sup>240</sup> *A.C.*, *supra* note 147 at paras. 5-6.

<sup>241</sup> *Ibid.* at para. 163.

<sup>242</sup> As reproduced at para. 238 of Justice Binnie's reasons, those questions read as follows: "1. Do ss. 25(8) and 25(9) of *The Child and Family Services Act*, S.M. 1985-86, c. 8, infringe s. 2(a) of the *Canadian Charter of Rights and Freedoms*?"; and "2. If so, is the infringement a reasonable limit prescribed by law

The religious pedigree of the case is indisputable, as is the applicability of proportionality analysis to it pursuant to s. 1 of the *Charter*. And yet, what is striking is that the severity of the interference with A.C.'s religious convictions is reserved hardly a mention in either the majority or concurring opinions.<sup>243</sup>

Once again, the judicial marginalization of the intrinsically religious component of the dispute is far from surprising. Even more so than in *Wilson Colony*, real engagement with the internal significance of A.C.'s religious convictions, not to mention the associated exercise in balancing dictated by proportionality review, would have placed enormously challenging ethical and adjudicative demands on the judges hearing the case. The prospect of first, understanding what was truly at stake for A.C. – the depth of a religious commitment so important to her that she would knowingly risk her life to uphold it – and second, setting that commitment off against a competing and seemingly equally compelling principle – the interest of the state in protecting the lives of its children – brings into sharp relief the burdens of judgment implied by a thick engagement with religious difference within the proportionality framework favoured by constitutional adjudication.<sup>244</sup>

To borrow Geertz's terminology discussed in Chapter 2, the strength of A.C.'s ethical commitment – her religious opposition to receiving a blood transfusion – is difficult to comprehend outside of the particular worldview she inhabits as a Jehovah's witness. Conversely, the state's ethical commitment to the preservation of A.C.'s life "through the forced pumping of someone else's blood into her veins,"<sup>245</sup> as Binnie J. dramatically describes it, is contingent on the scientific-rational worldview that is privileged by our legal system to the exclusion of others.

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as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?"

<sup>243</sup> The reasons of Justice Binnie, in solitary dissent, will be discussed below.

<sup>244</sup> For a discussion of the unique ethical demands that this case posed for the judiciary, see Berger, "Section 1", *supra* note 204 at 42-45.

<sup>245</sup> *A.C.*, *supra* note 147 at para. 166.

We are faced with a seeming incommensurable and irreconcilable clash between not only normative but indeed metaphysical commitments – to which Alexy’s triadic scale seems a decidedly weak antidote. In fact, given the ontological rift between the respective positions of the litigants, one might plausibly argue that a legal judgment aimed at evaluating the constitutionality of A.C.’s claim to religious freedom on her own terms – as proponents of procedural public reason in the public sphere might advocate – is next to impossible.

Circumventing those difficulties entirely, Justice Abella, writing for the majority at paragraph 27, manages to summarize the “heart of A.C.’s constitutional argument” without even mentioning her religious beliefs. As framed by Abella J., the fundamental question for the court is whether the irrebuttable presumption of incapacity contained in the provincial legislation violates the asserted right of all persons, including minors, to decide their own medical care. In one fell swoop, the entire religious dimension of A.C.’s argument is evacuated, despite its seeming core character. Safe from the muddy ontological waters of religious difference, the majority is able to assess the merits of the case on the relatively firm – and common – ground provided by the best interests of the child and the right to personal autonomy. Far from representing a clash in worldviews, these uncontroversial principles find mutual support in a liberal conception of the person that has deep roots in law: a rational chooser whose autonomy increases as she gains maturity and approaches adulthood:

The question is whether the statutory scheme strikes a constitutional balance between what the law has consistently seen as an individual’s fundamental right to autonomous decision making in connection with his or her body and the law’s equally persistent attempts to protect vulnerable children from harm. This requires examining the legislative scheme, the common law of medical decision making both for adults and minors, a comparative

review of international jurisprudence, and relevant social scientific and legal literature.<sup>246</sup>

As in *Wilson Colony*, the religious character of the beliefs motivating, or arguably compelling, A.C.'s choice to decline medical treatment is treated as immaterial. A.C.'s decision to refuse the blood transfusion is approached as if it were connected to a preference like any other – for instance a person's favourite colour, food, or song – albeit one with potentially fatal consequences. When Abella J. does finally advert to A.C.'s argument that her freedom of religion has been infringed, in all of two paragraphs, that argument is dismissed out of hand and in relatively cursory fashion.<sup>247</sup> Why? Because she has already addressed at length the deference to be afforded to a minor's wishes – be they religious or otherwise – as his or her maturity increases. Further, the reasons contain no inquiry whatsoever as to what the interference with A.C.'s religious convictions might mean for A.C. Although Abella J. did not find that there had been a prima facie violation of s. 2(a), 7 or 15 of the *Charter*, and thus did not proceed with a formal inquiry into the proportionality of the limit on a *Charter* right pursuant to s. 1, she commented in closing that the legislation reflected “a proportionate response to the goal of protecting vulnerable young people from harm, while respecting the individuality and autonomy of those who are sufficiently mature to make a particular treatment decision.”<sup>248</sup> Again, as in *Wilson Colony*, the variables placed on the balancing scale by the majority reflect the overriding concern of the court with the deprivation of autonomy – i.e. liberty *simpliciter* – not *religious* liberty.

The concurring opinion, authored by Chief Justice McLachlin, reflects the same preoccupation, and indeed makes it explicit. After observing that A.C.'s claims under s. 2(a) and

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<sup>246</sup> *Ibid.* at para. 30.

<sup>247</sup> *Ibid.* at paras. 112-113.

<sup>248</sup> *Ibid.* at para. 115.

s. 7 “merge, upon close analysis,” McLachlin C.J. proceeds to conclude that a person’s particular motivation for refusing treatment is irrelevant: “[t]he fact that A.C.’s aversion to receiving a blood transfusion springs from religious conviction does not change the essential nature of the claim as one for absolute personal autonomy in medical decision making.”<sup>249</sup> As in the reasons of the majority, religion and faith thus fade from the judicial decision-making equation. Despite finding that the legislative scheme constitutes a prima facie violation of A.C.’s right to freedom of religion, McLachlin C.J. can thus conclude that it is nonetheless a proportionate limit on the right – while avoiding the need to engage in an inquiry into the deleterious effects of the interference with A.C.’s religious conscience.<sup>250</sup>

Only Justice Binnie, in solitary dissent, appears to take seriously the religious dimension of the case, including the seriousness of the state’s interference with A.C.’s religious convictions.<sup>251</sup> Benjamin Berger goes so far as to describe the reasons of Binnie J. as an “exemplary” effort at navigating the demands placed upon judges by the interaction of constitutional adjudication with religious difference.<sup>252</sup> Even so, however, the distinctly religious motivation of A.C.’s objection to the blood transfusion is only considered to be one piece of the puzzle. The heart of Binnie J.’s analysis arguably lies instead in the right to personal autonomy guaranteed severally by the liberty provisions of the *Charter* (s. 2(a) and s. 7). As Binnie J. states at para. 197: “This right to personal autonomy is, of course, independent of any religious conviction, although religion may on occasion be a motivating factor.” Although Binnie J. takes pains to understand and seeks to convey in his reasons the religious moment of A.C.’s choice to refuse the blood transfusion, his determinative inquiry into the proportionality of the limitation

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<sup>249</sup> *Ibid.* at para. 155.

<sup>250</sup> *Ibid.* at para. 156.

<sup>251</sup> See e.g. *A.C.*, *supra* note 147 at paras. 163, 213-215 and in particular at 231: “I do not think the real *gravamen* of A.C.’s complaint is age discrimination. Her fundamental concern is with the forced treatment of her body in violation of her religious convictions” [emphasis in original].

<sup>252</sup> Berger, “Section 1”, *supra* note 204 at 45.

imposed on A.C.'s *Charter* rights – under both s. 2(a) and s. 7 – proceeds without explicit regard for the severity of the interference with A.C.'s religious freedom. Like the other judges in *A.C.* and in *Wilson Colony*, Binnie J. ultimately rests his holding on irreligious and thus more easily generalizable terms, finding that the state was unable to justify the reasonableness of the limit on the medical decision-making autonomy of mature minors, regardless of what their motivations might be.<sup>253</sup>

**c. *Multani v. Commission scolaire Marguerite Bourgeoys***

The reasoning in *Multani*, the judgment of the Supreme Court on a question of religious freedom that immediately preceded *Wilson Colony* and *A.C.*, confirms the pattern of avoidance of religious questions in constitutional adjudication. As mentioned in Chapter 2, *Multani* is notable for the fact that it arose out of a conflict between rules of general application and a specific act of religious worship. In contrast to *A.C.* and *Wilson Colony*, in which the religious convictions of the claimants proscribed otherwise benign conduct that was court-ordered or mandatory under law, in *Multani*, an otherwise benign rule of general application proscribed an act of devotional worship that flowed directly from the religious convictions of the claimants. If anything, religious faith was even more central to the latter case than the former ones, since the act at the centre of the dispute was an intrinsically religious expression of faith, and the general rule would have prohibited it altogether. Moreover, from a pure results standpoint, *Multani* could be perceived as a “win” for religious diversity, as the court sided with the litigants invoking their

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<sup>253</sup> *A.C.*, *supra* note 147 at paras. 232-237. Binnie J. did not engage in a formal analysis of proportionality in the narrow sense, as contemplated by the Oakes test, limiting his findings in that regard to the following at para 237: “Nor has the respondent shown that the irrebuttable presumption in the *CFSA* produces ‘proportionality between the deleterious and the salutary effects’. Indeed based on what I have already said, I believe A.C. has demonstrated that the deleterious effects are dominant” [references omitted]. Binnie J. had previously found that the limitation on the liberty interests of mature minors in the legislation was neither rationally connected to the legislative objective, nor minimally impairing of their right to personal autonomy. His perfunctory analysis of narrow proportionality was thus offered in obiter.

freedom of religion. Be that as it may, the various opinions issued by the court's judges suggests that they were no less eager to ensure that questions of religious faith were marginalized and moved to the periphery of their decision-making framework.

In *Multani*, the appellant Gurbaj Singh challenged the legality and constitutionality of an order of the school board that prohibited him from wearing his kirpan to school, under any conditions. The majority opinion of the court, authored by Justice Charron, is certainly the set of reasons that addresses the religious dimension of the case most directly, and reflects the most serious attempt by any of the justices to engage with and appreciate the religious significance that the kirpan holds for Gurbaj Singh.<sup>254</sup> However, Charron J.'s efforts in this regard merely serve to get the claimant through the door, so to speak; she relies on them in order to establish a prima facie infringement of his right to religious freedom, sufficient to trigger an analysis of the proportionality of the limit pursuant to s. 1 of the *Charter*. Thereafter in the reasons – when the “heavy conceptual lifting and balancing” is called for and the “crux of the matter” falls to be decided, as LeBel J. and Abella J. described it in *Wilson Colony*<sup>255</sup> – the religious character of the conduct at issue is relegated to the back seat.

First, at the minimal impairment stage of the Oakes test, the majority turns its attention squarely to the credibility of the school board's arguments in support of an *absolute* prohibition as opposed to the *conditional* permission contemplated by the judge who heard the case in first instance.<sup>256</sup> By focusing on the board's (rejected) contention that the school environment would be compromised by anything less than a total ban, the court is essentially able to dispose of the

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<sup>254</sup> *Multani*, *supra* note 145 at paras. 32-41.

<sup>255</sup> See Chapter 2 above at Section II(b) referencing *Wilson Colony*, *supra* note 81 at paras. 149 (Abella J.) and 190 (LeBel J.).

<sup>256</sup> See *Multani*, *supra* note 145 at paras. 50-77, and especially 54: “The issue is whether the respondents have succeeded in demonstrating that an absolute prohibition is justified.” See also Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87 at 103.

claim without needing to turn its mind to the subjective impact a prohibition would have on the life of Gurbaj Singh. This is because the ready distinction the court attends to, between an absolute prohibition and the conditional permission advocated for by the initial judge, stands in lieu of actual, felt differences in the gravity of the impairment; as discussed in Chapter 2, Charron J. can thus implicitly construct an *ordinal* scale of possible interferences, like Alexy's, that is sufficient to resolve the case at the minimal impairment step of the analysis. At this stage, Charron J.'s reasons reflect neither the judicial desire, nor indeed the need, to understand the internal significance of the interference with Gurbaj Singh's religious freedom.

In fact, as several commentators have noted, the ability to resolve constitutional rights disputes on the basis of minimal impairment can simplify the adjudicative task and provide an important safety valve for constitutional judges in cases involving religion.<sup>257</sup> As at the balancing stage, the relegation of religion to the periphery of the analysis lends sought-after objectivity and generalizability to the decision-making process. However, in contrast to the balancing stage, that relegation is largely inconsequential when it comes to the ability to assess degrees of impairment. Thoroughly anchored in the concrete comparisons between the perceived severity of possible interferences, the need for cross-cultural weighing and balancing that are attendant to the third stage of Oakes is completely obviated. One side of the proportionality equation is held constant while possible changes to the other variable are considered. As discussed in Chapter 2, the severity of the interference is accordingly only compared against interferences of like kind, and not given an absolute value. An understanding of the religious significance of a practice *for*

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<sup>257</sup> Berger, "Section 1", *supra* note 204 at 37-39. See also generally Sara Weinrib, "An Exemption for Sincere Believers: The Challenge of *Alberta v. Hutterian Brethren of Wilson Colony*" (2011) 56 McGill L.J. 719 [Weinrib, "Exemption"]; Weinrib, "Emergence", *supra* note 204; and Marshall Haughey, "The Camera and the Colony: A Comment on *Alberta v. Hutterian Brethren of Wilson Colony*" (2011) 74 Sask. L. Rev. 59.

*the believer* is no longer a necessary precondition to a resolution of the dispute that would take religious difference seriously.

In obiter, Charron J. goes on to balance the salutary and deleterious effects of the rights impairment at the narrow proportionality stage. At this juncture, when all signs seem to point to the need to consider the gravity of the interference with Gurbaj Singh's religious conscience, what is striking is that Charron J. still avoids dealing with it altogether. As in *Wilson Colony* and *A.C.*, the prospect of engaging in the difficult and precarious exercise of understanding what the religious stakes are for Gurbaj Singh, only to then find themselves exposed to a vast chasm of cultural difference, far from the shared cultural context upon which their adjudicative decisions generally rest, seems to prove overly daunting for the Court's judges. Instead, they retreat to the safety of the worldview embodied by the *Charter*, which provides the commensurability necessary to balance the rights interference against the school board's interest in protecting safety.<sup>258</sup> The majority's inquiry is thus limited to the indirect consequences a ban would have on society at large, measured essentially in *Charter* values:

An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others.

[...]

A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The

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<sup>258</sup> As discussed above, this approach is firmly rooted in the Court's *Charter* jurisprudence. See e.g. *Oakes*, *supra* note 86 at para. 64; and Berger, "Cultural Limits", *supra* note 63 at 257.

deleterious effects of a total prohibition thus outweigh its salutary effects.<sup>259</sup>

Any consideration of the particular position in which Gurbaj Singh finds himself, the significance he personally attaches to wearing the kirpan, and the affront to his religious identity that would come from not being able to wear a kirpan is avoided.

The concurring opinion issued in the case by Justices Abella and Deschamps similarly marginalizes its religious dimension.<sup>260</sup> They elect to approach the whole issue from the perspective of administrative law principles. Under this framework, freedom of religion serves merely as an access point to legal analysis. Much like the minimal impairment analysis of the majority, the sole issue becomes the reasonableness of the school board's decision to insist on an absolute prohibition, despite evidence that a limited prohibition posed little or no safety threat: “[b]y disregarding the right to freedom of religion, *and by invoking the safety of the school community without considering the possibility of a solution that posed little or no risk, the school board made an unreasonable decision*” [emphasis added].<sup>261</sup> Like the reasons of the majority, their approach avoids the need to delve into the significance or meaning of Gurbaj Singh's religious convictions *for him*.

In short, in resolving these types of cases within the proportionality framework dictated by constitutional adjudication, the judges in their reasoning effectively and consistently excise the subjective religious component of the claims. The Court's overriding concern seems to be that there has been a limitation on freedom; in turn, once a limitation is invoked, the seriousness of the limitation is measured against the objective inconvenience of or obstacles associated with maintaining one's freedom to act as one chooses in spite of the limitation. Moreover, in

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<sup>259</sup> *Multani*, *supra* note 145 at paras. 78-79.

<sup>260</sup> LeBel J. also authored a separate judgment. However, his was essentially a doctrinal commentary on the appropriate approach to follow when applying the Oakes test and thus of limited relevance for my purposes.

<sup>261</sup> *Multani*, *supra* note 145 at para. 99.

balancing the salutary and deleterious effects of a limitation, the common barometer of *Charter* values assumes paramount importance and provides commensurability between the variables on either side of proportionality's scales. The ineffability of religion is thus absorbed within the *Charter*'s universal-rational worldview and the religious beliefs themselves recede from judicial view, as do the particulars of the impugned religious practices. It is difficult to say whether the consequences of such a reality are positive or negative. What is certain, however – at least if one is to judge from the positions adopted by the Court in *Wilson Colony, A.C.* and *Multani* – is that the religious fact of the claim, like its subjective significance to the believer, appears to be of little consequence to the result.

## **II. Questions of Public Policy and Religious Discourse: Judicial Business as Usual**

The recent jurisprudence of the Supreme Court of Canada in religious freedom cases, and the reasons relied on therein, thus reveals the palpable discomfort of constitutional adjudicators when dealing with questions of religious faith. The answer for judges, in such cases, is to frame the issues in such a way as to avoid having to engage with the intrinsically religious dimension of the litigation. Given this approach – even when specific claims to religious freedom are made to the Court – it will not be surprising to discover that when religious discourse provides merely the subtext for the legal dispute, the decision-making paradigm characteristic of constitutional adjudication is such that judges resolve the dispute while excluding the relevance of its religious dimensions altogether. The Court's recent case-law revolving around one particularly controversial issue – the state's attitude towards same-sex relationships – is reflective, and indeed representative, of this pattern.

a. ***Chamberlain v. Surrey School District No. 36***

*Chamberlain*, once again, is a particularly fertile place to begin my analysis. As described previously, the underlying controversy in *Chamberlain* centred upon the appropriateness of materials depicting same-sex parents for use in the kindergarten public school curriculum. Some members of the Surrey School Board who disapproved of same-sex relationships on religious grounds considered such materials inappropriate; other members of the Board who harboured different religious views or none at all took the opposite position. The subtext of the controversy was thus a religious one. Members of the community with certain religious views were attempting to bring them to bear on an issue of public concern: the content of the public school curriculum and, specifically, the implicit attitude that curriculum should adopt towards same-sex relationships. The underlying dispute in *Chamberlain* is paradigmatic of the type of public policy debate, turned legal case, in which religious discourse claims relevance. The case thus serves as an illustration of how courts reason through legal disputes with implicit religious underpinnings and provides an indication of the limited space they reserve to religious discourse in so doing, if any.

Interestingly for my purposes, however, *Chamberlain* is not *just* that; it also involves a healthy dose of adjudicative navel-gazing. Indeed, the legal problem with which the court is seized specifically concerns the role that religious discourse should play in public decision-making processes. The consideration of that question – whether or not the religious views of certain of its members and of the community at large were relevant to the Board’s decision – forces the judges to consciously address and elaborate standards of reasoning that apply to the Board as a public decision-making body. As stated in the Introduction, the majority and minority decisions in many ways reflect the institutional gap between the public use of reason in legal, as opposed to political, institutions.

Moreover, by emphasizing the Board’s statutorily-mandated duty to operate on “strictly secular and non-sectarian principles,”<sup>262</sup> thus precluding the possibility that it “act as the proxy of a particular religious view held by some members of the community,”<sup>263</sup> the judges of the majority effectively liken the decisional constraints under which the Board is operating to those to which they themselves are subject. Having concluded that the Board is foreclosed from relying on substantively religious arguments in its decision-making exercise, the majority implicitly portrays it, much like the courts themselves, as a model of John Rawls’s public reason. We can therefore gain substantial insight into the Court’s own conception of itself, particularly as regards the legitimacy of its decisions, from the majority opinion. Thus *Chamberlain* deserves our attention both for what the Court *says* about the role of religious reasons in public decision-making and for what the Court *does* in order to arrive at its own conclusion on that issue.

On both counts, the reasons of the majority in *Chamberlain* suggest that religious perspectives will be excluded from consideration by judicial decision-makers, at least to the extent that they may clash with the dominant discourses embodied in the *Charter* and the rule of law – which, as I showed in Part I of this chapter, ultimately serve as the standard against which constitutional claims are measured. In terms of what the Court says, Chief Justice McLachlin, writing for the majority, first acknowledges the representative character of the Board,<sup>264</sup> and the integral role that religion plays in many people’s lives.<sup>265</sup> She then continues by stating that the Board “must conduct its deliberations on all matters...in a manner that respects the views of all members of the school community.”<sup>266</sup> Although such a description may, at first blush, sound like an endorsement of a procedural conception of public reason discussed in Chapter 1,

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<sup>262</sup> *Chamberlain*, *supra* note 3 at para. 18.

<sup>263</sup> *Ibid.* at para. 27.

<sup>264</sup> *Ibid.* at paras. 19, 26-28.

<sup>265</sup> *Ibid.* at para. 19.

<sup>266</sup> *Ibid.* at para. 25.

requiring a commitment from the decision-making institution to seek to understand religious perspectives and address them on their own terms, the reality is otherwise. Upon closer inspection, it appears that the court has graduated from the Habermasian school of legitimate law-making: as the majority goes on to explain, proceeding in the manner contemplated importantly entails that “the Board cannot prefer the religious views of some people in the district to the views of other segments of the community.”<sup>267</sup> The Board may hear out constituents and citizens arguing from religious perspectives. But consistent with its statutory duty, secular mandate, and subjection to judicial oversight, it may not rely on controversial religious views to substantiate its decision. In the parlance of Rawls, reasons that all can accept are required. Religious reasons that exclude from consideration the values of other members of the community are themselves to be excluded from the legal or quasi-legal decision-making process, since they are incompatible with a “secular” and thus legitimate decision that purports to be binding upon all citizens.

When addressing matters of public policy, avoidance of religious perspectives – not engagement with or adjudication in light of – is the decision-making paradigm that the court explicitly endorses. To the extent that such a standard of reasoning is relevant to the Board, in spite of the acknowledged responsibility it has towards the local community, it is a standard that is all the more applicable in the rarefied air of constitutional adjudication. My review of the case-law from Part I of this chapter certainly bears this out.

As the court says, so the court does. Having ascribed to the Board decision-making constraints reminiscent to those of a court, the majority then proceeds to assess the Board’s adherence to that standard of decision-making within the Court’s very own broadly similar institutional constraints. The judges of the Court cannot help but be deeply conscious that what is

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<sup>267</sup> *Ibid.* at para. 25.

fundamentally at stake in the litigation is the recognition by the state, as represented by the public school board, of homosexual relationships in the face of public outcry from religious segments of the community. For instance, after enumerating the formal reasons advanced by the Board for declining the resolution to approve the contentious books, the majority specifically states:

Behind all these consideration hovered the moral and religious concerns of some parents and the Board with the morality of homosexual relationships.<sup>268</sup>

And yet it avoids addressing this issue head on. The majority's approach ensures that the case's very present but implicit religious dimension remains just that – implicit. Rather than approaching the matter from a constitutional perspective, Chief Justice McLachlin frames the litigation as a question of administrative law, essentially fleeing from the challenges posed by proportionality review in matters of religious faith, just as the Court did, one way or another, in *Wilson Colony, A.C.* and *Multani*.<sup>269</sup>

Granted, a *Charter* analysis, replete with an inquiry into the proportional character of the Board's decision, would not necessarily entail a consideration of the consequences of an order upon people's religious faith and identity. Far from it, as my review of the accommodation cases in Part I showed. At the very least, however, such an approach carries with it a minimum level of transparency: the court engages in the balancing exercise for the specific and acknowledged purpose of striking an equilibrium between competing interests and values, one of which is the constitutional protection of diverse religious beliefs and practices. In contrast, the majority in *Chamberlain* rests its holding on whether or not the Board's decision complied with the legislative mandate and constraints imposed upon it by provincial law:

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<sup>268</sup> *Ibid.* at para. 55.

<sup>269</sup> *Ibid.* at para. 2.

[T]he Board was required to exercise its power...in a manner that accorded with: (1) the secular mandate of the Act; (2) the regulation which the Board had put in place pursuant to Ministerial Order; and (3) the factors required to be considered by the Act, including the desired learning outcome for K-1 students found in the curriculum. ...[I]ts decision here must be set aside as unreasonable because the process through which it was made took the Board outside its mandate under the *School Act*.<sup>270</sup>

As a result, the question of whether or not the Board gave undue weight to the religious views of some of its constituents – a question seemingly begging for resolution under the proportionality paradigm – is subsumed within a question of statutory interpretation and decision-making process. The Court seems miles away from the advice of Alexy and Beatty.

And for good reason. As in *A.C.*, the perspective of the religious believers on the Board represents a fundamental ontological challenge to the worldview of the law that is embodied in *Charter* values, which, as discussed in Part I of this chapter, serves as the very standard against which constitutional claims are to be measured. Despite good faith attempts by judges to understand and appreciate the internal meaning of religious difference, the terms of debate themselves are never up for discussion.<sup>271</sup> Law effectively lacks the resources to adjudicate such a claim. Faithful to its substantive conception of public reason, constitutional adjudication rather undermines any potential challenge by excluding from the discussion arguments that find their source in competing worldviews that are not sanctioned by the prevailing discourses of constitutional law. The Court's statements regarding the appropriate decision-making process of the Board merit one last look in this regard. "[T]he Board must conduct its deliberations on all matters, including the approval of supplementary resources, in a manner that respects the views of all members of the school community,"<sup>272</sup> says the Court in one breath. In the next, however,

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<sup>270</sup> *Ibid.* at para. 57.

<sup>271</sup> For a similar point, see generally Berger, "Cultural Limits", *supra* note 63, especially at 258-259, 273.

<sup>272</sup> *Chamberlain*, *supra* note 3 at para. 25.

that respect reaches its limit in the face of views that stand to undermine the underlying commitments of our legal system; the Board cannot “appeal to views that deny the equal validity of the lawful lifestyles of some in the school community.”<sup>273</sup> Through the process of constitutional adjudication, the intrinsically religious objections of the community are legalized into irrelevance.

As a result, the judgment of the Court in *Chamberlain* seems to produce a significant cleavage between the discourse operating in the legal sphere and the discourse operating in the public political sphere on the issue of sexual orientation equality. While the judges in *Chamberlain* may have skirted the underlying question of state recognition of same-sex relationships, that does not make their decision any less determinative of the underlying issue, nor does it decrease the sound of their voice in the public arena. Despite the decentralized structure contemplated by the public schools legislation, which delegated decision-making authority concerning the inclusion of supplementary instructional materials to the local level, the Board, as an arm of the state, was essentially left with no choice but to add the books depicting same-sex parents to its list of approved materials. The Court’s role as an important author of coercive law and a leader of public policy in matters of controversy is affirmed.<sup>274</sup>

**b. *Trinity Western University v. British Columbia College of Teachers***

*Trinity Western University v. British Columbia College of Teachers*,<sup>275</sup> decided by the Supreme Court of Canada in 2001, shares many parallels with *Chamberlain*. Like *Chamberlain*, it revolved around the legality of a decision by a statutory school authority, in this case the

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<sup>273</sup> *Ibid.* at para. 25.

<sup>274</sup> In this regard, considerable legal scholarship has focused on the decision. For an example of the tenor of that discussion, which centred mainly on the implications of the decision for the ongoing debate on the competing values of sexual orientation equality and freedom of religion, see Richard Moon, “Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on *Trinity Western University v. B.C. College of Teachers* and *Chamberlain v. Surrey School Board District 36*” (2003) 8 *Rev. Const. Stud.* 228.

<sup>275</sup> *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 [TWU].

British Columbia College of Teachers (BCCT). Like *Chamberlain*, the decision was contentious for its implications for the public school system. And like *Chamberlain*, fundamentally at issue were public attitudes towards gays and lesbians, homosexuality, and same-sex relationships generally. Public reason and religious discourse are again knocking at the door of the judiciary on an issue of public policy with important political dimensions.

The underlying controversy in this case centred specifically on a community standards document that students enrolled at Trinity Western University (TWU), a private Christian educational institution, were required to sign. The document contained a paragraph whereby students undertook to refrain from certain “biblically condemned”<sup>276</sup> practices. These practices included various so-called sexual sins such as premarital sex, adultery, viewing pornography and, notably, “homosexual behaviour.”<sup>277</sup> On the basis of this requirement, and citing the institution’s resulting discriminatory practices in terms of sexual orientation, the BCCT withheld approval of TWU’s teacher training program; without BCCT approval, graduates of the program were denied eligibility to teach in the public school system. TWU sought to have the decision reversed and the case made its way to the Supreme Court.

As in *Chamberlain*, the majority of the Court considered the dispute at its base to be an administrative law case, allowing it once again to skirt the underlying political issue at the heart of the dispute.<sup>278</sup> The legal question to be resolved by the Court was whether the BCCT had properly exercised its jurisdiction. In particular, were TWU’s alleged discriminatory practices a relevant consideration for the BCCT to rely on when deciding whether to accredit the university’s teaching program? And was the BCCT justified in declining to accredit the program,

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<sup>276</sup> *Ibid.* at para. 4.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.* at para. 8.

having regard to the evidence?<sup>279</sup> As in *Chamberlain*, the outcome turned on the whether the relevant decision-making authority, in this case the BCCT, exercised its public reason in a manner that was consistent with its statutory duties, and – having determined that a standard of correctness applied to the BCCT’s decision – with the eventual opinion of that supposed exemplar of public reason, the Supreme Court. In contrast to *Chamberlain*, however, there was no assertion that the BCCT had relied on religious discourse. To the contrary, what was disputed was the weight and interpretation that the BCCT had given in its decision to *Charter* values and human rights legislation protecting equality, particularly in light of TWU’s special position as a private, Christian educational institution sanctioned by the provincial government, and insulated in large measure from the application of human rights instruments.<sup>280</sup>

Ultimately, the majority of the Court concluded that the BCCT had not properly exercised its discretion, and that approval of TWU’s teaching program should be granted. If one were only interested in results, one might thus chalk up *TWU*, like *Multani*, as a “win” in terms of allowing space for minority religious discourses within the world of judicial decision-making. But that would be missing the point. The conclusion of the court is actually incidental. The administrative law framework adopted in the reasons of the majority, this time co-authored by Justices Iacobucci and Bastarache, both obscures the highly contentious nature of the underlying controversy – state attitudes towards homosexuality and same-sex relationships – and minimizes its distinctly religious underpinnings. No formal *Charter* or proportionality analysis is conducted. While reviewing the correctness of the BCCT’s decision, the majority does ultimately turn to a form of implicit balancing, finding that sexual orientation equality considerations were unduly emphasized at the expense of concerns for freedom of religion. But true to adjudicative

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<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.* at paras. 25, 32.

form, the inquiry by Iacobucci and Bastarache JJ. into the purported interference with religious freedom is superficial and conclusory:

There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice.<sup>281</sup>

Beyond pointing out that TWU's continued insistence on the signature of the community standards document would act as a bar to certification, and that students that chose to enrol in and graduated from the program would be precluded from teaching in the public system, the majority offers little in terms of support for its position. Relying summarily on these placeholders for infringement of religious belief, Iacobucci and Bastarache JJ. fail to explain what makes these burdens on religious faith and practice serious or substantial enough to warrant overturning the BCCT's decision. "These are important considerations,"<sup>282</sup> they are content to conclude without more, before moving on to discuss the decision-making approach that the BCCT should have adopted to reconcile any perceived conflict of rights.<sup>283</sup>

As is characteristic of the Court's approach, completely absent from the analysis is any consideration of the spiritual implications of these perceived burdens on any actual students of TWU. Apart from the considerations canvassed above in the context of *Wilson Colony, A.C.*, *Multani* and *Chamberlain* – the significant ethical demands required by a thick engagement with religious meaning, the decentring effect that such an engagement is likely to have on the process of judgment, the ontological challenge that alternate worldviews represents for constitutional law, all of which are relevant in the instant case – an additional factor particular to the *TWU* case would have made a meaningful inquiry into the religious significance of the decision especially

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<sup>281</sup> *Ibid.* at para. 32.

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*

problematic for adjudicators. Indeed, it is important to note that the primary party to the application seeking to quash the decision of the BCCT was a corporate institution, not a person. In contrast with the factual situations in *A.C.* and *Multani*, and to a lesser extent *Wilson Colony*, TWU *as an institution* bore the immediate brunt of the denial of accreditation.<sup>284</sup> Not only were the students of TWU one step removed from the impact of the BCCT decision, but they also represented a *class* of religious believers – a pool of people whose individuated, subjective narratives of faith would likely have caused them to understand and interpret its religious moment differently, if at all. As stated in Chapter 2, when divorced from a person’s experiential baggage and the unique social and cultural space that each individual occupies, her religious ethos and worldview cease to be meaningful. Accordingly, the religious implications of a given course of action upon a *group* are exceedingly difficult to make sense of. In order to navigate its way out of this difficulty, the Court is left with little alternative but to concentrate on objective, decontextualized factors similar to those that it privileged in *Wilson Colony*.<sup>285</sup>

In the end, though, the ratio of the Court makes any inquiry into the gravity of any interference with religious faith, whether considered in spiritual terms or secular equivalents, superfluous. The majority hangs its hat on a failure by the BCCT to insist on concrete evidence

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<sup>284</sup> It should be noted that one TWU student, Donna Lindquist, was a co-applicant along with the university. However, it seems that she was joined as a personal applicant in order to ensure that freedom of religion arguments could be raised to challenge the BCCT decision despite TWU being a corporate defendant in a civil action. See the BCCA decision at *Trinity Western University v. British Columbia College of Teachers* (1998), 59 B.C.L.R. (3d) 241 at para. 11. As disclosed in the reasons for judgment issued at all judicial levels (see also the decision of the BCSC at *Trinity Western University v. British Columbia College of Teachers* (1997), 41 B.C.L.R. (3d) 158), the record with respect to the personal situation of Ms. Lindquist, beyond her being a 3<sup>rd</sup> year TWU student who intended to enrol in the Teacher Education Program at TWU, appears to have been scanty.

<sup>285</sup> It is interesting to note that the two cases that laid the foundations for Canada’s religious freedom jurisprudence under the *Charter*, *Big M* and *Edwards Books*, also involved corporate defendants. In both cases, the defendants invoked a violation of s. 2(a) to challenge the constitutionality of an offence with which they had been charged. The Court accordingly was forced to develop the basis of the test of whether there has been an unconstitutional violation of s. 2(a) in the context of a factual matrix that lacked any personal religious dimension.

that the discriminatory practices of TWU embodied in its community standards document would reverberate in the public school system:

*For the BCCT to have properly denied accreditation to TWU, it should have based its concerns on specific evidence. It could have asked for reports on student teachers, or opinions of school principals and superintendents. It could have examined discipline files involving TWU graduates and other teachers affiliated with a Christian school of that nature. Any concerns should go to risk, not general perceptions.*<sup>286</sup>

[Emphasis added]

Both the legal framework adopted by the majority in *TWU*, and the judicial reasons offered while working through that framework, are thus reflective of the avoidance of religious matters that is characteristic of constitutional adjudication. Although undeniably present, the underlying controversy surrounding the degree of state recognition – or disapproval – of homosexuality and same-sex relationships, not to mention religious discourse connected to that controversy, is pushed into the periphery. As in *Chamberlain*, the judgment illustrates the dissonance between the constrained use of public reason by the Court and the relatively free exchange of ideas, and hence the presence of religious perspectives, contemplated by advocates of a procedural conception of public reason in the political sphere.

**c. Reference re Same-Sex Marriage**

While the state's position towards same-sex relationships may have remained somewhat implicit in *Chamberlain* and *TWU*, that issue was undeniably at the forefront of the *Marriage Reference*, the last in the trilogy of Supreme Court of Canada cases I will be looking at on this topic. Generally speaking, the underlying political controversy surrounding the recognition of same-sex marriage pitted advocates of equality rights for gays and lesbians against religiously-minded individuals who, more or less in keeping with the religious dogma of most Christian

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<sup>286</sup> *TWU*, *supra* note 275 at para. 38.

denominations, considered marriage between a man and a woman to be a sacrament or at the very least a holy union ordained by God. The religious dimension of the debate was overwhelming and unequivocal. Religious views regarding the sanctity of an opposite-sex definition of marriage lay at the heart of the contentious debate concerning the extension of the right to marry to same-sex couples which, by the early 2000s, and in the face of lower-court rulings pronouncing on the constitutionality of the definition of civil marriage, had become a political hot potato.<sup>287</sup> As discussed in Chapter 1, motivated by the intense political controversy in turn primarily fuelled by religious objections, in 2003 the Liberal government referred a draft bill redefining marriage to include same-sex unions to the Supreme Court of Canada for review as to its constitutionality.

The centrality of religious discourse to the underlying political debate on same-sex marriage, coupled with the absence of an idiosyncratic factual situation which would enable the Court to frame the issues in a way that might facilitate the process of constitutional avoidance, meant that such a process would be at once more blunt and more transparent. The relative brevity of the Court's substantive reasons reviewing the consistency of the proposed same-sex definition of marriage with the *Charter* – a mere 15 paragraphs, or 4 typed double-spaced pages – bears witness to this fact.<sup>288</sup> Indeed, as a review of those reasons indicates, the process of constitutional adjudication of the same-sex marriage question did nothing less than completely remove the religious discourse from the policy debate as it played out in the courtroom, despite the central role that that discourse had played in the public political sphere.

The profound significance that the institution of marriage carries for many people in Canadian society cannot be denied. Nor can it be denied that the extension of marriage to

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<sup>287</sup> Petter, *supra* note 78 at 34-36.

<sup>288</sup> *Marriage Reference*, *supra* note 103 at paras. 40-54.

include same-sex couples constitutes, for many Canadians but especially for religious believers, a profound change in the meaning of that institution. As Jennifer Nedelsky and Roger Hutchison describe it:

[I]f we take seriously the argument that marriage is such a central social, legal, and religious institution that exclusion from it is incompatible with equality and dignity, then it follows that inclusion is a crucial – and fundamental – change in the institution.<sup>289</sup>

Exactly what that significance would be, to build on my analysis in Chapter 2, would depend on the lived experience of each individual believer, and the way in which each person constructs his or her religious identity. However, it is safe to assume that “some people will experience that change as a significant loss.”<sup>290</sup> Justice Prowse of the British Columbia Court of Appeal, faced with a challenge to the constitutionality of the opposite-sex definition of marriage prior to the *Marriage Reference*, adverted to the significance such a redefinition might have for some Canadians:

[T]he relief requested, if granted, would constitute a profound change to the meaning of marriage, and would be viewed as such by a significant portion of the Canadian public, whether or not it supported the change. It would certainly be viewed as a profound change by those who hold religious beliefs which are incompatible with an acceptance of same-sex marriages.

[...]

Whatever one's point of view, the fact that previous legislative changes and changes to the common law have expanded the rights of same-sex couples does not make the further expansion of those rights any less significant to those who, by reason of religious beliefs, or otherwise, view these changes as momentous.<sup>291</sup>

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<sup>289</sup> Nedelsky & Hutchison, *supra* note 63 at 57.

<sup>290</sup> *Ibid.*

<sup>291</sup> *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 at paras. 78-79. It is interesting to note that Justice Prowse addressed the particular moment of a redefinition of marriage upon religious believers not in the context of her *Charter* analysis per se, for instance at the narrow proportionality stage, but as a way of justifying the importance of proceeding with a formal *Charter* analysis at all. One

An issue such as this one has far-reaching social and political implications. Under the circumstances, regardless of what one thinks of the views of those people whose religious beliefs are incompatible with same-sex marriage, the procedural conception of public reason canvassed in Chapter 1 would suggest that those views are at the very least entitled to respect and an effort at engagement on their own terms. As I have observed thus far in this chapter, however, the decision-making paradigm characteristic of constitutional adjudication and its attendant posture towards questions of religion implicitly but firmly shuts the door on such a possibility. The legal arguments invoked in the *Marriage Reference* to impugn the legislative redefinition of marriage on the basis of the *Charter*, and the Court's treatment of those arguments, make plain the instinctive ease with which constitutional adjudication tacitly constricts the space available for plural discourses in its decision-making processes.

Quite simply, the concerns of religious believers centred on the *religious meaning* of marriage and the *religious significance* of that meaning in their lives are unintelligible from a legal perspective. This is reflected as much in the way the legal arguments are framed by the litigants, as in the disposition of the Court towards them. Just as judicial decision-makers have difficulty grappling with what is truly at stake in matters of religion, so the interveners opposed to same-sex marriage on a religious basis have difficulty formulating legal arguments that capture what is truly at stake for them while not falling afoul of the governing commitments of Canadian constitutional law that set the terms of the debate. Rather than focusing on questions of religious meaning, significance and identity, those arguments are instead expressed in terms that resonate in the substantive conception of public reason relied on by Canadian judges: "equality,"

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might paraphrase her as saying that, given its religious significance, the matter merits a full, formal, legal analysis with all the attendant trimmings. Ironically, as discussed in this chapter, a full, formal legal analysis with all the attendant trimmings seems to have the effect of *excluding* the religious significance of a policy decision from public consideration.

“discrimination” and “freedom of religion.” In constitutional legal terms, religious opposition to the legislative recognition of same-sex marriage is thus reformulated, first, as an argument further to s. 15(1) of the *Charter* alleging discrimination against “(1) religious groups who do not recognize the right of same-sex couples to marry (religiously) and/or (2) opposite-sex married couples.”<sup>292</sup> As discussed in Chapter 1, however, given their distinct epistemological and ontological bases, not all arguments can be successfully conveyed within a version of reason considered public. Cast in such language, the vocal and in many cases considered – if contentious – political opposition to same-sex marriage emanating from religious quarters never even makes it off the ground. As the court states:

No submissions have been made as to how the *Proposed Act*, in its effect, might be seen to draw a distinction for the purposes of s. 15, nor can the Court surmise how it might be seen to do so. It withholds no benefits, nor does it impose burdens on a differential basis. It therefore fails to meet the threshold requirement of the s. 15(1) analysis laid down in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.<sup>293</sup>

[Emphasis in original]

The story is the same when it comes to the second constitutional argument formulated in opposition to the legislative recognition of same-sex marriage, this time invoking s. 2(a) of the *Charter*. Under this iteration, the purported unconstitutionality of the legislation stems from an alleged violation of freedom of religion, insofar as the recognition of same-sex marriage “will have the effect of imposing a dominant social ethos and will thus limit the freedom to hold religious beliefs to the contrary”<sup>294</sup> and “will create a ‘collision of rights’.”<sup>295</sup> Again, the difficulties inherent in conveying religious moment within the judicial decision-making paradigm are manifest. The process of translating arguments issuing from conceptions of

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<sup>292</sup> *Marriage Reference*, *supra* note 103 at para. 45.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.* at para. 47.

<sup>295</sup> *Ibid.*

religious meaning and identity into a legal vocabulary that is cognizable by the court strips those arguments both of their authenticity and their force. As one might expect, they accordingly find absolutely no traction with the Court. Referring to the alleged imposition of a dominant social ethos, the Court has only this to say:

The first allegation of infringement says in essence that equality of access to a civil institution like marriage may not only conflict with the views of those who are in disagreement, but may also violate their legal rights. This amounts to saying that the mere conferral of rights upon one group can constitute a violation of the rights of another. This argument was discussed above in relation to s. 15(1) and was rejected.<sup>296</sup>

As far as the purported collision of rights is concerned, the Court dismisses the claim in similarly laconic fashion. In an ironic testament to the idiosyncrasies that result from a juridified practice of politics, the Court determined that it would be premature to consider whether an impermissible conflict of rights might occur if the same-sex definition of marriage were enacted into law.<sup>297</sup> The factual vacuum within which it was forced to consider the constitutional questions, given the *prospective* nature of the debate typically characteristic of the legislative branch, meant that the Court was not in a position to engage in the balancing exercise that would be required by proportionality analysis in a conflict of rights situation. As a result of this factual deficiency, the court concluded that, on the evidence before it, the legislation was, one might say, not unconstitutional.<sup>298</sup> In the context of the *Marriage Reference*, the constraints of the judicial decision-making framework – both substantive and procedural – thus had a decisive effect on the outcome. The substantive arguments against same-sex marriage having their roots in religious discourse were marginalized or otherwise rendered unintelligible and, in at least one instance, the corresponding legal argument was deemed not ripe for adjudication.

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<sup>296</sup> *Ibid.* at para. 48.

<sup>297</sup> *Ibid.* at para. 51.

<sup>298</sup> *Ibid.* at para. 54.

It remains, however, and much moreso even than in *Chamberlain* or *TWU*, that the Court's judgment was decisive of the political controversy at the heart of the matter – the state recognition of same-sex relationships. As Alexander Bickel has noted, a finding that legislation is “not unconstitutional” can nonetheless consist of a significant incursion by the judicial into the political branch of government.<sup>299</sup> This is especially true when the legislation in question is referred to the constitutional court for review precisely to defuse an issue being hotly debated in the political sphere.<sup>300</sup> And so it was in this case. On the strength of the decision of the Supreme Court in the *Marriage Reference*, the draft bill was enacted into law and civil marriage was thus redefined to extend the capacity to marry to persons of the same sex. Through the process of constitutional adjudication, the voice of the Court – speaking in a language far removed from the discourse that was heard in the political branches – pronounces a policy outcome that is controlling of the debate in the public sphere. The debate having been resolved through the legal system, the religious objections to the result arrived at by the Court are implicitly de-legitimized and rendered irrelevant.

### III. The Constitutional Avoidance of Religion

As the above review of the case-law shows, the special character of religion explored in detail in Chapter 2 is more than a mere academic curiosity when it comes to judicial decision-making. The reasons of the Supreme Court of Canada in cases having a religious dimension bear the distinct imprint of the conceptual challenges posed by religion to constitutional adjudication generally, and proportionality analysis in particular. On their surface, those reasons as a whole suggest an awareness of the exceptional character of religious belief in a diverse society; often, they explicitly acknowledge the degree to which religion is bound up with the cultural

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<sup>299</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2<sup>nd</sup> ed. (New Haven: Yale University Press, 1986) [originally published in 1962] at 129, 158.

<sup>300</sup> See generally Petter, *supra* note 78.

attachments, worldview, narratives and ways of life of individual believers. Notwithstanding this awareness – or perhaps *because* of it – when one takes the time to unpeel their several layers, those reasons disclose an unwillingness by constitutional adjudicators, if not an outright inability, to grapple seriously with the subjective significance of religious perspectives and, a fortiori, to appreciate the normative force of religious commitments.

As a purely descriptive point, the difficulties inherent in judging religion are thus reflected in a practice of avoidance of the intrinsically religious aspect of controversies that end up before the courts. This is so whether or not the religious dimension of the dispute is explicit, as in cases involving specific claims to religious freedom and associated requests for religious accommodation, or implicit, as in cases where the court is called upon to weigh in on a question of public policy that is heavily coloured by religious discourse, such as the position of the state towards same-sex relationships. In the former instance, courts avoid engaging with questions of religious significance and meaning in the way they frame the issues, and in the way the legal decision-making paradigm controls relevance and measures infringements of religious freedom. In the latter instance, the exclusion of religious perspectives from the constellation of factors relevant to constitutional adjudication is tacit and virtually automatic. For better or for worse, the religious implications of an issue, and the religious discourse brought to bear on that issue, are generally analyzed by law into irrelevance.

To summarize, as I have shown in Chapters 1, 2 and 3, the courts are increasingly influential actors on the socio-political stage in the public arena, with an often decisive impact on public policy, which, because of the incompatibility of their mode of reasoning with the ineffability of religion, almost systematically avoid encounters with plural religious discourses in their concrete decision-making processes. Constitutional courts appear to be not merely reticent

to embrace a procedural conception of public reason. When it comes to managing questions of religious difference, the constraints of the adjudicative paradigm are such that they seem almost incapable of engaging in the meaningful intercultural appreciation called for by procedural public reason. The next chapter will be devoted to exploring the normative implications of that observation.

## Chapter 4

### The Supreme Court as the Exception to Public Reason

In John Rawls's imagination, the United States Supreme Court, and constitutional courts in general, had a central and influential role to play in shaping public discourse in our age of cultural and religious pluralism. However, the neat picture that Rawls painted about public reason, the reasoning of constitutional courts, the legitimacy of coercive law, and political decision-making processes in a diverse society has essentially been turned upside down. If the widespread criticism levied against the applicability of Rawls's substantive conception of public reason to the political milieu is warranted – as it appears to be – but constitutional adjudication continues to hold fast to that model – as it appears to do – how should we properly understand the role that constitutional courts are called upon to play when it comes to navigating public policy issues that implicate religion and faith? It is this question, which flows directly from the several conclusions arrived at in Chapters 1, 2 and 3, that will be the focus of my attention in this final chapter of my work.

As I showed in Chapter 1, Rawls considered the reasoning of constitutional courts to be a model for an engaged and civic-minded citizenry to follow in a plural society. At their finest, the written reasons of the court constituted a paradigm of discursive excellence in the public sphere upon which to construct a theory of the legitimacy of coercive law. In a word, as Rawls saw it, a supreme court was destined to be the *exemplar* of the public use of reason in a contemporary liberal democracy. Why? Because public reason as invoked by constitutional courts is substantively constrained. Constitutional laws and the values enshrined in them prevent adjudicators from invoking justifications for their decisions that are derived from particular

conceptions of the good life – in particular religious ones – that are not shared by all reasonable citizens. Rawls considered such limitations to be a critical precondition for the legitimate creation and application of coercive law.

In *Political Liberalism*, Rawls accordingly proposed, first, that public discourse in a diverse society should be measured against the regulative ideal represented by a substantive conception of public reason and suggested, second, that the reasoning of constitutional courts should serve as a guiding light for such a model. The position that Rawls advocated had important normative implications for our understanding of the adjudicative function. As Rawls saw it, the way in which a constitutional court reasoned was a *good* thing; in fact, in a religiously diverse society, it was the best – and only – way to resolve the competing claims and grievances of diverse constituents and arrive at legitimate outcomes in controversial matters of public policy. On this view, the judicial forum was a model for other branches of government to emulate in their discourse wherever the legitimacy of law is concerned.

Since then, however, successive academic scholars have chipped away at Rawls's account. As far as the legitimacy of *political* decision-making is concerned, a substantively constrained standard of reasoning is no longer held up as its litmus test. Quite the contrary, as I showed in Chapter 1. Academic commentary, especially issuing from authors concerned with the ability of religious believers to make meaningful contributions to public discourse, has focused on the exclusionary consequences that invariably follow from a substantive conception of public reason. Dominant discourses are privileged at the expense of those that reflect minority worldviews. Participation in public decision-making processes need not and should not, critics have argued forcefully, be predicated on the adoption of a common set of values. In a religiously

plural society, critics of Rawls have pointed out, the public use of reason must itself be pluralized for political decision-making processes to be inclusive, fair and, ultimately, legitimate.

As I described in Chapters 2 and 3, the functional limitations that result from a Rawlsian conception of public reason are particularly apparent when judicial decision-makers encounter issues of religion. The ineffability of religion is such that attempts to weigh and process the religious implications of a legal judgment place considerable strain on constitutional adjudication. Recent case-law of the Supreme Court of Canada is indicative of a dual incompatibility characteristic of judicial decision-making in constitutional cases. First, questions of religious faith are essentially incompatible with the practice of proportionality review that dominates constitutional adjudication. Second, that practice is fundamentally at odds with the procedural conception of public reason that political scientists and philosophers now mostly favour as an explanation of the legitimacy of coercive law in the legislative branch.

In light of this reality, what should we make of Rawls's portrayal of the court as the exemplar of a conception of public reason whose relevance to the political branches of government has since been substantially undermined? What normative implications does the gap between judicial practice and legitimate political decision-making have for our understanding of the relationship between constitutional adjudication and issues of public policy that implicate religious difference? Two alternatives present themselves. Rawls may have been right to link constitutional courts and the legitimacy of public decision-making more broadly, but wrong to settle upon a substantive conception of public reason in order to account for that legitimacy. Rather than being an exemplar of public reason, the inability of the Supreme Court to engage with the religious implications of its judgments may suggest that it is a delinquent institution of sorts in the world of legitimate decision-making. Conversely, Rawls may have been wrong to

link the legitimacy of the decision-making processes of courts with those of the political branches. Constitutional courts may be justified in functioning as they do, despite the criticisms from political philosophers that have triggered a shift towards a procedural conception of public reason properly used in political discussion.

As I will show in Parts I and II of this chapter, my contention is that there are good reasons for constitutional courts to behave as they do, but that Rawls was wrong to endorse a theory of legitimate law that failed to distinguish between the particularities of the judicial and political branches. As I will discuss in Part III, we therefore need to rethink our understanding of the relationship between constitutional adjudication and public policy decisions in matters having a religious dimension. In sum, instead of occupying a central and foundational place in our politico-legal imaginations, as Rawls would have it, we would be better served taking the Supreme Court for what it is: an artificially constrained forum for decision-making that necessarily rejects plural discourses in favour of the unitary terms of law. Without such a common set of reasons upon which to draw, the ability of adjudicators to claim to resolve disputes correctly – to make “right” decisions – would be undermined. The substantive conception of public reason relied on by judges accordingly allows them to fulfil an important role in modern liberal democracies, and fulfil it well. However, constitutional adjudication must accordingly be understood as an exception to the general model of public reasoning. The inclusive and negotiated discourse privileged by a procedural conception of public reason is exchanged by constitutional adjudication for a set of reasons that reflect an ostensibly universal, but in reality privileged, ontology. That awareness suggests in turn that precisely the constrained features of legal decision-making that Rawls applauded foreclose the possibility for intercultural

dialogue and thus make it an imperfect tool for deciding questions of policy having religious import in a plural society.

### **I. Legal Legitimacy and Political Legitimacy: A Failed Marriage?**

In Part III of Chapter 1, I examined the perceived rapprochement currently under way between constitutional adjudication and political decision-making. As a result of the juridification of politics and the politicization of judging, the subject matters with which the decisions of judges and politicians are concerned seem more and more similar. Instruction in our public schools, the certification of educational programs in our universities, the recognition of same-sex relationships generally and marriage in particular – these are all areas of public policy in which the line between the judicial and legislative roles has become increasingly blurred. The line between the formal structures of reasoning characteristic of both fora also seems to have become somewhat fuzzy. On its face, as authors such as Paul Kahn and Alec Stone Sweet have pointed out,<sup>301</sup> proportionality review in constitutional cases, with its emphasis on pragmatic weighing and balancing as opposed to textual exegesis,<sup>302</sup> implies an all-things-considered approach to judicial decision-making that is generally associated with policy determinations made by legislatures. The effects, too, of political and judicial decisions are increasingly comparable. Since the advent of the *Charter* in Canada, for instance, judicial decisions tend to have broad-ranging social, political and cultural impacts. Public policy seems to be shaped as much by the decisions of our Supreme Court justices as by our Prime Ministers. In a passage referring specifically to the European Union that nonetheless has relevance to the Canadian context, Stone Sweet successfully captures the implications of these realities:

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<sup>301</sup> Kahn, *Political Theology*, *supra* note 79 at 13; see also generally Stone Sweet, *supra* note 89.

<sup>302</sup> Beatty, *supra* note 176 at, *inter alia*, 37-49 and 72-74, contrasting the textual interpretive style of reasoning of the United States Supreme Court with the pragmatic approach of the German Federal Constitutional Court. See also generally Alexy, “On Balancing”, *supra* note 181; and Alexy, “Constitutional Rights”, *supra* note 179.

[T]oday judges legislate, parliaments adjudicate, and the boundaries separating law and politics – the legislative and the judicial functions – are little more than academic constructions.<sup>303</sup>

Under the circumstances, the linkages made by Rawls between the modes of reasoning appropriate to judges and politicians, and the bases of legitimacy of judge-made as opposed to legislative law, appear natural. However, it is a serious mistake to confuse an increasing tendency for the interventions and influence of the legislative and judicial branches in matters of public policy to overlap – which is undeniable – with a convergence, or outright identity, between the sources of legitimacy of constitutional adjudication and legislative politics. As the critiques of the legal realists such as Felix S. Cohen writing in the first half of the 20<sup>th</sup> century<sup>304</sup> or of critical legal studies scholars such as Duncan Kennedy and Joel Bakan writing in the second half of the 20<sup>th</sup> century have aptly pointed out,<sup>305</sup> judicial decision-making is undeniably political. But despite the degree to which adjudication and legislative decision-making are interwoven, it remains that, when it comes to institutional function and design, law is not politics, and politics is not law.<sup>306</sup>

First and foremost, while the political branches of government are generally responsible for elaborating norms in the abstract, the judicial branch is fundamentally responsible for applying norms in concrete situations, thereby bridging, as Aharon Barak puts it, “the gap between law and society.”<sup>307</sup> In contrast to legislatures, constitutional courts are tasked essentially with *settling concrete disputes* retrospectively and according to the received norms of the polity. Of course, in the moment of judgment, the court effectively gives content to the norms

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<sup>303</sup> Stone Sweet, *supra* note 89 at 130.

<sup>304</sup> See e.g. Felix S. Cohen, “Transcendental Nonsense and the Functional Approach” (1935) 35 Colum. L. Rev. 809.

<sup>305</sup> See e.g. Duncan Kennedy, *A Critique of Adjudication [fin de siècle]* (Cambridge, Mass.: Harvard University Press, 1997); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

<sup>306</sup> Paul W. Kahn, “Comparative Constitutionalism in a New Key” (2003) 101 Mich. L. Rev. 2677 at 2682.

<sup>307</sup> Barak, *The Judge*, *supra* note 82 at chapter 2.

it applies. But whether one describes this as making new law, or giving new meaning to the existing law, the judicial act remains an interpretive one, required by the necessary move from the legal text to the concrete decision.<sup>308</sup> As such, whatever the impact of a judge's decision might be, the judicial role does not consist in making anew the decisions of the political branches of the polity, but rather consists in disciplining the polity to its own norms – constitutional or otherwise. The particularities associated with that important role, which constitutional courts generally perform well, even in relation to religious questions, was largely ignored by Rawls. Indeed, when he suggested that the mode of reasoning of the Supreme Court in a constitutional democracy was one to be widely emulated, Rawls failed to attend to its fundamental character as a forum for the resolution of concrete disputes amongst actual citizens and state actors.

A further distinguishing characteristic of democratic as opposed to judicial institutions, which Rawls also largely ignored, is the representative, responsible, and participatory nature of the former. As a result, and as the advocates of procedural public reason have demonstrated, when it comes to the legitimacy of *political* decision-making in a diverse society, it is essential that each citizen have the opportunity to contribute to the process of decision through the expression, to the fullest extent possible and *without substantive limitation*, of the reasons why he or she favours a particular political outcome. In contrast, constitutional courts are not representative, participatory, or responsible to the electorate. Yet they enjoy the power to scrutinize and invalidate the actions of the political branches of government.<sup>309</sup> The implications

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<sup>308</sup> Paul Kahn, *Political Theology*, *supra* note 79 at 62-65. For an interesting discussion of what is at stake in the moment of decision, see generally Kahn, *Political Theology*, *supra* note 79 at chapter 2: “The Problem of Sovereignty as the Problem of the Legal Form and of the Decision”.

<sup>309</sup> See e.g. Bakan, *supra* note 305 at 16; and Beatty, *supra* note 176 at 5, 159.

of this reality, dubbed the counter-majoritarian difficulty, has been a central concern of constitutional scholars probably since *Marbury v. Madison*.<sup>310</sup> As Joel Bakan states succinctly:

Constitutional jurisprudence and scholarship are concerned to a large degree with constructing arguments aimed at mediating the apparent contradiction between judicial review and the principles of democracy.<sup>311</sup>

Bases of legitimacy are admittedly complex and plural. That being said, having regard to its institutional role as a forum for dispute resolution, and in order to address the apparent legitimacy deficit arising from the counter-majoritarian difficulty, a judicial decision must at minimum be portrayed not merely as "good" but as "right." The perceived legitimacy of constitutional adjudication – whose reason for existence is premised on its ability to act as a neutral, objective, arbiter of concrete disputes – has always been fundamentally connected to an assertion of "correctness" in a way that the legitimate exercise of authority by the political branches of government is not.

Closely associated with this claim to right as opposed to wrong decisions are the notions that judicial decision-making is subject to constraints and that the correctness – and legitimacy – of outcomes is measured against a justificatory standard implied by the foundational norms of the polity. A combination of factors mostly associated with the rule of law – the text of the constitution, prior judicial decisions, the doctrine of precedent, judicial impartiality and neutrality, rules of civil procedure or otherwise – thus invests in legal judgments the promise of constitutional truth, or falsity. This ambition to constitutional (and not metaphysical) correctness, judged according to the fundamental terms by which society in general and the institutions of

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<sup>310</sup> Kahn, *Political Theology*, *supra* note 79 at 9. The term “counter-majoritarian difficulty” was originally coined by Alexander M. Bickel in *The Least Dangerous Branch*, *supra* note 299. However, the preoccupation itself predates Bickel’s work.

<sup>311</sup> Bakan, *supra* note 305 at 16.

government in particular are to be regulated, lies at the root of adjudication's purchase on legitimacy.

The particular expression given to this criterion of legitimacy has changed and evolved with the ebb and flow of constitutional scholarship. Alexander Bickel suggested that the judicial branch was disciplined by its necessary recourse to reason and principle, as opposed to the considerations of will and expediency that often prevailed in politics.<sup>312</sup> Contrasting adjudication with legislation, Ronald Dworkin argued similarly that the courtroom was a forum where principle, not policy, prevailed. For Dworkin, a constitutional morality that is essentially concerned with rules, not results, could theoretically be distilled from constitutional history, text and precedent and constrain judicial decisions in hard cases.<sup>313</sup> Jürgen Habermas considered the twin requirements of certainty and a claim to correctness – both of which are reflections of judicial constraint – to be the fundamental pillars of any theory of legitimate adjudication.<sup>314</sup> For Habermas, a deontological understanding of legal norms, modelled after *obligatory* norms of action, erects a necessary firewall between constitutional adjudication and politics that collapses when judicial reasons assume the character of policy arguments.<sup>315</sup> More recently, Robert Alexy, that great proponent of proportionality review and an intellectual adversary of Habermas's, has similarly emphasized the primordial role that a claim to correctness plays in the judicial forum.<sup>316</sup> Answering a charge (from Habermas, incidentally) that proportionality analysis takes constitutional adjudication out of the realm of concepts like “right and wrong”<sup>317</sup> and into a

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<sup>312</sup> Bickel, *supra* note 299 at inter alia 41, 49-51, 205-206.

<sup>313</sup> See e.g. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at chapter 4; and Ronald Dworkin, “The Forum of Principle” (1981) 56 N.Y.U. L. Rev. 469.

<sup>314</sup> Habermas, *BFAN*, *supra* note 12 at 197.

<sup>315</sup> *Ibid.* at 256-259.

<sup>316</sup> See e.g. Robert Alexy, “Law and Correctness” (1998) 51 *Curr. Legal Probs.* 205.

<sup>317</sup> Robert Alexy, “Constitutional Rights”, *supra* note 179 at 134.

realm defined by concepts like “adequate and inadequate,”<sup>318</sup> Alexy affirmed that the dichotomy of correct and incorrect decisions is central to the legitimacy of adjudication:

If this were true, then, to be sure, the balancing approach would have suffered a fatal blow. Law is necessarily connected with a claim to correctness. If balancing or weighing were incompatible with correctness and justification, it would have no place in law. The development of German constitutional law in the last 50 years would, at its very core, be contaminated by error.<sup>319</sup>

[References omitted]

The important justificatory role that judicial reasons play within the legal process reflects the preoccupation with demonstrating that constitutional adjudication is constrained by objective norms that control the outcome. Alec Stone Sweet has pointed out that judges seek to preserve their legitimacy by, among other things, transforming policy disputes into rules-based discourse and portraying decisions as governed by logic.<sup>320</sup>

To thrive...the court must...convince its audiences that how it exercises its powers is meaningfully constrained by rules internal to normative reasoning (and therefore are not arbitrary powers).<sup>321</sup>

The way in which judicial reasons are framed invariably emphasizes the deontological, and not teleological, character of adjudication. “For these reasons, I would...”, concludes virtually every judgment of the Supreme Court of Canada, reminding litigants, counsel, and the citizenry in general that the result of the case is secondary. The reasons proffered are not ex-post facto justifications for the chosen outcome; to the contrary, those reasons determine the holding, the outcome itself being little more than an afterthought – an unavoidable consequence of the implacable logic of legal analysis.<sup>322</sup>

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<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.* at 135.

<sup>320</sup> Stone Sweet, *supra* note 89 at 141ff.

<sup>321</sup> *Ibid.* at 144.

<sup>322</sup> *Ibid.* at 200.

Whether or not constitutional judgments are *deserving* of legitimacy on the basis of these normative constraints under which judges supposedly operate is another question altogether, and one that has often been answered in the negative.<sup>323</sup> But the notion that judicial decisions must strive to be correct – that at some level and to some extent they should be compelled by legal norms, and not purely the result of the free, unstructured, preferences of the judges who author them – is a crucial and enduring component of adjudicative legitimacy in both the popular and academic imaginations. However, when Rawls portrayed the Supreme Court as the exemplar of public reason in a religiously diverse society, and a model for political actors in the public sphere generally, it is a characteristic that he either overlooked or chose not to emphasize. As I will show in Part II, that omission constitutes a significant piece of the puzzle if we wish to understand the existing disconnect between theories of political and judicial decision-making as they relate to the public use of reason.

## **II. Constitutional Adjudication and Substantive Public Reason: For Better and for Worse**

The distinct institutional features of constitutional adjudication and legislative politics, and the legitimacy considerations related to them, allow us to account for – but not close – the gap that has arisen between the theory and practice of constitutional adjudication and political decision-making under conditions of diversity since Rawls published *Political Liberalism*. The criticisms levied against the applicability of Rawls's conception of public reason to the public political sphere that were canvassed in detail in Chapter 1 are forceful and, in my opinion, persuasive. Without such an inclusive model, the opportunity for meaningful intercultural encounters on issues of public policy is foreclosed. However, it would be facile and unreflective on this basis to immediately indict constitutional adjudication for failing to endorse and rely on

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<sup>323</sup> See e.g. Bakan, *supra* note 395 at chapter 2, and especially at 40-42.

the procedural conception of public reason that has come to dominate theories of legitimate decision-making in the public political sphere more broadly.

The institutional particularities of constitutional adjudication suggest that there are very good reasons for the judiciary to diverge from the rest of the public sphere in its use of public reason. In fact, the inability of judicial decision-makers to engage with religious perspectives, which I examined in detail in Chapter 3, while admittedly a weakness of constitutional adjudication, is also paradoxically the source of its strength as a forum for dispute resolution on a correctness standard in a diverse society. Invested as they are with the vital function of disciplining their polity to its own norms, judges must necessarily rely on a substantive conception of public reason, even if that reliance has as a consequence the exclusion of religious voices from the courts. Without such a conception, constitutional adjudication's claim to correctness and constraint, predicated on its institutional role as an arbiter of disputes according to objective norms, would vanish. Deprived of the ability to make such a claim, whether in relation to religious questions or otherwise, the legitimacy of constitutional adjudication would be seriously compromised.

Given the institutional vocation of constitutional adjudication, some form of decision-making constraint that goes beyond the attitude of respect preached by procedural public reason is necessary to resolve competing claims while maintaining a claim to correctness. The notion of adjudication necessarily implies the existence of an a priori standard against which judges are to measure and assess the competing assertions made by litigants. In "easy" cases, the black letter law is generally sufficient to act as the justificatory standard according to which judges are to resolve disputes. But in "hard" cases, in which constitutional adjudicators must balance and weigh interferences with constitutional principles according to the logic of proportionality, a

*substantive* conception of public reason akin to the model proposed by Rawls becomes a crucial component of the justificatory standard.

Indeed, constitutional adjudication in general and proportionality analysis in particular are at bottom concerned with taking competing claims that are distinct and messy, rendering them commensurable, and measuring them against a common standard, all for the purposes of arriving at “correct” resolutions of disputes according to objective norms. But, as discussed in Chapters 2 and 3, because of the special features of religion that give it its ineffable quality, measuring the religious import of a given decision for an individual believer is an exercise in ontological exploration. Truly understanding what a blood transfusion means to a Jehovah’s Witness, or what the recognition of same-sex marriage means to a devout Catholic, for instance, asks a constitutional court to adopt or at least come to terms with the particular and idiosyncratic worldview of the religious persons concerned. A conundrum results: when matters of religion are in issue, in order truly to appreciate what is at stake, the court must step outside the dominant discourse of constitutional law. But standing in the subjective shoes of the believer – if it is even able to get there – the court can no longer weigh the claim according to objective criteria, and is thus unable to fulfill its intrinsically *adjudicative* function. Because of its plural nature, procedural public reason deprives judges of a useful standard by which to *decide*; but decide they must.

A useful judicial standard by which to compare seemingly incommensurable and irreconcilable claims is achieved by privileging an ostensibly universal and common perspective that in turn has the effect of excluding dissident discourses. As Alexy himself recognizes, it is only by weighing and balancing interferences from a common point of view – that afforded by

the constitution – that proportionality analysis can assume a rational character and continue to assert the claim to correctness required for the legitimacy of adjudication:

The question is not the direct comparability of some entities, but the comparability of *their importance for the constitution*, which of course indirectly leads to their comparability.... It is, naturally, possible to have a dispute about what is valid from this point of view. Indeed, this occurs regularly. It is, however, always a dispute about what is correct *on the basis of the constitution*.<sup>324</sup>

[Emphasis added]

The common point of view of the constitution, as developed and evolved through constitutional law and precedent, encompasses the complete pool of reasons upon which judges may draw in order to resolve disputes and justify their constitutional holdings. Narratives that are incompatible with *Charter* values, as in *Chamberlain* for instance,<sup>325</sup> are rejected.

It follows that while proportionality analysis in constitutional adjudication may rightly be likened to an “all-things-considered” approach to decision-making, it should not be confused with an “any-thing-considered” approach. In stark contrast to what is contemplated by a procedural conception of public reason, the *all-things* to be considered by constitutional judges are in fact *only* those things that are compatible with the worldview represented by constitutional law. As mentioned in the previous chapter, the impact of rights limitations or other government actions are measured and weighed having regard to the values, assumptions and commitments of the rule of law itself.<sup>326</sup> The defiance of A.C.’s religious objections to a blood transfusion becomes a deprivation of medical decision-making autonomy. The imposition of a mandatory photo requirement upon the Hutterites of Wilson Colony, despite their religious objections, becomes a challenge to their liberty interest in driving. As for the redefinition of marriage to

<sup>324</sup> Alexy, “On Balancing”, *supra* note 181 at 442.

<sup>325</sup> *Chamberlain*, *supra* note 3 at para. 25. On this point, see also generally Chapter 3, Part II above.

<sup>326</sup> Berger, “Cultural Limits”, *supra* note 63 at 257.

include same-sex couples over and above the religious objections of a significant number of Canadians, it becomes...nothing at all.

Granted, as Alexy recognizes, the common point of view of the constitution makes for a weak form of constraint on judges, insofar as it does not determine a *specific* outcome.<sup>327</sup> But that is not to minimize the importance that the existence of a finite and predetermined set of reasons has on judicial decision-making. In proportionality analysis, public reason is not necessarily decisive. However, by determining what variables should be placed on the scales – if any – and how those variables should be weighed – if at all – it has a crucial impact on the result. As the Supreme Court’s treatment of the same-sex marriage question demonstrated, the substantive limitations imposed by constitutional law foreclose reliance on certain reasons, and hence certain outcomes. The “polyphony of fully valid voices,” to borrow an eloquent turn of phrase from Jennifer Nedelsky and Roger Hutchison,<sup>328</sup> which together make up the range of discourses in the political sphere, are exchanged for a monophonic perspective on the validity of diverse voices. All positions and arguments are necessarily reduced to a common vocabulary. What would otherwise be a Babel of dissonant discourses, each with its distinct ontological bases, can accordingly be measured and assessed against the same constitutional standard.<sup>329</sup> The critical ability of constitutional adjudication to assert a claim of correctness, through adherence to objective decision-making norms, is preserved.

As a by-product of that reality, and notwithstanding a rhetoric that emphasizes its ability to embrace different conceptions of the good, the paradigm of decision-making represented by constitutional adjudication has a tendency to have a homogenizing impact. Countervailing perspectives such as those held by the Hutterites in *Wilson Colony*, or the members of the Board

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<sup>327</sup> Contrast with strong constraint upon judges: see Bakan, *supra* note 305 at 34ff.

<sup>328</sup> Nedelsky & Hutchison, *supra* note 63 at 42-43.

<sup>329</sup> For a similarly linguistic expression of the point, see Berger, “Cultural Limits”, *supra* note 63 at 274-275.

in *Chamberlain* that had religious objections to same-sex relationships, are marginalized or altogether excluded from consideration by the judicial branch when engaging in questions of public policy. In fact, integral to the effective use of reason in constitutional adjudication is the success with which it suppresses dissident voices, thus ensuring commensurability between competing claims and the potential to arrive at “right” decisions.<sup>330</sup> While the use of reason by constitutional courts allows them to perform their adjudicative role successfully, as a forum they exhibit significant shortcomings when it comes to resolving general questions of public policy; this is especially so in cases in which divergences of opinion can be traced to religious commitments that are deeply interwoven with a person’s way of life and sense of self. The same-sex marriage controversy in Canada is emblematic of just such a question.

Most obviously, this consequence undermines the ability of constitutional adjudication, an important source of coercive law, to take religious difference seriously. In the face of cultural and religious diversity, a paradox of sorts results. On the one hand, it is reasonable for different people to hold different fundamental beliefs and worldviews – hence the constitutional protection of freedom of religion. On the other, the types of protections provided by that freedom suggest that it is ultimately unreasonable, or intolerable, for citizens not to share the common vocabulary of constitutional law. The majority’s reasons in *Chamberlain*, at once affirming respect for diverse views and rejecting those views that would see materials depicting same-sex couples excluded from the kindergarten curriculum, reflects this conundrum:

The Board must conduct its deliberations on all matters, including the approval of supplementary resources, in a manner that respects the views of all members of the school community. It cannot prefer the religious views of some people in its district to the views of other segments of the community. Nor can it appeal to views that

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<sup>330</sup> The inability for proportionality analysis to grapple with the religious ramifications of its decisions, as discussed in Chapters 2 and 3 above, is a consequence of this reality, and one might even say that it constitutes a very marker of its usefulness as a tool for judicial decision-making.

deny the equal validity of the lawful lifestyles of some in the school community.<sup>331</sup>

Respect for divergent religious views reaches its breaking point insofar as those views are not sanctioned by the pool of reasons made up of constitutional legal principles. Much like Rawls's modular conception of the wide version of public reason, only religious views that "fit" with the substantive conception of public reason embodied in constitutional law can lay valid claim to discursive space within the judicial decision-making process.<sup>332</sup>

Looking back at the constitutional jurisprudence of the Supreme Court in matters of religion canvassed in Chapter 3, one can begin to understand the Court's "avoidance" of the religious implications of its decisions in just such a light. Avoidance, indeed, may actually be an unfair moniker to affix to the Court's approach, implying as it does a conscious choice to keep away or refrain from doing something. Rather, the court simply processed the claims made to it in the only vocabulary that its correctness decision-making paradigm affords. Insofar as questions of religious meaning and significance were incompatible with that paradigm, as they mostly proved to be in *Wilson Colony, A.C.*, *Multani*, *Chamberlain*, *TWU* and the *Marriage Reference*, that incompatibility reveals an important limitation of constitutional adjudication, not a failure of constitutional adjudicators. When the Supreme Court is seized of important public policy issues, whether they involve the degree of accommodation to provide to religious minorities, state attitudes towards same-sex relationships generally or, most strikingly of all, the civil definition of marriage, the rules and principles embodied in the constitution and the rule of law tacitly control what discourses are relevant in the adjudicative context. One way of putting the point might be to say that constitutional legal discourse, and the substantive conception of public reason it represents, ensures that everyone is playing by the same rules, regardless of

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<sup>331</sup> *Chamberlain*, *supra* note 3 at 25.

<sup>332</sup> Rawls, *Political Liberalism*, *supra* note 4 at li-iii; Rawls, "Idea", *supra* note 33 at 783-787.

whether or not those rules end up excluding some people and ways of playing – most notably those influenced by a religious way of life – from the game. The Court cannot help but do otherwise. If the rules of the game themselves were up for grabs, there would be no way for the Court to declare the winner.

This realization in turn affects how we should understand the relevance to constitutional adjudication of the critique of public reason. In the political branch, that critique is sound. It also exposes important limitations associated with the judicial decision-making paradigm under conditions of religious diversity. But rather than suggesting that constitutional adjudication should be rethought into conformity with political decision-making, the gap that has resulted between theories of judicial as opposed to political decision-making suggests that constitutional courts were improperly included by Rawls in the same class of law-making institutions as the other branches of government. That gap should accordingly be understood as a structural one, rather than a temporary anomaly or a failure of coherence in politico-legal theory. As I will explain in Part III, it is not a gap that needs to be closed, but rather one that should be taken into account as we attempt to navigate the policy challenges that loom up before us in a religiously diverse society.

### **III. Exemplar or Exception: The Supreme Court in the Popular Imagination**

Given the reasons for which it has arisen, the gap that exists between the use of reason by constitutional courts and other actors in the public sphere has important implications for the way in which we conceive of the role of a constitutional court in a diverse society. Rawls lauded the use of public reason by the United States Supreme Court as a way of addressing the challenge of religious pluralism precisely *because* he understood its judges to be operating subject to the substantive constraints imposed upon them by constitutional principles. Rawls perceived the

court's particular and idiosyncratic use of reason to be an unqualified good that should serve as a model for public discourse generally. It was on that basis that he termed it the "exemplar" of public reason in a liberal democracy – a veritable paradigm of discursive excellence in the public sphere. However rather than embodying a discursive *ideal* in a plural society, the reason of a constitutional court actually reflects a discursive *necessity* dictated by its institutional vocation as a forum for dispute resolution according to a correctness framework, a necessity that entails significant limitations on the ability of constitutional courts to take diverse religious perspectives seriously. The procedural turn taken by public reason in politics, towards a model that emphasizes the duty upon citizens to adopt an attitude of respect towards each other in the public forum, thus signals a need to reimagine the role that our courts should play in matters of public policy that intersect with questions of religious faith. Given its ever-increasing prevalence in the Canadian political landscape since the advent of the *Charter*, the role we reserve for the judicial voice in public debate about religion, and the weight we attribute to it, is of critical importance for our ability to engage in meaningful intercultural dialogue in the public sphere.

**a. The Classical Imagination: The Exemplar of Public Reason**

Rawls was certainly not the first, nor the last, observer of a constitutional court to describe it as a shining example for public decision-makers everywhere. To the contrary, the vision of the Supreme Court reflected in *Political Liberalism* is a powerful and enduring one. In the popular imagination, constitutional courts in Canada, the United States and elsewhere have long been considered to occupy a position of eminence in matters of public policy, separated as they are from the so-called ordinary politics characteristic of the rest of the public sphere. Alexander Bickel, in his seminal work on the United States Supreme Court, *The Least Dangerous Branch*, suggested that the court's reasons offered a model for how political actors

should make decisions. Among other things, his understanding of the court's role underscores the centrality of its voice amidst the cacophony of public discourse. Presaging Rawls, Bickel referred to the court as "the teacher in a vital national seminar,"<sup>333</sup> "predestined...to be a voice of reason"<sup>334</sup> the *raison d'être* of which was to "to preserve, protect and defend principle."<sup>335</sup>

Paul Kahn, for his part, has similarly and repeatedly emphasized the elevated standing of the United States Supreme Court in the American public consciousness:

Today, the constitutional discourse of the [United States] Supreme Court may be our most important source of political rhetoric. ...Politically, judicial review functions in a different dimension from the adjudication of ordinary disputes. The Court shows us, on a regular basis, the high political rhetoric of the nation. When the Court decides, it speaks in the name of the sovereign people. That rhetoric serves to tell us who we are, and who we are not.<sup>336</sup>

More recently, exploring the enduring legitimacy of the USSC in the face of the counter-majoritarian difficulty,<sup>337</sup> Kahn has used a theological metaphor to capture the influence of the court. As he sees it, the public looks upon the Supreme Court as the mythical and transhistorical

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<sup>333</sup> Bickel, *supra* note 299 at 26, citing Eugene V. Rostow, "The Democratic Character of Judicial Review" (1952) 66 Harv. L. Rev. 193 at 208.

<sup>334</sup> Bickel, *supra* note 299 at 27, citing Henry M. Hart, Jr., "Foreword: The Time Chart of the Justices" (1959) 73 Harv. L. Rev. 84 at 99.

<sup>335</sup> Bickel, *supra* note 299 at 188.

<sup>336</sup> Kahn, *supra* note 77 at 251-252. It should be noted that Kahn specifically confines this understanding to the American context. His belief is that this attribute distinguishes the USSC from its other national counterparts. This may be so for the vast majority of constitutional courts around the globe. However, although the founding national myths in each country differ significantly, the history, symbolism, traditions and mode of operation of the SCC and, especially since the *Charter*, its functions and responsibilities, actually bear striking similarities to those of United States Supreme Court, a reality that differentiates the SCC from most other constitutional courts in the world.

<sup>337</sup> Incidentally, again focusing specifically on the American context, Kahn rejects the notion that the legitimacy of the United States Supreme Court can be adequately explained through a distinction between arguments of principle (the purview of constitutional courts) and arguments of interest and preference (the purview of legislative politics). Insofar as such a position is relevant to my argument in Part I of this chapter, it should be noted that Kahn is focusing here specifically on only one iteration of the argument that the claim to legitimacy of a constitutional is connected to a claim to correctness. Moreover, he does not reject its relevance, merely its *adequacy* in the American context. See Kahn, *Political Theology*, *supra* note 79 at 14.

“voice of the popular sovereign,”<sup>338</sup> a living oracle of public policy declaring “sacred” constitutional truth.<sup>339</sup>

Aharon Barak’s philosophy of judging, which, as discussed in Chapter 1, has had considerable influence on the theory and practice of constitutional adjudication in Canada and throughout the world, also places the constitutional judge at the forefront of public discourse in a democracy. For Barak, judges are uniquely positioned, given the institutional constraints within which they operate, to give expression to the fundamental values and principles that a society holds dear:

The judge must reflect the beliefs of society, even if these are not the judge’s own beliefs. The judge gives expression to the values of the constitution as they are understood by the culture and tradition of the populace in its progress through history. The judge reflects the fundamental tenets of the people and the national credo rather than his personal beliefs. ...[O]nly the judge, who has nothing to hamper his independence, is capable of, and suited for, reflecting the fundamental values of society.<sup>340</sup>

On this view, accordingly, the presence of the judicial voice in debates concerning questions of general public policy enriches the relevant discourse. It does so both through the form of the court’s intervention, which by its nature appeals to the profound and lasting commitments of a society as expressed in its constitution, and through the very act of engaging in a dialogue with the legislative branch, which places issues that would otherwise remain within the confines of the executive and legislative branches on the broader public agenda.<sup>341</sup>

Amongst Canadian scholars, the work of David Beatty vaunting the merits of proportionality analysis in *The Ultimate Rule of Law*, examined in Chapter 2, reflects a similar conception of constitutional courts. Commenting on the responsibilities generally attributed to

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<sup>338</sup> Kahn, *Political Theology*, *supra* note 79 at 13-14.

<sup>339</sup> *Ibid.*

<sup>340</sup> Barak, *The Judge*, *supra* note 82 at 95-96.

<sup>341</sup> *Ibid.* at 236-239.

the judiciary in contemporary liberal democracies, Beatty conveys an understanding of the foundational role that constitutional judges are expected to play in shaping public discourse, an understanding which, incidentally, is widely shared: “[t]hey are expected to provide answers to the most controversial and contested political and moral dilemmas; to tell people who is right and what they can and cannot do.”<sup>342</sup> In fact, as Beatty acknowledges at the outset, his book constitutes an attempt to elaborate a theory of adjudication – proportionality analysis – that rationalizes and buttresses the preeminent (and on his view deserved) position of constitutional courts when it comes to resolving social conflict.<sup>343</sup> As I will discuss next, given the limitations of constitutional adjudication inherent to its function as a forum for dispute resolution on a correctness standard, the traditional prominence of the judicial voice in public debate presents significant difficulties in a religiously diverse society.

**b. Religious Difference and the Classical Imagination**

Continuing to perceive the Supreme Court as the exemplar of public reason is problematic when it comes to managing questions of religious diversity. Granted, the court’s privileged mode of reasoning allows it to be an effective forum for settling disputes arising from the application of constitutional norms to concrete situations, and it fulfils a vital institutional role in that regard. But both owing to the character of constitutional discourse, and through the process of juridification, the limitations inherent in its use of reason for that purpose are projected onto the public sphere more generally. The conception of the court as a model of discursive excellence thus constricts the *political* space available for contributions to public discourse that reflect divergent worldviews, including religious ones. Where matters of religious difference are concerned, constitutional adjudication thus tends not only to be a homogenizing

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<sup>342</sup> Beatty, *supra* note 176 at chapter 2.

<sup>343</sup> *Ibid.* at 1-5, 159-161.

force, as described in Part II of this chapter, but also a hegemonic one whose influence on the public sphere is pervasive and reaches far beyond the courtroom.

The notional importance that the reason of the Supreme Court seems to claim for itself in public debate, and which it in fact tends to occupy in the public consciousness, flows easily and naturally from the character of constitutional discourse, which gives it a radiating effect. Our age of diversity has increasingly made plain the deeply subjective nature of religious faith, reflected notably in the widespread institutionalization of the right to freedom of religion in Western liberal democracies. The conviction of some enlightenment philosophers that the truth of religious beliefs could be derived through the use of human reason is now a thing of the past.<sup>344</sup> In stark contrast, as discussed in Part I of this chapter, it remains of the very nature of constitutional adjudication that it seeks to cloak itself in an aura of objectivity and determinacy. The portrayal of constitutional judgment as the exclusive province of reason and logic tends to conflate legal and metaphysical correctness, which in turn imbues the truth claims it makes with a universal, radiating, and expansive quality. As long ago as 1962, Bickel adverted to the scope of influence that constitutional adjudication, founded as it is on rationality, can exert upon public decision-making more broadly. Jurisprudence invariably seeks to treat like cases alike. It is partly the principled nature of constitutional judgment, a precondition of adjudication, as discussed earlier in this chapter, that makes it such a powerful political force.<sup>345</sup> The discourse of reason inevitably claims universality for itself.<sup>346</sup> As Benjamin Berger has stated:

When religious cultures claim the protection of rights that are a part of modern legal multiculturalism, there is no openness to the

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<sup>344</sup> See e.g. the discussion of the position of John Locke in Wolterstorff, *supra* note 36 at 83-88.

<sup>345</sup> Bickel, *supra* note 299 at 205-206.

<sup>346</sup> Kahn, *Political Theology*, *supra* note 79 at 17; Kahn, *Liberalism*, *supra* note 77 at 123-125.

possibility that the law might not be the ultimate arbiter of the terms and conditions that will settle the dispute.<sup>347</sup>

Despite their necessarily contingent ontological foundations, principles forming part of constitutional law thus tend to take on an uncontested, and even uncontestable, character. Within the world of legal argumentation, such a position is understandable and even necessary. However, in light of the reverence accorded to the judicial voice in the classical imagination, the final vocabulary of constitutional adjudication has a similar influence on public discourse in the broader public sphere. It hence has a tendency to control at the outset what assumptions and perspectives, specific to a certain worldview, must be adopted by citizens in order to engage not only in constitutional litigation, but in large swaths of political discussion more generally.

The nature of constitutional discourse both contributes to and is reinforced by the process of juridification that has marked the relationship between constitutional courts and politics in recent years, discussed in Chapter 1. Of course, as the ultimate arbiter of legal disputes, constitutional courts of their nature attract conversations to themselves for resolution. The scope of legal influence that the Supreme Court of Canada enjoys has only been enhanced and strengthened since the *Charter*, as public interest groups and political constituencies habitually and increasingly engage in strategic constitutional rights litigation to advance policy goals. In turn, rights discourse is mobilized by social movements and political actors in order to influence public decision-making more broadly, which only emphasizes the exemplary character of judicial decision-making. As discussed in Chapter 1, political advocacy tends increasingly to take its cues from constitutional law,<sup>348</sup> with the result that the richness and inclusiveness of

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<sup>347</sup> Berger, “Cultural Limits”, *supra* note 63 at 273.

<sup>348</sup> Petter, *supra* note 78 at 34-36, 41; for a similar point in the European context, see Stone Sweet, *supra* note 89 at 196-197.

public discourse, not to mention the ability of our law-making institutions to develop creative solutions to the challenges posed by religious diversity, is decreased.

Another facet of the same-sex marriage debate that took place in Canada, also highlighted by Andrew Petter, is indicative of the perspectival closure that can result from the exemplar view of constitutional adjudication. Following the decision of the Supreme Court finding the draft law recognizing same-sex marriage to be constitutional, and the subsequent enactment of the law, political rumblings expressing discontent with the judgment of the Court continued to be heard. The Conservative Party of Canada, then in official opposition, suggested that if it formed the government it would consider reopening the same-sex marriage debate. Partly in response to these musings, numerous legal scholars and academics across Canada composed an open letter to Mr. Stephen Harper, then leader of the official opposition, emphasizing that any effort to withhold civil recognition of same-sex marriage would be unconstitutional, and would require that his party invoke s. 33 of the *Charter* (the so-called “notwithstanding clause”).<sup>349</sup> However inappropriate and inexcusable sexual orientation discrimination may be, the position taken in the letter is emblematic of the radiating effect that constitutional adjudication tends to have in the political sphere, with the result of foreclosing possibly promising avenues of political discussion.

In this specific instance, the legal/illegal dichotomy characteristic of judicial decision-making obscured alternative solutions that may have taken the religious significance implied by the redefinition of civil marriage more seriously. For one, the Court’s judgment in the *Marriage Reference* was restricted to whether or not a same-sex definition of marriage was constitutional – not whether an opposite sex-definition of marriage was unconstitutional. In fact, the Court specifically declined to answer the latter question, leaving open such a possibility.<sup>350</sup> Moreover,

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<sup>349</sup> Petter, *supra* note 78 at 44-46.

<sup>350</sup> *Marriage Reference*, *supra* note 103 at paras. 61-72; Petter, *supra* note 78 at 44-45.

the grievances of gays and lesbians could have been addressed in several other ways which may have avoided engendering a sense of loss among religious believers opposed to same-sex marriage. Nedelsky and Hutchison make the point that equality for gays and lesbians might ultimately be better achieved if an opposite-sex definition of civil marriage were complemented by a model of civil partnerships or unions similar to that which exists in the United Kingdom<sup>351</sup> or in the province of Quebec;<sup>352</sup> such civil unions could be available both to same-sex and opposite-sex couples. Another alternative would have been for the state to get out of the marriage business altogether; marriage would be a purely religious institution. Conversely, a clean separation could have been effected between civil and religious marriage; in many countries, the state refuses to delegate the authority to perform legal marriages to religious institutions.<sup>353</sup> In the case of the same-sex marriage controversy, the exemplar view of the Supreme Court effectively excluded any of these alternatives. Possible solutions other than the one upon which it had conferred a declaration of constitutionality were condemned to the political wilderness.

Importantly, the resulting impoverishment of public debate on this issue does not have zero-sum consequences for the way we manage cultural diversity in our society. It would be oversimplistic to say that the result achieved was “good” for gays and lesbians and “bad” for religious believers who objected to same-sex marriage. The structure of the debate – bearing as it did the distinct imprint of the judicial voice – not only had the effect of excluding traditional religious worldviews from public discourse, but also ones that would prefer not to see gays and lesbians implicitly normalized within pre-existing and often conservative social institutions, or the institution of marriage privileged as a superior social relationship:

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<sup>351</sup> *Civil Partnership Act 2004* (U.K.) c. 33.

<sup>352</sup> *Civil Code of Québec*, S.Q. 1991, c. 64, art. 521.1 – 521.19.

<sup>353</sup> Nedelsky & Hutchison, *supra* note 63 at 59-60.

The argument – which has become central...to the Canadian legal and political debates – that inclusion in marriage is the *only way* to respect the dignity of gay and lesbian people slides easily not only into “they are just like us” but also into essentializing language about the biological nature of homosexuality and the privileging of marriage as the preferred form of adult intimate relationship. ...[T]he arguments for same-sex marriage are some of the strongest statements in favour of the traditional nuclear family that have been seen in recent...public discourse.<sup>354</sup>

[Emphasis in original]

The way in which the same-sex marriage debate in Canada originated, evolved, and was ultimately resolved reflects the pervasive, limiting and potentially negative impact that the exemplar view of the Supreme Court – and the type of public reason it relies on and embodies – can have on the tone and structure of broader public discourse.<sup>355</sup> Arguments emanating from divergent worldviews, including religious ones, are delegitimized. This in spite of the fact that they often represent necessary and desirable contributions to public discussion, as discussed in Chapter 1, for their ability to enrich public debate and engage the viewpoints of fellow citizens who might otherwise find themselves alienated from mainstream political discourse. When placed on a pedestal of sorts in the popular imagination, the reason of constitutional courts can assume a proselytizing character. Despite the fundamental protection of religious freedom provided by constitutional law, monist state legalism continuously asserts and reasserts itself as it is invoked by private litigants and political actors.<sup>356</sup> Political space that would otherwise be made available by a procedural conception of public reason in the democratic public sphere is choked off.

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<sup>354</sup> *Ibid.* at 52.

<sup>355</sup> Petter, *supra* note 78 at 33-36, 44-46.

<sup>356</sup> Esau, *supra* note 92 at 118-124.

**c. Reimagining the Supreme Court**

The view that the Supreme Court is the exemplar of public reason tends to have a detrimental impact on the ability of our society to manage public policy issues that intersect with questions of religious diversity. This signals a need to relocate – both imaginatively and institutionally – the Supreme Court towards the periphery of public discourse in matters of religious controversy. This exceptional reimagination of the court’s role within the public sphere has concrete normative implications.

First and foremost, an attitudinal shift is required. All citizens, but especially legal and political actors that are active in shaping public discourse, must become more aware of the contingent character of judicial decisions, and locate those decisions accordingly. As I discussed in Parts I and II of this chapter, judicial reasons are necessarily the product of the constrained normative order under which judges operate and the concrete legal disputes they are asked to resolve. As Jeffrey Stout ably points out, echoing the work of Ludwig Wittgenstein and Richard Rorty, it is understandable that all human beings will have a “final vocabulary”<sup>357</sup> – a point beyond which they will find themselves unable to further justify their deepest convictions: “many of our beliefs are such that we would not know how to justify them in a non-circular and informative way even if we tried, and...life is too short to...supply argument in support of many of them.”<sup>358</sup> In other words, argument eventually runs out. But this is as much for secular humanists as it is for religious believers; as much for judicial reasons as for religious ones.<sup>359</sup> Despite the hegemony asserted by the final vocabulary of constitutional adjudication for the purpose of state-sanctioned dispute resolution, it is crucially important to be cognizant of the artificially constrained character of legal reasoning.

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<sup>357</sup> Stout, *supra* note 31 at 87.

<sup>358</sup> *Ibid.* at 234.

<sup>359</sup> *Ibid.* at 88-89, 234.

Lest we be destined to repeat the mistakes of history, it is appropriate to cite a passage from Chief Justice Edward Coke's classic colloquy with King James I of England, in response to the King's claim to exercise jurisdiction personally:

[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and *causes which concern the life...or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law....*<sup>360</sup>

[Emphasis added]

Moreover, any inference that the law affords a privileged epistemological perspective on questions of public policy – which may have been a position that Coke would have supported – must today be carefully nuanced. The epistemological perspectives of law and constitutional courts, and the ontological foundations upon which they rest, are privileged not necessarily because those perspectives are better; they are privileged because they are backed by the power of the state. “We are not final because we are infallible,” famously said Justice Jackson of the United States Supreme Court, “but we are infallible only because we are final.”<sup>361</sup> In a culturally diverse society such as ours, insofar as questions of religious significance and meaning are concerned, it is sage counsel to be wary of any pretense to metaphysical universality implied by legal reason.

The structure and form of constitutional argument and adjudication, most notably proportionality analysis, also tends to dictate certain outcomes. As I pointed out in Chapter 3, not only do the premises and worldview of the judicial decision-making paradigm shape the

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<sup>360</sup> *Prohibitions del Roy*, 77 Eng. Rep. 1342 (K.B. 1655) at 1343; the same passage is also cited in Robert M. Cover, “Foreword: Nomos and Narrative” (1983-1984) 97 Harv. L. Rev. 4 at 42.

<sup>361</sup> *Brown v. Allen*, 344 U.S. 443 (1953) at 540.

direction of the outcome, they can also limit the range of alternatives available to the judge. For instance, the emphasis on the third stage of the Oakes test that follows from the nature of proportionality analysis promotes all-or-nothing resolutions of disputes, at the expense of innovative alternatives that might straddle the divide – or even explode a false dichotomy – between the competing positions of litigants.<sup>362</sup> In *Wilson Colony*, once at the balancing stage of analysis, both the majority and the minority opinions found themselves hemmed in by a binary approach to the problem: declare the legislation imposing the universal photograph requirement either constitutional or unconstitutional. Similarly, in the *Marriage Reference*, the Court's holding was directly constrained by the questions that were referred to it.

Under the circumstances, we must be careful not to equate a declaration of constitutional adequacy with either a declaration of metaphysical truth or even political desirability. Conversely, political responses to a declaration of unconstitutionality by the Supreme Court need not and should not be dictated by the way in which the issues were framed in law – either by the litigants or by the Court. Both the legislative response of the Canadian government following the judgment of the Court in the *Marriage Reference*, as discussed in Chapter 1, and the way in which legal and political academics subsequently marshalled that opinion in support of the same-sex marriage, as discussed previously in this chapter, are reflective of a reflexive and unreflective attitude towards the import of reasons issued by a constitutional court.

A second practical implication is closely connected with this necessary attitudinal shift in the perception of the Court's role. Political actors and citizens generally, and religious minorities in particular, should be wary both of seizing the courts of constitutional rights disputes, and leveraging rights discourse to advance political goals within the informal public sphere. Of

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<sup>362</sup> Berger, "Section 1", *supra* note 204 at 38; see also generally Weinrib, "Exemption", *supra* note 257, especially at 747-749.

course, as with all citizens, religious ones are often left with little choice but to invoke the protection of the constitution before the courts in order to defend their rights. As discussed in Part I of this chapter, a constitutional court exists fundamentally to discipline the other branches of government to its own norms; it cannot be denied that, in many cases, the courtroom is the best forum in which to settle concrete constitutional disagreements, including those having a religious dimension. That being said, especially where it is engaged in strategically in an effort to resist a contentious legislative initiative or bring closure to a policy debate playing out in the political sphere – as for instance in *Wilson Colony* or the *Marriage Reference*, constitutional rights litigation can bring about undesired consequences. Notwithstanding the uncertainty of the outcome, such litigation poses multiple threats. As discussed in this and the previous chapter, it has a tendency to delegitimize arguments that emanate from religious perspectives and reinforce the dominance of the legal paradigm, while controlling the shape of public debate and restricting opportunities for innovative solutions. It is safe to say that little does more to contribute to the primacy of constitutional courts in matters of public policy than routinely enlisting their services to resolve social and political conflicts having a religious basis.

Close behind, though, would have to be invoking the authority of the Court in public discussion – outside the courtroom – to advance political goals. If we are truly seeking to maximize the benefit that a procedural conception of public reason affords in the political branches of government, where religious disagreements exist we should to the extent possible seek to promote public discourse that is uncoloured by a priori claims to constitutionality or unconstitutionality. As Nedelsky and Hutchison argue, intercultural or cross-cultural dialogue is meaningful, and constitutes a true dialogue, only insofar as it does not occur within an overriding matrix of who is right to start with. “Dialogue” that has as its avowed, if tacit, purpose to bring

people along to what you already “know” to be the right position is no dialogue at all.<sup>363</sup> It is also at odds with the procedural conception of public reason explored in Chapter 1. The posture of respect required for legitimate political decision-making is predicated on a willingness to admit that you might be wrong. As Jeffrey Stout might say, in an age of diversity, each person must approach her epistemic entitlements with modesty. Referring to the moral and ethical beliefs of others that may be in conflict with our own, he has this to say:

Unless we can show that they acquired their beliefs improperly or through negligence, we had better count them as justified in believing as they do. And while we are at it, we had better consider the possibility that their context affords them better means of access than we enjoy to some truths.<sup>364</sup>

Invoking constitutional law as a trump card of sorts in political discussion is essentially equivalent to denying the possibility that your position could be wrong. Like the effect of law itself, such a position leaves little room for dialogic understanding or the mutual enlightenment necessary to build a shared community of judgment.<sup>365</sup> At the same time, however, it has the incontrovertible effect of marrying the outcome of the political debate to any eventual constitutional adjudication on the question. Even before the Supreme Court has been seized of the issue, the conclusive effect on the debate of any eventual opinion it might render is confirmed. The Court’s position as the exemplar of public reason is reinforced. By invoking the public use of reason by the Court as the be-all and end-all of the debate, the possibility of suggesting solutions different from one that the Supreme Court eventually arrives at – contingent as that solution may turn out to be – is delegitimized.

In arguing for this reimagination of the court, I should be careful to make clear what I am *not* suggesting. My point is not that the political sphere is a perfect forum in which to resolve

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<sup>363</sup> Nedelsky & Hutchison, *supra* note 63 at 46-47, 53.

<sup>364</sup> Stout, *supra* note 31 at 234.

<sup>365</sup> Berger, “Cultural Limits”, *supra* note 63 at 273; Nedelsky & Hutchison, *supra* note 63 at 53.

questions of public policy that intersect with religion. Far from it. Indeed, I am only too aware of the wide-ranging and acute problems afflicting democratic politics in Canada as elsewhere, including the prevalence of decisions motivated by political expediency and opportunism, partisan intractability, voter apathy, the influence of corporations and special interest groups, and the concentration of the mainstream media, to name but a few. All of these factors and more tend to dilute the potential for a meaningful practice of democratic deliberation, upon which the procedural conception of public reason relies. But whatever the *relative* merits of constitutional adjudication and democratic politics in managing religious diversity, casting the Supreme Court as the exemplar of public reason does justice to neither, and reduces our *overall* ability to take questions of religious difference seriously. Indeed, such a conception of the Court further limits the discursive potential that lies in the political sphere while foisting upon the legal sphere controversies that may not be suitable to judicial resolution, and for which a judicial resolution may not be desirable.

Overall, then, the perception of the Supreme Court as the exemplar of public reason has a controlling and constricting effect upon the management of public policy issues that have a religious dimension. In order to combat that effect, we need to relegitimize public discourse and argument that takes place beyond the perceived framework set by constitutional law, by avoiding reliance on constitutional norms in political decision-making. Constitutional adjudication is first and foremost a forum for settling concrete disputes. It serves a crucial function in a liberal democracy and by and large it serves it well, including when it comes to the adjudication of disputes involving religion. However, it is also an *artificially constrained* forum: in order to fulfil its function, it necessarily rejects plural discourses in favour of the unitary terms of law. Constitutional adjudication is not a magical oracle of public policy. And despite the substantial

impact that constitutional courts can have on public policy issues in contemporary liberal democracies, we must resist the temptation to treat it as such. Otherwise, our perception of the Supreme Court as the exemplar of public reason will become a self-fulfilling prophecy.

#### **IV. The Supreme Court as the Exception to Public Reason**

In portraying the Supreme Court as the “exemplar” of public reason, Rawls was certainly alive to the centrality of constraint to judicial decision-making. In fact, he applauded the use of reason by the Supreme Court because he considered it to exclude arguments issuing from contingent worldviews – reasons that *not* all could accept. Thus, Rawls’s error was evidently not to misunderstand the basis of legitimacy of the United States Supreme Court in a *substantive* conception of public reason. Rather, his mistake was confined to projecting its peculiar mode of reasoning, contingent upon its vocation as a forum for dispute resolution according to objective norms, onto the public sphere more generally. His effort to unify the legitimacy of the decision-making processes of courts with those of the other branches of government under conditions of diversity were misguided. The gradual shift towards a procedural understanding of legitimacy in the political sphere – a model contingent on a conception of public reason that emphasizes the duty upon citizens to adopt an attitude of respect towards each other in the public forum, and one that has emerged as a response to important claims to discursive justice from cultural and especially religious minorities – should accordingly be taken to signal a necessary realignment in the relationship between the judiciary and public discourse. Instead of occupying a central and foundational place in our politico-legal imaginations, as Rawls would have it, we would be better served understanding the voice of the Supreme Court of Canada as an exceptional one sitting on the periphery of public discourse, at least when it comes to its involvement in matters of public policy having a religious dimension. If we do not reconceptualize the role of the court, and act

accordingly as we reason with each other in the public sphere, our ability to engage in meaningful intercultural dialogue in public debate that involves religion will continue to be seriously undermined.

## Conclusion

“No matter how justified in smug retrospect our moral decisions seem to have been,” wrote Sidney Hook more than 50 years ago, “only the unimaginative will fail to see the possible selves we have sacrificed to become what we are.”<sup>366</sup> That may be true. If so, however, when it comes to deciding questions of public policy that have a religious dimension, the central place that the Supreme Court occupies in our collective imaginations ironically and all too often consigns us to the ranks of the unimaginative.

If the Court had been able to engage more meaningfully with the religious significance of its decisions in the cases considered in this work, the results it reached may have been affected. For better or for worse, different real world outcomes may have resulted. Today, books depicting same-sex couples might not be found on the shelves of classrooms in the Surrey School District. TWU students might still be walking the halls of Simon Fraser University, completing the 5<sup>th</sup> year of their teacher training program. Gay and lesbian couples might be affirming their love and commitment to each other in civil partnership ceremonies, rather than at weddings. The Wilson Colony Hutterites might still be driving their cars and trucks themselves. Gurbaj Singh Multani might be wearing his kirpan in his university classroom, proudly displayed outside of his clothes, or he might not be wearing it at all. A.C. might be dead.

These are some of the possible collective selves we sacrificed to become what we are. I should be careful to point out that, in drawing attention to these possibilities, I am not lamenting the outcomes that the Court did reach. My own political sympathies are mixed and plural. Like

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<sup>366</sup> Sidney Hook, “Pragmatism and the Tragic Sense of Life” (1959) 33 *Proceedings & Addresses of the American Philosophical Association* 5 at 14. My thanks go to David Schneiderman for originally drawing my attention to this quotation through his inclusion of it in his article “Associational Rights, Religion and the Charter” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 65 at 79.

many Canadians, I believe strongly that we should strive to respect the diverse religious commitments that our citizens hold dear. Also like many Canadians, I believe strongly in the equal recognition of gays and lesbians in our society. In some cases, I believe that the court struck an appropriate balance in its judgment. In others, I do not.

Regardless of what one might think of the justness of the actual adjudicative outcomes, my point is rather this: the shadow the Court projects as the exemplar of public reason obscures these alternative realities from our view. What were formerly possibilities are turned retroactively into impossibilities, as declarations of constitutionality and unconstitutionality – or the spectre of such declarations – are issued by the Court. Staking their claim to correctness, constitutional courts tell us not only what we are, but also what selves we could *never* have been. As we lose the faculty to imagine those selves, we lose consciousness of our collective social responsibility for what we have become. The burdens of judgment are lessened as we cease to view the moral, ethical, political and legal positions we adopt as a society *as choices* but rather as the *inevitable products* of a priori norms, or of universal reason. We tend to forget that “[l]ike all norms, ours are embedded in contingent, fallible social practices.”<sup>367</sup>

In turn, this imaginative failure erodes the responsibility we feel to justify our most fundamental epistemic commitments to our fellow citizens of all religious persuasions, as we progressively and often uncritically place more authority and emphasis on the received wisdom of the Court. Our democratic practice of exchanging justifying reasons on matters of public concern – each from our own unique metaphysical and epistemological perspectives – begins to assume the look and feel of the reason of a constitutional court. Polyphonic political discourse, with all its attendant possibilities for mutual enlightenment, the generation of novel and original

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<sup>367</sup> Stout, *supra* note 31 at 291.

outcomes, and the creation of a community of shared judgment is subsumed within the restrictive and dichotomizing language of rights constitutionalism.

The winding path I have followed in this work points to precisely this conclusion. The challenge posed by religious diversity to the public justification of legitimate law; Rawls's answer to that challenge; the gap between theories of legislative and judicial decision-making that emerged along with a procedural conception of public reason; the misfit between the ineffability of religion and the limitations inherent to constitutional adjudication in a diverse society: ultimately, my examination of all these things suggests that portraying and understanding constitutional courts as the exemplar of public reason limits our ability to work through issues of public policy that involve deep metaphysical disagreement. It is accordingly an attitude that we should seek to avoid.

The foreclosure of our imaginations that is accomplished by the exemplar view of our constitutional courts is particularly problematic when it comes to managing controversies that are connected to religious difference. Claims of justice that arise out of or have their roots in a clash of religious worldviews inherently require a measure of cross-cultural engagement and inquiry that is the hallmark of the procedural conception of public reason. Given the constraints associated with constitutional adjudication, the difficult task of understanding the nature and force of religious experience is one that we have little reason to believe our Supreme Court Justices will be able to perform competently, despite their best efforts. As a result, much more so than in other areas of public policy, we have every reason not to blindly defer to their judgments, or allow the parameters of their decisions to limit our appreciation of what policy alternatives were possible, or might still be. For indeed, as the advocates of a procedural conception of public

reason have argued, intellectual humility in our ethical, moral and legal positions is surely the best policy:

Perhaps our distant ancestors had no way of anticipating some of the considerations that make us diverge from their moral conclusions. Chances are, our distant, descendants will discard some moral claims that we find deeply intuitive or that a clever philosopher has “proven” to the satisfaction of his followers; which claims, we cannot say.<sup>368</sup>

So it is with legal and constitutional conclusions. As the ultimate arbiter of legal disputes in our society, constitutional courts are of their nature conversation-stoppers. But we must resist the temptation to allow constitutional courts to set the limits of the conversation in public debate informed by diverse religious viewpoints. Making room for religious reasons in the public sphere is not only an exercise in inclusion or a means for the state to justify the legitimacy of its coercive law. Decentring the role of constitutional adjudication in the overall management of claims related to religious difference in our society is a way of reinvigorating public debate by broadening our imagination of what selves we could become – either good or bad – and forcing us to take responsibility for our choices. As much as possible, our social, political and legal institutions and practices, including constitutional adjudication, should encourage us to thicken our epistemic entitlements in the face of the metaphysical challenge posed by different religious worldviews. With the “selves we have sacrificed to become what we are” ever present in our minds, it may be easier for us to contemplate and work towards a society in which claims of justice related to religious significance and meaning can and are considered on their own terms. It is up to us to let our imaginations run wild.

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<sup>368</sup> *Ibid.* at 233.

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