Democracy After the Charter

DEMOCRACY AFTER THE CHARTER

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ABSTRACT

The adoption of the *Canadian Charter of Rights and Freedoms* has marked a revolutionary change to our legal and political institutions and practices. While parliament used to have the final say in defining the details and limits of the rights of Canadians, the Supreme Court is now the ultimate arbiter of our rights as it has the authority to determine the meaning of the *Charter* and decide when legislation contradicts the letter and spirit of the *Charter.* The question of whether the entrenchment of the *Canadian Charter of Rights and Freedoms* and the subsequent practice of *Charter*-based judicial review are beneficial developments to our political culture is the topic of this dissertation. I argue that entrenched Charters of rights in general, and the *Canadian Charter of Rights and Freedoms* in particular, are unnecessary in mature democracies which already have adequate institutions and practices which protect rights. My central claim is that Charters of rights and judicial review are not only unnecessary, but they are also fundamentally undemocratic; Charters and judicial review limit the ability of citizens, acting through their democratic representatives, to make important decisions concerning rights.

First I explore Jeremy Waldron's rights-based critique of Charters of rights and judicial review to argue that Charters and judicial review are undemocratic and then defend Waldron's critique against three major arguments which claim that Charters and judicial review do not necessarily conflict with our commitments to democracy and might also be mandated by our democratic principles. Then I explore two major consequentialist arguments supporting Charters of rights and judicial review: the "tyranny of the majority" argument, and the institutional argument. I critique these two influential arguments and conclude that the fear of the "tyranny of the majority" is an exaggerated fear based on simplistic conceptions of "majorities" and "minorities" which does not recognize the limits of majority rule within a parliamentary democracy, while the institutional argument is based upon questionable assumptions of voter and legislative motivations and behaviour. Finally, I argue that Charters of rights and judicial review might subtly undermine our commitments to democracy by reinforcing unrealistic attitudes concerning rights and cynicism toward democratic politics. Furthermore, I argue that Charters of rights and judicial review imply that there are "correct answers" and moral expertise concerning rights debates which also undermine our commitment to democracy. Finally, I offer some democratic alternatives to Charters of rights and judicial review which could help protect rights without having the democratic illegitimacy of Charters and judicial review.

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Introduction

In 2007 Canadians celebrated the 25th anniversary of the drafting of the *Canadian Charter of Rights and Freedoms*. A recent poll in the *Globe and Mail* reported that the majority of Canadians are supportive of the *Charter* and consider it to have had a positive affect on our political and legal landscape.[1] On a recent CBC special on the 25th anniversary of the *Canadian Charter of Rights and Freedoms*, retired Justice Lamer claimed that the *Charter* helped nurture a "culture of rights" among Canadians, as Canadians are more aware of their rights and more willing to claim these rights thanks to the *Charter*. Advocates of Charters of rights often claim that the written expression and entrenchment of certain legal and political rights within a Charter helps create a more just society where the rights of individuals are protected against legislation which could inadvertently infringe upon these rights. Charters, and the practice of judicial review[2] which often accompanies the framing of a Charter, are seen as guaranteeing the rights of individuals and minorities whose interests can often be ignored or overlooked within a majoritiarian democracy. Charters of rights can also have an important symbolic function, as Charters can serve as a unifying force by publicly proclaiming the shared values, aspirations, and commitments of a political community.

While Charter advocates claim that Charters of rights help protect the rights of vulnerable individuals and minorities against oppressive state power and can be an important symbolic tool which contributes to the creation and maintenance of a rights respecting culture, there are those of us who continue to have doubts about both entrenched Charters and the corresponding practice of judicial review. Charter critics are concerned that the negative effects of an entrenched Charter and judicial review on the democratic practices and attitudes of a liberal democracy outweigh their purported benefits. Charter critics are concerned that the tension that exists between Charters

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[1] "After 25 years of Charter, most think Supreme Court is on right course", Kirk Makin, *Globe and Mail*, Feb. 16, 2007. An SES Research poll reported that 53.5 percent of 1,000 respondents considered the *Charter* based Supreme Court rulings to be "moving society in the right direction."

[2] Judicial review refers to the practice of a Court reviewing and striking down legislation because the legislation is deemed by the Court to be inconsistent with the wording and/or principles within an authoritative Constitutional document, such as a Charter of rights. My primary focus on judicial review throughout this dissertation will refer to this practice of reviewing and striking down legislation which Courts decide infringes upon Charter rights and values. Non-rights based judicial review, such as Courts ruling on the proper boundaries and responsibilities of different branches and levels of government will not be addressed in this dissertation except in a few specific cases.

and judicial review and majoritarian democracy cannot be resolved. Entrenched Charters of rights are seen as being fundamentally at odds with our commitments to democracy and majoritarian proceduralism, as enshrining certain rights and values in a Charter can limit the abilities of democratic polities to rule themselves and determine their destiny over time. By making certain rights and values "beyond the pale" through the act of entrenchment, democratically elected legislatures are hampered in their ability to create legislation which attempts to redefine or place limits on rights. The will of the majority becomes thwarted as Charters place limits on the principle of majoritarianism in favour of minority interests. Furthermore, Charter critics are concerned that the practice of judicial review is inconsistent with the concept of democratic governance and weakens the democratic practices and principles which are essential for the maintenance of a healthy functioning democracy. Whether our rights are best defined and protected through legislation and a strong liberal culture which fosters the democratic attitudes of trust, respect, compromise, and responsibility, or by Charter based litigation and judicial review, is a matter of utmost importance if our ongoing experiment in self-government is to be realized.

In this dissertation I will explore these issues and argue that Charters of rights and judicial review are inconsistent with democratic principles and commitments. I will also argue that while Charter based judicial review *might* provide better protection of the rights of certain individuals or groups than legislation created through the majoritarian procedures of democratic politics, these individual rights "victories" come at significant cost to our democratic culture. Moreover, I will argue that legislators, and the voters who elect them, are as equally adept at making moral decisions concerning rights as judges, while the democratic process itself, such as the role of political parties, elections, and legislative debate are all adequate methods of promoting and protecting individual and minority rights.

The majority of literature in legal and political philosophy surrounding the debate over the legitimacy of Charters of rights and judicial review uses the US *Bill of Rights* and American Supreme Court rulings as the archetypal examples which arguments for and against Charters and judicial review are based upon.[3] My contribution to this debate is to place these arguments within a Canadian context by using the *Canadian Charter of Rights and Freedoms* and Canadian Supreme Court rulings as the primary focus of my dissertation. By incorporating specific arguments of Canadian constitutional scholars into my critique, I will argue that the *Canadian*

[3] A notable exception to this general trend is Wilfrid Waluchow's *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press, 2006).

Charter of Rights and Freedoms was, and still is, unnecessary; it is at best redundant, and at worst undemocratic and divisive. My specific criticisms against the *Charter* can and will be expanded to criticisms against Charters of rights and judicial review in general. Hopefully it will reinvigorate vigorous debate over the costs and benefits of Charters of rights and judicial review in Canada and abroad. As I argue throughout this dissertation, in a democracy it is ultimately the individual citizen who is responsible for protecting her rights, while simultaneously respecting the rights of her fellow citizens and acknowledging the limits and social costs of these rights and the duties which usually accompany any rights claim.

Caveats and Definitions.

Before outlining my argument chapter by chapter, it is important to make some initial caveats and provide some definitions in order to avoid any unnecessary confusion or misunderstandings. First, my critique of Charters of rights and judicial review is relevant to *mature* democracies such as those in the English speaking Commonwealth, the United States, and Western Europe. I utilize Robert Dahl's definition of a mature democracy as one which has experienced democratic institutions and practices for at least one generation, or approximately 20 years.[4] As for nascent or immature democracies, my critique will depend on the existence of a mature democratic culture and a history of stable relations between minority cultural, ethnic, religious, or language groups and the dominant majority group (if one exists). In a new democracy with a fairly homogenous population, or with a democratic culture which is tolerant and respectful of rights, an entrenched Charter of rights and judicial review would probably not be necessary and could possibly hamper the development of a mature democratic culture. However, if a new democracy had no history of democracy or has a fragile democratic culture, along with a history or recent experience of ethnic/cultural/religious hatred and intolerance, an entrenched Charter of rights might be required to protect vulnerable individuals and minorities. All in all, I am an agnostic about the benefits of entrenching a Charter of rights in immature democracies as each state is unique and the pros and cons of a constitutionalized Charter of rights will depend on the specific needs and circumstances of the new democracy.

Second, when using the term "democracy", I am referring to a form of majority rule where the important political decisions of a political community are made through a form of majoritarianism. The specific form of democracy I am

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[4] Robert Dahl, *How Democratic is the American Constitution?* (New Haven: Yale University Press, 2003), 235.

defending is a representative democracy with a multi-member legislature. Furthermore, when using the term "democracy", I usually equate democracy with "liberal democracy". I acknowledge that "democracy" is a fundamentally contested topic, and that the claim that democracy equates to liberal democracy is also contested, as is the meaning of liberal democracy. Without getting derailed in a long exposition of the meaning of these terms, for my purposes I want to claim that a democracy must involve *some* form of respect for individual rights and acknowledge a sphere that is beyond the scope of state involvement and interference. My claim is that the liberal values of autonomy, equality, and respect for the individual underlie and reinforce our moral commitments to democracy and vice versa. Under my definition of democracy, individuals would be granted an unspecified range of rights and freedoms, primarily the rights which are necessary for democratic participation itself, such as the right to vote, the right to stand for public office, the freedom of assembly, the freedom of expression, the freedom of conscience (which itself implies the freedom of religion, as many religious believers base their conscience on their religious convictions), and freedom of the press.

Third, my central claim against Charters of rights is the act of entrenchment. When I use the term "Charters", I am assuming that they are entrenched. I have no major arguments or concerns against a statutory Charter of rights, such as the *Canadian Bill of Rights* of 1960 which was not granted special constitutional status and did not specifically grant the Supreme Court the power to review and strike down legislation. I am rather wary of such statutory bills giving the Courts *de facto* political authority, especially the symbolic authority to interpret such a Charter and review legislation, yet this is not my main concern in this dissertation.

Fourth, my argument is not a critique of constitutionalism *per se*. As previously stated, I am not opposed to all constitutional limits on state power. While I argue that the exact limits of such state interference upon the individual and the private sphere is itself open to reasonable debate and ultimately should be settled by democratic majoritarian procedures, I do not deny that there are and should be limits to state power. One of my central claims is that the rights, freedoms, practices, and habits of democratic politics itself place limits on state power. In addition, the institutions and practices of representative democracy, including the checks and balances of the different branches and levels of government, are all adequate methods of advancing and protecting individual and minority rights and interests.

Fifth, when using the term "rights", I am generally referring to the fundamental interests individuals have or might have which are important enough to

be recognized by her fellow citizens and the state.[5] Because of the contested debates over the existence, let alone meaning of rights, I want to avoid these debates and use the fairly neutral and innocuous definition of rights which I have provided. Under this general definition of rights, rights cannot be seen as being absolute or beyond limit and compromise. Even the most fundamental of rights, such as the right to self-government, can under this conception be limited or temporarily forfeited in certain circumstances, such as denying minors or incarcerated prisoners the right to vote. It is my position that rights and freedoms do not exist in a vacuum and can be limited by other rights or freedoms or other social goods and values, such as security or equality. As rights are ultimately social constructs which will be determined by the specific traditions, values, and circumstances of a political community, it is my position that the content and limits of these rights will, and should, be ultimately defined by the majority of the community.

Finally, when criticizing the arguments of the advocates of Charters of rights and judicial review, especially in Chapters 2 and 3, my main target is Ronald Dworkin. I do not want to imply that all advocates of Charters and judicial review are a homogonous group who share every aspect of his views and do not have different nuanced positions concerning the legitimacy and benefits of Charters of rights and judicial review. There has been simply too much ink spilled over this topic over the years to do justice to all of the various positions, pro and con, on Charters and judicial review. I focus primarily on Dworkin because of the influential nature of his work, and because he provides the clearest example of an unabashed advocate of Charters of rights and judicial review who holds an absolutist approach to rights, along with a subtle elitist disdain for majoritarian politics, which underlies much of the argument for Charters of rights and judicial review.

Chapter Breakdown

In Chapter 1, "The Rights-Based Critique of Charters and Judicial Review", I outline the traditional argument for Charters of rights and judicial review. Then I explore Jeremy Waldron's powerful rights-based critique of Charters of rights and judicial review and provide three possible counter-arguments to Waldron's critique: the inclusion of a democratic clause within a Charter, Christopher Eisgruber's argument for constitutional democracy, and Wil Waluchow's argument for a community's constitutional morality. I will argue that all three of these counter-arguments are themselves problematic and that Waldron's initial argument for

[5] This definition is generally inspired by Raz's interest theory of rights. However, I do not want to commit to one theory over another lest I be tied to a specific theory and leave myself open to the limitations and criticisms of such a theory.

majoritarian democracy still holds.

In Chapter 2, "Majorities, Rights, and Judicial Review", I investigate consequentialist arguments for Charters of rights and judicial review and provide consequentialist critiques of these arguments. The first section is on the "tyranny of the majority" argument for Charters and judicial review. I argue that this argument is exaggerated and is based on simplistic or controversial conceptions of minorities and majorities, and that the practices of democratic parliamentary politics are an adequate forum of promoting and protecting minority rights and interests. In the second section, I critique institutional and motivational arguments for judicial review by arguing that voters and legislators are just as motivated to respect rights as judges.

In the third and final chapter, "More Democracy, Not Less", I provide some additional consequentialist concerns to Charters of rights and judicial review, such as the possible negative effect Charters and judicial review can have on our democratic culture. Then I critique the "correct answers" thesis concerning rights and the concept of moral expertise within a democracy. Finally, I offer some possible alternatives to Charters of rights and judicial review.

In conclusion, I do not want to say that Charters of rights and judicial review do not or cannot have any benefits in a mature liberal democracy. My claim is that there is a tension between Charters and judicial review and democratic principles and procedures, and, more importantly, that the benefits of Charters and judicial review do not outweigh their costs. Although I agree with Waldron's rights-based critique of Charters and judicial review, it is the consequentialist arguments against Charters and judicial review which provide the strongest reasons for questioning the desirability of a Charter of rights and judicial review.

Chapter 1: The Rights-Based Critique of Charters and Judicial Review

Introduction

Perhaps the strongest reason to forge a Charter of rights is to protect individual and minority rights against state interference. According to Samuel Freeman, when the citizens of a polity decide to enshrine and entrench a Charter of rights, "they, in effect, agree to take certain items off the legislative agenda."[6] A Charter of rights is therefore a constraint on purely majoritarian decision making procedures. As formal constitutional amendment through super-majorities is usually the only means of revising an entrenched Charter of rights, something which occurs rarely and "requires levels of political will, commitment and agreement which can be very difficult to marshal",[7] Charters can be an effective tool for protecting the rights of individuals and minorities against "the tyranny of the majority", especially in democracies where there are minority interests which are not always considered or taken seriously in majoritarian institutions such as legislatures. For example, Ronald Dworkin claims that the United States, as the original modern constitutional democracy, guarantees its citizens certain moral rights against the government and is not based upon simple majoritarian democratic principles because the Constitution, and in particular the *Bill of Rights* was designed to protect individuals and minorities against the power of majorities: "if citizens have a moral right of free speech, then governments would do wrong to repeal the First amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed."[8]

Because Charters of rights are often part of a written, entrenched constitution, they are the supreme law of the land, and therefore the judiciary is usually granted the power to interpret and enforce the Charter by testing legislation for consistency with the Charter. In Canada, s.52 (1) of *The Charter of Rights and Freedoms* states that "(T)he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Individuals who believe that their *Charter* rights are being infringed upon by the government have the right to bring their case to court to determine if their rights are truly being infringed upon and can seek legal remedy. Judicial review of legislation is therefore a means of protecting rights against

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[6] Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review", *Law and Philosophy* 9, (1991), 352.

[7] Wilfrid Waluchow, "Constitutions as Living Trees: An Idiot Defends." *The Canadian Journal of Law and Jurisprudence XVIII* (2005), 212.

[8] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 191.

excessive state intrusion. Samuel Freeman gives the following defence of judicial review:

> By granting to a non-legislative body that is not electorally accountable the power to review democratically enacted legislation, citizens provide themselves with a means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative process. Thereby, they freely limit the range of legislative options open to themselves or their representatives in future. By agreeing to judicial review, they in effect tie themselves into their unanimous agreement on the equal basic rights that specify their sovereignty. Judicial review is then one way to protect their status as equal citizens.[9]

While Charters of rights and the practice of judicial review might be effective tools for protecting individual and minority rights, there is the problem of democratic legitimacy, or what Alexander Bickel describes as the "counter-majoritarian difficulty".[10] The "counter-majoritarian difficulty" of judicial review is not primarily the fact that the judiciary is unelected and democratically unaccountable to the will of the majority, but that "the exercise of this power works as a constraint upon the equal right of citizens in a democracy to take part in and influence the government-making processes that significantly affect their lives."[11] The conflict between Charters of rights and judicial review, and democracy and the principle of majority-rule, will be explored in this chapter. Yet before embarking on this investigation it is important to distinguish conceptually between the question of whether Charters and judicial review are democratically legitimate, and the question whether Charters and judicial review actually do protect rights better than legislatures enacting regular statutes and laws. Charters of rights and judicial review *could* be democratically legitimate yet not be effective methods of protecting rights, or could be democratically illegitimate yet are effective methods of protecting rights.[12] Whether Charters of rights and judicial review are the best methods to protect individual and minority rights, or whether legislatures enacting ordinary legislation can be better trusted to protect rights, along with possible negative affects of Charters and judicial review on the democratic culture of a liberal democracy, will be the topic of Chapter 2. For now we will explore

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[9] Freeman, 353-354.

[10] Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), 16.

[11] Freeman, 333.

[12] Wojciech Sadurski makes this important distinction in "Judicial Review and the Protection of Constitutional Rights", *Oxford Journal of Legal Studies*, Vol. 22, No. 2 (2002), 276.

the democratic rights-based critique of Charters of rights and judicial review and three different responses to this critique.

Part I: Waldron's Rights-Based Critique

Jeremy Waldron has arguably provided the most philosophically sophisticated and persuasive critique of Charters of rights and judicial review to date. What makes his critique so original is that it is not based on a communitarian or legal realist argument which decries the excessive individualism or rights obsession of liberal constitutionalism,[13] nor is it based on a form of rights-skepticism. Instead, it is a liberal argument which is based on the primacy of individual rights and the traditional liberal values of respect, autonomy, rationality, and toleration. While Waldron does make some consequentialist arguments against Charters of rights and judicial review, such as the possible effect of the "verbal rigidity" of Charters[14], he claims that "if there is a democratic objection to judicial review, it must also be a rights-based objection."[15] Waldron considers Charters of rights and judicial review to be fundamentally anti-democratic and insulting. Charters are anti-democratic because they decide "once and for all" the important moral, legal, and political rights which a liberal democracy shall have, while judicial review is anti-democratic because it takes decisions about these rights out of the hands of the electorate who act through their democratic representatives in legislatures.

A. The Circumstances of Politics, and the Right of Rights

Waldron's critique of Charters and judicial review, and argument for pure majoritarian democracy, is premised on his theory of deep disagreement and "the circumstances of politics". Waldron posits the existence of widespread reasonable

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[13] For example, Mary-Anne Glendon provides a communitarian critique of Charters and Charter-based judicial review by arguing that they reinforce excessively individualistic attitudes and behaviour which weakens communal bonds and identities, while Michael Mandel employs a critical legal studies critique of Charters and claims that Charter-based litigation helps reinforce the status quo by providing symbolic, yet superficial, legal victories while diverting attention and collective political effort from more pressing systemic socio-economic inequalities. See Mary-Anne Glendon *Rights Talk* (New York: The Free Press, 1991), and Michael Mandel *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1989).

[14] As written entrenched documents, the wording of rights which are contained in Charters of rights will determine how these rights will be interpreted. A prime example of this is the right to "freedom of speech" which is enshrined in the US *Bill of Rights.* Debates over whether flag burning or pornography are forms of "speech" which should be protected thereby limit and warp public debate over important moral and political issues. Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 220.

[15] Ibid., 232.

disagreement over rights within a modern heterogeneous democracy. We disagree at the philosophically abstract level as to the definition of a right or right claim: do rights refer to claims about liberty, or interest, or duties, or equality; are rights negative or positive; do they belong solely to individuals or also to groups; are they universal or solely agent or context relative; are they absolute or contingent, etc. At a more concrete level we disagree over what rights individuals have or should have, what they are rights to, and what they are based upon, all of which are disagreements over questions of justice. Finally, even if there is a broad consensus on some particular rights that exist in a Constitution or Charter of rights, there will be disagreement over the interpretation of these rights and what laws or social practices are required or forbidden by these rights. For example, does the right to freedom of expression allow for the legal protection of "hate speech", or does it call for the suppression of hate speech? What exactly does "cruel and unusual punishment" mean? Does freedom of religion require the public funding of faith based schools or the public acknowledgement of faith based legal systems? There are no easy answers to these questions. Moreover, Waldron claims that disagreement over these issues is usually based on good faith reasonable disagreement, not a lapse of reason or bigotry or moral weakness: "It is not a case of there being some of us who are in possession of *the truth* about rights – a truth which our opponents willfully or irrational fail to acknowledge because they are blinded by ignorance, prejudice or interest...they are simply hard questions – matters on which reasonable people differ."[16]

The existence of deep disagreement over questions of rights and justice might result in nihilism or anarchy. However, Waldron acknowledges that, as social animals, there is a powerful need for social cooperation in order to deal with a wide variety of questions concerning social coordination and dispute resolution in order to achieve some level of stability necessary for a civil society. The existence of deep disagreement, along with the social need for collective action results in "the circumstances of politics", which Waldron defines as "the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are *the circumstances of politics.*"[17]

The circumstances of politics and deep disagreement over rights leads Waldron to support pure proceduralism, in the form of majority rule, as the best form of decision making procedure within a liberal democracy. Deciding difficult issues by

[16] Ibid., 12.
[17] Ibid., 102.

majority rule, or voting, is the decision making procedure which is the most respectful of individual perspectives and disagreements concerning rights and justice. Majority decision is respectful because it doesn't silence disagreement by demanding a false consensus, and it respectful because it allows individuals to take responsibility for their collective decisions.[18]

Because of the existence of disagreement over rights and the circumstances of politics, Waldron proposes the right of political participation, or "the right of rights", as the best method of solving situations where individuals disagree about rights.[19] The right of rights is not just the right to have one's voice heard, it is also the right to have one's voice *count* in political decisions. The right of rights is respectful of all individuals as rights-holders because it respects their different views concerning rights and justice. The right of rights is also deeply egalitarian because it counts all voices equally and does not claim any preference for one voice over another, or presuppose that one interpretation of rights or justice is more correct or worthy than another.[20] Thus, Waldron supports majority-rule[21] as the best form of decision making procedure because of it is respectful of individual's status as rights-bearers who disagree over rights.

Precommitment and Hobbsean Predators

Waldron claims that any attempt to provide a "neutral" account of justice or rights *a priori* is bound to fail due to the presence of disagreement. He therefore rejects the attempt to entrench certain rights in a Charter of rights, thereby consitutionalizing them and placing them beyond the sphere of every day politics. Waldron criticizes the Dworkinian claim that rights are like "trumps" which individuals claim against majorities and their attempt to achieve social policy goals.[22] Because we disagree about the nature of rights, and it is only through majority-decision we can respectfully make decisions concerning rights, we cannot claim that rights are like trumps: "we cannot play trumps if we disagree about the suits."[23] Waldron questions both the ability and the desirability of a political community to precommit itself to the protection of certain rights by entrenching these rights in a constitutional Charter of rights. First, such constitutional restraints on

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[18] Ibid., 109.
[19] Ibid., 232.
[20] Ibid., 236.
[21] It should be noted that Waldron favours representative parliamentary democracy over direct democracy because direct democracy is impractical in a large modern society and does not allow for debate and deliberation before voting. Ibid., 54.
[22] Dworkin, 82.
[23] *Law and Disagreement*, 12.

majoritarianism are democratically illegitimate even if they are ratified by a majority. A majority could vote to institute an authoritarian regime, but this does not mean that the regime will be democratic.[24] Second, the concept of a political community rationally precommiting to constrain itself by placing constitutional limits on majority-decision concerning rights is based on a faulty analogy – Ulysses and the Sirens.[25] This analogy between constitutional precommitment to rights protection and Ulysses and the Sirens fails because Ulysses was fully aware that he would be tempted by the Sirens and therefore demanded to be tied to the mast and for his sailors to ignore his pleas to be freed from the mast. In the case of constitutional precommitment, however, there is no agreement over what rights should be entrenched, or even if these rights should be entrenched. Nor is there agreement as to when the majority could be or are "tempted" by the Sirens of irrationality, self-interest, panic, or prejudice. Waluchow describes Waldron's critique of the Ulysses analogy as follows: "We cannot tie ourselves to the mast of entrenched moral rights if we cannot locate the mast, let alone agree what it looks like."[26] The act of entrenching certain rights in a Charter of rights is therefore more akin to a victory of one side of a debate over another concerning rights than a collective form of rational precommitment. Therefore, "constitutional 'precommitment' in these circumstances is therefore not the triumph of pre-emptive rationality that it appears to be in the case of Ulysses...it is rather the artificially sustained ascendancy of one view in the polity over other views whilst the complex moral issues between them remain unsolved."[27] According to Waldron, constitutional precommitment in the form of an entrenched Charter of rights is insulting and anti-democratic because it robs both present and future generations of their right to self-government by placing rights issues beyond the realm of everyday politics. Future generations will have their autonomy limited by the decisions of their ancestors who, through constitutional precommitment, define and limit future debates concerning rights.[28] Waldron also claims that the ability for current or future

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[24] Ibid., 255.

[25] The Ulysses analogy compares Ulysses' act of strapping himself to the mast of his ship in order to prevent him from being tempted by the sirens with a political community's precommitment to constitutional limits on majority decisions concerning rights: "an electorate may resolve collectively to bind itself in advance to resist the siren charms of rights-violations." *Law and Disagreement*, 259.

[26] It should be noted that Waluchow doesn't reject the Ulysses metaphor, but instead provides a less ambitious understanding of the metaphor than the one commonly used by Charter advocates. *The Living Tree*, 154.

[27] *Law and Disagreement*, 268.

[28] "It seems like a good idea *now* for us to commit ourselves pre-emptively against *future* violations of rights. But it is important that those who embark upon constitutional change have the capacity to look upon what they are presently doing in

generations to alter this precommitment through formal constitutional amendment is not an adequate answer to the problem of precommitment because the difficulty of constitutional amendment procedures, as compared to ordinary legislation, "is precisely definitive of the constraint in question".[29] The absence of constitutional amendment procedures would make the argument against entrenchment stronger, but the existence of such procedures does not make entrenchment any less problematic.[30]

Waldron claims that Charters of rights, as constitutional precommitments, are also insulting to citizens as rights-holders because of the conflicting moral message that they send concerning rights-holders – rational agents versus Hobbsean predators. On one hand Charters boldly declare that citizens, as autonomous rational agents, are worthy of holding certain rights, which are so important that they must be enshrined and entrenched as foundational law, yet on the other hand Charters imply that these same citizens will, given the chance, infringe upon the rights of their fellow citizens, as they are either driven by self-interest or fall prey to the irrational impulses of panic and prejudice. This confident attitude concerning rights yet mistrustful attitude concerning one's fellow citizens contributes to the preoccupation with the fear of the "tyranny of the majority" and the distrust of majoritarian representative institutions such as legislatures. This inconsistent moral attitude towards individuals as rights-bearers undermines our collective attitudes toward democratic politics by equating legislative politics as a realm of self-interest, as contrasted to Charter based rights litigation which is equated with the realm of justice. Waldron claims that the mixed message of Charters results in the favouring of the judiciary over legislatures as the best forum for resolving disputes concerning rights. However, in the face of disagreement concerning rights, this optimism concerning correct answers concerning rights, juxtaposed with pessimism concerning the possibility of one's fellow citizens to protect these rights, is unwarranted.[31]

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the eyes of years, even centuries to come. We have to have in mind that at some future date a large number of people, favouring a change in some law or in the understanding of some right, will experience the force of the constraint which we are setting up as a restriction on their autonomy." Ibid, 274.

[29] Ibid., 275.

[30] While I am in agreement with Waldron that entrenchment has certain unattractive elements and should be avoided, entrenchment can come in degrees and entrenchment is not an "all or nothing" option. Constitutions can have many degrees of entrenchment and methods of amendment. Brazil, for example, has had over a hundred amendments to it's constitution within the past 20 years. My thanks to Wil Waluchow for pointing out this nuance.

[31] Ibid., 221-231.

B. The Case against Judicial Review

Waldron claims that Charter of rights-based judicial review of legislation, which usually accompanies the adoption of a Charter of rights, is democratically illegitimate because it interferes with the ability of citizens, acting through their democratically elected representatives in legislatures, to make important decisions concerning rights. According to Waldron, judicial review cannot be defended on the premise that judicial review is necessary for the preservation of democratic rights and the proper function of democracy itself:[32] "There *is* something lost, from a democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires."[33] Democracy is about procedures as well as results, therefore there is a loss to democracy when judges substitute their conceptions of the requirements of democracy over those of voters and legislators, even if judges make "correct" decisions concerning democracy.

In "The Core of the Case Against Judicial Review"[34], Waldron claims that judicial review cannot be successfully defended on process-related reasons,[35] and cannot be reconciled with democratic values or principles: "By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights."[36] Waldron's critique of judicial review is conditional, as it is based on a hypothetical democratic society which contains the four following features: democratic institutions which are "in reasonably good working order"; judicial institutions, also in reasonably good working order; a political culture committed to individual and minority rights; and the existence of disagreement concerning rights.[37] If these conditions are met, the argument for judicial review is suspect, for unless one assumes that judges are institutionally better placed to provide

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[32] This argument is put forth by John Hart Ely, who argues that judicial review is illegitimate when judges make substantive decisions concerning rights, but is legitimate when judges make rulings on procedural issues and protect democratic rights and the conditions for democracy. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge, Mass.: Harvard University Press, 1980).

[33] *Law and Disagreement*, 293.

[34] Jeremy Waldron, "The Core of the Case Against Judicial Review", *The Yale Law Journal*; April 2006; 115, 6, 1346-1406.

[35] Waldron also critiques judicial review on outcome-based reasons, but since the focus on this chapter is the conflict between democracy and Charters of rights and judicial review, I will only focus on Waldron's argument against process-related defences of judicial review. I will address his criticisms of outcome-related arguments for judicial review in Chapter 2.

[36] "The Core Case", 1353.

[37] Ibid., 1360.

correct answers concerning rights, there is no reason to privilege their judgments concerning rights over those of the electorate or their democratic representatives.

Defenders of judicial review sometimes claim that judges, who in most democracies are appointed and approved by elected representatives, are indirectly responsive to the citizenry and therefore pose no significant problem to democratic legitimacy. Waldron rejects this claim as the judiciary can never be as democratically representative and responsible as a legislature, while legislators base their democratic legitimacy upon their accountability and responsiveness to the electorate, contrasted to the judiciary's institutional legitimacy which is based on independence to public perceptions and pressures.[38]

Waldron also rejects the argument that in the process of judicial review, judges are merely applying the explicit wording or values of a Charter, or that they are enforcing the community's precommitment to rights, therefore judicial review is not inconsistent with democracy. These arguments all falter due to the existence of disagreement concerning rights. The vague and abstract terminology of a Charter of rights "are popularly selected sites for disputes about these issues", however, the moral question is "who is to settle the issues that are fought out on those sites."[39] Since citizens disagree about rights, as do judges, there is no reason to grant judges the power to decide what this precommitment requires. Moreover, when a new commitment to rights or new interpretation of rights takes place in society, the argument for judicial interpretation and enforcement of the current precommitment to rights is further weakened.[40]

Perhaps Waldron's most intriguing criticism of judicial review is the fact that judges themselves disagree over the meaning of rights and solve this disagreement through majoritarian decision procedures; judges uses majority decision to decide difficult rulings. It is not necessarily the best argument which wins the day, but a simple counting of heads, a method no different than that used in legislatures or elections. If supporters of judicial review place much of their argument on the problems of majority decision and the claim that majority rule is not an adequate method of settling questions of justice, how can majority rule be acceptable as a form of settling these disputes in the Supreme Court? According to Waldron, the fact that judges make their decisions concerning rights through majority decision does not add any democratic legitimacy to their decisions, because majority decision is morally relevant in terms of equality and representation, however, the Supreme Court Justices "do not represent anybody. Their

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[38] Ibid., 1391.
[39] Ibid., 1393.
[40] Ibid., 1394.

claim to participate is functional, not a matter of entitlement."[41] Waldron asks why supporters of judicial review, who base much of their argument upon the fear of the "tyranny of the majority" in ordinary legislative politics, do not share the same concern for judicial majorities or the judiciary deciding controversial moral decisions concerning rights through majority decision. If "it is disagreement all the way down"[42]over rights, there is no reason to favour the decision of a majority of judges over the majority of a legislature or the electorate. Judicial review is therefore democratically illegitimate and undermines the democratic values of respect and equality.

Part II: Three Responses to Waldron's Critique

1.) The Democratic Override Response to Waldron's Worries

Democratic rights-based critiques of Charters and judicial review, such as Waldron's, are largely premised on the concept of judicial finality – when the judiciary is entrusted with the final say in interpreting a Charter of rights, this disenfranchises the electorate because "the people", acting through their democratic representatives are silenced as their interpretation of rights is ignored or substituted by that of the judiciary. The US Supreme Court's ability to strike down legislation without the ability for legislators to challenge these rulings, except for the extremely politically difficult and hazardous method of constitutional amendment, is usually touted as *the* prime example of judicial finality and supremacy. While it is largely agreed upon that the US Constitution grants its Supreme Court the final say in interpreting the Constitution,[43] what of Charters which include a legislative override, such as s.33[44] in the *Canadian Charter of Rights and Freedoms*, which allows legislatures to override Supreme Court rulings concerning *Charter* rights? Does this not ultimately disarm Waldron's rights-based critique of Charters of rights such as the

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[41] Ibid., 1392.

[42] *Law and Disagreement*, 295.

[43] It should be noted that there are critics of this assumption who claim that, despite constitutional practice since *Maybury v. Madison* (1803), the US Constitution doesn't grant the Supreme Court finality in interpretation of the Constitution, but instead posits the ultimate authority of interpreting the Constitution and defining and protecting the rights of US citizens with the citizenry itself. See Larry Kramer *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004), and Mark Tushnet *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

[44] Section 33 (1) states "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 20 or sections 7 to 15 of the Charter."

Canadian *Charter*?[45] Jeffery Goldsworthy definitely thinks that this is the case when he declares that "Waldron's argument is explicitly based on a premise that is inapplicable to most of the Canadian Charter",[46] while *Charter* advocates Peter Hogg and Allison Bushell conclude that due to the presence of s.33, along with the ability for Canadian legislatures to respond to judicial rulings, "the critique of the *Charter* based on democratic legitimacy cannot be sustained".[47] Whether the existence of s.33 does deflate Waldron's argument from democracy will be explored in the following section. I shall attempt to identify problems with this claim and argue that despite the existence of s.33, Canada has *de facto* "strong" judicial review which, for all intents and purposes, is not significantly different from the form of judicial review practiced in the United States, therefore Waldron's democratic critique of Charters and judicial review is still relevant to the Canadian constitutional practices.[48]

Superman vs. Clark Kent (or, s.33 as Waldronian Kryptonite?)

Charter advocates such as Kent Roach claim due to the existence of s.33, the Canadian approach to *Charter* based judicial review is "miles away from the American *Bill of Rights*, in which the Court truly is a supreme Superman and the legislature is powerless to limit or override the Court's decisions with ordinary legislation."[49] The question whether Canada's *Charter of Rights and Freedoms* is a "Clark Kent" or "Superman" document, and whether our *Charter* allows for weak or strong forms of judicial review is one of significant debate and disagreement. *Charter* advocates claim that the democracy clauses of ss.1[50] and 33 allow for a golden mean

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[45] In this section I will focus solely on the *Canadian Charter of Rights and Freedoms*, therefore several conclusions may not be applicable to other Charters which have override clauses, unless they have similar flaws with their override clauses.

[46] Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy", *Wake Forest Law Review* (2003), 454.

[47] Peter Hogg and Allison Bushell, "The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't a Bad Thing after All)" (1997) 35 *Osgoode Hall Journal* 75, 105.

[48] My critique of s.33 is largely based on the wording of s.33 and Canadian political conventions since 1982. *If* s.33 were worded differently and actually gave legislatures the last word concerning interpretation of *Charter* rights and covered all *Charter* rights, I would be willing to agree with Goldsworthy and grant that a significant amount of Waldron's rights-based critique would be weakened. However, Waldron's criticisms against rational pre-commitment and the Hobbsian message of Charters would still hold, as would consequentialist concerns about Charters and judicial review, which will form the basis of Chapters 2 and 3.

[49] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law Inc., 2001), 63.

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

between the vices of legislative and judicial supremacy, and that they enable legislatures to engage in dialogue with the judiciary over the meaning and extent of rights. Dialogue theory[51] purports to solve the anti-majoritarian criticism of *Charter* based judicial review by downplaying the power of judicial finality by appealing to the legislatures to respond to judicial rulings, as well as the ability of legislatures to override Supreme Court rulings with s.33. According to Grant Huscroft, "dialogue theory says you *can* have your cake and eat it too: judges can strike down laws passed by elected legislatures with no loss to democracy, since it is usually possible for new legislation to be passed that accomplishes the same purpose."[52] Due to the presence of s.33, along with s.1, *Charter* advocates can claim that Canadian style judicial review is more similar to the "weak" form of judicial review practiced in the UK and New Zealand, as the Canadian *Charter* is more of a "Clark Kent" document than the stronger "Superman" American *Bill of Rights.* In addition, Dialogue theorists claim that the democracy clauses of the *Charter* contribute to a "decidedly non-absolutist approach to rights" as compared to the more absolutist approach of rights espoused by the US *Bill of Rights,* which also contributes to a weaker form of judicial review than that of the US.[53] Granting that the American *Bill of Rights* has no reasonable limits clause or no notwithstanding clause, it is somewhat misleading to claim that rights are somehow more "absolute" in the United States than in Canada, as the rights and freedoms specified by the *Bill of Rights* are subjected to reasonable limits similar to those in Canada. For example, the US Supreme Court ruling on regulation of commercial law in *Central Hudson Gas and Electric Corp. v. Public Service Commission* (1980) uses a similar approach to limiting rights as the Oakes test devised by the Canadian Supreme Court in *R v. Oakes* (1986).[54] Freedom of speech is not absolute in the United States, nor are other rights such as the right to own property or the right of privacy. In both the US and Canada, courts define rights and decide whether the other branches of government have legitimate reasons for limiting rights.

Section 33, the notwithstanding clause, is the greatest single difference between the *Charter of Rights and Freedoms* and the *Bill of Rights*, yet according to Huscroft, it is a difference that is of little difference, because "the notwithstanding clause is unused, and all but unusable."[55] Even *Charter* advocates Hogg and Bushell acknowledged in 1997 that s.33 had become "relatively unimportant" and that since

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[51] Hogg and Bushell are credited for first introducing Dialogue theory, see footnote 45.
[52] Grant Huscroft, "Constitutionalism From the Top Down", *Osgood Law Journal,* Vol.45, No.1, (2007), 92.
[53] Roach, 109.
[54] Huscroft, 96.
[55] Ibid., 96.

the *Charter* was drafted, we have witnessed "the development of a political climate of resistance to its use."[56] Huscroft agrees with Hogg and Bushell's point, and adds that "ten years on, it is time to go further and acknowledge that the notwithstanding clause is simply irrelevant."[57] Several prime ministers and premiers have either criticized s.33 or renounced using it, while in the 2006 federal election Prime Minister Paul Martin went so far as to make abolishing s.33 part of his re-election campaign as it was seen as such an affront to the spirit of the *Charter*.[58]

The *Charter* helps create standardized national norms and practices, thereby leveling regional and provincial differences. It should not be surprising that during the debates over adopting the *Charter* in the early 1980s, it was the provincial governments who were the main political actors who argued against the weakening of legislatures via increasing the role of the judiciary, especially the Supreme Court, which was seen as a symbolic tool of the centralizing agenda of the federal government. For the provincial governments, the Supreme Court was not seen as an "impartial umpire" but instead as "an instrument of centralization".[59] The provinces therefore demanded the inclusion of an over-ride clause in the *Charter* which would allow legislatures to over-ride *Charter* based Supreme Court decisions, before they would agree to ratify the *Charter*. The federal government was reluctant to do so, but after much political haggling included Section 33, the "notwithstanding clause", as a compromise to the provinces and our tradition of federalism and the supremacy of parliament.[60]

The political unwillingness to use s.33 can be attributed to the limited and unpopular use of s.33 by the Quebec legislature to prohibit English signs, which was widely condemned outside of Quebec as an unwarranted assault on minority language rights, and the Saskatchewan legislature using s.33 to force striking public employees

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[56] Hogg and Bushell, 83.

[57] Huscroft, 96.

[58] It is interesting to note that the Liberal Party also used references to the *Charter* in its tv campaign commercials during the 2006 election. By proudly proclaiming itself a "the party of the *Charter*", the Liberal Party implied that the other parties, particularly the Conservative Party, were anti-*Charter* and therefore anti-rights, anti-visible minorities, and thoroughly un-Canadian.

[59] Alan Cairns and Douglas Williams, *Constitution, Government, and Society in Canada* (Toronto: McClelland and Stewart, 1988), 243.

[60] In a press conference in 1981, Trudeau was asked by reporters if by including the notwithstanding clause as a compromise to the provincial governments, he was bartering with the rights of Canadians in order to make a political deal. He responded in the affirmative and was disappointed with s.33 because he was afraid that it would lead to a "checkerboard Canada with some rights respected in some provinces but not in others." Deborah Coyne and Michael Valpy, *To Match a Dream: The Practical Guide to Canada's Constitution* (Toronto: McClelland and Stewart, 1998), 141.

back to work, which was criticized as an unwarranted infringement of the right of association. The Quebec legislature's use of s.33 to support Bill 101 was especially interpreted by many Canadians as an indirect attempt of promoting separatism where more direct methods had either failed or were "constitutionally out of bounds".[61] Quebec's use of s.33 gave a lasting distaste among the general Canadian public for the notwithstanding clause as Canadians believe that legislatures should not infringe upon their *Charter* rights, or more specifically, judicial interpretations of these rights. The fact that the notwithstanding clause has not been used since 1988, has never been invoked by Parliament, and is considered illegitimate by many political leaders and other members of the public helps create a constitutional convention against its use. Thus, "the saving grace of s.33 has proved to be more honoured in its incantation than in its utilization."[62]

Due to an emerging constitutional convention to ignore s.33, *Charter* based judicial review is arguably closer in spirit to American judicial review than to milder forms of judicial review in countries such as New Zealand or the UK. Huscroft notes that despite the claims of *Charter* advocates who loudly proclaim the popularity of the *Charter* as a blueprint for other liberal democracies, no commonwealth democracy which shares our tradition of parliamentary supremacy has enabled its courts to strike down legislation. *The New Zealand Bill of Rights Act* and the *United Kingdom Rights Act* are both statutes, not entrenched Charters, and both give the courts the ability to merely declare legislation inconsistent with human rights; they cannot strike down legislation. These examples are, according to Huscroft, more accurately forms of "weak" judicial review.[63] However, even the "weak" forms of judicial review practiced in New Zealand and the UK are arguably evolving into *de facto* "strong" forms of judicial review. James Allan claims that the mere existence of a human rights act which grants courts the ability to review legislation and declare it inconsistent with a human rights act results in the slow erosion of the moral legitimacy and authority of legislatures at the expense of courts. A constitutional convention is evolving in the UK and New Zealand requiring legislatures to acknowledge and obey the rulings of the courts, even though legally they are not required to do so. A legislature which decides to ignore a court ruling concerning rights could be seen as being insensitive to rights and face dire political consequences. It is becoming increasingly difficult for legislatures in both New Zealand and the UK to ignore the court's rulings on rights

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[61] Tushnet, 127.
[62] Allan Hutchinson, *Waiting for Coraf* (Toronto: University of Toronto Press, 1995), 24.
[63] Huscroft, 97.

issues, thereby resulting in a form of judicial review which, in practice, does not differ from "strong" forms of judicial review. The normative force of political convention can be as powerful as the normative force of law.[64]

Not only can the Canadian Supreme Court strike down legislation, it has the power to preclude any legislative response to a rights ruling by deciding that the purposes of the legislation are not pressing enough to infringe upon any *Charter* rights, because the purposes of the legislation fail to meet the "pressing and substantial objective" section of the *Oakes* test. Canadian courts, including lower courts, also have the power to refuse to suspend a declaration of unconstitutionality, thereby creating "a new status quo that cannot be unwound, even in theory, since the notwithstanding clause can only be applied prospectively."[65] An example is when the Ontario Court of Appeal decided not to suspend the declaration of unconstitutionality in the *Halpern* decision of 2003, which immediately legitimized the practice of same-sex marriage. Finally, the Canadian Supreme Court can formulate its s.1 analysis in a manner which can "dictate the terms pursuant to which a legislative response will be permitted", thereby weakening the ability for a legislature to reformulate the proposed legislation.[66]

Another problem with s.33 is that it does not apply to the whole *Charter.* It only applies to ss.7 to 15 (legal and equality rights) and s.20 (bilingual services rights); it doesn't apply to s.3 (voting rights), s.6 (mobility rights), ss.16-22 (official language rights), s.23 (minority language education rights), s.24 (judicial enforcement of rights), and ss.25-31 (general provisions). Therefore, the provincial legislature of Ontario cannot dis-establish the Roman Catholic school system, the New Brunswick legislature cannot declare itself unilingual, and the Canadian parliament cannot pursue policies which are inconsistent with the principle of multiculturalism, without major constitutional revision. Our recent experience with constitutional tinkering, the failures of the Meech Lake Accord and the Charlottetown Accord, provide evidence of the difficulty of constitutional amendments and support Waldron's argument against entrenching Charters. If the *Charter of Rights and Freedoms* was truly a democratic document and gave legislatures the last word, the notwithstanding clause would apply to the entirety of the *Charter.*

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[64] See James Allan, "The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand", *Sceptical Essays on Human Rights*, Ed. Tom Campbell, K.D. Ewing, and Adam Tomkins (Oxford: Oxford University Press, 2001), and "Oh, That I were Made Judge in the Land", *Federal Law Review* Vol.30, No.3.(2002).

[65] Huscroft, 98.

[66] Ibid., 98.

An additional problem with s.33 is that it has a five year limit. After a period of five years the legislature must revisit the decision to invoke the notwithstanding clause. Placing a five year limit on s.33 sends the subtle message that legislative use of s.33 is something that should only done in extreme cases, akin to a police officer using lethal force. Goldsworthy claims that "overrides are thereby treated as short-term expedients, no doubt because they are described as overriding the Charter itself."[67] The five year limit of the notwithstanding clause can be interpreted as a form of "second guessing" the legislatures decision to invoke s.33, which is reinforced by the fact that the Supreme Court does not have to revisit any of its decisions concerning *Charter* rights. If use of s.33 was seen as overruling Supreme Court interpretation of *Charter* rights, instead of overruling the *Charter* itself, there would be no need for any time limits to its use. The five year time limit of s.33 is a further disincentive for legislatures to disagree with Supreme Court *Charter* rulings, as "it is difficult enough for the legislature to summon the political will to use it once, let alone twice or thrice, and a one-off use may not seem worth the effort."[68] The extraordinary political effort and will necessary to invoke the notwithstanding clause should not be underestimated by *Charter* advocates who quickly trot out the existence of s.33 as the easy solution to the counter-majoritarian problem of judicial review.

Perhaps the greatest weakness of s.33 is its wording and the subtle message it sends to Canadians about *Charter* rights. The notwithstanding clause is written in a manner such that "legislatures seem to be given a power to over-ride the Charter of Rights itself – *not* a power to over-rule a particular interpretation given it by the judges, which is what would be really be happening."[69] The wording of s.33 gives the impression that legislatures which reject a judicial interpretation of the *Charter* are blatantly subverting the *Charter* and infringing upon the rights of Canadians, thereby subverting the Constitution itself. This delegitimizes the notwithstanding clause and adds to the political perils of legislatures going against Supreme Court rulings of the *Charter*. Goldsworthy describes the weakness of the wording of s.33 as follows:

> Section 33 has always been defended on the ground that, since rights are not absolute, but must often give way to other rights and interests, what they require in particular cases is often a subject of reasonable disagreement, and that there is no good reason to assume that when judges and legislators disagree, the former are necessarily correct. *It is unfortunate that this*

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[67] Goldsworthy, 465.
[68] Ibid., 465.
[69] James Allan, "Paying the Comfort of Dogma", *Sydney Law Review* 4, (2003) 25, 11.

justification is not reflected in the wording of the section itself.[70]

As the Supreme Court is specifically granted the power to interpret and enforce the *Charter*, legislative attempts to interpret *Charter* rights and provisions are not granted the same legitimacy and status as Supreme Court rulings.[71]Therefore, if a legislature utilizes s.33, it is seen as supplanting its faulty and illegitimate interpretation of the *Charter,* which is probably perceived as being based more on expedience than on principle, with the Court's "correct" and legitimate interpretation which is based upon moral principle. It is this interpretation of s.33 behind Janet Ajzenstat's claim that, *contra Charter* advocates, s.33 is not a concession to the tradition of parliamentary supremacy, because the notwithstanding clause "powerfully suggests that a sovereign parliament, however valuable as a vehicle for majority opinion, is always a potential threat to rights."[72] Supporters of s.33 claim that legislatures must have the power to circumvent individual or minority rights on occasion in the name of some overriding principle, or for the collective good of the majority, while critics of s.33 claim that it fundamentally weakens the *Charter*'s commitment to individual and minority rights and should therefore be rejected. Yet both critics and supporters of s.33 are united by the logic that legislatures routinely infringe upon rights and the denial that legislatures can protect rights. Therefore, "everything in the debate over the merits of s.33 reinforces the idea, which I would argue is deeply entrenched in the Canadian mind, that legislatures let off the leash are ready, willing, and eager to trample on citizen's rights."[73]

At this stage we can agree with Mark Tushnet's claim that the *Charter of Rights and Freedoms*' commitment to the principle of majoritarianism "is not as transparent as would be the case if a constitution simply eliminated judicial review."[74] A legislature invoking an unpopular override clause which could result in political suicide is not really a legitimate compromise to the principle of majority rule. Thus, at this stage we can conclude that s.33 does not make the *Charter* immune to a rights-based democratic critique of Charters of rights and judicial review. Whether

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[70] Jeffrey Goldsworthy, 465. Emphasis mine.

[71] The potential dangers of the delegitimization of legislatures at the expense of the judiciary will be developed in Chapter 2, while possible solutions will be explored in Chapter 3.

[72] Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms", *Canadian Journal of Political Science*, Vol.30, No.4. (December, 1997), p.646-647.

[73] Ibid., 647. This cynical attitude towards legislatures can have a negative impact on citizens' attitudes toward parliament and the democratic process, is a problem with Charters and judicial review which I shall explore in depth in Chapter 3.

[74] Tushnet, 221, note 51.

Charters of rights and judicial review can be reconciled with democracy will be explored in the following sections.

2.) Eisgruber's Response: Constitutional Democracy

Christopher Eisgruber provides a unique response to Waldron's critique of Charters of rights and judicial review by providing a role for judicial review which contributes to the principles of democratic self-government, thereby reconciling democracy and judicial review. Eisgruber challenges Waldron's conceptions of the electorate, legislatures, and the judiciary, and claims that Waldron "underestimates the institutional complexity of constitutional self-government."[75] Eisgruber shares Waldron's commitment to democracy and self-rule, and also agrees with Waldron's claim that due to the persistence of disagreement concerning rights, along with the inability to agree on a method of producing "correct answers" concerning rights, "the people" should have the ultimate say on debates over rights and be able to decide the limits of state interference on individuals.[76] However, there is no need for Waldron to claim that legislatures are the only democratically legitimate institutional bodies within a constitutional democracy which can achieve the democratic goals of respect and equality through self-government that he supports. Eisgruber claims that Waldron is mistaken in equating "the people" with legislators and that Waldron overlooks the elitist features of legislatures, the same elitist features which he criticizes the judiciary.[77] Eisgruber also points out that the average citizen has no more voice in making congressional decisions as they do making judicial decisions: "you and I don't have the right to vote on any of the bills that go through Congress, not initially and not *via* referenda afterwards."[78]

Majoritarianism vs. Democracy and "The People" vs. "Voters"

While in a simplistic sense legislatures are more responsive to "the people" than the judiciary within a democracy, Eisgruber claims that this assumption is mistaken because it confuses majoritarianism with democracy. Democracy is the principle of self-government for the entirety of "the people", not just the majority. Majorities do not represent all the people, especially legislative majorities, so the claim that legislative or electoral majorities speak on behalf of "the people" is

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[75] Christopher Eisgruber, "Democracy and Disagreement: A Comment on Jeremy Waldron's *Law and Disagreement*", *New York University Journal of Legislation and Public Policy*, Vol.6, No.1, (2002), 35.

[76] "Democracy and Disagreement", 39.

[77] "National legislatures are tiny, elite bodies; there are more than 260 million Americans, but only 535 members of congress. The vast majority of Americans have no hope of ever mounting a credible congressional campaign." Ibid., 40.

[78] Ibid., 40-41.

mistaken. As for the question of fairness in majority decision, Eisgruber poses the following scenario: If sixty percent of the population wanted to spend public money on museums, and forty percent of the population wanted to spend public money on parks, would it be fair if the majority got its way? Eisgruber asks "would anybody think it unfortunate, from the standpoint of democracy, if the country adopted a rule designed to ensure that tax dollars were shared among majority and minority interests?"[79] According to Eisgruber, the ideal of self-government must reflect the wishes of *all* of the citizenry, not just the majority or some other fraction of the populace. Therefore the essential goal of a democratic government is impartiality when making decisions concerning "the people's" differing opinions concerning questions of political morality.[80]

Eisgruber claims that the purpose of constitutionalism is "to construct institutions through which the people can govern themselves."[81] He claims that in most large modern democracies, direct democracy is both impractical and undesirable because it would require too much political effort on part of the average citizenry and would be difficult, if not impossible, to influence the outcome of each plebiscite due to lack of access to the national media and the sheer weight of numbers involved in such direct elections. "When numbers are that large, direct elections may guarantee every voter equal weight in determining the outcome, but the weight of each individual vote is nearly zero...*every voter can be confident that the election's outcome would be no different had she stayed at home.*"[82]

Eisgruber claims that in a constitutional democracy, there are several institutions which represent "the people", not just legislatures. Legislatures, even if they are truly majoritarian institutions,[83] do not represent "the people" because they do not speak for the entire population. Eisgruber supports this claim by distinguishing between electoral majorities and the citizenry as a whole, and by distinguishing between "the people" and the electorate. Eisgruber claims that we cannot equate "the people" with "voters" because "voter" is a political role which features specific powers and incentives. For example, voters act anonymously – they do not have to identify their choices or give reasons for their choices in public, voters choose from a

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79 Christopher Eisgruber, *Constitutional Self-Government.* (Cambridge, Mass.: Harvard University Press, 2001), 19.
80 Ibid., 19.
81 Ibid., 40.
82 Ibid., 80-81. Emphasis mine.
83 Eisgruber also doubts that legislatures are truly majoritarian institutions due to the powerful influence of interest groups and financial interests on legislative politics. Ibid., 49.

limited set of options and cannot set the agenda of the election, and voters realize that their individual choice will have no effect on the results of the election.[84] Therefore, the role of "voter", "gives people very little incentive to take their responsibilities seriously: each individual voter can be sure that her vote will affect neither her reputation nor the government's policy."[85] These features of the political office of "voter" create certain incentives for individuals: they have little incentive to vote, they have little incentive to make informed decisions when they do actually vote, and they have incentives to vote on the basis of self-interest.[86] Eisgruber cites the old adage "people vote with their pocketbooks", along with national election campaign slogans which encourage votes to vote according to their economic self-interests to support this claim.[87] Therefore, due to the specific powers and incentives of the political role of "voter", voters should not be equated with "the people".

Contra Waldron, Eisgruber claims that we cannot merely assume that legislators or voters are automatically the best representatives of "the people" within a democracy. The point is to find out which institutions best represent "the people": "the authority of any institution to speak for the people must be justified on the basis of a pragmatic assessment of its ability to serve democratic values." [88] Therefore democratic government must be sensitive to moral questions and know that there is a difference between interests and principles. Echoing Dworkin's distinction between arguments of policy based on interests versus arguments of rights based on moral principles,[89] Eisgruber makes the following claim: "To speak on behalf of the people, a democratic government must respect the distinction (which the people themselves make) between those issues that are matters of principle and those that are not."[90] In the face of moral controversy, impartiality is difficult in the face of moral disagreement, yet it is essential. Eisgruber claims impartiality might be gained if the government distinguishes between questions of moral principle and self-interest and then attempts to find some level of agreement on this point, along with general agreement that moral positions should be supported by moral reasons, and agreement

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84 Ibid., 50.

85 Ibid., 50. The political role of "voter" can be contrasted to the role of "juror" which involves a much higher level of seriousness and responsibility.

86 "Democracy and Disagreement", 42.

87 Bill Clinton's "It's the economy, stupid!", and Ronald Reagan's "Are you better off now than you were four years ago?" are two examples of blatant appeals to economic self-interest during US national elections. Ibid, 42.

88 *Constitutional Self-Government,* 51.

89 See Ronald Dworkin *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 11.

90 *Constitutional Self-Government,* 53.

that moral positions can benefit from debate and argument.[91]

The Democratic Role of the Judiciary

By challenging Waldron's argument for the special role for the legislative majorities to fairly resolve moral questions concerning rights, Eisgruber provides an argument for the democratic legitimacy of judicial review which is based on the special institutional incentives of the judiciary "to resolve issues of principle on the basis of moral reasons that have popular appeal."[92] Eisgruber rejects the claims that the judiciary are moral experts or have a special ability to solve moral questions compared to average citizens, which are both antithetical to the principles of democratic self-government. Instead, Eisgruber identifies the institutional advantages Supreme Court judges have over legislators which grants them a much higher degree of immunity to political pressure and more freedom to act on principle. First, Supreme Court justices have life tenure,[93] which, along with the fact that Supreme Court justices are not elected and do not have to worry about being fired or voted out of office if they make unpopular decisions, disposes them to have more courage to make decisions based on moral principle than legislators. Second, judges must take greater moral accountability for their decisions than voters or legislators. Because of the small size of the Supreme Court, for example, one justices' vote can greatly affect the outcome of a vote compared to a voter or legislator. Also, judges must give public reasons for their decisions, which is not the case for voters or legislators. These institutional factors contribute to judicial "disinterestedness" which allows them greater freedom to act on principle and resist personal and collective self-interest.[94]

Eisgruber also identifies the democratic pedigree of judges, which he claims is an important factor which deflects much of the critique of judicial review being anti-democratic. Judges are selected by nominated and approved by elected officials, therefore they have no less democratic pedigree than members of any other law-making bureaucratic institution who are appointed by legislators but not directly responsible to the public, such as the head of the US Federal Reserve Board.[95] In addition, in the US, Supreme Court justices are selected on the basis of their political views and political connections; "hence their views of justice are unlikely to be

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91 Ibid., 54-56.
92 Ibid., 57.
93 Eisgruber is specifically referring to the US. Not all constitutional democracies have life tenure for Supreme Court justices. In Canada, for example, there is a policy of mandatory retirement for Supreme Court justices at the age of 75.
94 Ibid., 58-64.
95 Ibid., 65.

radically at odds with the American mainstream."[96] Thus, the democratic pedigree of Supreme Court justices, along with their disinterestedness, allows them to speak on behalf of "the people". Judicial review must be the application of "the people's" sense of justice, not some abstract metaphysical approach to justice, or subjective interpretation of justice.[97]

"The People" and the Problem of Dissensus

Eisgruber's attempt to reconcile judicial review with democracy is creative and compelling, yet under further analysis, falls prey to several of the weaknesses of traditional defences of judicial review which rely too much upon over-emphasizing the negative features and incentives of voters and legislators, while simultaneously over-emphasizing the positive features and incentives of judges. As I will deal with the institutional advantages and disadvantages of legislatures compared to the judiciary in terms of moral reasoning concerning rights, along with the ability of voters to make moral decisions about rights in the following chapters, for now I will only focus on some conceptual problems with Eisgruber's theory, in particular his distinction between majoritarianism and democracy, and "the people" and "voters", and his argument for the democratic pedigree of judges.

Eisgruber is correct to claim that there are different definitions of democracy and that they do not all equate democracy with pure majoritarianism. However, his claim that "there is *no inherent connection* between majoritarianism and *democracy*"[98] is rather puzzling. Democratic decision making could theoretically involve a form of unanimity rule, yet this form of decision making rarely works outside small homogenous groups. Unanimity rule would require a level of consensus unimaginable within a pluralistic society and could involve the silencing of dissenting opinions. Even if one acknowledges that there might be special cases where supermajorities might be more desirable than simple majorities, such as the creation or amendment of a constitution, these cases must be considered deviations or exceptions to the norm.[99] Modified majoritiarianism is still a form of majoritarianism which appeals to the ideal of majority rule. The idea of democracy, or rule of the many, has involved the concept of majority rule since the time of Athenian democracy. While democracy invariably involves some form of majority rule, majority rule does not always make an institution democratic. A tribunal of tyrants can vote and make decisions using majority rule, yet

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96 Ibid., 71.

97 Ibid., 126.

98 Eisgruber, "Constitutional Self-Government and Judicial Review: A Reply to Five Critics", *University of San Francisco Law Review*, 37, (2002), 11.

99 For example, Bickel famously declared the anti-majoritarian principles of judicial review a "deviant institution in American democracy." Bickel, 18.

this hardly makes them democratic.[100] One can make the argument that democracy does not have to feature elements of majority rule in *every* aspect, yet any "democracy" which did not involve some method of the citizenry expressing their opinions and letting the majority decide which decision is mandated would have a hard time convincing democratic theorists, let alone the average citizen, that it is a true democracy. Eisgruber might be claiming that majority decision is only valuable instrumentally, which is debatable,[101] but to deny majority decision as a necessary element of democracy is rather perplexing. Even if one wanted to have a decision making procedure which could be fair and equal, like a lottery or a toss of the coin,[102] to be democratic one would still have to have popular support for such a procedure before instituting it, which would most likely be based upon some form of majority decision.

Eisgruber's claim that democracy is rule by the entire populace, and that because a democratic majority doesn't represent all the people, "thorough and relentless majoritarianism will be therefore undemocratic"[103] is also unconvincing. His example which he uses to illustrate this point, of a majority deciding to spend public money on museums as being unfair to the minority who wants to spend money on parks, is questionable. *Contra* Eisgruber, it *would* be undesirable from the standpoint of democracy to deny the majority their wishes and to entrench a constitutional rule "requiring that tax dollars be shared proportionately among majority and minority interests."[104] First, entrenching such a constitutional rule could freeze the issue and shackle the ability for both current and future generations to revisit and debate the issue, thereby reinforcing a status quo which might no longer be relevant or reflect the desires of the electorate in the future. Second, entrenching such a constitutional rule could give both the majority and the minority less incentive to compromise on future issues. If the current minority on the issue realizes that in the near future it can form a new coalition and possibly form a majority by compromising

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[100] Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), 125.

[101] For arguments supporting the intrinsic value of majority rule see Brian Barry "Is Democracy Special?", *Philosophy and Democracy,* ed. Thomas Christiano (Oxford: Oxford University Press, 2003), Thomas Christiano *The Rule of the Many: Fundamental Issues in Democratic Theory* (Boulder: Westview Press, 1996), Robert Dahl *Democracy and its Critics* (New Haven: Yale University Press, 1989), and Elaine Spitz *Majority Rule* (Chatham, NJ: Chatham House Publishers, 1984).

[102] David Estlund claims that a lottery or coin toss "show no failure of equal respect", and are therefore just as democratically legitimate as majority rule. Estlund, "Jeremy Waldron on *Law and Disagreement*", *Philosophical Studies* 99 (2000), 113.

[103] "A Reply to Five Critics", 7.

[104] Ibid., 7.

on some other issue, it will be less demanding in its desire to entrench its demands on the issue of parks. The same holds true for the majority, which would realize that in order to maintain power it will need support from members of the public who might prefer some funding for parks, or might need minority support for some other issue which is more pressing. However, if the minority realizes that no matter its size or the unpopularity of its demands, it can entrench its interests in the face of majority opposition, the minority could become more dogmatic and less willing to compromise on other political issues. This move in turn could make the majority more dogmatic and less willing to compromise and therefore seek to entrench its interests against the minority. This race for entrenchment could destabilize the sense of trust and compromise which is necessary for a functioning democracy. Because democratic politics invariably involves compromise and the need to revisit issues in the future, the claim that constitutional entrenchment poses no significant cost to democracy is one which should be seriously questioned.

Eisgruber claims majoritarianism can be undemocratic because it can contradict the democratic value of impartiality. Yet *how* can government ever be truly impartial? It is an admirable goal for government to represent all of "the people", yet how can the government always know exactly what "the people" want, especially when "the people" disagree about questions of justice and rights? There will always be relative "winners" and "losers" in politics, as not everyone's interests, as well as their visions of justice, can be equally satisfied at all times. Eisgruber's goal of impartiality would require a level of consensus on political, economic, and moral issues which is improbable, if not impossible, in a large pluralistic society such as the United States or Canada. Eisgruber claims that the institutional features of the judiciary lead to a higher level of "disinterestedness" than citizens or legislators. Yet even if we were to grant him this claim, there would still be the problem disagreement – judges are usually not unanimous in their rulings, especially their rulings on controversial rights issues, thereby they use majority decision to decide these rulings. The Supreme Court justices might be "disinterested", and therefore the decision could appear impartial to both the justices and the winning side of the decision, but to the losing side of the ruling this "impartiality" could appear to be a travesty of injustice, *especially* if the Court has an elevated sense of moral status and the final say on divisive moral and political issues. It is bad enough to be on the losing side of a political debate – it is much worse if this failure becomes entrenched and the winning side is granted the mantle of moral correctness or progress. Eisgruber needs to explain how the majoritarianism of Supreme Court decisions is legitimate when "the people" are not unanimous in their

conceptions of justice and rights.

Eisgruber's conceptual distinction between "the people" and "voters" is ingenious yet is based on controversial metaphysical assumptions. A constitutional theory such as Eisgruber's which is based on an argument from deep consensus, i.e., "the people's" sense of justice, would require, in the words of Andrei Marmor, "nothing short of a comprehensive philosophical defence of the 'general will', or some similar conception of the common good."[105] Marmor claims that constitutional theories which are based upon a juxtaposition between selfish individual actions and more enlightened communal ideals are heavily influenced by Rousseau's myth of the "general will": "Beneath the superficial level of individual's particular will, there is a deeper, more authentic, communal moral self that addresses itself to the common good."[106] While Eisgruber does not refer to Rousseau, his trust in "the people", represented by the judiciary, to achieve the goal of impartiality and attain a greater grasp of moral issues concerning rights and justice over individual "voters" definitely smacks of the Rousseauian tradition of the "collective will". Rousseau, however, considered democracy as the best method of generating the collective will, while the modern heirs of Rousseau, deliberative democracy theorists, claim that inclusive popular public deliberation is the best method of generating decisions which accord with the general will and achieve the common good.[107] More or better democratic institutions and practices would probably be a much more accurate method of determining "the people's" collective sense of justice or rights than un-democratic practices like judicial review.

Whether the citizens of a large pluralistic society such as the United States can actually be referred to as one "people" is also questionable. While Americans are united by their citizenship, they are divided by race, gender, ethnicity, religion, class, sexual preferences, and regional identity and loyalty. In addition, Americans are divided along political and moral lines concerning a myriad of political, economic, cultural, and legal issues. The recent political division of America in to liberal "blue" states, which are clustered along the northeast and northern mid-west and west coast, and conservative "red" states consisting of the south, central, and mountain states, reflects the deep moral and political dissensus within the American "people". Michael Perry questions the existence of a consistent tradition of American political or moral

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[105] Andrei Marmor, "Are Constitutions Legitimate?" *The Canadian Journal of Law and Jurisprudence.* Vol. XX, No. 1 (2007), 89. Marmor is specifically referring to Waluchow's theory of a community's constitutional morality, however, Marmor's criticism are applicable (if not more so) to Eisgruber's theory.

[106] Ibid., 89.

[107] Ibid., 89.

values to support constitutional theories, like Eisgruber's, which are based on appeals to community norms, for "there is no single, predominant American tradition – none so determinate, at any rate, as to be of much help in resolving the particular human rights conflicts that have come before the Court in the modern period and that are likely to come before it in the foreseeable future."[108] Even such traditional American values such as equality, liberty, and the dignity of the individual can have multiple meanings, some of which can be completely contradictory to one another. For example, freedom of speech can be interpreted as the right to produce and consume pornography, while this same right can be interpreted as the right to limit or suppress pornography. Even if there is a discernable American political or moral tradition, it is not unified: "there are *several* American traditions, and they include the denial of freedom of expression, racial intolerance, and religious bigotry."[109] Perry also questions the existence of consensus or "basic shared national values" or "conventional morality" as the basis of norms for interpreting the Constitution due to the level of disagreement concerning the meaning of these norms. Moreover, if there was such a consensus, there would be little need for Courts to enforce those norms against legislatures "whose policy choices presumably would usually reflect any truly authentic consensus."[110]

Even if we grant Eisgruber that there is such a unified entity as "the people", Eisgruber's contrast between the collective identity of "the people" and the individual identity of "voters" is problematic. When he is defending his constitutional theory against his critics[111]who claim that judicial review disenfranchises the electorate, he makes the following response: "If the 'electorate' had a 'mind' or 'feelings,', then 'it' might 'feel' that judicial review had left 'it' less powerful. *But the electorate does not have a 'mind'; only individual voters have minds and feelings."*[112] However, if "the people", as a collective body of individuals personified, can have a mind, voice, and feelings, why cannot "the electorate", which is a collective body of voters personified, have the same attributes? We often attribute personal characteristics to groups and collectivities, and sometimes even grant these groups and collectivities the legal and moral status of individuals.[113] Linguistic groups, ethnic minorities, people with

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[108] Michael Perry, *The Constitution, The Courts, and Human Rights* (New Haven: Yale University Press, 1982), 93.
[109] Ibid., 93.
[110] Ibid., 94.
[111] In this case specifically Waldron, Mark Tushnet, and Roderick Hills.
[112] "A Reply to Five Critics", 25-26. Emphasis mine.
[113] For arguments supporting the concept of group rights see William Galston "Two Concepts of Liberalism", *Ethics* 105 (1995) 515-534, and Will Kymlicka *Multicultural*

physical disabilities, and even corporations can be granted collective rights which are based on a shared identity. If we grant that individual members of a society can have a collective identity and can act collectively, why cannot we grant that these same individuals have a collective identity as voters and can express their voices collectively through democratic politics?[114] The adage "the people have spoken" after the results of an election are tabulated is a much more convincing determination of "the people's" desires than a majority of Supreme Court justices ruling in the name of "the people".

The Democratic Pedigree of the Judiciary

Eisgruber's point about the democratic pedigree of the judiciary is problematic for two reasons. First, Eisgruber is correct that the judiciary does have a level of democratic legitimacy because the judiciary, in particular the appellant courts and the Supreme Court, are nominated by the executive branch and approved by the legislative branch, which in the US has the power to veto the executive's choice for the judiciary.[115] In the sense that Supreme Court justices are selected by elected representatives, they are *indirectly* responsible to the electorate, just like any bureaucrat, and granted a significant amount of political or economic responsibility. However, any other bureaucrat, including a highly respected and powerful bureaucrat such as the head of the Federal Reserve Board, can be disciplined or even fired if she makes a decision which is highly controversial or unpopular. This is not the case with a Supreme Court justice, whose unique political immunity insulates her from political pressure. The fact that Supreme Court justices can only be impeached if they have broken the law undermines Eisgruber's claim that they are as democratically responsible as any other high level bureaucrat. Furthermore, we can grant Eisgruber's point that no modern democracy is thoroughly democratic or majoritarian, and that

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Citizenship: A Liberal Theory of Minority Rights (Oxford: Clarendon University Press, 1995). For criticisms of the concept of group rights see Brian Barry *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001).

[114] Eisgruber could possibly respond that "the people" have different moral incentives than "the electorate" and therefore "the people" are the personification of individuals acting or reasoning morally, while "the electorate" are the personification of individuals acting or reasoning selfishly. However, this would require a level of psychic dissonance which could result in a form of collective hypocrisy at best, or collective psychosis at worst. I will challenge Eisgruber's claim that voters act primarily on the basis of self-interest in Chapter 2.

[115] In Canada the nomination of Supreme Court justices is still largely the prerogative of the Prime Minister, despite recent legislation to make the nomination process more public and responsive to Parliament. Parliament still does not have the power to veto the Prime Minister's choice for Supreme Court justices.

modern democracies are becoming increasingly unresponsive to direct political pressure by creating layer upon layer of bureaucratic institutions. However, this is a fact which should be lamented, not celebrated. This increase in the layers of bureaucracy and lack of accountability to the public can only perpetuate the sense of anomie and powerlessness which confronts most modern democracies.[116]A liberal democracy should be as politically accountable as possible; democratically unresponsive elements of a democratic government should be seen as unfortunate anomalies to the norm of voter accountability, not vice versa.

A second problem with Eisgruber's claim that Supreme Court justices have a democratic pedigree because they are selected by political representatives is that this point undermines one of his central claims for judicial review; the impartiality and disinterestedness of judges. In the US, judges are not selected by their colleagues or have to have a proven track record of sound moral reasoning, but are instead "chosen on the basis of their political views."[117]If judges, especially Supreme Court judges are blatantly political appointees selected for their conformity to certain moral or political positions, how can they in any way be "impartial" and claim to speak on behalf of "the people"? Why does not Eisgruber's critique of legislatures for their failure to represent the entirety of "the people" not also hold for the judiciary if they are selected by elected officials who themselves represent only a certain percent of "the people"? Does not this process also make the judiciary not wholly representative of "the people"? Eisgruber doesn't think that the blatant politicization of the judicial appointment system in the US is to be lamented, but is rather celebrated because it guarantees that "judges will not be idiosyncratic political radicals, but rather will express moral judgments more or less consistent with some current of mainstream American political thought."[118] The problem with this claim is the terms "more or less" and "some current" undermine Eisgruber's argument that "the people" have a consistent moral view of justice and rights. The divisive politicized Supreme Court appointment process alludes to the fact that there are *two* main currents of American political thought which are usually at odds: one "liberal" or "progressive", and one "conservative" or "traditionalist". The President's ability to choose Supreme Court justices, and therefore entrench a political victory by altering the political landscape for a generation, is considered one of *the* main reasons for the importance of

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116 Michael Sandel, "The Political Theory of the Procedural Republic", *The Rule of Law – Ideal or Ideology*, ed. Allan Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), 96.
117 "Democracy and Disagreement", 45.
118 Ibid., 45.

presidential elections. Furthermore, the label "idiosyncratic political radical" is largely in the eye of the beholder; a feminist who believes in the sanctity of *Roe v Wade* would consider any Supreme Court justice who wanted to repeal that decision as a reactionary radical, while an evangelical Christian would consider the judges who voted for *Roe v Wade* as radicals hopelessly out of touch with traditional American values. Eisgruber's claim that judges can be simultaneously disinterested and yet politically accountable is inconsistent, as one claim undermines the other. If judicial review is attractive because of the supposed political independence of the judiciary, highlighting the politicization of the judiciary is hardly a point in favour of judicial independence.[119] When it comes to judicial impartiality and democratic accountability, Eisgruber cannot have his constitutional cake and eat it too.

3.) Waluchow's Reply: Constitutional Morality

In "Constitutions as Living Trees: An Idiot Defends", and *A Common Law Theory of Judicial Review: The Living Tree,* Wil Waluchow attempts to defend Charters of Rights and Charter based judicial review by rejecting the traditional conception of Charters, or the "fixed view" which inspires both Charter advocates such as Dworkin, as well as critics like Waldron, and by developing his own alternative conception of Charters based upon common law jurisprudence and "the living tree" metaphor. As this theory for Charters and judicial review is possibly the most original and powerful rebuttal of Waldron's rights-based critique of Charters and judicial review to date, I will spend the rest of the chapter addressing Waluchow's theory and identifying two of the most controversial elements within Waluchow's theory: his concepts of authenticity and a community's constitutional morality.

Waluchow acknowledges the force of Waldron's arguments concerning the ability and desirability of Charters to form fixed points of rational precommitment to entrenched moral rights that are beyond the level of governmental authority and interference.[120] In order to answer Waldron's critique, Waluchow rejects the fixed view of Charters and develops an alternative view of Charters based on a Hartian analysis of the development of law from a pre-legal to legal society, and the "living

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[119] It is true that not all "conservative" judges will make "conservative" rulings, or that not all "liberal" judges will make "liberal" rulings. Supreme Court Justice Earl Warren is a classic example of a judge who voted contrary to the expectations of the executive. However, this is more of an exception to the rule than the norm, for if it wasn't, there would not be so much political scrutiny and controversy over Supreme Court nominations.

[120] "If this shared picture of the role Charters are supposed to play is accepted, then it seems to me that it's pretty much game over and Waldron is entitled to take home the Cup." "An Idiot Defends", 209.

tree" metaphor of a Constitution which was first formulated in *Edwards (1930).*[121] The living tree conception of Charters utilizes a common law approach to Charter adjudication that combines the dual needs of fixity of written entrenched laws and the flexibility of the common law. Hart's emphasis on the importance of fixity and flexibility in the law, and subsequent rejection of legal formalism, form the basis of Waluchow's rejection of the fixed view of Charters, and the "Hubristic message" of Charters which claims that a community knows "*which* moral rights count, *why* they count, and the *many complex ways* they count in the myriad circumstances of politics." [122] By acknowledging Waldron's circumstances of politics and the impossibility of predetermining how specific moral concerns and issues might evolve in the future, Waluchow claims that a Charter can instead be a modest attempt at precommitment and a humble acknowledgement that legislators cannot predict the outcomes of legislation and foresee how legislation might have the unintended consequence of infringing upon an individual or minority right.[123] Through a common law approach to Charter interpretation, judges can show a level of flexibility and respond to changing social circumstances and the evolving definition of Charter rights on a case-by-case basis. According to Waluchow, the living tree conception of Charters therefore avoids the rigidity and semantic obsession that concern Waldron.

Waldron's Legislature: A Realistic Approach

Waluchow makes his case for judicial review by contrasting a realistic approach to legislatures and the legislative process, with a realistic view of judges and judicial review. Waluchow identifies six criteria which would be necessary conditions for Waldron's ideal legislature which could be trusted to draft legislation which would be respectful of individual and minority rights, the most important being that a legislator act as an autonomous moral agent and would "bear in mind the constraints of justice and equality and not just vote in terms of special interests or wishes of their constituents." [124] Within these criteria, Waluchow is making a fundamentally important assumption: that voters can be mistaken in determining their true wishes, and that voters' current or momentary wishes (or the majority's wishes) can conflict with voters' more fundamental beliefs and commitments to justice and equality. Waluchow is implying that when it comes to constituents' wishes and moral commitments, especially concerning important rights issues, there *are* correct answers and voters can be mistaken about them.

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[121] *Edwards v. A.-G. Canada* (1930) A.C. 124, also referred as the "Persons Case".
[122] Ibid., 235.
[123] Ibid., 228.
[124] Ibid., 242-243.

Waluchow favours the judiciary over the legislature as safeguarding Charter rights because "at the end of the day, when all had been said and done, were I forced to bet on which group, judges or legislators, is more likely to stand up to the relevant political forces at play in deciding the contentious issues surrounding Charter rights, my money would be on judges."[125] Waluchow also claims that minority voices are sometimes not taken seriously in public and legislative debates, therefore, the "courts are often the best, indeed *only* institutional forum in which those (minority) voices can successfully be heard and the expressed interests considered and given due measure."[126] While judges are relatively free from political pressures that affect legislators, due to their unelected status, and legislators can be swayed by political pressures to which judges are more immune, Waluchow concludes that judges are therefore better at reasoning about Charter rights and issues than legislators. Waluchow also provides practical reasons why legislators would not be able to address every Charter issue. For example, legislatures are more concerned about policy and must create general legislation to deal with specific issues and concerns, while the judiciary uses common law reasoning to flesh out the law on a case-by-case basis. The abstract terminology of a Charter cannot, in advance, specify what legislation is required to fulfill Charter norms and values. Therefore the judiciary using common law reasoning can resolve particular cases and slowly make Charter values more concrete. In addition, legislatures simply wouldn't have the time to deal with the increasing number of Charter challenges and controversies.[127]

Authentic Wishes and Constitutional Morality

In order to explain how voters and legislators can "get it wrong" and how judges can "get it right" when it comes to Charter rights, Waluchow develops an intriguing theory of "authentic" voter choice based upon a community's "constitutional morality". By using an analogy of a patient advocate, Waluchow investigates the concept of representation to argue that a legislator, as a democratic representative, must make thoughtful informed decisions based on her constituents' wishes and best interests, just as a patient advocate must act in the best interests of a patient when following her expressed wishes. Waluchow uses the concept of informed consent to strengthen this analogy; just as patients can sometimes be mistaken in their

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[125] Ibid., 244.

[126] Ibid., 243, emphasis mine.

[127] Ibid., 246. This is an admittedly extremely short summary which does not do justice to Waluchow's theory. However, my goal is not to analyze or critique every element of his theory, but instead focus on two elements of his theory which I find problematic – authenticity and constitutional morality.

best interests and can therefore "consent"[128] to certain decisions or procedures out of ignorance, fear, or duress due to their medical condition, voters can also make mistakes in determining the implications of their fundamental moral/political commitments and make decisions based on ignorance, fear, or duress due to a variety of reasons. Just as a patient advocate must distinguish between the patient's expressed wishes versus the patient's true wishes, a legislator must distinguish between her constituent's "expressed wishes that she considers *genuine* and those that she judges to be *inauthentic*".[129] Waluchow acknowledges that this analogy can lead to charges of paternalism which contradicts of the image of constituents as being rational autonomous agents who know their true interests and desires: "I no doubt run the risk of being labeled an elitist and paternalist – of assuming that our representatives sometimes know better than we do and are justified morally in forcing us to do the right things."[130] However, it is "a risk assumed by anyone who argues that a community must sometimes be protected against its own excesses."[131]

In order to avoid the charge of paternalism, Waluchow investigates the concept of representation[132] and identifies three conditions which would entitle a democratic representative to override the expressed desires of her constituents: a representative has moral obligations as a moral agent not to perform immoral acts and can therefore ignore the immoral desires of constituents, a representative sometimes has superior knowledge about complicated political and moral issues than her constituents and can therefore reject their wishes when they are based on ignorance or lack of information, and a representative can ignore the expressed wishes of her constituents when they are inauthentic, or "inconsistent with the community's own basic beliefs, values, commitments, and settled preferences."[133] Waluchow claims that these beliefs, values and commitments can be identified in "the community's basic laws and political institutions, as well as through its many and varied social

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128 Waluchow rejects this type of consent as being true consent, as the patient either lacks full understanding of their options or cannot make a reasoned decision due to impaired cognitive ability.

129 *The Living Tree*, 91.

130 Doing "the right things" here refers to being true to the community's own constitutional morality. Ibid., 91.

131 Ibid., 91.

132 Waluchow rejects the conception of a democratic representative being merely a spokesperson or proxy for her constituents. He has a broader conception of a democratic representative, one where the representative has more independence to make decisions according to her conscience. It is akin to the concept of a "trustee" developed by Dimitrios Kyritsis in "Representation and Waldron's Objection to Judicial Review", *Oxford Journal of Legal Studies*. Vol.26, No.4 (2006) 733-751.

133 Ibid., 95.

practices."[134]

Waluchow acknowledges that this third condition is controversial, but can be defended by appealing to a community's "genuine" wishes that are consistent with their true beliefs, values and commitments. These commitments can be identified through our legal and political systems; a Rawlsian "overlapping consensus" which can form the norms of a community's "constitutional morality". The norms of this constitutional morality are "norms thought so essential to a thriving constitutional democracy that they have been included within a community's entrenched Charter of Rights."[135] The norms of a community's constitutional morality can, and often do, include commitments to liberty, democracy, freedom of expression, equality, and minority rights. Therefore, by appealing to authenticity and constitutional morality, Waluchow can make a case for Charters and judicial review "that rests on the less contentious grounds that they represent a vital means by which a society can strive to honour *its own* basic beliefs, values, commitments, and settled preferences – that is, its own authentic wishes." [136] A Charter is therefore the embodiment of a community's commitments to its constitutional morality which simultaneously identifies and reinforces a community's commitments to rights, while judicial review is the best means to interpret this constitutional morality as judges have the political independence and freedom to perform this function free from majoritarian pressure, and judges interpret the community's constitutional morality through interpreting and applying the law itself, as the law, especially criminal and tort law, can embody elements of our constitutional morality[137] and is in turn shaped by landmark rulings. Thus, judges "are in fact helping to shape and render more determinate the very content of political morality."[138]

While Waluchow's theory of authenticity and constitutional morality is original and intriguing, I hope to show that certain key questions remain concerning his two pivotal concepts of authenticity and the community's constitutional morality. More specifically, my aim will be to show the serious epistemic and pragmatic problems inherent within any theory of authenticity. Moreover, Waluchow must provide a stronger case for the existence of a unified constitutional morality which seriously takes into account pluralism and dissensus concerning moral rights.

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[134] Ibid., 95.
[135] Ibid., 262.
[136] Ibid., 97
[137] It is important to note that Waluchow's definition of constitutional morality is not based exclusively in the law. It is also based upon our political institutions, practices, and traditions.
[138] Ibid., 233.

The Problem of Authenticity

Waluchow does acknowledge some of the empirical difficulties of determining when an individual or a community is being authentic verses inauthentic, and does not claim that cases of individual or communal inauthenticity are typical. Waluchow is introducing the *possibility* that an individual's or community's expressed wishes might in certain circumstances be inauthentic and inconsistent with their deepest commitments and values, and that in such cases someone other than the individual or the electorate might be in a better position to interpret the individual's or community's authentic wishes and commitments. Waluchow remains agnostic about whether the next logical step should be made and that a patient advocate should be allowed to override a patient's expressed wishes, or that political community should adopt judicial review to override the electorate's expressed wishes, although he argues that in the case of Canada, Charter-based judicial review is justified. My critique is an attempt to address questions Waluchow leaves unanswered and argue that such cases of individual, and especially collective, inauthenticity are significantly more difficult to identify than Waluchow assumes. Furthermore, my claim is that even if we could agree that an individual or political community might be acting inauthentically, that would still not justify judicial review, as the individual (or individual voter) is ultimately the best judge of her true wishes, interests, and commitments.[139]

"Authentic" and "inauthentic" are terms which carry significant epistemological, ontological, psychological, and moral implications.[140] Waluchow defines inauthenticity as "evaluative dissonance"; a person acting inconsistently with their "fundamental beliefs, values, commitments, and settled preferences – those features of her personality that, in a sense, make her the person she is."[141] This definition might appear to be unproblematic, however, it implies a level of self-awareness and consistency that might be beyond the average individual. For many of us, our fundamental beliefs, values, and commitments are not fully rationalized or wholly consistent, if not at times contradictory, while our preferences can change depending on circumstances or exposure to new experiences. Consistency in our

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[139] In addition, individuals and the electorate have the right to make mistakes, an argument I develop in Chapter 3.

[140] The language of authenticity, which we have inherited from late 18th and early 19th century Romanticist ideals of creativity and subjectivity, has traditionally stood *against* conventional morality in all of its forms. There is no compelling reason why constitutional morality, which is not actively created or chosen by an individual, would be attractive to the modern "free spirit" who embraces the language and ideals of authenticity, especially the Sartrean sense of authenticity which implies a radical existential freedom.

[141] Ibid., 87.

fundamental beliefs, values and commitments might be an admirable goal, but it might be much more difficult than Waluchow's theory implies.

The demand for authenticity is not only difficult, it might also be illusory. One problem with the concept of authenticity is that it presupposes one *distinct* consistent persona or self that one identifies as the locus of all commitments. However, our persona is arguably not completely consistent as it changes and adapts to a variety of social circumstances and situations. Our identities are largely defined by the myriad of different social roles which have their corresponding varying commitments, and sometimes these roles and commitments conflict with other equally important roles and commitments. For example, the social role and subsequent commitments of a friend can conflict with the social role and commitments of a supervisor or employer, while the commitment to justice can conflict with the commitment to loyalty, and the commitment to honesty can conflict with the commitment to kindness. Not only do individuals have various social roles and commitments, these roles and commitments can also change over time. A teenager's authentic commitment to "drugs, sex, and rock'n'roll" can evolve into a middle-aged adult's authentic commitment to "cocktails, promotions, and golf". While Waluchow acknowledges there are cases when an individual can radically alter her beliefs and commitments and have a "genuine change of heart",[142] he does not provide any criteria to determine when a "change of heart" is genuine or inauthentic. He acknowledges that in the case of patient advocacy this could lead to paternalism and abuse, but does not take these concerns seriously enough when it comes to democratic representation, nor does he explain how we can determine between someone being inauthentic and someone having a "true change of heart".[143] As such radical changes in beliefs, values, and commitments are usually deeply personal and often the result of a significant personal experience or change of circumstances, others might not understand the change or be in a good position to question or criticize the change. A feminist who suddenly changes her pro-choice position when she becomes pregnant might have a hard time explaining her radical change to her feminist colleagues, yet her change of heart can be genuine all the same.

Waluchow's claim that voters can have incorrect views about what is required by their own moral beliefs and commitments is premised on the presence of

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142 *The Living Tree*, 87.

143 One reason Waldron rejects the analogy between constitutional precommitment and Ulysses and the sirens is the problem of defining rational precommitment, for honouring another's precommitment can be regarded as respecting their autonomy "only if a clear line can be drawn between aberrant mental phenomena the precommitment was supposed to override...and genuine uncertainty, changes of mind, conversions, etc." *Law and Disagreement,* 269.

inconsistencies between voter's "false" opinions and beliefs versus their "true" moral commitments and values. Yet when evaluative dissonance results from such inconsistencies, can one merely reject the false opinion for the true commitment? Moral dilemmas, for example, do not offer clear situations of abandoning one belief for another; conflicting moral convictions struggle with each other, with no clear choice between the two. Moral dilemmas are less like rejecting false beliefs for correct ones, but more like choosing between competing desires; one does not "think in terms of banishing error", but instead one thinks "in terms of acting for the best, and this is a frame of mind that acknowledges the presence of both the two oughts".[144] A liberal minded person with strong traditional religious convictions might be able to see the logic of supporting same-sex marriage on liberal principles of equality, yet be equally able to oppose same-sex marriage because it devalues the traditional religious definition of marriage as a holy bond between a man and a woman.[145] At the end of the day, after much anguish and soul searching, such a person might support same-sex marriage, but it would probably involve a deep feeling of regret and some degree of self-doubt, which is a natural result of having to make a difficult moral choice. Reconciling and rejecting inconsistent epistemic beliefs, however, rarely involves such regret, unless one is deeply personally committed to such beliefs.[146] Reconciling individual evaluative dissonance might be possible, but there is no guarantee that the "authentic" commitment will win out over the "inauthentic" opinion, as the distinction between the two is not always so clear.[147]

It is a difficult enough epistemological problem to determine what an individual's true fundamental moral beliefs and commitments are, let alone those of an entire electorate. The problem is identifying the criteria for defining one's beliefs as "inauthentic" as compared to "authentic"; is it the *content* of the belief which is authentic, or is the *process* which the individual has arrived at her belief which is inauthentic, or a combination of the two? Individual moral beliefs, commitments and settled preferences are often unarticulated, vague, malleable, and contradictory, and sometimes completely incommensurable and/or indeterminate.[148] What we say we

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144 Bernard Williams. *Problems of the Self.* (Cambridge: Cambridge University Press, 1973), 172.

145 Former Canadian Prime Minister Paul Martin Jr. is a prime example of someone caught in such a moral dilemma concerning the same-sex marriage debate.

146 Williams, 172.

147 Once again, I do not want to imply that Waluchow does not acknowledge the difficulty of distinguishing between the two. However, as opposition to same-sex marriage is one of his prime examples of voter inauthenticity, the difficulties of reconciling evaluative dissonance that I have developed are relevant.

148 Joseph Raz, for example, has a well-developed moral/political philosophy largely

believe in often does not result in the actions we actually perform, especially in the sphere of morality.

Waluchow acknowledges that there are situations where an individual could be unwilling or unable to act according to her "deepest moral commitments and settled preferences". He uses an example of himself at a pub where he is intoxicated yet demands to drive home, even though he abhors drinking and driving. In this case it is the "drink – or the machismo – talking, not me", therefore his wish to drive home drunk is inauthentic.[149] While this example is one which many of us can relate to, it is not entirely convincing that his "true" desire is not to drive home intoxicated; perhaps the machismo desire to drive home intoxicated is his true desire, one that the drink was able to make public. Alcohol can enable us to throw away our socially created and enforced inhibitions and allow us to reveal sides of our personality which are not always attractive, but are part of our character all the same. Alcohol is the ultimate social lubricant which reveals "truths" we may not want to face, but it can also ease tension, allow for bonding, and enable individuals to be honest and "tell it like it is" in situations where they would normally be uncomfortable with such honesty.[150] Perhaps the anti-drunk driving stance is inauthentic, merely a "politically correct" attitude which is the result of social pressure and prudence, one which could be rejected when the opportune circumstance permitted.

That one can make such a case concerning a seemingly non-problematic example shows the problem of defining an individual's authentic preferences. Authenticity is a nebulous concept, which could require layer upon layer of psychological and historical investigation to get to the "true" self, if such an entity actually exists or can be defined. Individuals might make mistakes in identifying their deepest values and commitments, but they are still, over all, more likely to be the best judges of these commitments and values. We can make the reasonable conclusion that individuals are the best judges of their values and commitments for the following reasons: they have the greatest incentive to understand their values and commitments compared with anyone else, they have the greatest knowledge of the details of their

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based upon the view that different conceptions of the good life are incommensurable. See *The Morality of Freedom* (Oxford: Oxford University Press, 1986) and *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994).

149 *The Living Tree*, 88.

150 In Japan, for example, alcohol is essential for allowing individuals to reveal their "inner face" (*honne*) instead of their "public face" (*tatamae*) and speak truthfully, especially in organizational settings where subordinates usually do not have the option of speaking frankly with their supervisors, lest they cause their supervisor to "lose face".

own lives, along with their complex history of their relationship to others, and individuals are the best judges to know changes in their values and commitments.[151] The moral value we place on personal autonomy is primarily based on the concept that individuals have the right to choose for themselves decisions that directly affect their own lives. In the words of Marmor, "it is more important for people to be able to choose for themselves than to choose correctly (that is, even if there is a correct answer.)"[152]

J.S. Mill famously defends the moral right of individuals to be their own judges of their values and commitments: "...it is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way. It is for him to find out what part of recorded experience is properly applicable to his own circumstances and character."[153] According to Mill, the individual must be the ultimate arbiter of her interests, preferences, and values and must not be interfered with by others in deciding and pursuing these interests, preferences, and values unless they harm others, even though others might think the individual's actions are "foolish, perverse, or wrong."[154] Self-regarding conduct, according to Mill, must be the sole purview of the individual, who is the person best placed to know her true interests, preferences, and values, and, more importantly, has the most at stake in having these interests, preferences, and values in the first place.[155] Mill would consider well-meaning attempts to substitute the individual's interpretation of her authentic wishes, values, and commitments a form of paternalism which harms the individual's moral development, especially the exercise of moral reasoning and judgment. Individual moral development and autonomy are stymied if the individual does not have the final say in determining her interests, preferences, and values.[156]

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151 Thomas Christiano, "An Argument for Democratic Equality", *Philosophy and Democracy*, ed. Thomas Christiano (Oxford: Oxford University Press, 2003) 58. Christiano's argument is for knowing an individual's interests, which in this case can be analogous to knowing an individual's moral values and commitments.

152 Andrei Marmor, "Authority, Equality and Democracy". *Ratio Juris.* Vol.18 No.3 (2005), 322.

153 John Stuart Mill, *On Liberty: In Focus.* Ed. John Gray and G.W. Smith (London: Routledge, 1991), 74.

154 Ibid., 33.

155 "He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it is trifling, compared with that which he himself has; the interests which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else." Ibid., 91.

156 Ibid., 75. Mill's faith in individual self-knowledge could be challenged by recent

Individuals can have a hard enough time knowing their own values and commitments, let alone determining the "authentic" values and commitments of others. The move from a patient's authentic interests and preferences to those of an entire electorate is even more difficult. How exactly is a legislator (or judge) to determine the community's "authentic" moral beliefs, commitments, and settled preferences? Within a large diverse state such as Canada, there are numerous communities: geographic, ethnic, religious, sexual, professional, political, economic, philosophical, and cultural. None of these groups are monolithic entities as members of these groups often have multiple memberships and allegiances to these communities which often compete and conflict with each other. Applying the moral commitments in a Charter is unhelpful as most of the values in a Charter are abstract, vague, or open to fundamental debate and disagreement. It is an extremely difficult task to ask a democratic representative or judge to distinguish between the electorate's "authentic" and "inauthentic" desires. For example, how are the desires of fundamentalist Christians or Muslims who vote Conservative because they are opposed to same-sex marriage less authentic than the desires of those who vote New Democrat because they support same-sex marriage? Waluchow is correct to identify the danger of paternalism when determining authentic wishes, but he needs to take this concern much more seriously.[157]

Constitutional Morality and the Problem of Pluralism

Waluchow's appeal to constitutional morality as the basis of an electorate's authentic commitments is an original and attractive position, however, I question whether there is the level of agreement necessary for this theory to be convincing. Let us grant that Waldron's deep disagreement thesis is not as strong as he proclaims and that there is a minimum level of agreement which is embedded in our constitutional norms and practices. This minimum level of agreement still does not warrant making the move to granting the judiciary the right to strike down legislation. While Waluchow does not claim that a community's constitutional morality is fully determinate in deciding difficult rights decisions, as his common law methodology is offered as a method of slowly developing and interpreting a community's

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psychological studies on unconscious impulses and self-deception. For a philosophical critique of self-awareness and its relation to authenticity, see Charles Guignon, *Being Authentic* (London: Routledge, 2004).

[157] Even if the epistemic challenges of determining a community's moral commitments could be overcome, there is still the moral concern of whether democratic representatives, let alone judges, *should* reject voters "inauthentic" wishes and desires. I will address this question, concerning "right answers" in rights debates, in Chapter 3.

constitutional morality on a case-by-case basis, my claim is that it still does not provide the level of determinacy that his theory requires.

First, there is the sociological problem: one can question Waluchow's assumption that there is *one* identifiable or consistent constitutional morality within any political community. Differing or contesting legal principles and jurisdictions could potentially challenge the existence of one consistent constitutional morality. For example, while the *Charter of Rights and Freedoms* forms part of our foundational law, the Quebec legislature has never actually ratified the *Charter*. Enshrining the *Charter* without the consent of Quebec undermines the Canadian constitutional tradition of federalism. In addition, Quebec has its own provincial Charter of rights which pre-dates the *Charter* and is seen by the majority of Quebecoise as a more accurate reflection of their distinct constitutional morality than the *Charter*. Furthermore, Quebec has a different legal tradition than the rest of Canada which is based on French civil law rather than English common law. The failure of the Meech Lake Accord, for example, could be interpreted as a reflection of the different constitutional moralities of Canada, especially in relation to the *Charter*. According to Alan Cairns, in the rest of Canada the *Charter* has become a "sacred symbol that is profaned by Meech Lake", while in Quebec, "the Charter is seen to go beyond the simple task of rights protection and is viewed as a straight jacket whose dynamicism leads to centralization and uniformity."[158] Aboriginal groups, such as the Assembly of First Nations,[159] also reject the *Charter* for having values which are overly individualistic and therefore inconsistent with their more collectivistic values and legal and political traditions. Aboriginal nationalism emphasizes the unique status of aboriginal world views and practices contrasted with European inspired colonial attitudes, and question the ability of non-Aboriginals or non-Aboriginal institutions to represent Aboriginal interests and values. Therefore, "a powerful strain of Aboriginal political discourse challenges or discounts the possibility of Aboriginal and non-Aboriginal Canadians sharing a common membership in a single community."[160]

A second problem with the theory of a community's constitutional morality is

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[158] Alan Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake.* (Toronto: McClelland and Stewart: 1991), 244.

[159] It is important to note that not all Aboriginals or their representatives share this position. The Native Women's Association of Canada, for example, supports the *Charter* and are critical of the male-dominated leadership of the Assembly of First Nations and consider the *Charter* to be a tool against aboriginal patriarchal attitudes and practices. This is further evidence of the pluralism and disagreement within all levels of Canadian society.

[160] Ibid., 254.

of a more philosophical nature. Marmor identifies the potential problem with the theory of constitutional morality: it does not take the existence of pluralism seriously enough by claiming that moral differences are only on the surface and that there is a deeper underlying consensus we can appeal to. Marmor claims that arguments for deep consensus, like Waluchow's, imply either that moral disagreements are not as deep as pluralists claim, or that even if these disagreements are deep, these disagreements do not deserve the level of respect pluralism proclaims, "since they are not sufficiently authentic; they do not manifest the true moral values that people living in a political society ought to share."[161] Waluchow's theory arguably implies both claims. For example, Waluchow claims that our constitutional morality would completely reject "any opinion that oppresses a minority group, harbours the prejudices of patriarchy, and so on."[162] While the vast majority of citizens in a constitutional liberal democracy like Canada would reject such opinions or legislation, we can reasonably disagree about the specific details of this claim: who constitutes a minority group, what attitudes, actions, or policies constitute and cause oppression, and whether patriarchy actually still exists in our society, let alone what attitudes stem from or reinforce patriarchy. Even if we could identify a consistent community constitutional morality, there would still be the problem of interpretation – there will be different interpretations of what the constitutional morality entails or demands. Citizens will legitimately disagree on what our constitutional morality entails, as will our elected representatives, *as will our judges.*

Marmor might be guilty of implying that Waluchow's theory of constitutional morality is much more determinate than Waluchow intends. However, I agree with Marmor that Waluchow's theory of a constitutional morality, even coupled with his common law approach, does not provide judges with the determinacy Waluchow desires, nor does it justify judicial review. During *Charter* cases concerning same-sex marriage, for example, Waluchow is correct to claim that both supporters and opponents of same-sex marriage are committed to the constitutional norms of equality and respect. It is plausible that the opponents of same-sex marriage were not suffering from evaluative dissonance, but instead had different interpretations of what these constitutional norms entail or require. One can make a reasonable argument that the norms of equality and respect might require something like "civil unions" between same-sex couples, but these norms do not necessarily require the state to change the traditional definition of marriage. When courts make decisions on highly divisive

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161 "Are Constitutions Legitimate?", 90.

162 *The Living Tree,* 237.

political and moral conflicts, such as pornography, hate speech, abortion, Sunday shopping, and language rights, they are more aptly described as giving a momentary victory for one side of a moral debate over another, not a victory of a "correct" interpretation of a community's constitutional morality over a "false" or deluded interpretation. An appeal to a community's constitutional morality can potentially become a form of question begging, as it is exactly a disagreement over what the community's constitutional morality requires which is the basis for the litigation in the first place.

While one could make the case for norms within our political and legal system which we can roughly agree upon, and that a case-by-case common law approach to Charter disputes could provide judges with a cautious, incremental method of fleshing out the requirements of our constitutional morality, the interpretation and application of these norms will still be more difficult than Waluchow's theory implies. First of all, there is no guarantee that judges would accept such an interpretive theory as they could be originalists or textualists, or have a radical view of judicial activism which eschews a more cautious common law approach. Second, judges could still disagree over the meaning of Charter values and norms and what a common law approach might require. If there was any deep underlying consensus over what the freedom of expression or equality require, for example, it is questionable that the judiciary would even have a major role in striking down legislation, or that there would be need for a Charter of rights in the first place. However, the norms within our political and legal traditions, institutions, and practices are not always wholly consistent and can often conflict with each other. "Freedom of association" could be interpreted by a social democrat as the right of workers to strike, while it could be simultaneously interpreted by a libertarian as the right to withhold union dues which go to political parties. The right to "life, liberty, and security of the person" could be interpreted by a pro-life advocate as the right for the fetus to be protected by the state, while it could be just as easily interpreted by a pro-choice advocate as a woman's right to have an abortion. Waluchow acknowledges in controversial issues like abortion, our constitutional morality will probably run out and judges will have to use other sources to decide these controversial topics.[163] My claim is that these cases are much more likely to be the norm than the exception.

Even if Charter norms can be consistently identified, it is questionable that we leave their interpretation and application with an unelected unaccountable elite of nine individuals. The vague terminology of the *Canadian Charter of Rights and*

[163] *The Living Tree*, 229.

Freedoms can lead to inconsistently overruled decisions, split decisions, and conclusions that come from strikingly different reasoning. *Morgentaller* (1988), for example, involved a unanimous Ontario Court of Appeal which followed an earlier split decision of the Supreme Court of Canada which was later over-ruled by another split Supreme Court decision with the five judges of the majority ruling having three different opinions.[164] If Supreme Court judges cannot consistently agree on the definition and application of our norms of constitutional morality, why should we leave the interpretation of our constitutional morality primarily with the judiciary? If, at the end of the day, determining our constitutional morality comes down to basic majoritiarian decision making procedures, why not let legislatures, which are far more diverse and responsive to changing social, political, and moral norms, be the primary agents in charge of interpreting our constitutional morality? Granted, legislatures can make mistakes and possibly "get it wrong" when it comes to interpreting and applying a society's constitutional morality.[165] However, the community has the right to make mistakes. Democracy is based upon trust in "the people", which necessarily includes the possibility of "the people" making mistakes. Morality in all of its forms must allow for some level of individual choice and responsibility; this is no less true concerning constitutional morality.[166]

Conclusion

In this chapter I have argued that creative constitutional theories which attempt to reconcile Charters of rights and judicial review with democracy, such as those proposed by Eisgruber and Waluchow, are bound to falter on the rock of dissensus. Strategies such as attempting to drive a conceptual wedge between the popular equation of "the people" with "voters", thereby de-legitimizing the moral authority of the electorate and their democratic representatives (Eisgruber), or appealing to the concepts of authenticity and constitutional morality in order to show how judges are institutionally advantaged to make correct decisions concerning rights (Waluchow), either suffer from conceptual or epistemic problems and do not take the dangers of paternalism seriously enough. In the specific Canadian case, I have argued that Section 33 does not answer the counter-majoritarian difficulty, and that the *Charter of Rights and Freedoms*, along with the practice of judicial review, still has

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164 Mandel, *The Legalization of Politics*, 37.

165 Legislators might mistakenly assume that their policies or strategies have more public support than is the case. For example, despite the legality of the opposition party coalition to remove the Conservative government in 2008, the coalition leaders underestimated the unpopularity of overturning the results of the 2008 election and attempting to form a government without an electoral mandate.

166 I will develop this line of argument in much more detail in Chapter 3.

significant tensions with parliamentary democracy, despite the inclusion of the notwithstanding clause.

Perhaps a better strategy for supporters of Charters and judicial review is to acknowledge the tensions between democracy and Charters/judicial review, yet accept these tensions as a necessary feature of our political world which can be justified on consequentialist grounds; Charters of rights and judicial review can be defended because they produce better outcomes concerning rights than legislatures, and they can contribute to the creation and reinforcement of a "culture of rights" in which citizens become more self-conscious as rights-holders and are more vigilant of government infractions upon their rights. In the next chapter I will critique the assumption that Charters, specifically the *Canadian Charter of Rights and Freedoms,* and the practice of judicial review are better tools for protecting rights than legislatures relying solely upon majoritarian procedures. *Contra* Waldron, who claims that democratic objections to judicial review must be rights-based,[167] I will argue that there are consequentialist arguments for majoritarian parliamentary democracy and against Charters and judicial review which are not only compelling, but also avoid some of the problems of radical dissensus which affect Waldron's theory.[168]

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[167] *Law and Disagreement*, 283.

[168] Waldron's theory of deep disagreement is criticized by Waluchow, who claims that Waldron's "no reasonable disagreement criterion" results in a Cartesian dilemma: if he privileges the "supposed, but undeniably disputed, virtues of unadulterated majority rule, then he is in no position to reject similar attempts by Advocates, who embrace Charters and their interpretation and enforcement via judicial review, on the ground that they all founder on the rock of reasonable dissensus." "An Idiot Defends", 241. Aileen Kavanagh also questions the legitimacy of Waldron's privileging of pure proceduralism in the face of radical disagreement: "an assertion that one procedural arrangement should be used in preference to another invites the questions of why *that* arrangement should have special claim on our support." Aileen Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron" *Law and Philosophy* 22 (2003), 496. These are valid criticisms of a major weakness of Waldron's theory. I will offer no defence of Waldron's theory of radical dissensus, as my purpose is to critique Charters and judicial review, not defend every detail of Waldron's theory. However, even if Waldron does push the case for disagreement too far, he exposes the problem of *reasonable* disagreement and pluralism within our society concerning questions of justice and rights. Even if there is more consensus on rights than Waldron believes is the case, there is still a significant level of disagreement on the meaning, content, and application of these rights, which makes his critique of Charters of rights and judicial review relevant. The ultimate question is *who* should ultimately resolve these disagreements, courts or legislatures.

Chapter 2: Majorities, Rights, and Judicial Review

As we have seen in Chapter 1, arguments which claim that Charters of rights and judicial review are consistent with, or even mandated by, the democratic right of self-rule falter upon the rocks of reasonable disagreement. Waldron's rights-based argument for the importance of the right to self-rule in the form of unmodified majoritarianism, and the democratic illegitimacy of Charters and judicial review still holds. However, one can respond that the right to self-rule is but one of many important rights, and that Charters of rights and judicial review might conflict with the principle of self-rule, but can be justified on consequentialist grounds: Charters of rights and the practice of judicial review can protect the rights of unpopular individuals and minorities who might not be able to adequately protect their rights and interests within majoritarian practices and institutions because of institutional weaknesses within democratic politics. In this chapter I shall investigate the main arguments against majority rule – the "tyranny of the majority"[169] argument, and the institutional argument. I shall conclude that both of these arguments are fundamentally flawed and that within mature democracies, the practices and institutions of representative democracy can, and do, protect both individual and minority rights.

Part 1: The Tyranny of the Majority

In 1969, when Liberal Justice Minister Pierre Trudeau was leading the chorus of civil libertarians who were loudly clamoring for the need for Canada to have an entrenched Charter of rights to protect the rights of individuals and vulnerable minorities against the excesses of majoritarian democracy, Peter Russell questioned whether this concern about majority rule was really justified:

> Those of us who are concerned about the quality of liberty in our civil society, should step back for a moment and take a good long look at the approach to civil liberties which the bill of rights represents. How realistic is it as a diagnosis of the main threat to our liberty? How plausible is its prescription for our emancipation? Do you feel menaced by the proposal of the great Canadian majority, acting through its elected representatives in Ottawa, stream-rolling over your basic rights and liberties in pursuit of its own interests? Are you comforted by the possibility that soon the Canadian Bill of Rights might be "entrenched" in the Constitution enabling our judiciary to

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[169] I shall utilize Knopff and Morton's definition of tyranny in this chapter: "concerted government attack on the core meaning of a fundamental right". Rainer Knopff and F.L. Morton, "Does the Charter Hinder Canadians from Becoming a Sovereign People?" *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell.* Ed. Joseph Fletcher (Toronto: University of Toronto Press, 1999), 283.

> veto these strident majoritarian demands and secure your liberty? If you ask yourself these questions and can honestly answer them in the affirmative, what you surely need is a psychiatrist, not a bill of rights.[170]

Despite Russell's rhetoric, I agree with his substantive claim. Yet it is important to address this concern about majoritarianism which advocates of Charters and judicial review share. Perhaps the strongest justification for an entrenched Charter of rights is to protect the rights and interests of vulnerable minorities against the whims of capricious majorities – the "tyranny of the majority" argument. This concern about the dangers of unlimited majoritarianism, articulated by Alexis De Tocqueville and popularized by John Stuart Mill, has become such an integral part of our political culture that "the need for constitutional constraints on legislative decisions has become more or less axiomatic."[171] However, as Waldron's "Hobbsean Predators" argument has demonstrated, this concern of the "tyranny of the majority" is largely an irrational fear which is inconsistent with our liberal commitments to respecting individuals as rational, moral agents capable and worthy of self-government, as well as somewhat insulting as it smacks of elitist paternalism because it implies that the "masses" can be easily swayed by fear, prejudice, ignorance, or self-interest.[172] Therefore majorities cannot be fully trusted to act morally or rationally and need to be curbed by constitutional limitations such as a Charter of rights and the practice of judicial review lest they intentionally or unintentionally trample on the rights of minorities or unpopular individuals." If the "tyranny of the majority" is an exaggerated fear based upon dubious premises,[173] why does it still have such power over the imaginations of our intellectual, cultural, and political elites, let alone the average citizen? In order to answer this question and develop a critique of the "tyranny of the majority", we will first have to turn to Tocqueville and Mill to see how this concept gained such credence in our political culture.

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170 Peter Russell, "A Democratic Approach to Civil Liberties", *University of Toronto Law Journal*, 19 (1969), 109.

171 *Law and Disagreement*, 11.

172 I don't want to deny that within democracies historically certain groups have suffered, or continue to suffer to a degree. My claim is that in a relatively well-functioning democracy, there will always be political winners and losers, but these victories and defeats are neither permanent nor do they automatically equate to tyranny.

173 Once again, my critique of the "tyranny of the majority" is relevant to *mature* democracies such as those in the English speaking Commonwealth, the United States, and Western Europe. I am an agnostic about the benefits of entrenching a Charter of rights in immature democracies as each state is unique and the pros and cons of a constitutionalized Charter of rights will depend on the specific needs and circumstances of the new democracy.

Tocqueville and Mill: Aristocratic Reservations

While the fear of unadulterated majority rule was expressed by Plato and Aristotle, its more recent historical incarnation was a reaction to the popular democracy of the United States, along the expansion of the franchise in Great Britain after the Reform Bill of 1832. *Democracy in America*, first published in 1835, was generally filled with Tocqueville's admiration of the egalitarian spirit and democratic habits of the new republic, but it also expressed his concerns with the lack of limits of such a democratic society. Tocqueville considered the greatest threat to American democracy to be the tyranny of the majority: "I am not so much alarmed at the excessive liberty which reigns in that country, as at the inadequate securities which one finds against tyranny."[174] Tocqueville defined the essence of democratic government as the total sovereignty of the majority, yet considered majorities, as collectivities of individuals, capable of making mistakes and misusing their power against their adversaries the same as individuals. Just as an individual does not have a moral right to do whatever he wants, collectives do not have the right to whatever they want. Tocqueville warned that no force or institution within a democracy was capable of resisting majority pressure.[175] The federal system of government, the checks and balances of the three branches of government, and even the Bill of Rights and the political independence of the judiciary were all inadequate protections against the will of the majority. Tocqueville describes the overwhelming and nearly unstoppable juggernaut of the tyranny of the majority as follows:

> When an individual or a party is wronged in the United States, to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority and implicitly obeys it; if to the executive power, it is appointed by the majority and serves as a passive tool in its hands. The public force consists of the majority under arms; the jury is the majority invested with the right of hearing judicial cases; and in certain states even the judges are elected by the majority. However iniquitous or absurd the measure of which you complain, you must submit to it as well as you can.[176]

Tocqueville anticipated Mill's fear that the tyranny of the majority would be one of opinion which could stifle creativity, genius, and originality. Tocqueville saw the moral legitimacy and authority of majority rule as an almost irresistible force

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[174] Alexis De Tocqueville *Democracy in America*, ed. Phillips Bradley (New York: Vintage Books, 1945), 271.
[175] Ibid., 264.
[176] Ibid., 271.

which made it more powerful than the overt political and legal oppression of the tyranny of the absolute monarchs in Europe. The political tyrant of the day could never exercise his power over the thoughts, attitudes, and habits of the average subject. However, in a majoritarian democracy, the majority has not only overt political power and legitimacy, but more importantly, it has *moral* power and legitimacy which can not only settle controversies and debates, but also quash disagreement.[177]

Democracy in America had a profound impact on John Stuart Mill's political philosophy and contributed significantly to Mill's growing concerns about majoritarian democracy as it was practiced in the United States.[178] Like Tocqueville, Mill considered democratic government to be an inevitability in Europe, as the disenfranchised working classes were starting to demand the right to vote and participate in government. Mill considered the majoritarian democracy which Tocqueville described in America as abhorrent, and labeled it "false democracy".[179] Mill defined "false democracy" as "Democracy as commonly conceived and hitherto practiced", or majority rule, which resulted in the "complete disenfranchisement of minorities". It was to be contrasted with "true democracy" which consisted of "the government of the whole people by the whole people, equally represented."[180]

Mill acknowledged that in a representative democracy, the will of the majority should ultimately over-rule that of the minority, but it does not follow that the minority should have no voice in making political decisions and that their opinions should be ignored.[181] Furthermore, within a majoritarian democracy, in closely contested elections, a bare majority of the electorate chooses the representatives who then go on to form a bare majority in the legislature, yet they claim to represent the will of the whole of the electorate and pass legislation affecting the whole of the populace.

Mill proposed a system of proportional representation as a solution to protecting the interests of minorities within a majoritarian legislature. Yet this measure alone would not protect the liberties of minorities from the two greatest dangers of democratic government: the "insufficient mental qualifications" of the legislature, and

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177 Ibid., 273.

178 While *On Liberty* is largely responsible to making the conception of the "tyranny of the majority" part of our political lexicon, Mill only devotes two pages specifically to the political form of tyranny in *On Liberty*, and instead focuses on what he considered to be the greater danger of social coercion over matters of morality and conscience through social pressure and conformity.

179 John Stuart Mill *Considerations on Representative Government.* Ed. Currin V. Shields. (Indianapolis: The Bobbs-Merril Company, 1958), editor's introduction, xxiii.

180 Ibid., 102-103.

181 Ibid., 103.

the possibility of the legislature being influenced or controlled by interests "not identical with the general welfare of the community."[182] The danger of a majority, both of electors and legislators, ruling on the basis of their narrow interests instead of the interests of the community as a whole was a greater concern for Mill, as a purely majoritarian system of government couldn't guarantee that the majority would rule out of a sense of justice and consider the interests of the entirety of the citizenry. Because the interests of many groups within a political community are opposed to each other, especially the financial interests of the wealthy and the lower classes, it is too tempting to identify solely with one's group interests or to define one's group interests as being identical with those of the society at large. A society divided by race, language, religion, and class must therefore guarantee that the interests of each group must be represented in the legislature.[183]

A. Majorities and Minorities – Conceptual Problems

At first glance, the danger of the "tyranny of the majority" within majoritarian democracies *does* look like a legitimate concern which gives credence to arguments for entrenched Charters of rights and the practice of judicial review. However, under further analysis, a considerable part of the rhetorical force of the "tyranny of the majority" is based upon, at best, a debatable, or, at worst, an overly simplistic definition of "majorities" and "minorities". In a simplistic sense, there are ethnic, racial, linguistic, religious, and cultural minorities and a numerical "majority" within even the most homogenous society. In addition, members of these minorities have historically sometimes suffered from legislation passed by majorities who were either un-sympathetic, or in certain cases overtly hostile, to their rights and interests. "Jim Crow" legislation which treated black Americans as second class citizens is perhaps the archetypical example of such legislative tyranny. However, in modern mature democracies which are more pluralistic, culturally sophisticated, and aware of the legacies of racism, such overt acts of legislative tyranny are largely a thing of the past.[184] The modern concept of "minorities" is also more subtle, as in heterogeneous democracies such as Canada or the United States, minority identities often overlap with other identities which could belong to any majority coalition. "Minorities" and "majorities" are not homogenous, static entities. Defining which groups are

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[182] Ibid., 86.

[183] Ibid., 101.

[184] I do not want to deny that a legislative majority in a mature democracy could pass legislation which harms a certain minority's interests. However, I will argue that this is not the same as infringing upon rights, and that sometimes these rights infringements are justified. Furthermore, I shall argue that the same is true for judicial majorities.

"minorities" or "majorities" is often arbitrary depending on how membership is defined. For example, women and "women's issues and interests" are often lumped together with issues and interests of racial, economic, and sexual preference minorities, even though women usually make up the majority within most societies. Within any polity there are regional, racial, ethnic, linguistic, religious, political, moral, economic, and sexual preference groups which could conceivably be considered "minorities" in one situation, yet belong to a "majority" in another situation. For instance, French speaking Quebecois consider themselves to be a minority within English speaking North America, yet are a majority within Quebec. The definition of groups, especially ethnic groups, can also be arbitrary and change over time: the Irish used to be considered a racial "minority group" in the United States, while Latinos or Hispanics are a recently contrived minority group which could conceivably include people as diverse as Argentineans of German descent to Mayan Indians from Guatemala. Furthermore, the increasing rate of inter-racial and inter-cultural marriages within most liberal democracies will only increase the difficulties of classifying individuals into distinct and discreet minorities.

In addition, every individual belongs to a variety of communities and groups which can have conflicting or competing allegiances which also affects the difficulty in defining specific "minorities" and "majority" identities. A gay Sunni Muslim of Pakistani descent living in a preponderantly Muslim neighbourhood in Mississauga, for example, might consider himself to be a "minority" because of his sexuality, yet part of the "majority" within his neighbourhood because of his religious and ethnic identity. The same individual might feel like a member of the "majority" because he identifies with the broad cultural norms of his city and province, yet is simultaneously a "minority" politically because he votes Conservative when the majority of his family, friends, and neighbours vote Liberal. This individual could feel like a "minority" in his community because of his deep love and affiliation with hip-hop music and culture, yet feel like a member of the "majority" within his age group who feel an affinity to this popular musical and cultural genre. This example demonstrates the difficulty of consistently identifying minority or majority membership; it depends on how one defines the category and the importance placed on the distinction and involves a significant level of arbitrariness. We are all individuals who have different, competing, and some times mutually exclusive collective identities and affiliations. There are no "natural" minorities or majorities as these groups are themselves heterogeneous and are in flux and open to interpretation and reformation. In the words of Elaine Spitz, "*The* majority is a figment of the imagination...where race unifies, economics

sometimes divides. Where income problems draw people together, religion may rend them asunder."[185]

Even in cases where a specific minority can be successfully identified, there is the problem of identifying these minority interests. Every minority has smaller sub-groups or internal minorities within the larger group which might have different or competing interests with the larger or dominant group. K. Anthony Appiah warns of the coercive effects of a simplistic definition of minorities which is not sensitive to the heterogeneity of groups and multiplicity of identities. A danger with recognition of collective identities and the subsequent granting of rights to these identities is that it often implies an essentialist notion of groups and group identity, thereby demanding conformity to a certain identity and behaviour.[186] Appiah claims that demanding respect for individuals as blacks or homosexuals, for example, will involve "scripts" about how blacks or gays should act, which can create undue expectations upon individuals in these minority groups who do not want to follow this script: "the politics of recognition requires that one's skin color, one's sexual body, should be acknowledged politically in ways that make it hard for those who want to treat their skin color and their sexual body as personal dimensions of the self."[187] Within minority groups there can also be divisions between the elites and the masses of these groups, a cleavage which can be pose serious political problems because these interests often conflict. For example, the elites of cultural communities might be more interested in status or symbolic gestures, while the masses might be more interested in economic benefits.[188] The question of who speaks for minority groups is a serious one, because awarding rights to the majority or elite which claims to represent the group could lead to entrenching the majority or elite interests over the minority or mass interests. Entrenching minority interests could also hamper the development of the minority and help reify and fossilize differences between the "minority" and "majority" which could corrode the civic glue of trust and compromise which is necessary for a healthy functioning democracy.

Part of the problem of defining minority rights against the majority is that

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185 Elaine Spitz, *Majority Rule* (Chatham, NJ: Chatham House Publishers Inc., 1984) 178.

186 Barak Obama, for example, was criticized for not being "black enough" by some African-American commentators on the Black Entertainment Network.

187 K. Anthony Appiah "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction". *Multiculturalism.* Ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 162.

188 Chandran Kukathas, "Are There Any Cultural Rights?" *Political Theory* Vol. 20, Feb. 1992, 114.

most "minority" rights or issues are not individual rights which only affect members of a specific group; they affect *all* members of society to differing degrees. Wojciech Sadurski defines the problem as follows:

> It is infrequent that the class of beneficiaries of a given right can be precisely identified as a specific social group: who are the beneficiaries of the right to abortion, the right to free political speech, or the right not to suffer the death penalty? The line between the advocates and opponents of any such concretely articulated right does not neatly divide those who stand to benefit from that right from those who are against it by the virtue that their membership of a "majority" that cannot be trusted to protect the interests of the minority.[189]

Both supporters and opponents of different conceptions of a wide variety of rights have differing views of what's best for society, or different views of justice for all, not just the "minority" or "majority". For example, both supporters and opponents of homosexual rights, such as same-sex marriage, are not generally making decisions based upon self-interest – what self-interest would a heterosexual have for either supporting or rejecting same-sex marriage – but instead on their view of what is best for society. It is too easy to claim that opponents of same-sex marriage are motivated by homophobia, rather than deep feelings of concern about the traditional definition of the family, just as it unfair to claim that opponents of pornography are motivated by Puritanical prudishness instead of legitimate concerns about the portrayal of women in sexually explicit material.

Topical vs. Decisional Minorities and Majorities

Let us grant for a moment that minorities and minority interests and rights can be easily identified and agreed upon. Even if this was the case, the fear of the "tyranny of the majority" and claims that minority rights are being infringed upon by democratic majorities is often the result "confusion of political loss with majority tyranny".[190] Waldron claims that if one defines tyranny as any action which denies a right, there will be endless claims of tyranny regardless of the legitimacy of the claim: "In any disagreement about rights, the side in favor of the more expansive understanding of a given right (or the side that claims to recognize a right that the other denies) will think that the opposite side's position is potentially tyrannical."[191]

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189 Sadurski, "Judicial Review and the Protection of Constitutional Rights", 293.

190 F.L. Morton, "The Charter of Rights: Myth and Reality", *After Liberalism: Essays in Search of Freedom, Virtue, and Order.* Ed. William Gardiner (Toronto: Stoddard Publishing Co., 1998), 44.

191 Jeremy Waldron, "The Core of the Case Against Judicial Review". *The Yale Law*

Thus, anyone on a losing side of a rights debate can claim that their loss is an example of tyranny. The "correct" answer to the rights debate itself does not have to determine whether tyranny actually occurs. When the recent proposal to legalize same-sex marriage in California was defeated by a democratic majority, supporters of same-sex marriage were quick to claim that their loss was due to the "tyranny of the majority", yet when a similar law to legalize same-sex marriage in Canada was passed by a Parliamentary majority, opponents of same-sex marriage claimed that their loss was due to the same form of tyranny. Waldron acknowledges that legislatures will sometimes act tyrannically, but this is also true for courts: "Tyranny, on the definition we are using, is more or less inevitable."[192] For Waldron, the important question is whether the tyranny of a political decision concerning rights is amplified because it is enforced by a majority upon a minority. Because a decision is made in a majoritarian manner which includes a diversity of opinions and respects equality, the tyrannical aspect of the decision is mitigated.[193]

There can be cases where the rights and interests of a minority are treated unfairly by a majority, however, it is important to distinguish between a "decisional" majority and minority and a "topical" majority and minority. Waldron defines a decisional majority as any majority within a democratic body which, through majority rule, makes the final decision concerning a political issue, while a topical majority refers to the group whose rights and interests are the topic of the debate.[194] Sometimes the membership of a decisional majority and minority will correspond to the membership of a topical majority and minority. The classic example of tyranny of the majority is of a decisional majority whose members also make up a topical majority voting against the legitimate rights of a decisional and topical minority, such as a majority of white legislators voting to disenfranchise blacks. Although there is always the danger that this can happen, it is important to acknowledge that in a pluralistic liberal democracy, people will disagree over rights and that these disagreements are often, if not usually, based upon good will and honest disagreement, not fear, prejudice, or blatant self-interest. In many cases concerning rights and interests, membership of a decisional majority does not correspond to membership of a topical minority and vice versa. Protestant British legislators who voted for Roman Catholic emancipation in the mid 19th century did not represent the topical majority on that controversial issue, just as the heterosexual majority of Canadian Members of

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Journal, April 2006, 6, 1396.

[192] Ibid., 1396.

[193] Ibid., 1396.

[194] Ibid., 1397.

Parliament who voted for same-sex marriage did not represent the topical majority of that issue. As Waldron states,

> ...nothing tyrannical happens to me merely by virtue of the fact that my opinion is not acted upon by a community of which I am a member. Provided that the opinion that is acted upon takes my interests properly into account along with everyone else's, the fact that my opinion did not prevail is not itself a threat to my rights, or to my freedom, or to my well-being. None of this changes necessarily if I am also a member of the topical minority whose rights are at issue. People – including members of topical minorities – do not necessarily have the rights they think they have. They may be wrong about the rights they have; the majority may be right.[195]

A minority coming down on the losing side of a legislative debate over a policy decision does not necessarily equate to discrimination or the tyranny of the majority. In a multi-ethnic, multi-cultural, multi-regional country as diverse as Canada, for example, there is bound to by a myriad of different identities and cleavages which Canadians identify with. More importantly, Canadians are also divided along political issues, especially concerning moral, economic, and social policies ranging from the status of Quebec, to taxation, to our relationship with the United States. It is rather simplistic to conceive that there is a consistent stable topical or decisional "majority" and "minority" on each of these issues. It is more plausible to conceive of transient coalitions of interests or positions which form majority coalitions on some issues and break apart over other positions. Political parties are themselves broad coalitions of individuals and groups who share some common ideas, goals, and interests, yet even powerful political parties can disintegrate when their supporters cannot agree on controversial political, moral, or economic issues.[196] To some degree, in a diverse heterogeneous country such as Canada, everyone belongs to some minority or another. The concept of a decisional or legislative majority does not refer to a static monolithic entity but to "a finite group of people in a defined space in a defined period of time."[197] Decisional majorities of voters and legislators are not "natural" pre-existing collectives, but coalitions of individuals and groups who might momentarily work together for common goals and policies based on compatible interests and common views of justice. Therefore, "a coalition consisting of 50 percent plus 1 of these people

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195 Ibid., 1398.

196 For example, the Whig Party in the US dissolved because its supporters could not agree on the issue of slavery, with the abolitionist wing leaving to form the Republican Party in the mid 1850s.

197 Spitz, xii.

does not naturally exist; it must be created", and these majorities reflect "shifting, temporary alliances" instead of entrenched interests.[198] In most modern pluralistic democracies, it is safe to assume that there are neither consistent, permanent political majorities nor minorities. Majority rule might be more accurately described as rule by a coalition of minorities, especially in large diverse democracies such as the United States and Canada, where the existence of any consistent topical or decisional majorities is never stable and can quickly break apart due to changing social, political, or economic circumstances. While certain groups sometimes lose in the political process, as long as the political process is dynamic and diffuses political power over time, "no group that is prepared to enter into the process and combine with others need remain permanently and completely out of power."[199]

It should also be noted that even if we find evidence of a minority or minority interests being explicitly discriminated against by a majority, that in itself does not necessarily equate to a conflict with justice. We should not forget that historically, a powerful justification for democracy was that it would weaken the power of a certain minority – the aristocracy. In the words of Ian Shapiro, "there are, in sum, minorities and minorities. Hostility to some of them is an appealing feature of majority rule."[200] Cass Sunstein points out that most rights claims are made by members of *some* group or another which is in the minority, such as "property owners resisting environmental legislation, rich people resisting progressive taxation, people seeking to eliminate endangered species, and so on."[201] Belonging to a minority *qua* minority does not automatically grant one special moral claims against the majority. For example,

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198 Ibid., xiii.

199 Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row Publishers, 1970), 37. Bickel's claim might sound naïve to groups who have a legacy of discrimination and are still politically, socially, or economically inferior to other groups in society, such as aboriginal Canadians. However, aboriginal Canadians have unique status within Canada and do not necessarily want to belong to or participate in "mainstream" Canadian society, but rather want greater political and legal autonomy. It is questionable that progressive judicial rulings and/or progressive legislation could solve the myriad of social and economic problems that face the majority of aboriginal Canadians, especially those who live in remote reserves which have no real economic base. Certain feminists might also disagree with Bickel's claim, yet the dramatic advances of the legal, social, and economic status of women within liberal democracies over the last several decades, as contrasted to their status within non-democratic societies, along with the powerful influence of female voters and women's groups on democratic politics, supports Bickel's claim.

200 Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press,2003), 8.

201 Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press, 1996), 177.

perennial "losers" in political elections in Canada, such as supporters of the Christian Heritage Party or the Marxist-Leninist Party, cannot realistically claim that they are victims of the tyranny of the majority if their unpopular policies are not enacted. Furthermore, discrimination against certain minority groups can sometimes be mandated by justice. Hate speech laws against racists infringe upon the rights of racists to express their views and propagate their organizations and ideas, yet this limitation of rights is considered legitimate as it protects other groups from discrimination and creates a sense of toleration and egalitarianism necessary for a smooth running pluralistic society. The majority might not always be right, but it is not always wrong either.

B. Majorities and the limits of Majority Rule

The fear of the tyranny of the majority is often exaggerated in well-established mature democracies like Canada, the United Kingdom, and the United States. In nearly every majoritarian democracy, majority rule is constrained to some degree by the institutional limits and practices. Shapiro notes that it is not only the Courts which play this role, but also "the police and the military, and long-established regulatory bodies all limit what political decision-makers can do – not to mention norms of behavior to which people have become habituated."[202] Robert Cooper makes a similar point that healthy democracies which are respectful of individual and minority rights are ones that are based not just upon constitutions and certain institutions, but upon unwritten rules that "the army does not seize power, that the courts are politically neutral, that the losers in elections do not take to the hills, that certain levels of social justice will be preserved, that some balance among different communities will be preserved, that those in power will govern for the good of the country and will keep personal enrichment within bounds."[203] For example, despite the Constitution, there is nothing really stopping the powerful, and popular, US military from ever taking control of the American government, except the American military culture itself, where even contemplating such an action would be a heresy antithetical to the military's values of patriotism, liberty, service, and loyalty to the Constitution itself, which would make a military *coup d'etat* unimaginable.

Much of the fear of the "tyranny of the majority" is based on a simplistic account of how representative democracy functions. Despite the rhetoric from both supporters and critics of majoritarian democracy, it is important to remember than "in no significant way does the majority conduct the government of a large modern

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[202] Shapiro, 90.

[203] Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (London: Atlantic Books, 2003), 178.

democracy".[204] Democratic government governs in the name of "the people", or at least the majority of the electorate, and is sensitive to the will of the majority, however, governments are rarely ever elected by the majority of the population, let alone the electorate. Representative democracy is not direct democracy, and legislators have a significant amount of freedom and discretion to interpret their mandates and follow the wishes of their constituents. Thus, "the majority of citizens themselves do not, and indeed cannot, deliberately rise up and seize the power formally guaranteed to them by democratic constitutions to realize their ends at the expense of severe deprivations of the minority's freedom."[205] The United States, for example, has what Robert Dahl describes as a "hybrid" system of majoritarian and proportional representation.[206] While two political parties, the Republicans and Democrats, dominate US politics, it is extremely rare that one majority wields all the power because three different majorities are required to have one party dominate the federal government – the executive branch, the Senate, and the House of Representatives. The American tradition of strong bicameralism, along with the unique role of the President who, as head of government and state, is simultaneously politically partisan yet symbolically representative to the entire nation, creates a system which does not allow pure majoritarianism. This system might help alleviate the fears of majority tyranny, but it cõmes at a significant cost to democracy as it often leads to gridlock and problems of accountability.[207]

Perhaps British style parliamentary democracy, especially the tradition of the "Sovereignty of Parliament", is a better example of a form of democratic government where minority rights can be easily trampled because of the seemingly unlimited power a parliamentary majority can wield. It is a truism that even with a Charter of rights, a British or Canadian prime minister governing with a strong majority wields power that an American president could only dream of. At first glance, the tradition of parliamentary sovereignty seems to contradict the idea that parliament can secure and protect minority (or individual) rights because there are no formal or legal boundaries to state power within the traditional parliamentary system.[208] However, the

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[204] Russell, 110.

[205] Ibid., 110.

[206] Robert Dahl, *How Democratic is the American Constitution?* (New Haven: Yale University Press, 2003), 110.

[207] In the words of Dahl: "Who do voters hold responsible for national policies, let alone their interests, the House, the Senate, the President, or the Supreme Court?" Ibid., 115.

[208] This does not mean that the British Parliament is not bound by basic moral principles such as the rule of law, but that Parliament is bound by these principles "as a matter of political morality and constitutional convention, rather than judicially

democratic rights to vote, along with the right to assembly, conscience, speech, and freedom of the press are all necessary conditions of a functioning democracy, and the concept and practice of democracy would be impossible without these freedoms. Critics of the principle of parliamentary sovereignty can easily argue that these democratic rights and practices are themselves no guarantee that a government wouldn't suppress or abuse these democratic freedoms in order to maintain power or to achieve some utilitarian goal, and that individual liberties and minority interests might be easily infringed upon by zealous majorities without the guarantees of an entrenched Charter of rights enforced by a vigilant judiciary. However, such criticisms of parliamentary sovereignty are too quick to equate parliament to a "monolithic entity speaking for a single elite," as they readily "assimilate 'parliament' with 'government'".[209] In the parliamentary system the members of the executive branch, the prime minister and his cabinet, are selected by the House of Commons, the legislative branch, yet these two bodies have separate powers and responsibilities. While the prime minister and cabinet dominate their own party in the House of Commons, the other parties in parliament are not only free to dissent, but obligated to dissent as their duty as "Her majesty's loyal opposition". According to Janet Ajzenstat, the division of parliamentary government into separate branches allows for checks and balances that promote competition between parties which helps to restrain the government in the area of rights.[210] A great advantage of the parliamentary system is that "the majority cannot claim to *be* the nation. It is compelled to refrain from riding roughshod over the minority, that is, over dissenting political opinion."[211]

Furthermore, a democratic system with a vigilant loyal opposition allows for, if not mandates, competing visions of justice and helps to protect minority interests and rights. The opposition within a legislative body subjects the current legislative majority's legislation to scrutiny and votes against it if it is not to their liking, and actively seeks to supplant the current majority, yet is loyal to the government and the democratic system itself. Shapiro also identifies the important role a loyal opposition performs in a parliamentary democracy by protecting minority and public interests, as well as focusing dissent against the governing party instead of the government and

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enforced law." Jeffrey Goldsworthy, "Homogenizing Constitutions" *Oxford Journal of Legal Studies*, Vol.23, No.3, (2003), 497.

[209] Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms", *Canadian Journal of Political Science*, Vol.30, No.4 (Dec, 1997), 654.

[210] Ibid., 656.

[211] Janet Ajzenstat *The Once and Future Canadian Democracy: An Essay in Political Thought* (Montreal-Kingston: McGill-Queens University Press, 2003), 68.

institutions of democracy themselves. A loyal opposition protects minority interests by "ensuring that there are groups and individuals who have incentives to ask awkward questions, shine light in dark corners, and expose abuses of power."[212] A loyal opposition, committed to the institutions of democracy yet peacefully opposed to the current administration, can help protect minority interests by allowing for topical minorities to coalesce into majorities and unify in an attempt to oust the current majority from power. The opposition minority in a legislature, who wishes to replace the governing majority party, has an avid interest in identifying and publicizing the governing majority's rights infractions. Also, "because the party of the 'outs' is so eager to polish its image as protector of the people's rights, the party of the 'ins' must be ready to show that its legislation offers guarantees, and in all ways furthers the cause of rights."[213] Peter Russell adds that "in our political culture today there is no more potent charge for an opposition party to make against a government than to accuse it of violating a fundamental right or freedom".[214]

Parliamentary democracy therefore has within its practices and conventions a viable method to respond to and protect minority interests. Democratic governments want to claim to represent the will of "the people" in its entirety, not just the majority of the electorate who voted for them, or as sometimes the cases in democracies such as ours with a "first-past-the-post" system, a minority of the electorate. For reasons based on justice as well as self-interest, majority governments will not want to ignore or harm minority rights or interests. In an age where both voters and politicians are increasingly aware of and sensitive to past injustices committed to visible minorities,[215] any legislator who purposely sought to step on minority rights or harm minority interests would soon be punished by her fellow parliamentarians and most likely be kicked out of caucus and would face the censure of her constituents at election time. Openly racist, sexist, or homophobic attitudes are almost never rewarded in contemporary Canadian public life. Politicians of all political stripes are eager to court the powerful "ethnic" vote and are therefore sensitive to issues affecting visible minority groups. Yet what of legislative majorities harming minority rights or interests out of benign neglect or ignorance instead of outright contempt? This is a concern that Charter advocates like Waluchow have concerning healthy functioning

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[212] Ian Shapiro, *Democracy's Place.* (Ithaca, NY: Cornell University Press, 1996), 235.
[213] Ajzenstat, "Reconciling Parliament and Rights",656.
[214] Russell, 124.
[215] One could make the point that this awareness is partially a result of high profile Supreme Court cases and the culture of rights awareness the *Charter* has created, but it could also be argued that *Charter* based Supreme Court rulings concerning minority rights have followed evolving public attitudes towards minority rights.

democracies such as our own: "even when they function *as they should*, with each representative merely reflecting the best interests and the fully informed, authentic wishes of her constituents, democratic procedures will often leave minorities holding the short end of the stick."[216] In this case should not a democracy add a Charter of rights and the practice of judicial review as a safeguard for situations where legislative majorities, representing the interests of the majority, accidentally ignore or intentionally do not respond to minority rights or interests?

Majority Tyranny or Minority Tyranny?

What is the best method of reconciling competing majority and minority interests in those cases where such interests can be accurately defined? Ronald Dworkin provides an argument for Charter-based judicial review as the best method of addressing and reconciling these clashing interests by appealing to the legal maxim that one should not be the judge of one's own case. According to Dworkin, letting the majority determine the rights it has against minorities, when this very question is at stake, is unfair and contradicts the tradition of constitutionalism which seeks to protect individual and minority rights against the majority. Therefore "to make the majority judge in its own cause seems inconsistent and unjust".[217] Dworkin claims that it is morally acceptable for a majority to decide issues of policy or issues "of what is in the best interests of the community as a whole, and the gains to some groups are balanced against losses to others", however, it is unacceptable to let the majority decide such issues "in matters of fundamental principle".[218] Issues concerning individual and minority moral rights are, for Dworkin, distinct from other political disputes involving majorities and minorities. While certain government policies do cause different constituencies to break down into different groupings such as labour or welfare issues, this is not the case when it comes to constitutional rights disputes, such as the rights of the accused in criminal cases. Dworkin claims that in disputes of individual or minority rights, "the interests of those in political control of the various institutions of the government have been both homogenous and hostile" to individual and minority rights.[219]

Dworkin's claim that due to the principle of fairness the majority can never

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[216] *The Living Tree*, 116.

[217] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 142.

[218] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996), 344. Dworkin claims that arguments of principle involve questions concerning individual rights, while arguments of policy concern utilitarian concerns over the greater good.

[219] *Taking Rights Seriously*, 143.

be allowed to make decisions affecting minorities has two major weaknesses. First of all, arguments of fairness often legitimate majorities making decisions concerning minorities. For example, within a democracy decisional majorities are entitled, if not obligated, to make decisions concerning the proper level of taxation on the wealthy, the subsidization of artists, the consumption of violent pornographic material, and the regulation of narcotics. As previously argued, *all* laws and policies affect minorities of some kind or another, be they the wealthy, artists, sadomasochists, or drug users. It seems unreasonable that the Courts should be granted the power to decide specific polices for these groups based on arguments of fairness when there is no consensus on what these arguments would entail or require. The interests of individuals and groups can all be negatively affected to various degrees by legislation and policies, and not all members of society share the burdens of certain legislation and policies equally, yet in a large heterogeneous society, this cannot be avoided. Merely substituting "interests" with "rights" does not make a minority claim any stronger, it only increases the rhetorical force of its case. The second problem with Dworkin's position on the injustice of a majority ruling on its own case is that it in almost every case in a democracy, someone is making a decision which is bound to affect themselves: "Even a Supreme Court justice gets to have the rights that he determines American citizens to have."[220] Waldron claims that Dworkin's principle is more accurate in a case where an individual or group is deciding an issue based solely on its own interests at the exclusion of another group or the rest of society. However, in a liberal democracy where all the members of the community are deciding together over the rights of all the citizens, Dworkin's argument falters.[221] Even if one agrees with Dworkin's claim that the majority should not determine the rights of the minority, this in itself does not provide support for judicial review, as in judicial review Courts decide their cases through the same decision procedure as legislators: majority rule. Within judicial review a majority is still making decisions concerning the rights of minorities.[222] The problem with judicial review as an answer to majoritiarianism is that judicial decisions are themselves made in a majoritarian manner. Why should a majority in a Court be less problematic than a majority in a legislature? Dahl describes the dilemma as follows: "If disagreements are to be settled by voting, and if the justice's votes are counted equally, then all problems of majority rule and its alternatives will exist in a microcosm."[223]

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[220] *Law and Disagreement*, 297.
[221] Ibid., 297.
[222] Sunstein, 178.
[223] Robert Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989),

If majorities, acting through their representatives, are not given the final say in making decisions concerning rights and the proper limits of minority interests, does this not merely substitute the "tyranny of the majority" with the "tyranny of the minority"? Just as a majoritarian democracy cannot guarantee that the majority will always pay sufficient attention to and respect the interests of the minority, a democracy with entrenched limits on majoriarianism cannot guarantee that a minority will not use its protected status to harm the interests of the majority. According to Dahl, "the argument that a minority veto can be employed negatively only in order to block majority threats to minority rights and welfare but cannot be used to inflict positive harm on a majority or on another minority is false".[224] Historically, it has been powerful minorities – the landed aristocracy, the clergy, and the business class – who have posed the greatest threats to individual, and in many cases, minority rights. In the US, it was the constitutionally entrenched "slaveocracy" minority of the South, which stood in the path of legislative majorities in the North, who did the most damage to the rights of black Americans. In Canada, the powerful minority of the Roman Catholic clergy arguably did more damage to the rights of Quebecers and the rights of non-Catholic minorities in Quebec than any legislative majority of English Canadians. The Supreme Courts of both the US and Canada have for much of their histories stood *against* individual and minority rights by supporting the political and economic status quo.[225]

Just because the US Supreme Court still basks in the glory of the Warren Court, while its Canadian counterpart still shares the popularity of *The Charter of Rights and Freedoms,* there is no guarantee that the Courts will make rulings that protect minority rights. The celebrated *Brown* decision which is often cited as evidence of the US Supreme Court defending minority rights against the majority, is more accurately a case of the Supreme Court enforcing national standards on a recalcitrant regional minority – southern whites. Robert Nagel claims that legalized school segregation was a "regional aberration" within the dominant American national culture, and that *Brown* should be seen as a judicial *and* national majority protecting the rights of a minority group by quashing the longstanding, yet illegitimate, rights of

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[224] Ibid, 156.

[225] *Dred Scott* (1857) was a significant blow to the rights of black Americans and legitimized slavery by contributing to its expansion into new American territories, *Plessy* (1896) institutionalized racial apartheid in the South, while *Lochner* (1905) set back the rights of workers for decades. In Canada courts invalidated progressive economic legislation during the 1930s, and as recently as the 1970s denied rights to aboriginal women in *Lavell* (1974).

a regional minority. Therefore *Brown* "confirmed and enforced the understanding of 'equal protection of the law' held and practiced by the dominant culture."[226]

The threat of the "tyranny of the majority" within a majoritairan democracy must therefore be balanced against the dangers of minority domination. In the words of Shapiro:

> Justice theorists might be right that in democratic systems there is the permanent possibility for tyranny of the majority, but the risks of tyranny should be evaluated not against some specified ideal of a just order, but against the alternative feasible systems of ordering social relations. In this light I would venture that the question should not be whether or not democracy carries with it the threat of majority tyranny but whether or not this threat is better to live with than systems that carry with them the threat of minority tyranny.[227]

The Tyranny of the Majority: Concluding Thoughts

At this stage we should return to Tocqueville and Mill. It is important to note that neither Tocqueville nor Mill considered bills of rights and judicial review to be the optimal methods of combating the worst excesses of majority rule. Tocqueville did identify the American legal system as an important contribution to the survival of American democracy, along with the checks and balances system of the different branches of government and the administrative weakness of the federal government contrasted to the strength of state governments and, more importantly, local governments. However, Tocqueville put most of his faith in the American people themselves and their democratic "customs, manners, and opinions" which foster a sense of independence, tolerance, and a republican outlook, as the greatest guarantee that democracy would overcome its inherent weaknesses and dangers.[228] According to Tocqueville, these habits and attitudes which were the product of the practical education in self-rule itself contributed to a vibrant democratic public and private realm. Tocqueville concluded that if American democracy was to survive the potential danger of the "tyranny of the majority", it was the American people themselves who were ultimately responsible for being the guardians of their democracy and of protecting their rights and the rights of their fellow citizens. Mill realized that the greatest threat to liberty was not legislative tyranny, but society itself, which through non-political or legal social norms and pressures "practices a social tyranny more

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[226] Robert Nagel *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkley: University of California Press, 1989), 5.
[227] *Democracy's Place*, 78.
[228] Toqueville, 301.

formidable than many kinds of political oppression", for unlike formal laws which have much harsher sanctions, the societal pressure of conformity "leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul".[229] Therefore it is the power of social pressure and coercion "by means other than civil penalties"[230] which Mill saw as the greater threat to personal freedom.[231]

There is no question that the interests of minorities can sometimes be harmed by majority rule. The question is when are majorities illegitimately infringing on the basic rights of minorities and what to do in these cases. In any case where the fundamental rights of a minority were being harmed by a legislative majority, the media, opposition parties, civil libertarians, members of other minority groups, and (hopefully) members of the general public would be so incensed that civil disorder would probably erupt and the legislative majority would be forced to back down.[232] The question is whether a minority right is indeed a right in the first place, and whether limits on this right are legitimate. *Charter* cases tend to focus on interpretations of core *Charter* norms and values, which are open to reasonable disagreement. If a core right was actually being infringed upon by a legislative majority, it is doubtful that judicial review would be an effective method of protecting the right because the Courts do not have a good track record of standing up to real political tyranny.[233] If a truly tyrannical legislative majority doesn't respect the fundamental rights of its citizens, why would it respect and obey a judicial ruling? Angry voters are surely a much greater guarantee that democratic legislatures will not trample basic rights than rights based judicial review.

No rights are absolute, and most rights have limits which can be justified for a variety of reasons, such as conflict with other rights or liberties, public safety, economic scarcity, and "the common good". However, if a majority legislated that a minority's freedom of speech or freedom to vote, for example, should be revoked, the majority would *not* be acting within its democratic principles, because democracy

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229 *On Liberty*, 25.

230 Ibid., 26.

231 These social pressures can, however, shape politics and further threaten minorities. Yet if these social pressures are too powerful, it is questionable whether even the judiciary could withstand them for long.

232 A recent example is the Ontario legislature backing down from the proposal to legalize *Sharia* law in 2005 because of the massive public outcry by feminists, civil libertarians, members of the Muslim community, and the general public who were concerned that such a move would harm the rights of Muslim women.

233 "Does the Charter Hinder Canadians from Becoming a Sovereign People?", 283. To illustrate this point, Knopff and Morton use the examples of Courts unwillingness to oppose the internment of Japanese Americans in WW2, and of Idi Amin ordering his secret police to shoot judges who opposed him.

requires certain basic moral rights to function properly. In a liberal democracy, the "right to self-government", or to use Waldronian language, "the right of rights" is *the* foundational right from which other moral, political, and legal rights originate. Freedom to vote, freedom of association, freedom of expression and conscience, and freedom of the press are all essential to democracy as they allow citizens to learn about important political matters, voice their opinions, and organize for collective action. Therefore, if a majority were to deny a minority – or vice versa – of any of the rights that are integral to the democratic process, it would not be acting consistently with democratic principles; it would be acting undemocratically. If citizens are committed to the democratic process, odds are they would only violate their fellow citizen's rights by accident.[234]

According to Dahl, the potential for the tyranny of the majority involves the following paradox: "If a majority is not entitled to do so[235], then it is thereby deprived of its rights; but if a majority is entitled to do so, then it can deprive the minority of *its* rights."[236] The paradox reveals the inconsistency between democracy and justice. Yet this paradox falls apart under closer scrutiny. One cannot simultaneously support the concept of democratic self-rule while denying it for certain segments of the population. If all citizens are to enjoy the right of self-government, the majority cannot violate the political rights of the minority which are essential to the concept of democracy: "In effect therefore the majority would affirm that the association ought not to govern itself by the democratic process. They can't have it both ways."[237] Ajzenstat agrees with Dahl's claim and adds that "the idea that political majorities should respect minorities itself depends on the underlying, deep-seated idea that each and all consent to be governed," therefore, "each and all must be respected, and retain their rights and fundamental freedoms, even when they're on the losing side of a vote."[238]

Majoritarian democracy is premised upon a moral view of the importance of the individual and equal respect for individual interests. Contrary to pessimists like Tocqueville or Mill, mass democracy in the US and Western Europe hasn't collapsed

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234 Dahl, *Democracy and Its Critics*, 171. As Waluchow notes, Charters exist to prevent this type of accident, yet I question *how* we can determine when such accidents occur. Reasonable people, be they legislators or judges, disagree over such cases. At the end of the day a majority still decides when such cases occur. The question is whether this majority should consist of a majority of judges or legislators.

235 Make decisions concerning minority rights.

236 *Democracy and Its Critics*, 171.

237 Ibid., 171.

238 Ajzenstat, *The Once and Future Canadian Democracy*, 53. Ajzenstat claims that legal equality is itself dependent upon the concept of popular sovereignty; "the two are inseparable". Ibid, 53.

into authoritarianism, nor have democratic majorities routinely trampled on the rights of minorities.[239] *Contra* Tocqueville, "as democratic institutions become more deeply rooted in a country, so do fundamental political rights, liberties, and opportunities. As democratic government matures in a country, the likelihood that it will give way to an authoritarian regime approaches zero."[240] Within the last century all the democracies which reverted to authoritarian regimes were either nascent democracies or democracies which had immature democratic institutions lasting less than a generation. The hoary example of Nazi Germany trotted out by anti-majoritarians fits this pattern as the Weimar Republic was less than 14 years old when Hitler rose to power. The only example of a country with democratic institutions lasting more than one generation before giving away to authoritarianism was Uruguay in 1973.[241]

Much of the fear of the "tyranny of the majority" is based on legitimate concerns over racism, especially the legacy of slavery and institutionalized racism within the United States. However, as Mary Anne Glendon notes, in the US, popular support for the judicial activism of the Warren Court era as a solution to oppressive minorities was due to specific American problems of racism and representative problems within American legislatures at the time, a unique problem which is not relevant to many other liberal democracies.[242] Canada also has its history of racial and religious discrimination, however, it is questionable whether *Charter* based judicial review is an adequate solution to the problem of racism and prejudice. Canada's sad history of its treatment of its indigenous people's is without doubt our greatest collective shame, yet this problem, which would take substantial social and political will to remedy, has been and still is largely beyond the legal powers of Courts and the *Charter*.[243] The interpretation and limits of certain rights belonging to minorities or unpopular individuals, however, is open to reasonable disagreement. The

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[239] There are obvious examples like the internment of Japanese Americans and Canadians during WW2, and more recently, the Patriot Act which curtails privacy rights in the US. However, these are extreme cases which resulted from war and/or direct attacks on the US. Furthermore, in both cases the Supreme Courts of both the US and Canada did nothing to prevent these obvious violations of minority rights. As I shall argue later, Charters of rights and Courts offer no more guarantee to the protection of minority or individual rights than legislatures.

[240] *How Democratic is the US Constitution?*, 134.

[241] Ibid., 135.

[242] Mary Anne Glendon *Rights Talk* (New York: The Free Press, 1991), 162.

[243] Section 25 of *The Canadian Charter of Rights and Freedoms* states that *Charter* does not apply to Aboriginal peoples of Canada and does not affect traditional treaty agreements or recent land claims agreements. Even in cases where the Supreme Court has expanded certain Aboriginal rights, such as fishing rights, these rulings have lead to a backlash against the ruling and harmed Aboriginal relations with the non-Aboriginal majority. *Marshall* (1999) is such an example.

best solutions to racism and prejudice are also open to reasonable debate. Whether affirmative action polices, which are entrenched within the *Charter of Rights and Freedoms*, actually combat racism or acerbate racist feelings to visible minorities, is a point of reasonable disagreement. One could make the radical claim that modern liberal democracies like Canada are rife with systematic and/or systemic racism, sexism, and homophobia, and that Charters and judicial review are an essential bulwark against such forces. However, if modern liberal democracies are wrought with systemic racism, sexism, and homophobia, it is exceedingly doubtful that Charters and judicial review would be useful tools in combating these social evils, as Charters and judicial review are both products of such a racist/sexist/homophobic society and are therefore bound to be as prone to these attitudes as legislatures, if not more so, as judges are much more socially monocultural than legislators or voters and are more socially representative of the power elites of these societies than voters or legislators. Therefore, we can safely assume that the vast majority of our rights debates, including those affecting certain minorities, are open to reasonable disagreement and debate. Therefore we can generally agree with Knopff and Morton when they claim that as other rights protecting features of Canadian constitutionalism are in reasonably good working order, "policies that have been challenged under the Charter cannot be honestly described as truly tyrannical deprivations of rights."[244] Whether homosexuals have the right to call their unions "marriage", or whether Sikhs have the right not to wear motorcycle helmets, or whether the homeless have a right to camp on public land, are all debates that are open to disagreement. These issues all affect "the majority" as well as "the minority", therefore the majority has a right to determine whether these interest claims are rights and to what extent these interests can be claimed against other competing interests. As such issues are ultimately decided by a majority, the question we must ask is which majority, a legislative majority or a judicial majority, has the better chance of protecting individual and minority rights.

Part 2: Charters, Judicial Review, and the Question of Rights

A. Dworkin's Principle vs. Policy Distinction

Ronald Dworkin provides one of the most influential arguments for judicial review which is utilized by many supporters of Charters and judicial review. Much of his critique of majoritarianism and his defence of judicial review are based on his distinction between questions of policy and questions of principle. Arguments of principle "justify a political decision by showing that the decision respects or secures

[244] Knopff and Morton, 283.

some individual or group right", such as arguments for free speech, versus arguments of policy which justify political decisions based on the interests of society.[245] As the law states the majority's view of the common good, "the institution of rights is therefore crucial because it represents the majority's promise to the minorities that their dignity and equality will be respected."[246]

Dworkin rejects utilitarian arguments that support infringing upon individual or minority rights for the greater good of society, because utilitarian arguments imply that individuals have no real moral rights against the state, and that rights are merely conveniences which can be revoked when more pressing concerns, be they economic, efficiency, or security concerns, face the government.[247] While individuals have rights against the state, the same cannot be said about "society" or the majority. Dworkin claims that granting a competing right to society or the majority against an individual's right would threaten the concept of individual rights. Therefore, "a right against the government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done."[248] According to Dworkin, competing rights claims must be between individual rights. Therefore Dworkin rejects the "balancing model" theory which claims that government, especially legislatures, must balance between individual rights and the greater good of society. According to this theory, government must balance between harming individuals by infringing upon their rights, and between inflating rights by giving a too broad definition of rights which might harm the interests of society. Therefore government must "steer to the middle, to balance the general good and personal goods, giving to each its due."[249] Dworkin rejects this model because it assumes that rights inflation is as serious as rights infringements[250] and is based upon confusion between the rights of the individual and the rights of society, or the majority. If an individual has actual moral rights, they must be against the majority or another individual. If the majority "has rights against individuals, then individuals don't really have rights. Balancing of rights must be against competing *individual* rights."[251]

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245 *Taking Rights Seriously*, 82.
246 Ibid., 205.
247 Ibid., 191. Dworkin doesn't claim that the state is never justified in infringing upon a moral right, but that it must acknowledge the seriousness of such infringement.
248 Ibid., 194.
249 Ibid., 198.
250 Ibid., 199.
251 Ibid., 199.

For Dworkin, the unique structural features of the judiciary enable the judiciary to be the best forum for debate and deliberation over questions of principle, while the institutional features of legislatures make them the best forum for questions of policy. Dworkin claims that rights issues are best decided through "questions of speculative consistency" or imagining scenarios of testing rights to hypothetical counter-examples, a technique "far more developed in judges than in legislators or the bulk of the citizens who elect them."[252] In addition, the institutional independence of judges from political pressures makes them more able to withstand majoritarian demands to limit or not acknowledge certain rights, especially rights belonging to unpopular individuals or minorities. Therefore judges can make more objective and accurate decisions regarding rights.[253] Dworkin rejects equality based democratic arguments which claim that judicial review is unfair to majorities, by pointing out that not every democracy is wholly majoritarian. In addition, he states that the wealthy often have more political resources to affect democratic politics than the poor, and that certain minorities might have a history of discrimination which limits their ability to participate in democratic politics.[254] Dworkin acknowledges that while some individuals will gain power at the expense of others, it is the members of entrenched minorities who stand the most to gain from this transfer of power from legislatures to courts. This transfer of political power from legislatures to courts could enhance, not diminish democratic egalitarianism by protecting the rights of weaker members of society.[255] In the words of Dworkin: "judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself."[256]

Dworkin's distinction between arguments of policy and principle has several conceptual problems. First, this distinction glorifies rights based arguments over policy based arguments because the latter are supposedly based upon utilitarian calculation while the former are based on moral principles of equality, autonomy, and

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[252] Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 24.

[253] Ibid., 25. See Chapter 1 for more detailed arguments made by Eisgruber and Waluchow which support the institutional superiority of the judiciary over legislatures concerning rights issues.

[254] This is a serious concern for any democrat, but a better solution is more accessible democratic institutions and procedures, along with limits on donations to political parties and campaign spending, than Charter based litigation which is far more costly than political lobbying or protesting.

[255] Ibid., 27.

[256] Ibid., 70.

individual moral worth. Even if we accept this distinction, Dworkin must acknowledge that utilitarianism is itself a moral theory concerning the morality of certain actions. Therefore "if the non-rights-related decisions are governed by utilitarian principles then they are just as moral as right-related ones."[257] A more serious problem for Dworkin's principle/policy distinction is the difficulty, if not impossibility, of drawing a distinct line between rights-based issues and non-rights based issues, and the involvement of some form of consequentialist reasoning in moral dilemmas, including those which involve individual or minority rights. Sadurski gives examples of issues that obviously involve rights and moral arguments – legalized abortion, religious expression in public schools, and hate speech laws – and contrasts these examples with seemingly non-rights based policy issues – entering a supranational economic alliance, replacing conscription with a volunteer army, and privatizing public industry.[258] Under further analysis, both sets of questions involve moral dilemmas and reasoning and also involve consequentialist concerns. How do questions in the second category fail to involve the same level of moral considerations as the first set? The example of joining a supranational economic alliance involves the moral issues of patriotism, as well as the rights and obligations of citizenship, and the rights and interests of business owners and workers who might be harmed or benefit from this alliance.[259] The examples of the first category include rights reasoning, however, they also involve consequentialist reasoning as abortion, religious expression in public spaces, and hate speech all have costs and benefits and involve questions concerning social stability and safety.[260]

While we can try to divide the moral from the non-moral in order to maintain the distinction between more arguments of principle, and consequentialist arguments of policy, this distinction can be difficult to maintain as it is often arbitrary. Economic, cultural, and aesthetic issues might not be addressed using moral rights language, yet they easily can be interpreted that way. Some constitutions include socio-economic rights which can be judicially enforced, while others include cultural rights, such as multiculturalism and bilingualism rights in the *Canadian Charter of Rights and Freedoms*. The boundaries between morality and economics/culture/aesthetics can be

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257 Wojciech Sadurski, "Rights and Moral Reasoning: An Unstated Assumption", *European University Institute,* Vol.7, No.1, (2007), 30.

258 Ibid., 3.

259 The intense moral debates of the 1988 "Free Trade" election is a good example. Both sides of the issue used moral arguments and rights language to press their points. Free trade supporters invoked (directly or indirectly) property rights, while opponents invoked the rights of workers, culture, and the environment.

260 "Rights and Moral Reasoning", 5.

blurry, just like the boundaries between principle and policy. Adrienne Stone makes the point that even non-Charter constitutional disputes between the federal government and state governments can involve moral reasoning and rights appeals as federalism itself is a normative concept which can be disputed. Furthermore, the role of the Supreme Court as the "honest broker" between federal government and the state or provincial governments can also be disputed because the Supreme Court is a national institution which is part of the federal government and might have a subtle bias in favour of the federal government's interests over those of the provinces.[261] This should not be surprising if the Supreme Court desires to enforce a country's "constitutional morality", it might be less sympathetic to regional interests or the rights of provincial governments.

Questions of rights cannot be made without reference to questions of the social good, as rights do not exist in a vacuum any more than individuals do. The existence and interpretation of rights, including which rights should or should not be constitutionally protected, will depend on historical and cultural reasons which vary from society to society. Rights are not static; they come and go, are vigorously enforced, and then go out of favour. We currently reject the "right" to own slaves, or the "right" for parents to beat their children, yet these rights were vigorously defended and enforced at certain points in our history. Contract and property rights were strictly enforced to void labor legislation which benefited workers, yet are not now stringently enforced and are not even constitutionally protected in the Canadian *Charter*, even though property rights are a vital feature of our commercial, legal, and political culture. The right to inject illegal narcotics in publicly funded safe injection sites has recently been created as a *Charter* right,[262] while the right to abortion and contraceptives in the US was created from a privacy right.[263] In addition, the application and meaning of rights can change over time. In the US, the *Bill of Rights* wasn't thought to apply to state legislatures until 1925, while the prohibition against the establishment of religion allowed for voluntary prayers in American public schools until 1962.[264] As the interests which gain the status of rights reflect changing social circumstances, values, and goals, debates over the identification, definition, and application of rights must address these larger social circumstances, values, and goals.

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261 Adrienne Stone, "Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review", *Oxford Journal of Legal Studies*, Vol.28, No.1 (2008), 22.

262 *PHS Community Services Society v. Attorney General of Canada* (2008), BCSC 661.

263 *Roe v. Wade* (1973).

264 Nagel, 10.

Echoing Raz's critique of the distinction between questions of justice and the good, Sadurski questions how we can identify what rights people have without having a vision of the values necessary for a good society and vice versa.[265] *Contra* Dworkin, rights questions cannot be made without reference to the social goals and values of a political community, a point which is acknowledged by the s.1 of the *Canadian Charter of Rights and Freedoms.*

Interests vs. Principles: Bentham vs. Rousseau

Much of the argument for constitutionalized Charters of rights and judicial review is based upon Dworkin's distinction between questions of justice and interests,[266]which is implied within his distinction between questions of principle and policy, along with a view of voters being primarily motivated by self-interest. However Dworkin's distinction between questions of justice and interests is a distinction which cannot be consistently defended. First of all, questions of justice and interests often are not mutually exclusive, and often reinforce each other. Women who fought for the right to vote did so both out of reasons of justice and self-interest, workers fought for legislation to allow them to organize and fight for better working conditions out of reasons of justice and self-interest, and homosexuals fought for the right to marry out of reasons of justice and self-interest. Even in economic cases where voters might vote out of selfish self-interest, questions of rights, justice, and the common good are bound to be involved in such decisions and cannot be easily separated from self-interest. Sadurski poses the following scenario to challenge Dworkin's justice/interest distinction:

> When a particular person votes, for example, for a particular tax scheme which in fact will make her richer, does she vote on the basis of her interests, or of her sense of justice (she genuinely believes that she deserves it), or on the basis of her view about the public good (she believes it is the most efficient scheme, which will, incidentally, also make her richer)? It is difficult to separate these different justifications from each other, and the most sensible observation would be that, usually, we make our public decisions on the basis of a complex mix of each, and other, justifications.[267]

The juxtaposition between interests and rights becomes even more difficult to

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265 Sadurski, "Rights and Moral Reasoning", 6.

266 Christopher Eisgruber uses the terms "preference" versus "morality" to convey a similar argument. *Constitutional Self-Government*, 57.

267 Wojciech Sadurski, "Law's Legitimacy and 'Democracy-Plus'", *Oxford Journal of Legal Studies*, Vol.26, No.2, (2006), 405. Sadurski could be guilty of conflating voter motivation with justification for voting a certain way, however, the distinction between the two is not always clear.

maintain when voters face complex moral questions such as abortion or the legalization of narcotics. However, interests and questions of justice are fundamentally interwoven and often mutually dependent: "A society does not have normativity-free zones: it is, so to speak, normatively saturated...*most* subject matter belonging to the public area – yield individual choices based on values...its is not the case that democracy *should not* be value-free but, rather that it *cannot* be so."[268]

As for the view of voters being primarily motivated by self-interest, Waldron claims that this is based upon a Benthamite conception of democracy which is rife with difficulties and contradictions. First, such a utilitarian conception doesn't provide an argument for representative democracy because there would be no guarantee that representatives would automatically reflect their voters' preferences and might instead act independently. Even though Bentham didn't support direct democracy, a pure utilitarian democracy would most probably require a form of direct plebiscites and a computerized utilitarian preference machine than representative democracy, as when it comes to measuring and implementing aggregate utility, "representative democracy is a no more convincing dues ex machina than a benevolent legislator."[269] A second problem is the method of measuring individual interests – voting – cannot measure the intensity of individual preferences. Electoral decisions and choices cannot be neatly distinguished in rank of intensity. Moreover, individuals might not be able to rank their interests in an election, as electoral platforms usually have a wide variety of policies and promises. Individual interests are often not easily ranked in order of preference, and these interests usually do not easily match political party platforms. For example, a university student's main preference might be more funding for her studies, yet a policy of increased spending on post-secondary education might not necessarily translate to lower tuition costs or extra money for her individual program. Also, the main political parties in an election might promise more support for post-secondary education, yet one party might promise tax cuts for low income citizens, such as the student voter, but no major increase in university funding, while the other main party might promise increased funding for post-secondary education, but higher taxes. Which post-secondary education policy helps the student more directly? The student might also be equally concerned about increasing the minimum wage because she is a student, yet should she support the party which promises to increase minimum wage when she will graduate in a year and might no longer be stuck with a minimum wage job, or should she support the party which promises tax

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[268] Ibid., 405.

[269] Jeremy Waldron, "Rights and Majorities: Rousseau Revisited", *Liberal Rights: Collected Papers 1981-1991.* (Cambridge: Cambridge University Press, 1993), 396.

breaks for the middle class when she will hopefully join the middle class in a year or two? Should the student make a utilitarian calculation on her immediate economic interests or her future economic interests? The difficulties of the "average" voter acting according to utilitarian principles can only be amplified when one takes into account other interests such as the interests of a voter's family, friends, and community.

A more important problem for the Benthamite conception of democracy is that it is based on a highly controversial, if not dubious, view of human psychology – that individuals make decisions based solely on self-interest. However, individuals often make decisions based on their views of justice and the common good. According to Waldron, the Benthamite conception of democracy falls apart if some members of the electorate vote fore non-egoistic reasons and instead vote on their view of what the greatest good or justice requires.[270] Waldron contrasts the Benthamite conception of democracy with a Rousseauian conception of democracy where voters vote according to their conception of the common good. If we take a more Rousseauian conception of democracy, we will be less quick to call for constitutional limits, in the form of Charters of rights and judicial review, on the actions of the majority. A Rousseauian conception of democracy views voters as being able to distinguish between self-interest and the interests of society, and to take these distinctions into count when voting and attempt to find a balance between the two.

Supporters of Charters of rights and judicial review might claim that the Rousseauian definition of democracy is too idealistic, yet if voters are always, or usually, acting solely out of self-interest, how could such an egoistic society ever agree to any constitutional limits on majority action or rights protection for individuals and minorities in the first place? It is doubtful that the franchise would ever have been extended to the middle class, and later the working class, if electors were primarily motivated by self interest. The example of Protestant electors voting to extend the franchise to Catholics in the UK, white electors voting to extend the franchise to blacks in the US, and men voting to extend the franchise to women in New Zealand, are examples which do not fit comfortably with a Benthamite conception of democracy. A majority deciding to limit its own powers through constitutional limits must be based upon the idea that the majority of voters *can* and *will* act morally.[271] Therefore we can agree with Waldron when he states that "any theory that holds that the majority will always abuse its power cannot be used as an argument in favor of a

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[270] Ibid., 397.

[271] Or at least from a sense of enlightened self-interest if the majority realizes that it could be replaced by another majority in the future.

Bill of Rights" because such a pessimistic theory "would preclude the possibility of a majority ever initiating and sustaining institutional constraints on itself, except by accident."[272]

B. The Selfishness and Ignorance of Voters

The idea that voters are largely motivated by selfish reasons is a recurring premise in the argument in favor of Charters and judicial review. According to Eisgruber, "judicial review is a reasonable mechanism for ensuring that moral questions are decided on the basis of moral reasons rather than on the basis of collective self-interest.[273] Likewise, Dworkin claims that the majoritarian argument presupposes a statistical or aggregate definition of a political community where there is no sense of common identity or purpose, just an aggregate of individuals following their individual interests devoid of moral reasoning and concerns. Therefore, "individual citizens may be able to exercise the moral responsibilities of citizenship better when final decisions are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence."[274]

Supporters of Charters and judicial review also cite shortcomings in the electoral process, especially the competency of voters to know their interests or true moral commitments, or to be easily gripped by fear or prejudice, as arguments supporting Charters and judicial review.[275] However, the claim that voters are primarily motivated by self-interest, yet are simultaneously ignorant, inauthentic, or easily frightened or driven by prejudice is inconsistent. The image of voters as rational Benthamite utilitarians coldly calculating their interests does not fit easily with the image of voters being ignorant of their interests or being irrational and driven by their basest emotions. Certainly, individual voters can be driven by fear or prejudice at certain times, or fail to meet their deepest moral commitments at times, or be mistaken about their interests at times. However, these cases are more likely the exception than the norm. If they were the norm, then our basic commitment to democracy would have to be re-assessed and rejected for a form of elite rule.

The question of voter ignorance or selfishness is a serious one, but it should be put into perspective. First, general voter ignorance of the finer details of the democratic system or political party platforms doesn't mean that voters are incapable

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[272] Ibid., 406.

[273] *Constitutional Self-Government*, 95.

[274] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996), 30.

[275] See Chapter 1 for Eisgruber and Waluchow's arguments for Charters/judicial review which are largely based upon these claims.

of making sound decisions. David Estlund uses an analogy between data criticizing voter competence with data criticizing parental competence to make the following point:

> It helps putting this kind of data in context to know that parents, when polled about important matters pertaining to raising healthy and educated children, perform pretty poorly. There are good questions about how parents could make good decisions without being able to do well on questionnaires, but this is hardly an absurd possibility. As for voters, there is no reason to be complacent about the state of voter competence, but we should be reluctant to infer from voters failing these quizzes to the conclusion that they are incapable of making good decisions.[276]

Thomas Christiano also acknowledges that individual voters might at times make mistakes concerning their interests due to the following reasons: incompleteness of knowledge, changeability of preferences, and the contestability of comparisons of interests.[277] While individual citizens can improve their knowledge of their interests as well as their convictions, beliefs, and commitments, through self-reflection, discussion, and debate, it is ultimately the individual who is the best judge of these issues concerning such important personal matters. Even if a citizen is momentarily mistaken about her interests or commitments, in a democracy the individual citizen must be the ultimate interpreter and arbiter of her interests and commitments. Anything less would be opening the door to elitism and paternalism, both of which are antithetical to democratic self-government. Christiano rejects the view that citizens in a democracy need a deep or complex understanding of their interests and a well-developed sense of the inner workings of the political system itself in order to make informed decisions concerning politics. Citizens instead must be concerned with the aims of society – being questions of justice and the common good. The average citizen is able to acquire competent knowledge of their interests and the ability to rank them and balance them with the interests of others in a multitude of situations in everyday life. One is confronted daily by issues, big and small, of justice and the common good through our social interactions among friends, family, co-workers, neighbours, and strangers: "every organization in which a person is a member gives him or her some experience of basic norms of living together and fairness as well as

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[276] David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008), 13.

[277] Thomas Christiano, *The Rule of The Many: Fundamental Issues in Democratic Theory* (Boulder: Westview Press, 1996), 64.

conceptions of how organizations can contribute to the well-being of the members."[278] The moral dilemmas, questions of substantial and distributive justice, rights and duties, and the balancing of personal and collective interests all help to create mature citizens who have the ability to make mature political decisions concerning justice, rights, and the greater good.[279]

The question of voters being motivated by selfishness is also challenged by Estlund, who provides an interesting folk experiment to challenge this common perception. Estlund surveys his students, who, as morally and intellectually engaged young adults in an elite institution, should provide an "enlightened" sample of the population, by asking them two questions. The first question is if most people vote selfishly or for the common good. The students "overwhelmingly" respond that most voters vote selfishly. The second question is whether they, as individuals, vote selfishly or for the common good. This time the students "overwhelmingly" answer that they vote for the common good. According to Estlund, this simple social experiment helps to confirm the lack of consistent empirical evidence to prove the widespread stereotype that voters vote for selfish reasons.[280]

Estlund's social experiment is probably not enough evidence to convince skeptics of the electorate's ability to make decisions based upon reasons of justice and/or the common good. However, there is interesting empirical research that supports the thesis that voters do not base their decisions primarily, or even to a lesser degree, on self-interest. David Sears and Carolyn Funk's research on racial, economic, and crime and security issues, concluded that self-interest plays only a minor role in voter choices. For example, the stereotype that seniors are more concerned about "elderly" issues such as social security and medicare, and are unconcerned with education issues which do not benefit them, is unfounded, as studies show no greater support for social security and medicare issues and less interest in education issues among seniors than the general public.[281] Sears and Funk's research revealed that "policy preferences are somewhat more closely linked to economic position among older people, but the effects are neither very strong nor very consistent."[282] As for group or collective interests, there is no correlation between women supporting "women's issues" such as abortion, as women do not generally support women's

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278 Ibid., 191.
279 Ibid., 192.
280 Estlund, 14.
281 David O. Sears and Carolyn L. Funk, "Self-Interest in American's Political Opinions", *Beyond Self-Interest.* Ed. Jane Mansbridge (Chicago: University of Chicago Press, 1990), 156.
282 Ibid., 156.

issues any more than men. Both women and men respond to issues like abortion as "symbolic issues."[283] Sears and Funk propose a theory of "symbolic politics" as an explanation for most voter decisions; political symbols and affiliation provide a much stronger and consistent basis for political decisions than calculations of self-interest. Therefore, how one symbolically attaches one's loyalty or identity to a political party, policy, or institution, along with one's identity as a liberal, conservative, or radical, plays a much greater role in determining how one votes than self-interested utilitarian reasoning.[284]

Sears and Funk posit that self-interest isn't a significant factor in voter decisions due to the ambiguity of most government policies on individual well-being, especially economic well-being. Policies proposing to deal with complex economic issues such as unemployment, inflation, and taxes, can have unpredictable and mixed affects on the economic status of most individuals. In addition, in the specific American context, the private individualist approach most Americans have concerning their economic status results in few Americans considering the government as directly responsible for their economic well-being.[285] Furthermore, a political culture which sees politics in terms of the common good rather than individual self-interest contributes to the symbolic approach to political issues: "perhaps political socialization teaches people to weight most heavily the common good when they don their 'political hats', and to weight their private good most heavily only when dealing with their personal affairs."[286] Therefore, symbolic attitudes might express a voter's position considering the greater good, "and would be quite deliberately and self-consciously given more weight than private considerations in judgments about public policy."[287] For example, a conservative attitude towards law and punishment issues could reflect genuine concern for order and stability for everyone, not just a reflection of self-interest.[288]Likewise, a liberal attitude towards pornography more accurately reflects a principled stance on freedom of expression versus a private desire to produce or consume pornography.

These studies are not meant to provide "knock down" arguments against the view of voters basing their decisions primarily upon calculated self-interest. Empirical evidence in the social sciences can often provide conflicting conclusions, such as studies attempting to make a causal connection between violent pornography and

283 Ibid., 155.
284 Ibid., 149.
285 Ibid., 165.
286 Ibid., 169.
287 Ibid., 169.
288 Ibid., 169.

violence against women.[289] However, Sears and Funk's research is meant to demonstrate that there is ample empirical evidence to make us question the common assumption that voters act selfishly, which, along with conceptual arguments against this Benthamite view of majoritarian democracy held by Charter advocates like Dwrokin, should make us question these assumptions. If voters can generally, if not usually,[290] be trusted to make sound decisions concerning questions of political morality, in particular questions concerning rights, why should we not trust them to make these decisions and to let their democratic representatives in legislatures be the final arbiters in such decisions?

C. Rights Protection: Legislatures vs. Courts

Just as supporters of Charters and judicial review often claim that voters are driven primarily by self-interest, Charter/judicial review advocates often claim that legislators are motivated primarily by self-interest – the desire to be re-elected. In addition, for legislators to do their jobs properly, they should listen to their constituents' wishes and interests. Yet like the caricature of the selfish voter, there is also the caricature of the selfish politician. Steven Kelman claims that the view of legislators, specifically members of Congress, as being beholden to narrow local concerns and only being concerned with re-election is a false stereotype. Congressmen are often motivated to pursue public life because they genuinely want to help their community. Because of the great stress, insecurity, long hours, and relative low pay of political life, it is hard to assume that most Congressmen enter political life for personal gain: "the diversity of rewards and punishments ensures that the motivations of professional participants in government will be more complex than any dichotomy between public spirit and self-interest implies."[291] Kelman posits that a common psychological motivation among politicians is "the desire for attention and adulation. Politicians seem to want, more than the average, to be liked."[292] This motivation does not necessarily result in narcissistic behaviour or excessive self-interest, as this desire for public adulation can contribute more for developing a spirit for the public good than selfish behaviour, for "people driven by personal self-interest are not likely to get

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[289] See Wayne Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto: University of Toronto Press, 2004).

[290] The point could be made that voter skepticism or uncertainty over how to vote according to their self-interest could be extended to voter skepticism/uncertainty over how to vote for the common good. However, political parties and platforms often support broad, different views of the common good, or differing policies to achieve the common good, which are relatively easy for the average voter to identify with.

[291] Steven Kelman, "Congress and Public Spirit: A Commentary", *Beyond Self-Interest.* Ed. Jane Mansbridge (Chicago: Chicago University Press, 1990), 201.

[292] Ibid., 201.

far in the estimation of others, who have no reason to value the self-interest of others."[293]

Kelman also claims that the institutional factors of Congress contribute to the cultivation of a public minded spirit among legislators. First, studies show that Americans are not united in a desire for Congressmen to only or always, obey the majority of their constituents' opinions at all times. Second, congressional staff who help develop policy are often motivated by strong conceptions of public service and are quite independent from voter pressure. Third, congressional committees must work with other committees and formulate broad legislation and compromises that contributes to a communal sense of working for the greater good. Fourth, campaign donors and majority constituent interests are not synonymous, so they can lead to different policy choices which allow space for legislators to show independent judgment. Finally, Congressmen feel pressure from their peers and the media, as well as constituents, pressure groups, lobbyists, and financial supporters. The desire for respect among one's fellow Congressmen, along with the political power and influence of the media, can be difficult for Congressmen who look like they are beholden to special interests.[294]

If we accept Kelman's argument and agree that legislators can make decisions based upon the common good, can we still not grant the claims of judicial review advocates that judges generally make better decisions concerning rights questions than legislators? According to Dworkin, in the Supreme Court "we have an institution that calls some issues from the battle ground of power politics to the forum of principle."[295] This distinction between courts and legislatures, however, is hard to sustain. One problem with the distinction which Amy Gutmann and Dennis Thompson identify is that it can be criticized on empirical grounds, as "empirical evidence about the behavior of judges and legislators is almost never offered to support the contrast" and instead is based upon "deductive institutionalism, relying on certain incentives of presumed self-interest."[296] The problem with institutional arguments[297] is that institutional incentives are usually not wholly consistent. Legislators must answer to many different constituencies, and make compromises between these different groups, along with other legislators, which can result in polices which are justified by general

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293 Ibid., 201.
294 Ibid., 203.
295 *A Matter of Principle*, 71.
296 Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Belknap Press, 1996), 45.
297 See Eisgruber's and Waluchow's institutional arguments for judicial review in Chapter 1..

principles. In contrast, judges, in ruling on specific cases, might "lose sight of the greater social implications of their decisions and frame their principles too narrowly, fitting only the facts of the immediate case."[298] There is simply not enough empirical evidence to conclude that legislators are any less principled in making decisions than judges. Also, judges comprise and form voting blocs in a manner not so different from legislators. For example, in the Lamer Court, Justices Cory and Iacobucci agreed on 74 percent of all rulings, and were often supported by Justices Lamer, Sopinka, and Major.[299] Peter McCormick claims that "this searching for coalition partners, for like-minded colleagues who approach major legal issues with a similar set of values and priorities is an important part of the appellate process."[300]

As for deliberation over rights and principle, it is true that judges usually do give public reasons for their decisions and legislatures do not. However, this difference should not be exaggerated, as some legislators, especially legislative leaders and the leaders of the executive, do usually give public justifications for their decisions. Legislatures are much more open to the media and the difficult and challenging questions of the media scrum than the Courts. Legislative debates are significantly more partisan, visceral, and emotive than judicial debates, yet this does not mean that they are not principled debates. Just because judges usually act and sound more "scholarly" or philosophical than legislators does not mean that legislators' medium of reasoning should be devalued as being less rational or principled. Parliament is not just a highly formalized utilitarian preference calculation structure, but a forum of deliberation and debate: "The formal process of parliamentary debate ensures that all opinion is canvassed and considered", thereby allowing for "the formation of a well-considered majority."[301] Nagel claims that even if we acknowledge the point that legislative decision making is not as developed and "rational" as judicial reasoning, legislative "irrationality" serves an important function, as legislators can be more flexible and satisfy several divergent interests and goals simultaneously if they are unencumbered with consciously articulated values. Legislators can be more responsive to the intensely felt moral beliefs of their constituents, "so that groups whose values are difficult to formalize or explain, but nevertheless are strongly held, can be accommodated."[302] *Contra* Dworkin, the compromise and bargaining of policy making acknowledges, not denigrates, the

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298 Gutmann and Thompson, 45.
299 Peter McCormick, *Supreme At Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company, Ltd., 2000), 136.
300 Ibid., 137.
301 Ajzenstat, *The Once and Future Canadian Democracy,* 57.
302 Nagel, 119.

difficulty and complexity of controversial moral issues which often do not have any clear or unified solution. Legislative "irrationality" also allows legislators to be more flexible and experimental in applying policies to address rights issues which, if they are not working, can be quickly reversed and revised, with the explanations of the purpose of the change coming after the fact.[303]

Sadurski points out that the specific style of judicial reasoning used in the courtroom can also distort rights debates: "In a highly adversarial model of appellate judicial proceedings – such as in the US – those same factors that are often cited as improving the impartiality of a trial can simultaneously handicap judicial inquiries into a wide range of moral issues that might be relevant to the rights in question."[304] For example, only the parties in the appeal can present their arguments in court, while the public participation through lobbying, letter writing, and protesting is discouraged. Judges are limited to the specific case at hand and must review specific briefs, have pressure to follow precedent and base their decisions on previous rulings, and are not expected to utilize outside expert advice on the case.[305] In the courtroom judges have power to silence speech within court and to decide who can present information before the Court. Furthermore, judges have used their powers to silence debate and dissent of controversial rulings. For example, in the US, a judge in *Newberg Area Council, Inc. v. Board of Education* (1975) suppressed dissent of a controversial bussing ruling by prohibiting protesters along bus routs and near any public school buildings.[306]

Gutmann and Thompson describe the problem of elevating courts at the expense of legislatures as deliberative bodies as follows:

> To regulate principled politics to the judiciary would be to leave most of politics unprincipled. Judges review only a small portion of public policy and much of what they do consider they accept mostly in the form that it was made by legislators and administrators. Furthermore, the moral reasons and principles to which judges defer do not stand above those of other members of society. Judges find their principles in the experience of their own society, and they must justify those principles to other members of their society. If citizens and their representatives deal only or even primarily in preferences, judges sooner or later will find themselves doing the same, or defending

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303 Ibid., 119.
304 "Judicial Review and the Protection of Constitutional Rights", 294.
305 Except for the case of *amici curiae* briefs. Ibid., 294.
306 Nagel, 55.

principles that no one else shares.[307]

Sunstein also considers the elevation of the judiciary as the "forum of principle" and the legislature as the "arena of power politics" as a "historically myopic" view which "reflects the spell cast by the Warren Court over the past academic study of the law".[308] While courts often do invoke moral principles, they are often "modest and low-level".[309] Sunstein claims that it is instead the legislative and executive branches of government which have historically produced the most significant examples of principled reasoning. The American democratic system is itself a forum of principled deliberation which has lead the way and been most responsive to the major progressive political and social movements of American history from the Founding of the republic, to the Civil War, to the New Deal, the civil rights movement, and the women's movement. According to Sunstein, "the basic democratic norms – political equality, broad deliberation, expansive rights of participation – are hard to transplant into judicial arenas."[310]Part of the problem is that Courts are basically passive bodies; they can only react to specific legal appeals and deal with rights infractions after the case, unlike legislatures which can be, and are expected to be, activist in expanding rights.[311]

Even if one can conclude that in specific cases some articulation of individual or minority rights might be better protected through Charter based judicial review, advocates of a different conception of individual or minority rights might still question whether judicial review protects *their* specific conception of rights. As Sadurski queries, "what good is produced by protecting rights *in abstracto* that is distinct from the good produced by protecting specific articulations of rights?"[312] The traditional answer is that the concept of rights presupposes limits on state power, so protecting any and all rights is good because it limits state power. However, this leads us back to

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307 Gutmann and Thompson, 46.

308 Sunstein, 59.

309 Ibid., 59.

310 Ibid., 60.

311 An advocate of judicial review could claim that I am presenting a stark "either/or" choice between legislators and judges on a range of issues which automatically favour legislators. That is not my intention, however, as the institutional argument is a powerful argument which is often used to support Charters of rights and judicial review, I must address and critique this argument in order to support my central thesis that Charters and judicial review are unnecessary in mature liberal democracies. I do not want to denigrate judges or the important role of the judiciary in a constitutional democracy. My claim is that when it comes to controversial rights issues, the Courts should defer these issues to legislatures which have a greater democratic pedigree than Courts.

312 *Judicial Review and the Protection of Constitutional Rights*, 294.

the problem of disagreement – we don't agree on what limits of state power are legitimate, or whether certain legislation actually does infringe upon a certain right. For instance, is the right to abortion a limit on state power? If you agree that legalized abortion is a right, then it is a limit on state power, but if you think abortion is not a right, state action would be mandated to protect fetuses.[313]

While the Court's institutional independence and distance from the messy realm of democratic politics is often considered to be an institutional advantage over legislatures concerning their ability to protect rights, this same independence and distance can equally be used against the judiciary. Judges usually do not have to be elected,[314]and, more importantly, do not have to be re-elected. Judges do not have to regularly face the public or the media, are not expected to be accountable to the public, and usually only have to debate among fellow judges and lawyers. Their only contact with the public is on their turf, "the stuffy atmosphere of the courtroom", where they "run the show, sit on the highest chair, and wear the fanciest clothes."[315] In addition, compared to legislatures, judges are much more socially and culturally monolithic.[316] For example, social science surveys confirm the belief that in Canada, the judiciary is a homogenous group which does not reflect the demographics of the general Canadian population. Judges are mostly married middle-aged men of British or French ancestry with middle or upper-middle class backgrounds, and have been successful lawyers, with limited trial experience.[317] Therefore, judicial cultural homogeneity, coupled with their political independence, could make judges less responsive than legislators to changing cultural norms which could affect decisions concerning individual and minority rights.

The institutional argument supporting judicial review cannot push the point that the judiciary is isolated from political pressures too far, lest it devalue the relevance of judicial rulings in the first place. It is true that judges will be less

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313 Ibid., 156.

314 This is not the case in the US where in some states, local and state judges do run for office. However, all federal judges are appointed.

315 Mandel, 46.

316 This is not to imply that the judiciary, or legislatures, should automatically represent the demographic composition of a nation. However, legislatures should be somewhat representative of the demographics of the population, as should the judiciary to a lesser degree. However, the judiciary in most democracies is *significantly* less representative than legislatures, which poses problems for both their democratic legitimacy and their ability to understand and be sympathetic to minority interests compared to legislators.

317 Maryka Omatsu, "On Judicial Appointment: Does Gender Make a Difference", *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell.* Ed. Joseph F. Fletcher (Toronto: University of Toronto Press, 1999), 176.

responsive to political pressure from the electorate than legislators, but this institutional difference is "only one of degree and the degree might not be all that great in a specific context."[318] For example, Dahl has argued that the US Supreme Court has rarely made decisions which radically varied from the predominant moral attitudes of the American public, and that judicial review can, at best, merely slow down a determined national majority.[319] Also, judges are members of the society they represent; they are selected from the same elites that that generally represent the political elites of most democratic societies – well educated, wealthy lawyers. Judges, like legislators, are not completely immune to public criticism from the media and face the scrutiny of their peers. Finally, judges, like legislators, make decisions concerning rights based upon their philosophical and political perspectives; some will be more activist or progressive, while others will be more passive or conservative in their approach.

Comparisons between democracies that have Charters of rights and/or the practice of judicial review, such as the US, Israel, and France, to those which do not have Charters and judicial review are difficult to make. However, we can safely infer that democracies without Charters and judicial review, such as Norway, the Netherlands, and Australia (and Canada before 1982), have as good a record protecting individual and minority rights as democracies which have Charters and judicial review.[320] In addition, in countries which have Charters of rights and judicial review, for every example of the Courts protecting individual or minority rights, there can be a counter-example of where the Courts failed to protect, or stymied, individual or minority rights. In the US, for example, the Courts didn't adequately defend freedom of speech during the McCarthy communist witch hunts in the 1950s, or the anti-German/immigrant scare during WWI, nor did they prevent the Jim Crow laws in the South during the latter part of the 19th century and first half of the 20th century, while the Supreme Court's interpretation of the "separate but equal" principle in *Plessy* (1886) justified the constitutional sanctioning of racial apartheid in the South.[321] Even historic rights victories like *Brown* were largely ineffectual before

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318 Sadurski, "Judicial Review and the Protection of Constitutional Rights", 292.

319 Robert Dahl, "Decision Making in a Democracy: The Supreme Court as a National Policy Maker", 6 *Journal of Public Law* (1957), 279-295.

320 According to the 2000 Freedom House Survey, Norway, which has a unicameral parliament and no practice of judicial review, received the highest score in rights protection among the 22 democracies included in the survey. *How Democratic is the American Constitution?*, 98.

321 F.L. Morton, "The Charter of Rights: Myth and Reality", *After Liberalism: Essays in Search of Freedom, Virtue and Order* Ed. William Gardiner (Toronto: Stoddard Publishing Co., 1998), 35.

the democratic branches of government acted on the issue of racial discrimination by passing the *Civil Rights Act* in 1964.[322] Because of the relative difficulties of comparing different democracies in how they protect individual and minority rights, and comparing democracies which have Charters and judicial review to those that do not, it might be more reasonable to conclude that different levels of rights protection are not due primarily to constitutional arrangements, such as Charters of rights and judicial review, but due to "differences in national histories, political cultures, and perceptions of internal and strategic threats to survival."[323] Democratic governments, like all governments, sometimes go through crises, such as wars, recessions, internal strife, and momentary collapses in faith in the system itself. However, if a democracy is to survive these crises and maintain its democratic institutions and commitment to rights, it will require "a body of norms, beliefs, and habits that provide support for the institutions in good times and bad – a democratic culture transmitted from one generation to the next."[324] Therefore, it is safe to assume that the best guarantees of rights protection, for individuals as well as minorities, is not a Charter of rights and the practice of judicial review, but a vibrant democratic culture which promotes a vigilant citizenry which is aware of its rights and committed to protecting them, along with the democratic institutions and practices which secure these rights.

Conclusion

The "tyranny of the majority" argument and the institutional argument are perhaps the two strongest arguments in the arsenal of advocates of Charters of rights and judicial review. However, if the tyranny of the majority is an exaggerated fear within mature democracies which have adequate means of protecting minority rights and interests within the institutions and practices of democracy itself, and the institutional incentives of voters and legislators to make principled decisions are comparable to those of judges, we can safely assume that Charters of rights and the practice of judicial review in mature democracies are at best superfluous. At this stage we can conclude that majoritarian decision procedures and institutions are tied with Charters and the judiciary when it comes to rights protection. Yet are there other consequentialist arguments that can be provided against Charters of rights and the

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322 According to Gerald Rosenberg, "before Congress and the executive acted, courts had virtually *no direct effect* on ending discrimination in the key fields of education, voting, transportation, accommodations, and public spaces and housing. Courageous and praiseworthy decisions were rendered, and nothing changed." *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991),71.

323 *How Democratic is the American Constitution?*, 99.

324 Ibid., 138.

practice of judicial review which can tip the balance against them and provide a further support for rejecting Charters of rights and judicial review? Can alternatives to entrenched Charters of rights and judicial review be offered to satisfy the concerns of those who still feel that individual and minority rights are not adequately protected within majoritarian democracy? In the next chapter I shall explore these issues and conclude my argument for unmodified majoritarianism. I shall address the consequentialist concerns that Charters of Rights and judicial review have a negative effect on a democratic culture, the "right answers" thesis, and provide alternatives to Charters of Rights and judicial review. I shall conclude that the optimal solution to our moral and political woes is more democracy, not less.

Chapter 3: More Democracy, Not Less

As we have seen in the last chapter, there are serious consequentialist challenges to Charters of rights and the practice of judicial review. It is conceivable that for every "victory" for the case of individual or minority rights being protected by Charter based judicial review, there could be a counter case of individual or minority rights "losses" due to Charter based judicial review. For example, one can make the argument that in Canada the freedom of expression has been significantly weakened, not strengthened, due to *Charter* based Supreme Court rulings.[325] Even in fairly uncontroversial Charter based "victories" for individual rights, such as the area of civil liberties protection in criminal justice cases, these legal victories for civil rights do not automatically guarantee that Canada's criminal justice system is more protective of individual rights because these rights victories cannot guarantee that they will alter the behaviour of the police and justice officials who are expected to respect these rulings.[326] Russell cites empirical research in the US which revealed that during the Warren Court Era, some police decided to administer "street justice" because they fundamentally disagreed with the Supreme Court's liberal approach to law and order.[327] Furthermore, liberal or lenient Supreme Court rulings on criminal justice cases can contribute to a growing public backlash against Charter rights and the Supreme Court, as both can become seen as elevating the rights of criminals over the rights of victims and the public's right to safety. This attitude in turn can lead to increasing public support for "tough on crime" policies and political parties and public cynicism concerning the moral authority of the justice system itself.[328] A certain level

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325 The most glaring examples are *Butler* (1992), where the Courts used inconclusive empirical evidence on the connection between violent pornography and violence against women to suppress violent and "demeaning" pornography, (*R. v. Butler* 1 S.C.R. 452, 501) and *R. v. Keegstra* (1990) 3. S.C.R. 697, where the Courts ruled in favour of censorship over free expression concerning "hate speech". Supporters of these decisions could, however, make the counter-argument that these limitations on the freedom of expression are justified on the basis of protecting the rights of women and vulnerable visible minorities.

326 Peter Russell, "The Political Purposes of the Charter: Have they Been Fulfilled? An Agnostic's Report Card", *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life*, Ed. Philip Bryden, Steven Davis, and John Russell. (Toronto: University of Toronto Press, 1997). 39.

327 Russell cites Jerome Skolnick's book *Justice without Trial* (New York: John Wiley, 1967).

328 An example is the recent Supreme Court ruling to strike down reform of the Young Offenders Law (The Youth Criminal Justice Act of 2002), which sought to strengthen penalties for violent young offenders, which was created to respond to public concern over the increase of murders and violent crimes committed by teenagers under the age of 18. A *Globe and Mail* editorial claims that this Supreme Court ruling is directly responsible for the Conservative government's recent proposal to allow maximum

of skepticism can be a healthy attribute of a democratic culture, which is vigilant and questions authority. However, do Charters of rights and judicial review contribute to an unhealthy sense of cynicism toward the democratic process by creating false expectations concerning rights and a sense of rights absolutism that corrodes the bonds of civic trust and compromise which are essential to the maintenance of a healthy democratic culture? Do Charters of rights and judicial review imply that there are moral experts or "right answers" which can be determined concerning moral rights? Are there alternatives to Charters and judicial review that can promote and protect rights? These questions will be addressed in the following chapter.

Part 1: Charters, Judicial Review, and Democratic Culture

Perhaps the greatest consequentialist concern of Charters of rights and judicial review is the possible negative effect Charters and Charter based judicial review have on the democratic culture itself; judicially enforced Charters of rights can help to reinforce public cynicism towards legislatures and participating in democratic politics. A concern is that a growing number of citizens will forsake the democratic forum of legislative politics and instead use litigation to address and solve controversial rights debates. The influence of the *Canadian Charter of Rights and Freedoms*, and the identification of the Courts as the main protector of our rights and freedoms, has arguably resulted in the elevation of the status of the Courts at the expense of legislatures. Ajzenstat claims that not only are Canadians more skeptical of the ability of parliament to protect individual and minority rights, there is also increased cynicism concerning the role of partisan debate in parliament and its goal of creating policies for the greater good of Canadians.[329] Jeffrey Simpson summarizes the affect of the *Charter* on Canadian's attitudes towards democratic politics as follows:

> The political culture of Canada these days, within which public policy must be conceived and executed, reflects the increasingly self-evident facts that judges are considered more trustworthy, capable, and desirous of advancing the public interest than politicians; courts are more appropriate institutions for the rectifications of wrongs and the elaboration of solutions than parliaments; the Charter is a surer guide to respect for the expansion of

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youth penalties for 14 to 18-year-olds to be similar to adult penalties in cases of murder and violent assault. The editorial claims that by "overreaching, the Court provoked the in-your-face response of Stephen Harper...such is the dialogue that the Court is supposed to have with Parliament." "The Tories in-your-face plan for Youth Justice", Editorial, *The Globe and Mail*, Oct.3, 2008.

[329] "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms", 648.

> human liberties than parliaments; legal cases a better vehicle for confrontations from which will flow ringing affirmations of rights than messy compromises required by parliamentary debates, party politics, and national elections.[330]

Alan Cairns makes the point that the concept of constitutionalism itself depends upon a view of the different levels of government, such as legislatures and the judiciary, not being eternally pitted against each other: "It is a necessary assumption of constitutional government that governments are law-abiding, not rogue elephants hostile by nature to any limitations on their conduct."[331] Unfortunately, many Canadians, especially the intellectual elites,[332] seem to have lost faith in the ability of parliament to protect our rights. While it would not be accurate to blame the *Charter* and controversial judicial rulings for the general decline in the public's faith in democratic institutions over the past few decades, which is reflected in decreasing rates of voting, especially among younger voters, it is important to identify the subtle message of the entrenchment of the *Charter of Rights and Freedoms* and subsequent expansive judicial interpretations of *Charter* rights: the argument for drafting and entrenching a Charter of rights implies that the rights of Canadians were not adequately protected and that legislatures could not be trusted to protect rights.[333] Huscroft makes a similar claim concerning the public attitude toward rights: "In only 24 years, Canadians have come to assume that their elected representatives – the same ones who wrote and entrenched the Charter – are the enemy of rights and freedoms while the Court is their champion."[334] The idea that legislators have a right to contest Supreme Court interpretations of the *Charter* is considered by the public to be "a

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330 Jeffrey Simpson, "Rights Talk: The Effect of The Charter on Canadian Political Discourse", *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life.* Ed. Philip Bryden, Steven Davis, and John Russell. (Toronto: University of Toronto Press, 1994), 56.

331 Alan Cairns, *Charter vs. Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queens Press, 1992), 77.

332 James Allan points out that if one surveys the attitudes within the law schools of the English speaking democracies, there is an overwhelming belief in the desirability of Charters of rights which is "elevated to the level of taken-for-granted, indisputable, unimpeachable dogma." Among average members of the public, this faith in Charters and the corresponding faith in judges to interpret them is juxtaposed with a cynical mistrust of lawyers and their moral characters and motives: "The latter are unduly distrusted and yet the moment one of them is appointed to the bench he or she is unduly trusted to decide where to draw lines (in contentious matters of social policy-making) for the rest of us." James Allan, "Paying for the Comfort of Dogma", 11.

333 Ajzenstat,"Reconciling Parliament and Rights", 660.

334 Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory", 1.

radical idea, if not an affront to the rule of law itself."[335] Ajzenstat sees this lack of faith in parliament and the ability of parliamentary debate and legislation to protect our rights as a threat to our democratic culture, as "confidence in political deliberation has been a defining characteristic of Canadian public life from before Confederation. If we lose it we lose the essence of constitutional democracy."[336] This lack of faith in the efficacy of parliament and democratic politics is even affecting some legislators who are acting as interveners in *Charter* cases such as *Marriage Reference* (2004) and *Chaoulli* (2005). This development implies that some legislators believe that *Charter* litigation is a more efficient method of policy development than the democratic process.[337]

One can also question if the increased rights awareness of citizens due to Charters of rights and Charter-based judicial rulings will make the average citizen more vigilant of protecting individual and minority rights. Instead of making citizens more conscious of their status as rights-holders who have claims against the state and are therefore more vigilant against excessive state power, citizens could become lulled into a sense of false complacency as they "let their guards down", knowing that their rights are protected by the Charter and benevolent Supreme Court. This could have the perverse effect of making citizens more, not less, passive concerning rights protection. According to Hutchinson and Monahan, because Court rulings can convince the public that progress is being made on rights issues, "reformative energy may be frustrated and other governmental institutions may feel relieved of the pressure and responsibility to initiate and facilitate social change."[338] Mary Anne Glendon makes a similar point by claiming that in the US, the glorification of the Courts after *Brown* contributed to unreasonably high expectations of the Courts to solve difficult social and moral problems which lead social activists to seek legal victories in the Courts instead of the political compromises of legislative democracy.[339]

A related concern is that this unwarranted faith in Charters and the Courts to protect our rights could lead to legislative laziness concerning rights. Because the

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335 Ibid., 1.

336 "Reconciling Parliament and Rights", 662.

337 Huscroft, "Political Litigation and the Role of the Court", *Supreme Court Law Review* 34(2006), 56. One could make the counter-argument that such disaffection with legislative procedures and outcomes supports the need for judicial review. However, I would argue that legislative weaknesses should be dealt with by reforming legislative processes, not by granting more power to the Courts.

338 Hutchinson and Monahan, "Democracy and the Rule of Law", *The Rule of Law: Ideal or Ideology*. Ed. Allan Hutchinson and Patrick Monahan. (Toronto: Carswell Publishing, 1987), 119.

339 Mary Anne Glendon. *Rights Talk*. (New York: The Free Press, 1991), 6.

Courts can be expected to "clean up the mess" legislatures make concerning rights infringements, legislatures might not take rights issues as seriously as they should. As only a small percentage of legislation will ever be challenged and brought before the Courts, if legislatures do not take rights issues as seriously as they should, a considerable amount of legislation which infringes upon rights could be passed but never challenged for rights violations. Therefore an exaggerated faith in the Court's ability to protect rights could contribute to legislation which is *less* sensitive to rights, not more.[340] In addition, legislatures might avoid contentious rights debates and debates over controversial issues of political morality by "passing the buck" to the Courts to decide. This is arguably what happened in *Morgentaler* (1988), when the Canadian parliament failed to draft legislation regulating abortion after the Supreme Court struck down existing abortion legislation. Today Canada has *de facto* abortion on demand because of Parliament's failure to respond to the *Morgentaler* ruling. Huscroft claims that the legislative inertia following *Morgentaler* is a direct result of the collapse of the political will and energy to create new legislation concerning abortion after the Supreme Court's authoritative decision. After a Supreme Court ruling a legislature must revisit a political issue it considered settled, and must use valuable time, energy, and resources to revisit old debates which take time and resources away from other pressing issues.[341] According to Huscroft, the political will and majority conditions needed to revise or produce new legislation may no longer exist after a Supreme Court ruling because such a ruling could destroy political compromises or coalitions that cannot easily be recreated under different circumstances.[342] Furthermore, a decision by a legislature not to make a decision concerning a controversial issue, such as abortion, is itself a decision – a decision for the status quo along with the desire not to stir up divisive issues which can be put off for the future when more of a consensus, or at least a consistent majority position, might emerge on the issue.[343]

Another consequentialist concern about Charters of rights and judicial review

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340 Janet Hiebert, "Interpreting a Bill of Rights: The Importance of Legislative Rights Review", *British Journal of Political Science*, 35 (2005), 243.

341 Huscroft, "Constitutionalism from the Top Down", 99.

342 Ibid., 98.

343 One could argue that the abortion law struck down in *Morgentaler* was unjust and/or impractical and inconsistent in its application, as well as question whether parliament would have reformed the law without pressure from the Courts. The law was an imperfect compromise which did allow for local interpretation and application, but it is conceivable that it would have been eventually been reformed without *Morgentaler*, as public opinion concerning the legality and accessibility of abortion has been evolving since the 1970s.

is that citizens will develop an unrealistic view of rights by identifying any important interests and preferred policy claims as rights. By viewing rights as "trumps" which can be claimed against the majority regardless of the cost, individuals and groups can take an absolutist view of rights which fails to acknowledge the internal limitations of rights, the claims of other rights and rights holders, and the necessity of compromising between differing conceptions of rights, along with other social needs and concerns. Glendon identifies the problem of excessive rights discourse which too often results in unrealistic attitudes towards rights as its "starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyper-individualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities."[344] Rights discourse is too often expressed in absolutist terms which weaken the ability for people with different interests and views of justice to seek compromise or work together to form common solutions to controversial political and moral issues. Because excessive rights language involves such absolutes, rights talk tends to turn political debate and disagreement into moral battles that must be won at all costs.[345] With both sides of a debate framing their reasoning in terms of rights, neither of which can be violated, each side seeks not compromise but total victory through the Court system. When the Courts choose one side of a difficult moral issue over the other, the winning side of the debate is vindicated while the losing side is discredited. This zero-sum "winner take all" attitude further entrenches each side of the debate and weakens the ability for legislatures to seek compromise positions. According to Glendon, the Supreme Court's overly legalistic method of dealing with hard cases "inevitably affects the way the parties, their causes, and the future development of the issues are perceived by a large public that, for better or worse, increasingly regards the Supreme Court as a moral arbiter."[346]

The absoluteness of rights discourse, reinforced by Charters of rights and judicial review, can lead to "rights inflation", where any interest is interpreted as a right which must be recognized and protected, regardless of the social costs of the

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344 Glendon, *x*.

345 Ibid., 14. This rights absolutism can also affect legislatures, as legislative debates also use rights language. However, rights debates in legislatures are usually tempered by other social goals and concerns.

346 Ibid., 155. It should be noted that Glendon's critique is aimed specifically at the American political and legal culture. The Canadian *Charter of Rights and Freedoms* does not assume this form of rights absolutism. In particular s.1 and s.33 acknowledge the limited nature of rights. However, I am in agreement with Glendon that Charters of rights and judicial review generally reinforce public attitudes that support a naïve absolutist view of rights. Furthermore, in a specific Canadian context, this naïve attitude towards rights helps de-legitimize the use of s.33.

right or the legitimacy of the rights claim. In *Singh* (1985), for example, the Supreme Court ruled that the *Canadian Charter of Rights and Freedoms* protected not only Canadian citizens, but also refugee claimants, thereby transforming the previous privilege of becoming a refugee in Canada into a right. Requiring all refugees to be guaranteed a right to oral hearings of their refugee status caused a massive backlog in the refugee application process which undoubtedly harmed a significant amount of legitimate claimants.[347] Drug addicts in British Columbia recently gained the "right" to inject narcotics in safe-injection sites, while the homeless have recently been granted the "right" to create tent cities on public grounds,[348] thanks to British Columbia's Supreme Court interpretation of the *Charter.* One problem with these controversial interests being interpreted as *Charter* rights is that it leads to rights inflation which can have the perverse effect of trivializing the entire concept of rights in the first place. Glendon describes this perverse effect as follows: "If some rights are more important than others, and if a rather small group of rights is of especially high importance, then an ever-expanding list of rights may well trivialize this essential core without materially advancing the proliferating causes that have been reconceptualized as involving rights."[349] Rights inflation can also lead to excessive moral sensitivity, where any perceived offence is interpreted as an assault on someone's rights, which must be swiftly and forcefully remedied through litigation. This moral oversensitivity, reinforced by a sense of entitlement based upon a misguided form of rights absolutism, is antithetical to the rough-and-tumble world of democratic politics which requires a political culture of moderation, patience, compromise, and good-will to tackle divisive issues of political morality.

Part 2: The Right Answer Thesis – The Problem of Moral Expertise

The view that there are "correct answers" concerning rights and what a Charter of rights "requires" is, at best controversial, and at worst naive. According to Robert Nagel, many of the provisions of the US Constitution and Bill of Rights

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[347] According to Morton and Knopff, *Singh* contributed to a 950 percent increase within one year of legal aid certificates issued to immigration and refugee cases – 1610 certificates in 1989 to15,247 certificates in 1990. *The Charter Revolution and the Court Party.* (Toronto: Broadview Press, 2000), 101. Furthermore, it can be argued that *Singh* has contributed to liberal changes in the definition of a refugee from a person suffering from political/racial/religious/gender persecution to a person in need of protection from death or cruel/unusual punishment in their home country, which in turn has caused an increase in the amount of questionable refugee claimants. For example, one third of all current Canadian refugee claimants are from Mexico, a liberal democracy which is neither suffering a civil war nor any natural calamity. "Mexico's good fight", *Globe and Mail* Editorial, Oct. 21, 2008.

[348] *Victoria (City) v. Adams* (2008), BCSC 1363.

[349] Glendon, 16.

reflected "ambiguous compromises and suppressed disagreements" instead of an agreed upon state of affairs which should stand for all time. These constitutional compromises and ambiguities, such as slavery, which was never explicitly mentioned in the Constitution or Bill of Rights, but was protected through the "three-fifths compromise",[350] were unresolved and instead left open because either these compromises could be "fleshed out slowly through political process, or that they *couldn't* be settled, but merely interpreted differently by differing coalitions of the public and should never be settled 'for once and for all'."[351] It is important to remember that Charters of rights are imperfect documents which are themselves the products of majoritarian legislative politics, and reflect the concerns, challenges, and compromises of a certain historical period. In the words of Hiebert: "Not withstanding the intellectual rigour that may go into the drafting of a bill of rights, it cannot represent a full and complete statement of the values that are considered fundamental to a community."[352] It is simply impossible for all the values of a political community to be included in any document, and the values which are not included can still be extremely important, such as property rights and respect for the environment, which are both absent from the Canadian *Charter*. Just like creating any piece of legislation, drafting a Charter of rights will be a messy affair which involves compromises, mixed messages, and the exclusion of certain values and rights. A Charter should not be reified as a holy document, the product of a unique "constitutional moment",[353] but instead be considered an imperfect product of politics.

When it comes to interpreting Charter rights and values, judicial review advocates often claim that judges have special or superior expertise considering questions of political morality, especially concerning rights and justice. John Rawls, for example, identifies the Courts as the "exemplar" of public reason, or reasoning of

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350 The Southern slave states wanted to include slaves when it came to calculating the population for political representation in the Congress, but to exclude them when calculating the population for tax purposes, while the Northern free states wanted the opposite. The constitutional compromise was to count five slaves as three free men for both political representation and tax purposes.

351 Nagel, 80.

352 Hiebert, 240.

353 This is a concept coined by Bruce Ackerman, who distinguishes between "normal" every day politics, and "higher" politics involved in drafting and amending a Constitution. Interestingly, he includes the New Deal Era as a "constitutional moment", even though New Deal legislation was never entrenched in the Constitution. It seems rather arbitrary to include legislation from the New Deal Era, but not the Civil Rights Era, or the recent Regan Era, which, since 1980, has been repealing and repudiating New Deal liberal legislation and ideals. See *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1991), 230-94.

political morality based upon their understanding of the Constitution and relevant precedents,[354] while Dworkin famously describes the Courts as "the forum of principle",[355] and claims that judges have a unique form of expertise in interpreting the moral values of a political community which are enshrined in a Charter of rights.[356]

Waluchow provides a more sympathetic picture of the role of legislators and claims that its is not that legislators are "preoccupied with the pork barrel", but rather the role of legislators and judges are different; legislators must be responsive to the political pressures of their constituents, while judges are largely free from such political pressures and can therefore be better placed to make unpopular decisions concerning the rights of minorities and unpopular individuals.[357] According to Waluchow, legislators and judges are making different kinds of decisions concerning rights, with legislators making general legislation which must deal with general classes of individuals, conduct, and circumstances. Because of the general nature of legislation, it is bound to be under or over-inclusive, as legislators cannot foresee how the general legislation will affect certain individuals or respond to changing circumstances. Therefore Waluchow proposes that judges utilizing a common law methodology which focuses on judicial discretion and a case-by-case "bottom-up" approach to Charter of rights cases would be more effective in protecting rights than legislators using a "top-down" general approach. By fleshing problems with general legislation when they arise, Waluchow claims that judges can play a complimentary role to legislators. Furthermore, the sheer number of *Charter* cases would make it impossible for legislators to deal with all the unforeseen consequences of general legislation and *Charter* norms.[358]

While Waluchow's conception of the different, yet complimentary, roles of legislators and judges provides an alternative view of judicial review than the traditional "standard case", it is still largely premised on the institutional argument which assumes that judicial independence grants judges more freedom to withstand popular pressure than legislators. As previously argued in Chapter 2, judges do have

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354 "Public reason is the sole reason the court exercises." John Rawls *Political Liberalism* (Cambridge, Mass.: Harvard University Press, 1996), 235.

355 *A Matter of Principle*, 71.

356 Dworkin claims this expertise is also augmented by the moral legitimacy of the Supreme Court to have the final say in interpreting the US Constitution since *Marbury* (1803). *Freedom's Law*, 35.

357 *The Living Tree*, 118.

358 Ibid., 258-264. This last point is true, yet it is the result of entrenching the *Charter* in the first place. As judges have the power to decide which cases they will address, judicial passivity could greatly minimize the number of *Charter* based judicial review.

more independence than legislators, but that does not guarantee that they will be any more sensitive to the rights of minorities or unpopular individuals than legislators. In addition, legislators do at times make specific legislation for specific classes of individuals, cases, or circumstances. Finally, Waluchow's common law methodology does not guarantee that judges will usually make more principled rights decisions than legislators.[359] Jeffrey Brand-Ballard notes that common law reasoning "readily accommodates unprincipled exceptions and ad hoc compromises," as it "proceeds analogically, without requiring deep moral justifications for the distinctions it draws".[360] Such common law reasoning could easily justify same-sex civil unions instead of changing the traditional definition of marriage, for example.[361] Marmor also questions the ability of a common law approach to constitutional rights issues because the common law is "insular, self-perpetuating, and lacks adequate feed-back mechanism".[362] Because the common law focuses on specific cases which are brought before it by litigants, judges must focus their analysis on limited arguments, facts, and precedents which are relevant to the case and therefore miss larger social, political, or moral implications of the rights dispute. Also, the adversarial nature of the common law contributes to the narrow focus of common law reasoning which lacks the incentives, resources, and legitimacy to investigate the broader complexities and implications of a rights issue. In addition, common law adjudication is based upon the force of precedent which can perpetuate faulty or questionable past rulings.[363] Finally, the common law system has little incentive to correct previous rulings. As passive bodies, Courts cannot initiate new laws but instead respond to specific litigation.

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359 Bradley Miller criticizes the exaggerated elevation of "principle based" judicial reasoning as follows: "Do judges not, from time to time, wrongly inflate the value of good championed by favoured groups, secure the backing of other panel members on favoured decisions by trading off support in other cases, formally give reasons for judgments that do not reflect their actual reasons, and silently pass over contrary (yet binding) precedent? Do they not, in these and other ways, act in an unreasonable and unprincipled manner?" "Justification and Rights Limitations", *Expounding the Constitution: Essays in Constitutional Theory*, ed. Grant Huscroft. (Cambridge: Cambridge University Press, 2008), 102.

360 Jeffrey Brand-Ballard, "A Common Law Theory of Judicial Review: The Living Tree," *Notre Dame Philosophical Reviews* (2008), 5.

361 Ibid., 5.

362 Marmor, "Are Constitutions Legitimate", 91.

363 The force of precedent shouldn't be exaggerated, as judges are free to choose to interpret which rulings or which elements of past rulings have precedent. Waluchow claims that according to his theory precedent would be based on the community's own constitutional morality, however I would argue that there is the possibility that rulings could be based on incorrect, divisive, or outdated judicial interpretations of the community's constitutional morality.

Compared to legislatures, which have broader and more immediate access to the ramifications of legislation through public lobbying, media influence, and polls and election results, Courts' attempts to rectify previous rulings are much slower, costlier, and limited.[364]

It can be granted that judges can, and do, make moral decisions concerning rights issues. Even Waldron has recently admitted that judges engage in a form of public reasoning which attempts to be consistent with a society's moral commitments.[365] However, Waldron doesn't think that this is a role that is unique to the Courts; legislatures also engage in public reasoning and make moral decisions concerning rights. Moreover, the unique form of legal reasoning used by judges to decide rights cases might actually be a detriment, not benefit, to achieving "correct" or "better" answers concerning rights over legislators. First, the analogy between legal reasoning and Rawlsian reflective equilibrium is exaggerated, because reflective equilibrium implies a large level of autonomy and leeway to reject and or modify considered judgments and moral principles. However, when interpreting the law judges are not unconstrained in such a manner; they must respect precedents and are bound (to degree) by the wording and meaning of authoritative legal texts, such as the Constitution.[366] Second, while it is true that rights issues should be dealt with as moral issues using moral reasoning involving moral principles and arguments, this could be an argument for legislatures, not Courts, to be the primary place for such arguments of principle. In legislatures, the merits of moral issues in rights debates can be dealt with directly and can be weighed against other important moral issues, such as the common good.[367] According to Waldron, in legislatures, moral issues concerning rights "will *not* be compromised by the doctrines, texts, and interpretations with which legal reasoning is necessarily preoccupied, and which inevitably and quite properly comprise all such moral reasoning in which courts are able to engage."[368]

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364 "The great advantage of non-constitutional common law is that it is not a closed system: At any point in time, the legislature can intervene and correct the course, sometimes shift it entirely, by statutory law. But in constitutional cases, this option is not quite available. The only way to shift course is by constitutional amendment. And that is often much too costly and difficult to achieve." Marmor, 91.

365 Jeremy Waldron, "Do Judges Reason Morally?" *Expounding the Constitution: Essays in Constitutional Theory*. Ed. Grant Huscroft. (Cambridge: Cambridge University Press, 2008).

366 Ibid., 53.

367 Bickel makes a similar claim by stating that "principle-prone and principle-bound" judicial process which involves case-by-case reasoning and narrow focus on specific legal issues makes the Courts an unsuitable vehicle for broad social change. *The Supreme Court and the Idea of Progress*, 175.

368 "Do Judges Reason Morally?", 54.

Within legislatures, the social costs of infringing upon existing rights, or creating new rights can be debated and measured without such legalistic textual constraint, while the public is not limited to the sidelines of the issue as passive observers. Unlike Courts, legislatures cannot limit public involvement in such issues and must be responsive to the public, including changing attitudes and political/social/economic circumstances, therefore being more responsive of changing public attitudes on rights and justice issues.

Even if we could agree that there are moral experts concerning rights issues and questions of justice, there is the problem of deciding how to choose which moral experts we should listen to, as moral experts are rarely, if ever, in agreement. For the Dworkinian judge, for example, which arguments of principle should she choose? Should she choose a Rawlsian deontological theory of rights, or a Nozickian one? Perhaps she should instead use a Razian interest theory of rights, or perhaps she should use a consequentialist rights theory. Perhaps she should jettison overly individualist liberal rights theories completely and instead use a feminist or post-structuralist theory in an attempt to make society more "progressive". As moral philosophers, supposed rights experts, cannot agree on rights issues, how can we expect judges to agree on these same issues? Even in a less ambitious view of judicial reasoning, such as Waluchow's common law reasoning over a community's constitutional morality, there are bound to be many cases where there is disagreement over the interpretation of the community's constitutional morality and what exactly it entails. Furthermore, there are bound to be many cases where the guidance of a community's constitutional morality, like the wording of a Constitution, simply runs out.[369] Even if there is a form of moral expertise, or an identifiable moral expert, we can largely agree upon, there is the still the "expert/boss fallacy" which mitigates against following such expertise. Estlund describes the fallacy as making the inference from someone having superior knowledge to granting this person the authority to rule. A doctor, for example, has expertise in health issues, but it is our consent to listen to her which grants her authority.[370] In terms of moral expertise, such expertise does not

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[369] Waluchow agrees that on certain cases, such as abortion, this might happen. *A Common Law Theory of Judicial Review*, 228-229. My claim is that cases like this are more likely to be the norm, not the exception. If a community's constitutional morality provides the guidance Waluchow suggests, shouldn't the vast majority of Charter rights rulings be unanimous decisions with unanimous, or at least similar or consistent reasoning for these decisions? In the US Supreme Court, even strict texualists or originalists often disagree over textual meaning and original intent – we should expect the same level of disagreement over interpreting the requirements of a community's constitutional morality.

[370] *Democratic Authority*, 40.

grant one moral authority, especially in a democracy. In the words of Estlund: "You might be correct, but what makes you boss?"[371]

The very idea of moral expertise in questions of political morality, especially concerning rights and justice, must also be challenged by the basic egalitarian principle of democratic and liberal political theory: "individuals are, roughly speaking, naturally equally competent on moral matters."[372] Christiano provides four arguments for this egalitarian claim: the primacy of the individual as the best judge of her interests; the rough equal distribution of differences of moral ability throughout society; lack of consensus in determining the criteria to judge individual moral abilities; and the environmental basis of difference of individual moral capacities[373] While political and moral philosophers might have more thoroughly developed and articulated positions of justice, rights, and the common good, their basic ideas are not beyond the ability of the average citizen who has the time and inclination to familiarize herself with them. If these ideas are beyond the ability of the average citizen to understand, even after being stripped of all the jargon, opaque references, and turgid writing style, it is probably due to the problems of the individual philosopher's ideas, not the audience.[374] The average individual is totally capable of forming an opinion and providing reasons for the myriad of moral issues which face a political community. The egalitarian principles of democracy are not premised on moral expertise, but on moral equality and the basic rationality, responsibility, and decency of the average citizen.

The premise of expertise in matters of political morality within our democracy is also undermined by the practice of trial by jury, which is a prime example of a democratic forum within our legal system which rejects the principles of elitism and moral expertise. While the jury system is imperfect as juries can be swayed by ignorance, prejudice, flamboyant showmanship, and appeals to emotion over reason – all criticisms which can be leveled against majoritiarian democracy – the jury system is an integral part of our legal system which appeals to the ideals of collective reason, responsibility, citizenship, and justice. While juries, like democratic majorities, sometimes "get it wrong", they usually "get it right" because the average juror, like the average voter, is a rational, moral individual capable of deliberating and debating issues of justice, rights, and political morality. Hutchinson and Monahan

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371 Ibid., 77.

372 Thomas Christiano, *The Rule of the Many*, 192.

373 Ibid., 192-193.

374 According to Chirstiano, it is the extent to which these philosophical concepts "correspond to our common intuitive judgments on every day issues" that we judge the relevance or correctness of these theories. Ibid., 193.

claim that the jury system "represents a commitment to the principle that the ordinary citizen is competent to debate and decide important issues in the community."[375] The jury system rejection of moral expertise in favour of active egalitarianism is a tribute to our faith in "the people" being able to make correct decisions concerning justice and rights. During a trial the individual jury members are not passive spectators of a dazzling display of legal debate who make private decisions based upon self-interest, but instead discuss, deliberate, and attempt to achieve a consensus on important decisions concerning rights and justice. If individual citizens can be trusted to make responsible decisions concerning rights in the legal role of juries, why can they not be equally trusted to make responsible decisions concerning rights in the political role of voters? Estlund also defends the jury system as an example of responsible democratic citizenry making correct decisions concerning rights and justice. Estlund claims that the moral legitimacy of the jury system is based primarily upon its epistemic virtues to convict the guilty and free the innocent. The process of presenting evidence, testimony, cross-examination, and collective deliberation and voting all contribute to a system which usually convicts criminals while respecting their rights.[376]

According to Dworkin, there *are* correct answers concerning rights issues: "Judicial review should attend to process not in order to avoid substantive political decisions, like the questions of what rights people have, *but rather in virtue of the correct answer to those questions.*"[377] Dworkin also rejects arguments for deferring controversial rights questions to legislatures because these arguments are based upon a form of rights skepticism. Dworkin claims that this moral skepticism is ultimately inconsistent because it is skeptical of all questions of political morality, especially the ability of judges to find correct answers concerning rights, yet is not skeptical of its own position – that it is better for legislatures to make decisions concerning rights: "If the right answer to all questions about the political rights of minorities is that there is no right answer, then how can there be a right answer to the question of whose opinions should rule us?"[378] Even the view that rights protection will, in the long run, be better achieved through the democratic process of legislative compromise than through judicial fiat is a subtle form of rights skepticism according to Dworkin, who claims that this gradualist Burkean approach to rights is skeptical of new or non-traditional rights claims. This view implies that unpopular political actors or

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375 Hutchinson and Monahan, 120.

376 *Democratic Authority*, 8.

377 *A Matter of Principle*, 58. Dworkin adds that "The idea of democracy is of very little help answering that question." Ibid., 58.

378 Ronald Dworkin. *Law's Empire.* (Cambridge, Mass.: Harvard University Press, 1986), 373.

minorities who do not already have their rights claims acknowledged by majorities in the normal political process do not have real rights, a "bizarre proposition" which implies that "there are in fact no rights against the state."[379]

Dworkin's position concerning rights skepticism is *partially* correct. The democratic argument for majority rule and critique of entrenched Charters and judicial review does imply a certain degree of skepticism concerning rights, but it is primarily skepticism concerning the ability of finding correct answers to difficult rights questions. There *could* be "correct" answers concerning rights, but it is doubtful that we can ever know that our interpretations of rights are correct, or that our interpretations of the abstract rights claims in Charters are correct. Critics of Charters and judicial review are skeptical of the ability of judges to arrive at correct answers concerning rights, or at least the ability of judges to provide "better" answers concerning rights than voters or legislators. However, this skepticism itself does not necessarily imply moral skepticism or rights skepticism. Instead, it acknowledges the pervasiveness of moral disagreement, especially concerning issues surrounding rights and justice. In the words of Waldron: "In the end it is moral disagreement, not moral subjectivity, that gives rise to our worries of judicial moralizing."[380] If "rights experts" such as moral philosophers cannot agree about what exactly rights are, or even if they really exist in the first place, let alone what specific rights claims should be acknowledged, how they should be interpreted, and what concrete policies these rights claims would entail, what hope is there for judges, let alone legislators or the average citizen, to agree on the meaning and content of these abstract concepts? Even if one rejects Waldron's theory of deep disagreement and agrees that there is consensus concerning the core values and rights guaranteed by a Charter of rights, there will be disagreement over the interpretation, limits, and application of these rights. We could reasonably agree that the freedom of religion, for example, allows for religious believers to practice their religion in peace and prohibits the state from banning certain religions or establishing a theocracy. However, does the freedom of religion mandate public funding of religious schools or the exclusion of certain religious practices from the law, such as Sikhs wearing *kirpans* in public? Rights cannot be "trumps" against the claims of the majority or the "greater good", as questions concerning minority or majority interests and the greater good inevitably involve rights and are more accurately described as balancing between the rights of individuals or between different rights or social values, such as equality or safety.

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379 *Taking Rights Seriously*, 146.
380 *Law and Disagreement*, 187.

One cannot guarantee that citizens in a democracy will always make "correct" choices concerning individual and minority rights. There will always be a certain level of ignorance, prejudice, and bigotry within any society, including a democratic one. While it might be naïve to assume that the majority of citizens, or the majority of legislators acting on behalf of the majority of citizens, will always make "correct" decisions concerning rights questions, it is equally naïve to expect a majority of judges to always, or usually, make correct decisions concerning rights[381]. Furthermore, when it comes to identifying which institutional arrangements – legislative policy-making or judicial review – are best at producing "right answers" concerning rights protection and promotion, there is, once again, the problem of disagreement. People not only disagree about the meaning of rights, they also disagree over which rights should be protected in the first place. For example, property rights, socio-economic rights, environmental rights, and homosexual rights were not included in the *Canadian Charter of Rights and Freedoms* due to significant disagreement over entrenching these rights.[382] Sadurski makes the following claim concerning evaluating the rights protection of different institutional arrangements: "Your assessment of the value of institutions cannot be fully divorced from your assessment of the value of the outcomes they produce." Therefore the fact that citizens disagree about the outcomes of rights decisions will result in disagreement over the efficacy of the institutions which produce these outcomes.[383]

More importantly, the assumption that there *are* "correct answers" concerning rights questions in the first place is questionable. If one takes a Razian interest theory of rights, it is the interests of personal choice which is the primary reason for grounding many rights.[384] The interests of personal choice ground the majority of democratic rights, such as the right to vote, the right of assembly, freedom of speech, and freedom of religion and conscience. According to Andrei Marmor, the interest theory of rights is not primarily concerned with choosing the right option, whatever that might be, but having the right to choose in the first place. For example, concerning the right to marry, "we think that it is more important for a person to

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381 I do not mean to imply that all supporters of Charters and judicial review hold this position. However, I think it is safe to assume that most supporters of Charters and judicial review believe that judges are more likely to make correct, or better decisions concerning rights than the average voter or legislator due to their training and political independence.

382 Homosexual rights were later "read in" to the *Charter* with rulings such as *Eagan (1995),* and *Vriend* (1998).

383 "Judicial Review and the Protection of Constitutional Rights", 284.

384 See *The Morality of Freedom* (Oxford: Clarendon Press, 1986), Chapter 7.

choose her spouse for herself than to choose correctly. *Hence the right ought to protect wrong choices also.*"[385] The right to vote is analogous to the right to choose one's spouse, the right to choose where to live, and the right to choose one's beliefs and community. Like other democratic rights, the right to vote implies no "correct answer" and cannot be revoked or momentarily suspended if the voter makes a "mistake", whatever that could possibly mean. However, a Court which strikes down legislation which reflects the will of the majority of the electorate, acting through its elected representatives, often *does* imply that there are "correct" answers within political morality, especially concerning rights.[386] In the face of pluralism and reasonable disagreement concerning questions of political morality, especially rights, we must place a heavy onus on supporters of Charter-based judicial review to prove that their anti-majoritarian procedures can produce more "just" results concerning rights, which, as previously argued, is an epistemic problem of immense proportions. Judicial review is itself a form of majoritarian decision making, with disagreements over rights issues being solved by a simple majority vote, not the innate correctness of one side of the rights debate over the other. As previously argued in Chapter 2, when making any collective decisions, especially decisions concerning rights, it is almost inevitable that some interests are harmed while others are advanced. Therefore, the advocate of Charters and judicial review must prove that the regular democratic process is somehow failing to protect the interests of certain members of the electorate, that the judiciary can protect these interests (or identify the need to protect these interests) through judicial review, and that the damage done to these individuals or groups whose interests are not being fully respected in the democratic process is greater than the damage done to the right of self-rule.[387] According to Dahl, the supporter of the quasi-guardianship of the judiciary must assume that there are correct answers to questions of rights and justice, and that the existence of these correct answers can override the right of the electorate to make mistakes. Dahl describes the moral cost of judicial review as follows:

If a good political order requires that the demos must in no circumstances

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[385] Andrei Marmor, "On the Limits of Rights", *Law and Philosophy*, Vol. 16, No.1, (1997), 6. Emphasis mine.

[386] One could make the point that the Court is at times reinforcing majority opinion by declaring that a piece of legislation is not achieving its intended objectives or is accidentally treating people unfairly. This might be the case in some instances, however I question both the ability and the legitimacy of the Courts to decide legislative intent. Also, citizens in a democracy have alternative methods to challenge legislation, such as lobbying, alerting the media, protesting, and voting against the current government.

[387] Dahl, *Democracy and Its Critics*, 191.

> have the opportunity to do wrong, at least with respect to fundamental rights and interests, then one may be tempted to suppose that the demos and its representatives ought to be restrained by quasi-guardians who, like true guardians, possess superior knowledge and virtue. If however the best political order is one in which the members individually and collectively gain maturity and responsibility by confronting moral choices, then they must have the opportunity to act autonomously. Just as individual autonomy includes the opportunity to err as well as to act rightly, so too with a people. To the extent that a people is deprived of the opportunity to act autonomously and is governed by guardians, it is less likely to develop a sense of responsibility for its collective actions. To the extent that it is autonomous, then it may sometimes err and act unjustly. The democratic process is a gamble on the possibilities that a people, in acting autonomously, will learn how to act rightly.[388]

Just as autonomous moral agents have the right to make "incorrect" moral decisions, the electorate in a democracy has the "right to be wrong". Granted, the idea that individuals have the right to be wrong is a controversial one, philosophers as diverse as Dworkin and Waldron agree that moral autonomy implies the right to make mistakes.[389] According to Waldron, while the right to be wrong implies that having a right to do a certain action does not in itself give any reasons for performing the action, it does provide a reason for others not to interfere with an individual exercising her right.[390] Denying individuals, and collectives of individuals such as an electorate, the right to be wrong and make mistakes implies that moral agents, individually and collectively, cannot learn from their mistakes and that their mistakes are somehow permanent. However, just as individual moral autonomy is premised upon the proposition that individuals are capable of learning from their moral mistakes and achieving a level of moral maturity, democratic liberties are based on the faith that a

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[388] Ibid., 192.

[389] "Someone might have the right to do something that is the wrong thing for him to do." Dworkin, *Taking Rights Seriously*, 188. "It seems unavoidable that, if we take the idea of moral rights seriously, we have to countenance the possibility that an individual may have the moral right to do something that is, from the moral point of view, wrong." Waldron, "A right to do wrong", *Liberal Rights*, 63.

[390] *Liberal Rights*, 73. It should be noted that Waldron specifically refers to a "right to do wrong", while I am claiming that an electorate, like an individual, has a right to be wrong. This is a subtle difference, but I consider the two to be analogous. Furthermore, a right to be wrong implies that the individual (or majority in the case of the electorate or legislature) considers its choice to be right, but could, in the future with the gift of hindsight, consider the choice to be a mistake.

political community will generally make the "right" decisions, and when they don't, they will learn from its collective mistakes and attempt to avoid them in the future.[391] It is true that the electorate or legislators will sometimes make mistakes concerning rights, but as previously argued, this is also the case for the judiciary. Unlike electoral or legislative mistakes which can be relatively easily corrected by amending or repealing legislation, or by lobbying, protesting, and ultimately voting against the current government, judicial mistakes are significantly more difficult to correct or revise.[392] The incorrect or immoral rulings of a Supreme Court can eventually be overturned in time, yet this fact is of little consolation to those that are immediately harmed by such rulings, or in some cases can be harmed for a generation, such as workers during the *Lochner* era and runaway slaves after *Dred Scott.*

Democratic principles not only reject moral expertise, they also reject the paternalism which would result in denying the right of the electorate to make mistakes. The democratic principle of pluralism is itself a rejection of a single "correct" answer in questions of political morality. Furthermore, the majority of a political community might be more interested in fealty to its own messy, irrational traditions and practices which are based more on circumstances, historical accident, and political compromise, than the rationalistic principles of political morality. Michael Walzer claims that in such a situation, members of a political community "might well choose politics over truth", which is itself a choice for pluralism over correct answers concerning political morality.[393] According to Walzer, when confronted by the tension between truth concerning political morality and democratic principles, the democratic citizen must ultimately choose democracy. Philosophical validation of moral principles and political authorization within a democracy are distinct activities which shouldn't infringe upon each other: "Democracy has no claims in the philosophical realm, and

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391 For example, the terrorist attacks of 9/11 did not result in the public vilification and gross violations of the rights of Arab and Muslim Americans and Canadians. There is nothing remotely analogous to the mass rights violations of Japanese Americans and Canadians during WWII and the inconveniences many Arab/Muslim Americans and Canadians face since 9/11. This point is not meant to deny the seriousness of specific rights violations to individual Arab Americans or Canadians, such as Maher Arar.

392 This is not to deny that legislative changes can sometimes be slow, as they can depend on many political contingencies such as the timing of an election or media attention.

393 Michael Walzer, "Philosophy and Democracy", *Political Theory*, Vol.9, No.3 (1981), 395. It should be noted that there can be other reasons for choosing politics which are not related to pluralism, such as enlightened self-interest or belief in the intrinsic morality of democracy itself. Walzer's point is that pluralism is a social fact which often supports democratic decision making.

philosophers have no special rights in the political community. In the world of opinion, truth is indeed another opinion, and the philosopher is only another opinion-maker."[394]

Part 3: Alternatives to Charters of Rights and Judicial Review

Because of the democratic illegitimacy of judicial review, non-partisan legislative bills committees might be a better method of reviewing legislation than judicial review. This method is suggested by Hiebert, who claims that these committees would facilitate further debate over legislation, especially the justification of possible Charter infringements. According to Hiebert, such non-partisan legislative scrutiny would foster a more rights-conscious legislature and elevate the level of debate and deliberation in legislatures: "If parliament were to become a place for discussing the justification of policies and their effects on protected rights, this public record would, through media coverage and observation by interested individuals and groups, stimulate broader public debate on the merits of policies that raise these issues."[395] As the Courts are often wary of questioning the necessity of legislative policy directives, due to their seeming lack of democratic legitimacy, non-partisan parliamentary committees could more forcefully pressure the government to justify its legislature and offer alternatives.[396] Hiebert makes the point that supporters of judicial review question the legitimacy of legislatures showing such self-restraint and responsibility by reviewing its own legislation, yet show little corresponding concern about judicial self-restraint: "It is curious that those who worry about the apparent lack of logic in having parliament evaluate its legislation do not have the same doubts in connection with the judicial role."[397] The judiciary is completely within its legitimate powers to review the merits of previous judicial rulings, therefore the legislature should also be granted the legitimacy to scrutinize the merits of its own decisions, especially if these decisions can affect or infringe upon Charter rights. Hiebert claims that Charters should be seen as guides for legislatures, not just an "after-the-fact corrective instrument."[398] Parliamentary Charter committees would hopefully make legislatures more aware of rights issues and be able to provide convincing arguments to the public why the proposed legislation is necessary and that the possible rights infringements are justified, thereby hopefully pre-empting both

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394 Ibid., 397.

395 Janet Hiebert, "Legislative Scrutiny: An Alternative Approach for Protecting Rights", *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell.* Ed. Joseph Fletcher (Toronto: University of Toronto Press, 1999), 309.

396 Ibid., 309.

397 Janet Hiebert, "Interpreting a Bill of Rights: The importance of Legislative Review", *British Journal of Political Science*, 35, (2005), 242.

398 Ibid., 243.

public outcry and Charter challenges. Russell adds that the educational benefit to the public of such a non-partisan legislative committee would not only be better than Charter challenges, it would also be more democratically attractive than judicial review because it would avoid the excessive costs, effort, and time involved in Charter litigation.[399]

While a non-partisan parliamentary committee could help "Charter proof" proposed pieces of legislation, there is always the danger that the proposed changes to the legislation might be overly cautious or more extensively detailed than what the Charter actually requires. Mark Tushnet claims the problem of Charter-proofing legislation is when "legally oriented civil servants advise policy-oriented cabinet members", which can result in government lawyers not being sensitive to the broader policy goals of the legislature, while the cabinet member might not realize that the civil servant might be over-estimating the risk that the proposed piece of legislation might be struck down for conflicting with the Charter.[400]

Advocates of judicial review can still claim that the political independence of judges, which allows them to make politically unpopular decisions, can provide an extra layer of rights protection to unpopular individuals or minorities. However, as previously argued, the "institutional argument" is unconvincing: legislators can be just as rights conscious as judges; judges can be as "political" as legislators; judicial independence can be make judges less responsive to changing social, moral, and political developments; judicial "mistakes" concerning rights issues are harder to correct than legislative "mistakes"; and finally, there is no necessary connection between Charters of rights and judicial review and superior rights protection, as liberal democracies which do not have Charters of rights or judicial review can protect rights just as well as liberal democracies which have these institutions.[401] The history of rights protection of unpopular individuals and minorities within the US, the democracy which has the longest tradition of an entrenched Charter of rights and the strongest form of judicial review, should make advocates of judicial review question

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399 "The establishment of such a committee would provide Canadian citizens with a more reliable and accessible device for examining the libertarian aspects of public policy than would the opportunity to appeal to a judicial system, which not only might fail to take the libertarian's concerns seriously, but will charge him thousands of dollars and make him wait several years to find this out." "A Democratic Approach to Civil Liberties", 124.

400 Mark Tushnet, "Non-Judicial Review", *Harvard Journal on Legislation*, Vol.40, No.2 (2001), 475.

401 For more detailed analysis of the institutional argument for judicial review, refer to "Rights Protection: Legislatures vs. Courts" in Chapter 2 and "The Democratic Pedigree of the Judiciary" in Chapter 1.

the efficacy of judicial review. Even if judicial review can add an extra layer of rights protection, I would argue that potential positive features of this protection would be outweighed by the costs to democratic values and practices.

Even if there are problems with legislative review of legislation, there is no question that legislatures should have the ability to interpret Charters of rights. According to Huscroft, "the law of the *Charter*, as with the law of the constitution generally, is not the product of judicial declaration or fiat; the law of the *Charter* develops with the input of all the branches of the government on an ongoing basis."[402] Therefore the other branches of government should have the ability to vigorously disagree with and reject Supreme Court interpretations of Charters. This would require that legislatures become less deferential to Courts, and in the Canadian case, legislatures should be much less timid of invoking the notwithstanding clause. As for the Courts, legislative deference should be the norm when it comes to Charter challenges. In addition, Courts should avoid ruling on moot or hypothetical cases as they potentially expand judicial power and influence into political issues which are the proper domain of legislatures. According to Sunstein, judicial restraint is required in a democracy because "the right to democratic governance is an important part of the rights that people have, and this point suggests that judges, especially judges interested in protecting rights, should be cautious before invalidating democratic outcomes."[403] Because of their democratic pedigree and greater empirical abilities, legislatures should have just as much legitimacy, if not more, in interpreting Charter rights and provisions as Courts. Sunstein adds that in the American case, legislatures have actually interpreted constitutional rights "more expansively" than the Courts, especially concerning property rights, freedom of speech, and sexual equality.[404]

Instead of legalizing politics by taking rights debates to the Courts and using Charter-based litigation to settle our moral disagreements, it would be more efficacious to make a more democratically responsible society which is both respectful

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[402] "Constitutionalism From the Top Down", 101. Huscroft challenges the concept of judicial finality as follows: "'Why should the meaning of the *Charter* be fixed once a majority of the Court has spoken? Any meaningful conception of the role of law requires the outcome of *particular cases* to be accepted and enforced by the government, but what claim do judicial interpretations of the *Charter* have beyond this?" Ibid., 101.

[403] Sunstein, 178. I do not want to imply that all, or most, supporters of Charters of rights and judicial review would disagree with this point. However, defenders of Charters and judicial review who advocate a "progressive" or "living tree" interpretation of Charters would probably support much more activist approach to Charter issues than my more deferential approach would allow.

[404] Ibid., 178.

of individual and minority rights and vigilant in taking responsibility for these rights. Russell claims that a better tactic to respond to intrusive state interference on rights is to focus on the size and scope of governmental power itself. Local government is generally more democratic and responsible than larger federal government, as local government can be more sensitive to local circumstances, especially regional minority interests which might be ignored by a larger national majority.[405] Michael Sandel claims that "the universalizing logic of rights" requires that local differences and variations of rights must be quashed in favour of national standards and applications of rights. The flow of political power from local and state levels to the national government also follows with power being siphoned from representative democratic institutions toward less democratic institutions such as the judiciary and bureaucracies.[406] However, the principle of federalism, enshrined in both the American and Canadian constitutions, supports the concept of provincial rights and different regional interpretations of rights and interests. Therefore we should be wary of federal governments which intrude on provincial jurisdiction, especially in the name of universal or national "rights" which may not be acknowledged, or have different interpretations, in different regions. Russell identifies the municipal level of government as having the most promise for the democratization of public life, as it is the level which is easiest to access for the average citizen and often has the most immediate impact on individual lives.[407]

While addressing and reforming the power of the bureaucratic regulatory state will not by itself address what is perhaps the main problem concerning democratic participation – the cynicism and apathy of voters and lack of faith in the democratic process – if it is coupled with democratic reform of the educational system, it will hopefully contribute to a more democratic culture which takes its democratic rights and responsibilities more seriously and is less quick to bypass the political process for rights-based litigation. According to Russell, the connection between civic education and the socially and politically disenfranchised does not necessitate more people having the chance for higher education, but that the style and the content of the education system itself must be democratized: "universally accessible public education up to any level will do little to improve the democratic quality of our system if that education is conducted in an authoritarian way."[408] More active input of students on academic concerns at the secondary and post-secondary level, along with

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405 "A Democratic Approach to Civil Liberties", 115.
406 Sandel, 96.
407 "A Democratic Approach to Civil Liberties", 116.
408 Ibid., 118.

civic education classes which foster knowledge and respect for the democratic process, will hopefully give young adults the attitudes and aptitudes required for democratic citizenship. A truly democratic educational system would allow for and foster maximum free expression which is necessary for a more critical citizenry which is prepared to tolerate and debate different positions, and assert one's rights while also defending the rights of others.

Russell also suggests ombudsperson-like institutions as a better method of dealing with individual rights which are harmed by the actions of an unaccountable bureaucracy, which is a more realistic threat to individual rights than any legislative action. Due to the considerable cost and time of a Charter challenge, the legalistic solution of a judicial rights ruling might not be the best solution to an individual tangled in bureaucratic red tape. In some cases where lateness, incompetence, or seeming unfairness of a bureaucratic decision might not be a strictly "legal" matter or specifically or directly relate to an explicit Charter right, yet individual liberty is being infringed upon by bureaucratic action or inaction, an ombudsperson is the best solution. Ombudsperson-like institutions are more investigatory than judicial decision making bodies, as they investigate individual claims of bureaucratic injustice and suggest legal or administrative reform. An ombudsperson can help make bureaucracies more accountable, and, as importantly, "counteract the worst consequences of a system which enables the members of a privately run guild, the legal profession, to enjoy a monopoly in the distribution of legal knowledge."[409]

Part 4: Conclusion

As I have attempted to argue throughout this dissertation, Charters of rights and judicial review face serious objections from both rights-based and consequentialist arguments. Attempts to justify Charters of rights on democratic grounds are bound to crash on the rocks of pluralism and disagreement over the meanings and applications of rights. Even if one rejects Waldron's theory of deep dissensus concerning rights, in particular his claim that there is "disagreement all the way down",[410] one can make the less controversial claim that there is, or might be, considerable consensus concerning core Charter rights and values, however, there is a significant amount of reasonable disagreement over the penumbra of these core rights

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[409] Ibid., 130. Advocates of Charters and judicial review might welcome these suggestions but still not want to abandon Charters and judicial review. As I have previously offered arguments for rejecting Charters and judicial review, the purpose of this section is to offer possible alternatives to Charters and judicial review that could augment our ability to protect rights but not have the moral and political difficulties of Charters and judicial review.

[410] *Law and Disagreement*, 295.

and values, as well as their meanings and concrete applications. In the case of Canada, the majority of the core rights and values included in the *Canadian Charter of Rights and Freedoms* were already embedded within the political and legal culture and practices of Canada before 1982. If not, it is doubtful they would have been included in an entrenched Charter in the first place. Because these abstract values and rights were already in place within Canadian political culture before 1982, the entrenchment of the *Charter of Rights and Freedoms* was at best superfluous. It was not required and *is still* not required. My central argument has been that in a mature liberal democracy, such as Canada, a Charter of rights and the practice of judicial review which too often accompanies the adoption of an entrenched Charter of rights, is not only unnecessary, it is undemocratic. Charters of rights and judicial review are inconsistent with our commitment to democracy and our image of ourselves as rational, moral agents who are worthy of the right of self-government. Judicial review is fundamentally undemocratic as it gives the judiciary, a quasi-guardian elitist branch of government, the ability to strike down legislation which reflects the will of the majority of the electorate acting through its democratic representatives in the legislature.

I have also argued that while Charters of rights and judicial review are undemocratic, they might be justified on consequentialist grounds; Charters and judicial review might be justified because they create a more just society as Charters make citizens more rights conscious and Charter-based judicial review is a better method of protecting and promoting rights than every-day legislative politics. However, these consequentialist arguments are suspect, as there is ample historical evidence within both the United States and Canada which undermines these arguments. In addition, these consequentialist arguments are based upon questionable assumptions on the motives of voters and legislators, along with simplistic or controversial conceptions of majorities and minorities. The "tyranny of the majority" argument for entrenched Charters of rights and judicial review is based more on lingering elitist suspicions of "the masses" than a realistic appraisal of the dangers of minority rights being trampled or ignored by legislative majorities within a mature democracy. Furthermore, the checks and balances and practices of parliamentary democracy itself have adequate methods or protecting and promoting minority rights and interests.

Finally, I have argued that the long-term costs of Charters of rights and judicial review might not be worth the price to our democratic culture. The possible negative effects of Charters and judicial review on a democratic culture are hard to

predict and verify, however, if we look at the example of the United States, the liberal democracy with the longest experience with Charter-based judicial review and the strongest form of judicial finality, we can agree with Glendon that the United States is "one of the most law-ridden societies that has ever existed on the face of the earth",[411] with the greatest number of lawyers per capita in the world and a litigious culture which too often seeks legal remedy and the practice of rights claiming over political compromise within the legislative arena. In Canada, since the drafting of the *Charter of Rights and Freedoms*, the Supreme Court, along with provincial Supreme Courts, have become much more involved in political issues and policy debates, from the legality of Sunday shopping laws[412] to the constitutionality of nationalized health care[413], that are more legitimately the domain of legislative politics. Even the number of judges and the costs of running the judiciary have radically increased since the *Charter.*[414] Charter based judicial review might create some specific victories in certain areas of rights for certain individuals or groups of individuals, but these victories come at a cost – the cost of the democratic values of autonomy, equality, and self-rule, as well as the sense of trust, patience, and compromise which are essential for a mature democratic culture.

It has been my purpose within this dissertation to identify the costs involved in adopting a Charter of rights and granting the Courts the power to be the main, if not final, arbiters of Charter rights and values. In the specific case of Canada, I have argued that the price of adopting the *Charter of Rights and Freedoms*, a document which arguably the majority of Canadian's thought was not necessary, has, all things considered, not been worth the cost to our democratic culture. Does this mean that Canada is in danger of becoming a "jurocracy" ruled by judges, lawyers, and human rights advocates? Of course not. Canada's democratic culture and traditions are far too strong to be seriously damaged by the *Charter* and judicial activism. My argument has been that our democratic culture and traditions have instead been diminished by the *Charter* and judicial activism. Charter advocates will argue that there is no real damage at all, or that even if there is, it is worth the price because of the benefits of increased justice and rights protection. As I have argued, both of these positions are highly suspect.

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411 Glendon, 2.

412 *R. v. Big M Drug Mart* (1985).

413 *Chaoulli v. Quebec* (2005).

414 The number of superior court judges grew from 666 in 1982 to 1011 in 1991, an increase of more than 50%, while the costs of running the courts radically increased, especially after *Provincial Judges Reference* (1997) which "gave judges *de facto* control over their own salaries." *The Charter Revolution and the Court Party*, 108.

It is not likely that in the near future the vast majority of Canadians will want to jettison the *Charter* or amend it to make s.33 more democratic, especially after the solid rejection of the constitutional tinkering of the *Meech Lake* and *Charlottetown* Accords. A more realistic suggestion would be a more nuanced and vigorous debate about the meaning, limits, and social costs of rights, more criticism and skepticism concerning the *Charter* and the judiciary, less cynicism over legislatures and our democratic representatives, and more emphasis on the duties and responsibilities of citizenship which must accompany rights. What Canada needs, as any mature liberal democracy needs, is more democracy, not less: more public debate and involvement in the political process, better and more accurate political representation, more accountability among our representatives, less bureaucracy, more transparency and accountability within bureaucracy, more democratic education (including more democratic forms of education), and a more vigilant press which is less sensationalistic and more critical and enlightened.

At the end of the day whether any of these suggestions help promote and protect rights will depend on the political attitudes, habits, and practices of the citizenry itself. Ultimately, our rights must be protected by our fellow citizens. In a democracy, it is the individual citizen who is ultimately responsible for being vigilant in protecting her rights and being respectful of the rights of others. It is also up to the individual to acknowledge that rights almost always come with duties and responsibilities, and that rights are never absolute and will usually have to be balanced with other rights and other social values. It is also up to the individual to utilize her most basic right, the right to self-rule, or the "right of rights", by participating in democratic politics and framing and deciding these issues with her fellow citizens. It is ultimately irresponsible and infantilizing to leave these fundamentally important issues in the hands of the judiciary. In the words of Russell:

> In the future, government, no matter how sensitively and democratically we adjust its range and scale, will penetrate the lives of ordinary citizens so deeply that it would be folly to continue to rely on the thin and sticky trickle of formal court-room litigation as the prime defence of our rights. Today we should be no more inclined to accept the established judicial procedures as adequate for the purpose of mediating between the citizen and the state, than the leading English lawyers of several centuries ago were willing to acquiesce in a system which left the monarch's personal discretion as the final repository of justice between citizens.[415]

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[415] Ibid., 131.

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