

CHARTER REVIEW AND A
COMMUNITY'S CONSTITUTIONAL
MORALITY

Charter Review and A Community's Constitutional Morality

By Margaret O'Brien (MA)

A Thesis Submitted to the School of Graduate Studies in Partial Fulfillment of the
Requirements for the Degree Doctor of Philosophy

McMaster University © Copyright Margaret O'Brien, July 2016

McMaster University DOCTOR OF PHILOSOPHY (2016)
Hamilton, Ontario (Philosophy)

TITLE: Charter Review and a Community's Constitutional
Morality AUTHOR: Margaret O'Brien, M.A. (Western University)
SUPERVISOR: Professor Wilfrid Waluchow NUMBER OF
PAGES: ix,227

Abstract

I Lay Abstract

This dissertation participates in the ongoing debate around whether or not judicial review is democratic. Judicial review is the process by which judges review legislation for consistency with a nation's constitution or bill of rights. Some opponents have argued that such a process is undemocratic because it replaces the will of the people, as expressed through their elected representatives, with the will of a few judges. In my dissertation I develop an improved theory of judicial review that is able to respond to this argument. A central aspect of my work focuses on the role of communities as moral agents. I argue that communities are moral agents, and that charters and the judicial review of legislation are democratic because they attempt to hold communities to their own most deeply held moral beliefs. To illustrate my defense of judicial review I analyze the status of physician-assisted suicide in Canadian law.

II Abstract

This dissertation participates in the ongoing debate around whether judicial review is justified and sets out to present a novel defence of it and to reconcile it with our democratic commitments. I argue that judges are the cornerstones of our legal system, and that their ability to review legislation is fundamental to a healthy political system. Yet some people have argued that their doing so is undemocratic. I set out to develop an improved theory of judicial review and to answer its opponents. A central aspect of my work focuses on the role of communities as moral agents. Previous defenses of judicial review have failed to fully appreciate the importance of group agency. I contend that communities are moral agents and that charters and the judicial review of legislation are democratic because they attempt to hold communities to their own most deeply held moral beliefs. Understanding communities as moral agents provides the basis for a strengthened theory of judicial review. Nations have a moral centre whose principles they sometimes infringe. A charter reminds the nations of what it really is as a moral agent and reminds the citizens of who they are and of what they owe their fellows. The judiciary calls foul when they do not play by the rules. With this shift in perspective we can understand judges in charter cases as trying to assess what the community is committed to through its constitution, its charter and its laws. To illustrate my defense of judicial review I analyze the status of physician-assisted suicide (PAS) in Canadian law. I explain and demonstrate the constitutional justification of the shift from the 1993 *Rodriguez* decision concerning the criminal ban on PAS to the Supreme Court of Canada's decision in *Carter* that found that ban to be unconstitutional.

Acknowledgments

“Philosophy,” the mother said. “I didn’t know you could study just that for four years.”
“Slow learner,” Royce said.

- “Axis”, Alice Munro

It is a rare opportunity to spend four years thinking, reading, and writing about one problem. I am indebted to many people whose advice and support allowed me to pursue my work. I would like to thank them here.

To begin I want to thank my supervisor – Wil Waluchow. He has been a sympathetic, thoughtful, and rigorous reader. I have learnt a tremendous amount from him and my work has benefitted from his guidance. His support has truly been invaluable. I owe him a great deal.

I would also like to thank two professors from my MA and undergraduate studies – Carolyn McLeod and Kathleen Okruhlik. They were inspiring professors and without their mentorship and encouragement I would not have pursued graduate studies in philosophy.

I had the good fortune of being able to spend a year of my doctoral studies at Oxford University. This was a truly wonderful year. While there I worked under the supervision of John Gardner and many of the chapters herein were greatly improved by his comments

and criticisms. As well, I became a better thinker because my friends were so generous as to give their time to me – in particular Thomas Adams and Alexandra Whelan. Many fruitful discussions and debates happened in the pub and in walks around University Parks.

Back in Canada I was not short of people to count on either. My committee members, Elisabeth Gedge and Violetta Igheski, provided guidance and support and their comments and insight always made my work better. As well, many friends took time to read and comment on chapters, especially Hillary Nye and Katharina Stevens.

Thomas, Hillary, Katharina, Alexandra, and many more friends in Toronto, Hamilton, Oxford, London, and Vancouver provided me with seemingly unending support, patience, and encouragement over the years. I count myself exceptionally lucky for them.

Finally, I would like to thank my parents – Clare and Michael. They have helped me more than they know and I cannot thank them enough.

Table of Contents

Introduction.....	1
I Synopsis	6
II Some Preliminaries and Limitations.....	10
Chapter 1: The Debate Thus Far.....	15
I Introduction.....	15
II The Advocates and The Critics.....	16
III Out With the Old and In With the New: An Alternative Conception of Charters	23
IV A Common Law Method: The Community’s Constitutional Morality	26
V The Common Law Method at Work.....	34
VI A Common Law Method: Are We Sure?	36
VII Physician-Assisted Suicide Laws in Canada	39
Chapter 2: There’s No I in Team: Communities as Moral Agents.....	44
I Introduction.....	44
II Let’s Go Team	50
III Play as a Team, Win As a Team	75
IV Conclusion	88
Chapter 3: Norms Recognised in Law	89
I Introduction.....	89
II Judicial Reasoning	96
A Precedent.....	97
B Avoiding Precedent by Distinguishing.....	101
C Arguments by Analogy.....	106
III An Example: The Canadian Same-Sex Marriage Reference Case	131
IV Conclusion	136

Chapter 4: Public Reason and Judges	138
I Introduction.....	138
II Public Reason	141
III Why Public Reason.....	147
IV Public Reason is Incomplete?.....	155
A Incomplete as Inconclusive.....	157
B Incomplete as Indeterminate	158
C Public Reason is Inconclusive(?)	160
D Public Reason is Indeterminate (?)	162
V The Agents Limited to Public Reason	175
VI Public Reason is Not Necessarily a Way to the Truth	178
VII Conclusion	182
Chapter 5: Case Study of Physician-Assisted Suicide Laws In Canada From <i>Rodriguez</i> to <i>Carter</i>	184
I The Facts of <i>Rodriguez</i> and <i>Carter</i>	184
II The Problem: What Changed?.....	187
III A Community’s Constitutional Morality and Physician-Assisted Suicide.....	190
IV What Did Change?.....	191
A Section 7 Developments	193
V The <i>Carter</i> Decision	196
A Stare decisis	196
B Section 15 Analysis	198
C Section 1 and Section 7 Analyses	200
VI A Return to the Democratic Challenge and A Community’s Constitutional Morality	204
Conclusion	210
I Going Forward	215
A The Judges in Judicial Review.....	215

B	Another Reason in Favour of Charters	217
II	Final Remarks	221
	Bibliography	222

Introduction

The aim of this doctoral project is to defend the value and the democratic legitimacy of charters and judicial review. I take as a starting point Wilfrid Waluchow's theory of charters and judicial review. Waluchow's theory is the best defense of charters provided thus far in large part because it abandons the notion that we ought to understand charters as representing robust pre-commitments to the specific meaning of rights.¹ Instead Waluchow argues that a community's understanding of the legal rights and ideals enshrined in its charter will rightly develop over time. Waluchow's theory argues that when judges decide charter cases they ought to rule in accordance with a community's constitutional morality (CCM) as it has developed. That is, they ought to rule according to a community's moral commitments that have found recognition within the law through legislation, past judicial decisions, and/or constitutions or charters.² Waluchow contends that his doctrine that judges do not express their personal preferences, but seek to interpret and apply the charter in terms of CCM, supports the democratic nature of

¹ There are those who have articulated similar theories including David Strauss, *The Living Constitution* (Oxford University Press 2010); Aileen Kavanagh "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22 *Law and Philosophy* 5; Aileen Kavanagh, "The Idea of a Living Constitution" (2003) *Canadian Journal of Law and Jurisprudence* 1(January); and Den Otter, *Judicial Review in an Age of Modern Pluralism* (Cambridge University Press 2009). I take Waluchow's to be the most fully worked out of these theories. Importantly, though, I do draw on these authors' insights on charters and judicial review throughout to help develop and defend the theory articulated in this project.

² Wilfrid Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press 2007); Wilfrid Waluchow, 'Constitutional Morality and Bills of Rights' in *Expounding the Constitution: Essays in Constitutional Theory*. Grant Huscroft (ed). Cambridge University Press 2008).

charter review and supports its role in protecting minorities from the superficial prejudices of the majority. However, as I will demonstrate, there remain some aspects of his theory that need more explication; otherwise his theory remains vulnerable to the attacks of critics who argue that charters and judicial review are undemocratic. Thus, I set out to develop and strengthen Waluchow's theory and to demonstrate that the theory of charters I argue for is more than capable of responding to the democratic challenge. I aim to show that a more fully worked out theory of charters and judicial review stemming from Waluchow's original theory is capable of answering criticisms and especially the criticism that judicial review is undemocratic. This theory will do so by demonstrating how it allows for the meaning of the rights protected under the *Canadian Charter of Rights and Freedoms*³ to evolve and to do so in a way that we can understand as democratic. With a more fully developed theory of charter interpretation in hand, I plan to show how it is capable of adequately explaining and constitutionally justifying the shift from the 1993 *Rodriguez v British Columbia (Attorney General)*⁴ decision which upheld the criminal ban on physician-assisted suicide (PAS) to the 2015 *Carter v Canada (Attorney General)*⁵ decision that found the ban to be unconstitutional. That is, I aim to use my newly articulated theory to demonstrate that Canada's CCM, in particular the requirements stemming from its commitment to equality and the right to life, has changed and that the Supreme Court of Canada has responded to and ruled in accord with this change.

³ And charters and bills of rights generally. These are constitutional rights declarations against which government actions are to be measured in assessing their legal effect or legal validity.

⁴ [1993] 3 SCR 519

⁵ 2012 BCSC 886

The *Canadian Charter of Rights and Freedoms* was enacted in 1982. It is often heralded as a great document that speaks to the Canadian peoples' fundamental moral beliefs and commitments. When the *Charter* was enshrined in Canada, the Prime Minister at the time and one of the biggest supporters of the *Charter*, Pierre Elliot Trudeau, said "We must now establish the basic principles, the basic values and beliefs which hold us together as Canadians, so that beyond our regional loyalties there is a way of life and a system of values which make us proud of the country that has given us such freedom and such immeasurable joy".⁶ Among the rights protected in the *Charter* are equality to all Canadians before and under the law, and the right to life, liberty, and security of the person. Many of these rights had some legal status before the enactment of the *Charter*. For example, equality rights in Canada arguably began to be fleshed out in the famous *Persons*⁷ case – in which women were legally recognised as persons under the law (just like men!). However, enshrining these rights in the *Charter* gave them a status they did not previously hold. As of 1982 they were constitutional rights – rights that Canadians valued and were committed to protecting in perpetuity. No government action could violate these rights and citizens could challenge government action on the grounds that its action violated one or more of their *Charter* rights. Many important Canadian cases were argued and decided on the basis of *Charter* violations, including *Butler*⁸ (a case concerning obscenity and pornography), *Keegstra*⁹ (a case concerning hate speech), and

⁶ The Right Honourable Pierre Elliot Trudeau, 1982 (cited in *The Charter of Rights and Freedoms*),1.

⁷ *Edwards v Canada* (AG)

⁸ *R. v. Butler* [1982] 1. S.C.R. 452

⁹ *R. v. Keegstra* [1990] 3 S.C.R. 697

more recently *Bedford*¹⁰ (a case about laws regulating sex work), as well as the main case study of this project, *Carter*. These cases are all examples of judicial review of legislation, a review whose purpose is to ensure that legislation is consistent with the *Charter*.¹¹ This process of judicial review is often, and I believe correctly, seen as an integral aspect of Canada's constitutional democracy. But we need to understand how this process in which (largely) unelected judges determine the legal validity of legislation passed by the people's elected representatives, can in the end, be reconciled with democracy and the principle of self-governance.

Waluchow first laid out his position on charter interpretation in a "Constitutions as Living Trees: An Idiot Defends,"¹² then more fully in his book *A Common Law Theory of Judicial Review*¹³ and has continued to develop his theory in subsequent writings such as "Constitutional Morality and Bills of Rights"¹⁴ and "On The Neutrality of Charter Reasoning"¹⁵. As well as outlining his own views in these writings, Waluchow takes on one of the most powerful critics of charter review, Jeremy Waldron. Waldron's main claim is that charter review cannot be reconciled with democracy. Other objectors worry that charters will just be used by the powerful majority to manipulate laws and exert control

¹⁰ Canada (AG) v Bedford 2013 SCC 72, [2013] 3 SCR 1101

¹¹ Henceforth, I use the phrase "charter review" and "judicial review" interchangeably and mean it to refer to any form of judicial assessment of the legal validity of government legislation under a constitutional charter or bill of rights or constitution.

¹² Wilfrid Waluchow, "Constitutions as Living Trees: An Idiot Defends" (2005) Canadian Journal of Law and Jurisprudence 18 (Spring).

¹³ Waluchow, *A Common Law Theory of Judicial Review*.

¹⁴ Waluchow, "Constitutional Morality and Bills of Rights".

¹⁵ Wilfrid Waluchow, 'On The Neutrality of Charter Reasoning' in *Neutrality and Theory of Law*. J. Ferrer Beltrán et al (eds) (Dordrecht; New York: Springer 2013).

over minority groups. In the above-mentioned works, Waluchow has attempted to respond to these criticisms and in developing his theory of charters I aim to meaningfully contribute to and strengthen Waluchow's defense of charters and judicial review.

The importance of judicial review has been highlighted in Canada by the widespread public attention to the legal status of physician-assisted suicide. The issue has become important again because of the *Carter* case, as well as the widely publicized video made by the recently deceased Donald Low, in which he made an impassioned plea to remove the criminal ban on PAS. Understanding the moral questions surrounding PAS is without a doubt an important task. Given the *criminal* ban on the procedure, however, we also need to understand how the procedure fits into Canada's legal landscape. To summarize the recent legal history of PAS within Canada, in 1993 the Supreme Court of Canada maintained a criminal ban on PAS in *Rodriguez*. In the *Carter* case the British Columbia Supreme Court ruled that the criminal ban was unconstitutional, a decision that was later overturned by the British Columbia Court of Appeal which upheld the 1993 *Rodriguez* decision. Then in 2015, after the Supreme Court of Canada heard the *Carter* case it ruled the criminal ban unconstitutional. They declared the ban unconstitutional but suspended their declaration of invalidity for a year. In other words, the ban was left in place for a year, in order to give the legislature enough time to draft a new law regulating PAS. I plan to use PAS as vehicle for testing the efficacy of the more fully developed theory of charters I present and argue for throughout the dissertation. My hope is that when we re-examine PAS we will find that my more developed theory of charters is one that can adequately explain and justify the shift from the *Rodriguez* decision to the *Carter* decision.

The *Carter* decision will be seen to be constitutionally justified in terms of a community's evolving understanding of its moral commitments as expressed in its constitution, its charter, and its laws.

I Synopsis

Chapter 1 of this thesis describes the traditional debate between the Critics and the Advocates of charters and judicial review surrounding these practices. With Waluchow, I suggest that both the Critics and the Advocates of charters and judicial review rely on a problematic understanding of charters. This is a view that sees charters as representing points of fixed agreement about the meaning of specific legal rights. I highlight how the metaphor of Ulysses tied to the mast, often used by the proponents of charters to emphasize and argue for charters' value, assumes this problematic understanding that prizes charters as representing fixed moments of commitment. As well, I demonstrate how the strongest arguments against charters, like those put forward by Jeremy Waldron, also rely on this understanding of charters. Following Waluchow I contend that we ought to abandon this understanding in favour of what Waluchow has called the common law understanding of charters. This understanding of charters represents a meaningful improvement over the standard conception, but does not fully answer the democratic challenge. The final section of this chapter looks at two Canadian Supreme Court decisions surrounding a criminal code ban on PAS. Looking to these cases helps reveal those aspects of the common law method as described thus far by Waluchow that are in need of further development and sets the stage for the arguments to come.

In *Law's Empire* Dworkin suggests that some groups of people have the potential to be “deeply personified”.¹⁶ Chapter 2 takes up Dworkin’s intuition, defends it and makes an argument for its expanded relevance, particularly with respect to judicial review. I demonstrate that it is meaningful to talk about collective agency and that our understanding of group activities would be incomplete if we were to give up the notion of collective agency. What’s more, I advance the idea that a political community, through a form of what I call sincere artificial agency, forms a collective moral agent. The sincerity involved is a commitment by all citizens to political and moral ideals which are best manifested in a charter. These ideals forge a bond among the citizens because, beyond any differences, they can all identify with the need to strive for fairness and justice. Further, I argue that enshrining a charter or bill of rights will make a community a better moral agent. Waluchow has argued that communities ought to do their best to act in accordance with their moral commitments, but has failed to fully explain how these communities can be seen as agents separate from the individual members of the communities. I have explained this aspect of the community as a deeply personified agent through the notion of sincere artificial agency. Further, I argue that the community’s moral commitments are most effective if partially fleshed out in a charter. I also contend that charters and the judicial review of legislation are democratic because they attempt to hold communities to their own most deeply held moral beliefs. They play the role that a conscience or Jiminy Cricket should in the individual.

¹⁶ Ronald Dworkin, *Law's Empire* (London, Belknap 1986) 167-175.

The third chapter sets out to fully explain what it means for a norm to be recognised in law without, in many cases, being explicitly the law on the books. The norms recognised in law are evidence of the community's constitutional commitments. This chapter relies on scholars who have written on common law reasoning, scholars such as Grant Lamond, David Strauss, and Neil MacCormick. I attempt to use their work to show how the meaning of somewhat vague moral terms, like the ones often enshrined in charters, can evolve and change over time. The arguments of this chapter are key to responding to the democratic challenge because they show what legal material and traditions the judges can rely on when deciding charter cases. In setting these materials out this chapter further demonstrates that judges are not left to fall back on their own first order moral preferences. That is, that they are not forced to decide according to their personal moral beliefs about the issue at hand. To decide, for example, a case about abortion rights according to one's first order moral preferences would be to decide according to one's own beliefs about the permissibility or impermissibility of abortion rather than according to what the law requires. Furthermore, by highlighting the legal materials and drawing on common law reasoning this chapter emphasizes the particular aptness of this role for judges, whose training is in law and legal reasoning.

The fourth chapter responds to a worry about the resources discussed in the previous chapter running out and not providing judges with enough material to come to an answer. The worry is that this lack of material would leave a gap to be filled by the judges' own personal moral preferences about the issue at hand. Admitting that this is a possibility re-arms the democratic challenge and thus warrants considerable thought and response. In

answering this objection I marshal public reason as articulated by Rawls in works such as *Political Liberalism*¹⁷ and “The Idea of Public Reason Revisited”¹⁸. I argue that Rawls’ public reason and Waluchow’s CCM are in many important ways parallel concepts. I further contend that public reasons are the right sort of reasons for judges to rely on in charter cases and that decisions made using public reasons will be reasonable and publically justified even if not everyone agrees with the final decision.

The fifth chapter looks again at the Canadian Supreme Court cases – *Rodriguez* and *Carter* – that deal with the criminal ban on PAS. In this chapter I highlight why these cases of charter review may, at first glance, pose a problem for those in favour of charters and judicial review. The cases are strikingly similar, but in the later case, *Carter*, the Supreme Court found the ban that was previously upheld in *Rodriguez* to be unconstitutional, without declaring the decision in *Rodriguez* incorrect. In this chapter I intend to apply the theory of CCM as I have developed it throughout my dissertation to PAS in Canada. Given CCM as I have presented it, particularly in fleshing out what it means to be recognized in law and in introducing the role of public reasons, I will offer an interpretation of the change as constitutionally legitimate and democratic.

¹⁷ John Rawls, *Political Liberalism* (New York: Columbia University Press 1993).

¹⁸ John Rawls, “The Idea of Public Reason Revisited”(1997) 64 *The University of Chicago Law Review* 765.

II Some Preliminaries and Limitations

This project assumes that there is distinction between how one ought to reason and how one in fact does reasons. And with this assumption in place, it defends a view about how judges ought to reason. Specifically, it aims to answer an objection about how judges ought to reason that claims that there is nothing for judges to rely on other than their own first order moral opinions. In answering this objection, I argue that there is a substantial endowment of legal materials for judges to rely on and that they ought to reason according to those. There may further practical concerns about how best to ensure that judges do in fact reason this way.

Before moving into Chapter 1, I would like to say something about this thesis' discussion of PAS. Namely, I would like to stress that this is not a dissertation about the moral arguments surrounding PAS. There are many works that discuss the moral aspect of PAS. In his recent book *Assisted Death* Wayne Sumner surveys the moral arguments on either side of PAS and ultimately concludes that no "bright-line" can be maintained between PAS and other end-of-life measures which are morally and legally accepted such as withdrawing life-sustaining treatment.¹⁹ He concludes that PAS and these other end-of-life measures are, in principle, morally equivalent, a position that I am persuaded by. Some critics of the practice, however, are concerned about how truly voluntary PAS will be. They argue that it will be more often chosen by vulnerable groups of people in society. For example, Wolf has argued that the choice of PAS for women may not be fully autonomous

¹⁹ Wayne Sumner, *Assisted Death: A Study in Ethics and Law* (Oxford University Press 2011).

because they might be particularly susceptible to worries about being a burden to their families and opt for self-sacrifice.²⁰ Similar worries surround the issue of the disabled feeling pressure to choose PAS. Coleman contends that pressures to cut costs in medicine as well as a social devaluation of the lives of disabled persons will create a pressure on them to opt for PAS.²¹ While these are important worries, empirical evidence suggests that careful regulation can prevent any feared misuse of the procedure.²² So the moral case for PAS has, in my view, been adequately defended, but one needn't agree with me to accept the arguments of this project regarding charters and judicial review. This project sets out to explain the extent to which PAS is consistent with CCM as part of the over-all project of articulating and defending a theory of charters and judicial review. So the discussion of PAS within this dissertation is restricted to how the practice fits into the Canadian legal landscape. As will become clear in this work, especially in Chapters 3 and 4, we should not confuse the questions judges are asked to answer in cases of judicial review with the questions we ask of our grand moral theories. Thus, I take it to be an asset of this theory of charters and judicial review that assessing the legal status of PAS in Canada does not require a full fledged moral discussion of the merits and demerits of the practice. In making this quite clear we avoid any potential criticisms that the theory herein treats judges as Philosopher Queens and Kings. It is my hope that even a reader who does not – for moral reasons – think that PAS should be legal anywhere could still, given the

²⁰ Susan Wolf, 'Gender, Feminism, and Death: Physician-Assisted Suicide and Euthanasia' in her *Feminism and Bioethics: Beyond Reproduction* (Oxford University Press 1996).

²¹ David Coleman, "Assisted Suicide Laws Create Discriminatory Double Standard for Gets Suicide Prevention and Who Gets Suicide Assistance: Not Dead Yet Responds to Autonomy, Inc" (2010) 3 *Disability and Health Journal* 1.

²² Sumner, *Assisted Death*.

arguments contained within, see why legally the decision to find the criminal ban on PAS unconstitutional was constitutionally justified and democratic.

As well, the theory of charters and judicial review defended throughout this dissertation is intended to be applicable beyond the Canadian context. Many of the examples discussed in the project and the main case study are Canadian; however, the arguments articulated apply equally to many nations with similar constitutional rights declarations such as the United Kingdom with its Human Rights Act and the United States with its Bill of Rights. Thus, while I frequently use the term charters (mostly for convenience and brevity's sake) throughout the dissertation I mean equally to capture other forms of rights declarations. And this project does discuss some famous American constitutional cases including *Brown v The Board of Education*²³ and *Roe v Wade*²⁴ and demonstrates how they too can fit within the framework of the theory of charters and judicial review articulated throughout. The main point is that the question of how to reconcile bills of rights or charters of rights and freedoms and judicial review with democracy is not a problem unique to Canada. It is question of vital importance to any liberal democracy that enshrines rights in its constitution and places constitutional limits on government action.

²³ 347 U.S. 483 (1954)

²⁴ 410 U.S. 113 (1973)

Finally, there is a more refined debate about judicial review that involves arguing the merits and demerits of specific forms of judicial review: namely, strong judicial review and weak judicial review. Roughly, strong judicial review enables courts to strike down legislation as invalid. This form of judicial review is found in the United States. Weak judicial review, on other hand, is generally any form of review that does not result in invalidity when the court rules that there has been a breach of the relevant rights declaration. Weak judicial review comes in two forms: declarations of incompatibility as one sees in the United Kingdom; and declarations of invalidity that are overridable by the legislature, as one sees in Canada. Strong judicial review is where invalidity not only follows upon a judgment of incompatibility, but cannot be overridden by the legislature. In short, the court has final word on constitutional validity in the case of strong judicial review. The debate over types of judicial review will not be dealt with in this dissertation. It is a defense of charters and judicial review generally. If the arguments are successful then the reader has been persuaded that charters and judicial review are democratic. But even for those who accept the democratic nature of judicial review there may be pragmatic reasons to choose one type of judicial review over another.²⁵ In short, this project does not directly participate in the debates about the merits or demerits of specific forms of judicial review, but contributes equally to the defense of either type of judicial review.

²⁵ Stephen Gardbaum discusses some of the practical reasons why more legislative power over rights or more judicial power over rights may be preferred given different contexts. He provides a “new Commonwealth model of constitutionalism” that sets out to offer an alternative to the conventional dichotomy of legislative versus judicial supremacy. See, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2013).

With some of the preliminaries and limitations of the project laid out we can now move on to the substantive arguments of the dissertation. We begin, in Chapter 1, with a look at the standard debate around charters and judicial review.

Chapter 1: The Debate Thus Far

I Introduction

The aim of this chapter is to get a firm understanding of W.J. Waluchow's theory of charters and charter interpretation as he has described them in his works thus far. The main sources that I draw on throughout are: "Constitutions as Living Trees: An Idiot Defends",²⁶ *A Common Law Theory of Judicial Review: The Living Tree*,²⁷ "Constitutional Morality and Bills of Rights",²⁸ and On The Neutrality of Charter Reasoning.²⁹ As well, I hope to situate Waluchow's theory in the broader literature on charter interpretation and judicial review.

I believe that Waluchow's theory offers the best interpretation and defence of charters and of judicial review thus far. Because Waluchow has developed his interpretation of charters and judicial review partly in response to the on going debate between the Advocates and the Critics of charters, it is important to place his theory in the context of that debate. Waluchow begins his case by arguing that both the Advocates and the Critics of charters share a common view of what charters are, a view he labels the Standard Case. He argues that the assumptions and interpretations behind the Standard Case view are wrong and he offers an alternative theory: a common-law theory which sees constitutions and charters as part of a living tree.

²⁶ Waluchow, "An Idiot Defends".

²⁷ Waluchow, *A Common Law Theory of Judicial Review*.

²⁸ Waluchow, "Constitutional Morality and Bills of Rights".

²⁹ Waluchow, "On the Neutrality of Charter Reasoning".

A clear description of Waluchow's theory as he has presented it so far will also make apparent the areas that have been left relatively underdeveloped and that need further work. It is my contention that some aspects of the argument need expansion and further explication. With these areas brought to mind my doctoral project can move forward with the clear goal of addressing these gaps. This chapter begins by looking at the Standard Case. In the following section I present what I hope to be a fair representation of the sorts of arguments both for and against charters. These arguments seem to stand or fall on their acceptance of the Standard Case view of charters.³⁰ We will see whether or not we have good reasons to question the Standard Case and even ultimately to reject it. If we are motivated to reject this theory we will want to consider how an alternate theory may help provide a better interpretation and defence of charters.

II The Advocates and The Critics

In thinking about and evaluating the arguments surrounding charters Waluchow saw that on both sides – those for and those against – there was an understanding of charters that was taken for granted. Waluchow labelled this view the “Standard Case”³¹ and argued that the assumptions it took for granted it were problematic and spurious.

The Standard Case sees charters as representing fixed points of agreement about what legal rights we have and what those rights entail. As Waluchow writes, “most authors [...] view them [charters] as attempts to provide stable, fixed points of agreement on and pre-commitment to moral limits to government power – limits found, paradigmatically, in

³⁰ For reasons of convenience, I will henceforth refer simply to charters.

³¹ I use the expression Standard Case and Standard Conception interchangeably.

moral rights upon which valid government action is supposedly not to infringe”.³² The Standard Conception underpins the classic arguments about charters, both those in favour and those against. That is, you have to understand charters as claiming to represent fixed-points for either the arguments in their favour or against them to get any traction – this is the only way these arguments make sense. But its not clear that we have to accept this conception, and what’s more an alternative understanding of charters may make us better equipped to defend charters from objections. Before exploring the potential for an alternative understanding we need to look at how the traditional arguments on either side of the debate about charters make use of the Standard Case.

Those in favour of charters argue that entrenching rights in something like a charter is the best way to protect minority groups from what Mill famously called “the tyranny of the majority”.³³ If the rights are not entrenched then the government would be able to alter or even eliminate minority protection with a simple act of legislation. If this were the case, if rights could be done away with just by passing legislation, minority groups would not really be protected from the abuse of any majority in the legislature. Thus, the Advocates contend that charters set out enforceable limits on government power that enables the substantial protection of minorities. What’s more charters are able to serve this important function because the limits on government power are predetermined; charters represent fixed points of agreement. The Advocates would likely worry that, if the limits were not pre-determined, it would be a bit like playing a game and making up the rules as you

³² Waluchow, *A Common Law Theory of Judicial Review*, 124

³³ *Ibid* 115.

went along. The government may be inclined to make up rules to suit their agenda (re-election) rather than to protect vulnerable minority groups (especially if it were thought that the protection of minority groups might hinder their chances for re-election). For example, in the Canadian case of *Charkaoui*³⁴ the Supreme Court of Canada had to decide whether or not legislation designed to promote national security, which in effect allowed for the indefinite detention of non-Canadian citizens that were suspected of terrorism, violated the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada unanimously decided that the legalisation was in fact in violation of the *Charter* owing to its conflict with the right to life, liberty and security of the person, and struck it down. Advocates for charters might argue that had Canada not had a *Charter* and had the government been able to make-up the rules as they went such legislation would have not only been passed, but would have remained an enforced law - one that seriously violated people's rights. Given that the legislature is elected by the majority and as such is likely to make decisions according to popular majority opinion, perhaps with little concern about how the desires of the majority may infringe on minority rights, minorities without entrenched protection are in danger. The *Charkaoui* case involved fears of terrorism and worries about national security. Fear was likely motivating the majority of Canadians to support the legislation in question. That is, the popular opinion was in favour of heightened national security laws and the legislature responded accordingly. But because Canada had the *Charter* the government was not able to make up the rules as it went. The rules were set out in the *Charter* and the Supreme Court ensured that the government

³⁴ *Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9 (*The Security Certificates Case*).

played by them. The *Canadian Charter of Rights and Freedoms*, in entrenching the right to life, liberty and security of the person provided a clear, stable, mutually agreed on, and pre-determined prohibition on unjustifiable indefinite detainment. Or so the Advocates' argument goes.

The Critics, on the other hand, argue that the agreement and pre-commitment supposed and, in fact, heralded by the Advocates is simply impossible given what Waldron, perhaps the leading opponent of charters and judicial review, calls "the circumstances of politics".³⁵ The phrase "the circumstances of politics" captures the reality that there is radical disagreement about what our rights actually are and what they require of us and of the government.³⁶ By the circumstances of politics Waldron refers to the divisions found in any polity between factions from the extreme right to the extreme left or between religious and secular factions. These divisions do not allow for any agreement on what constitutes a good life and therefore any agreement on rights is impossible. Given such pervasive disagreement, Waldron and the other Critics argue that we couldn't possibly have pre-committed to what the Advocates suppose. The Critics would likely contend that the Advocate's understanding of the *Charkaoui* case I sketched above is implausible and naïve. Following from Waldron's point about radical disagreement, the Critics would insist that there is no way that Canadians, at the time of the *Charter's* enactment, could have agreed on and committed to what the right to life, liberty, and security of person allowed and prohibited. What's more, the Critics may contend, that it is reasonable to

³⁵ Jeremy Waldron, *Law and Disagreement* (Oxford, Oxford University Press 1999), 102.

³⁶ Waluchow, *A Common Law Theory*, 124.

think that some Canadians would have thought that the post-9/11, age of terrorism changes what it is justifiable for the government to do in order to protect national security. Such people may be motivated to adopt an attitude of “all’s fair in love and war” and argue that the legislation in *Charkaoui* is an appropriate response to terrorism and is legitimate. These Canadians would not have agreed with the Supreme Court decision. They would deny that the Supreme Court ruling aligned with the fixed-point understanding of what the right to life, liberty and security of the person that was agreed to in 1982. In their minds the right never did and never will protect non-citizens suspected of terrorism from indefinite detention. Thus, the Critics would argue that the idea that there was a consensus and pre-commitment to a fixed-point about what that right or any right required, is to put it bluntly, ridiculous. As such, the Critics would say that charters are an unrealistic and undemocratic attempt to limit the government and the citizens.

To see even more clearly how the Standard Conception underpins both the Critics case and the Advocates’ arguments let’s turn to a common metaphor used to motivate the case for charters – the Ulysses metaphor. Recall part of the myth of Ulysses: Ulysses decides to tie himself to the mast of his ship in order that he may avoid succumbing to the all too tempting call of the sirens. Waluchow fleshes out the work the metaphor is meant to do for the Advocates well:

Just as Ulysses knows, in advance, and in a moment of cool reflection, that he is justified in arranging now for a restriction on his freedom to choose and act later we as a people, can know in advance, and in a moment of cool reflection (a moment of constitutional choice) that we are justified in tying ourselves to

the mast of entrenched Charter rights and their enforcement, on our behalf by the judiciary. Just as Ulysses knows that he will descend into madness when he hears the call of the Sirens, we can know that at some point we will inevitably succumb to the siren call of self-interest, prejudice, fear, hatred, or simple moral blindness.³⁷

The intuitive appeal of the analogy is strong – we want to avoid infringing people’s rights, but at the same time know that there have been and likely will be again periods of history when we have enslaved, imprisoned, and oppressed groups of people. For example, the internment of Japanese Canadians during World War II was a clear violation of the rights of those who were interned. In order to avoid such violations again, we ought to entrench rights to put them beyond the reach of the general public and the government.

With closer inspection we see that the Ulysses analogy gets traction in our thinking about charters because it presupposes the Standard conception – namely, that charters represent pre-commitment to fixed points that limit what the government can do. However, as the Critics, would quickly point out – the Ulysses’ metaphor is not actually comparable to charters and limits on government. Ulysses knows the threat he is about to face – he knows that the sirens sing a song that no person can resist and that that song has lured many a sailor to their death. It is because of this foreknowledge that Ulysses can appropriately plan what to do when he reaches the siren’s waters. Ulysses ties himself to the mast of the ship, but does not put wax in his ears – this allows him to hear the beautiful song of the sirens but prevents him from following their call. As well, he instructs the crew of his ship to put wax in their ears so that they will not hear the sirens song and will still be able to sail the ship. The actions of Ulysses are reasonable and

³⁷ Ibid 153.

effective because they are well informed. Charters do not and cannot work this way. We, unlike Ulysses, do not know the troubles that we will face in the future and thus we do not know what are the reasonable and justifiable restrictions on how we and our governments should act. Tying oneself to the mast is a good idea if we face sirens whose voices may draw us to the sea to drown, however, it would be a rather poor choice if the danger we faced was a great wind that would rip our ship apart. In that case we best abandon ship and take our chances swimming. The trouble is, we do not know if it is sirens or winds or some other unimaginable threat we face ahead. So the Critics argue we ought to abandon charters.

The Critics case against charters is powerful. In fact, Waluchow writes that “if the Standard Conception of the role charters are supposed to play is accepted then there is no doubt that the Critics win”.³⁸ Thus, it may simply be naïve to think that charters can actually live up to the high expectations the Advocates have set for them. As Waldron aptly points out – it is a serious mistake to think that we can intelligibly pre-commit to limits upon which we cannot even agree about now. That is, if Canadians, for example, cannot agree *now* about whether or not the right to security of person protects the right to PAS, how can we even entertain the idea that in 1982 there was a general agreement and consensus about what all the rights included in the *Charter of Rights and Freedoms* actually entailed.³⁹ Generally though, the Advocates are willing to acknowledge that there is some amount of debate and controversy about how exactly we ought to flesh out the

³⁸ Ibid 125.

³⁹ An analysis of the legal status of PAS in Canada is provided in this project. See the end of this chapter and especially Chapter 4.

vague rights enshrined in a charter. That is, they are willing to concede *some* ground to the radical disagreement objection. But even though they accept that some disagreement exists they maintain that fixed-points that genuinely limit government powers are both possible and desirable and that they are to be laid out in charters. Given, however, the force of Waldron's objection it is hard to see how charters could possibly be seen as representations of pre-commitment to stable fixed-points.

Notice that the Critics' objections rest on an assumption - the assumption that charters represent or should be thought to represent fixed points of consensus and pre-commitment to these points. What happens if we give this assumption up? Is there a less problematic way to think about charters? Is there a way of thinking about them that would allow us to still talk about them meaningfully – a way that would satisfy the Advocates and quiet the Critics? Waluchow thinks there is and his approach's power lies in great part in abandoning the fixed-point understanding of charters.

III Out With the Old and In With the New: An Alternative Conception of Charters

The Standard Conception seems to immodestly suggest that we have the correct answers to difficult and complex questions and situations. In fact, it even suggests an element of infallibility regarding situations that have not yet happened and situations that we likely cannot even imagine. Think of, for example, how the advancement of technology has changed how we communicate, who we communicate with, and how often we are able to communicate. This is surely a hubristic claim. But as suggested this needn't be the conception we take on. As Waluchow writes, "I am going to suggest that we instead

view Charters as representing a mixture of only a very modest pre-commitment combined with a considerable measure of humility about the limits of our moral knowledge”.⁴⁰ His view of charters, “stems from the recognition that we do not in fact have all the answers when it comes to moral rights”, and a concomitant commitment to, “do all we can to ensure that our moral short sightedness does not, in the circumstances of politics lead to morally questionably government action”.⁴¹ Thus, *contra* Waldron and his fellow Critics, Waluchow contends that charters should be seen as an acknowledgement of our inability to know exactly what our rights are and what they call for and our inability to foresee how we may come to infringe rights.

Waluchow’s intuitions push him to defend charters – however, he recognises that the criticisms against them are powerful and possibly even fatal if we cling to the conception of charters that sees them as fixed-points. Thus, he advocates acceptance of a new understanding of charters. But how does this conception work? Can it reject a fixed-point characterization and at the same time meaningfully protect minority rights – arguably one of the most important roles a charter is meant to play. Let’s see.

Waluchow’s understanding of charters takes seriously lessons from H.L.A Hart: that the law aims to find the optimal balance between two social needs – the need for certain rules which can in general be applied and followed by private individuals and the need to leave

⁴⁰ Ibid 127.

⁴¹ Ibid 127.

certain questions/problems unsettled. Hart acknowledged that the issues left unsettled are those which are best understood, resolved, and dealt with as they arise in concrete cases and thus law should tolerate vagueness in some of its regulations.⁴² Humans cannot predict the future and we need to design our legal institutions so that they reflect this limitation. To illustrate the point Waluchow draws on modern advances in tools of communication. Waluchow asks us to reflect on laws governing communication at the time of the telegraph. Then, such laws may have been both effective and morally unproblematic, but now in the age of the Internet this may no longer be the case.⁴³ Consider the perhaps even more drastic example of a legal presumption that assumes that the mother of a child is the woman who gives birth to it. With the advancement of fertility technology, particularly *in vitro* fertilisation (IVF), such a presumption becomes highly problematic. Given IVF and surrogacy there could potentially be at least three persons with parental claims to the child. Arguably, the surrogate who carried and gave birth to the child but has no genetic connection to the child, the gamete donor, and the individual or persons who commissioned the surrogacy all have some parental claim over the child.⁴⁴ A legal presumption that the woman who gives birth to child is the mother of that child was perhaps at one time appropriate, but it is clearly morally and pragmatically problematic now.⁴⁵ When first designing legalisation around parental rights the scenario

⁴² Ibid 210.

⁴³ Ibid 212.

⁴⁴ I aim to remain neutral on which party's parental claim should be recognised by the courts when there is a disagreement. I am only suggesting, I think plausibly, that each party has some parental claim. Perhaps a child could have more than two parents.

⁴⁵ Likely, the existence of adoption also complicated such a presumption. But I think IVF and surrogacy presents a distinct complication and what's more the idea that women who gives birth to the child can have no genetic relationship to that child was the stuff of sci-fi at one point.

just described was no doubt unimaginable, particularly the idea that the woman who carried the child could have no genetic connection to that child. Given this example, we can see how having a law that is too specific could be problematic, even if it at one time it was appropriate. What's more this realization is not a new one – the common law has a history of, for the most part successfully, combining fixity and adaptability. And it is from this method of legal regulation, the common law method, that Waluchow says we should take our understanding of charters: “ Why should we not view Charters as setting the stage for a kind of common law jurisprudence of moral rights cited in the Charter”⁴⁶ asks Waluchow. He argues that the vague terms found in charters could be subject to the same on-going interpretation that we accept for some of the more vague terms of tort law such as negligent, reasonable and foreseeable.⁴⁷ Thus, Waluchow argues in favour of a common law understanding of charters that is symbolised in the image of a living tree: a charter is a “living tree capable of growth and expansion within its natural limits”.⁴⁸ In the following section I will try to get Waluchow's understanding of charters and his method of interpretation of charters on the table.

IV A Common Law Method: The Community's Constitutional Morality

Waluchow, like the Advocates sees charters and constitutions as embodiments of a community's commitment to limits on government action. However, he stresses that it is only a very modest pre-commitment reflected in the vague moral terms found in charters. The vague moral terms, such as equality, are acknowledgements that the government, for

⁴⁶ Ibid 203.

⁴⁷ Ibid 204.

⁴⁸ *Edwards v, A.-G. Canada* [1930] A.C. 124.

example the Canadian one, should take seriously concerns about equality and should not pass legislation that violates peoples right to equality. It does not, however, claim to know exactly what respecting that right requires of us now nor what it will require of us in the future. Adopting the common law conception of charters allows for the understanding of the vague terms found in charters to evolve. The word equality enshrined in the charter is – to return to the living tree metaphor – the roots. The meaning of terms and the implications of their meaning will be able to grow and expand within its natural limits. For Waluchow the natural limits will be realized by utilizing the familiar common law method of defining and developing the meaning of vague terms. More will be said about how the common law method can set “the natural limits” later. For now, we need only see that, while Waluchow acknowledges that the vague moral terms are doing some work in limiting the governments actions, his theory claims that we do not have absolute certainty about what a right to equality requires and that we have not all agreed to some complete and permanent understanding of it at the time of its enshrinement in a charter. What equality requires will be developed in a community using the common law. Fleshing out what the terms mean via the common law method overcomes Waldron’s point about radical disagreement, because this method makes no claims about an original agreement to what the right entails in perpetuity. Waluchow’s arguments thus far go some way to establishing what a common law conception of charters would look like, but more needs to be said.⁴⁹ I hope my work throughout the dissertation will add more strength to this claim.

⁴⁹ I gesture at what areas I think are left underdeveloped by Waluchow near the end of this chapter. It is the goal of this project to both identify these gaps and make significant headway in filling them in.

Waluchow's common law approach also begins to answer the criticism that charters and the judicial review that tends to go along with them are undemocratic. The democratic worry is motivated by a concern about unelected judges determining the legal validity of legislation passed by the peoples' elected representatives. How the common law method works and how it overcomes Waldron's objection and the democratic worry will become clearer in what follows.

Waluchow sees constitutions and charters as embodiments of a community's commitment to moral ideals, albeit a very modest pre-commitment. A fundamental tenet of Waluchow's theory is the idea that we can (for the most part) accurately differentiate between moral opinions and moral commitments. Moral opinions tend to be knee-jerk reactions rather than well-considered and reflective moral commitments. Moral commitments are distinct from mere moral opinions in that commitments are consistent, based on sincere beliefs, and in harmony with one's other judgments about specific cases.⁵⁰ For example, someone with a green thumb may have the moral opinion that it is wrong for local government to impose restrictions on outdoor water use. Upon reflection, however, she would likely see that given her thoughts about the importance of recycling and composting, and her commitments to energy saving, her genuine moral commitment is actually in favour of limits on the use of water outdoors. Because moral opinions and moral commitments can conflict with one another, a responsible moral agent ought to

⁵⁰ Waluchow, "Constitutional Morality and Bills of Rights", 72-73.

continuously reflect on her opinions and commitments and bring them in line with each other. Waluchow argues that a community is a moral agent and as such should maintain a consistent set of moral commitments. One aspect of the role of judicial review is to help ensure this consistency for the community. He writes, “why should judges deciding moral questions under a system of judicial review be required, for reasons of democracy, fairness and the like, to respect the moral opinions on the matter – as opposed to the community’s *true* moral commitments...? Why should they bend to the community’s *inauthentic wishes*, and not its *authentic ones*?”⁵¹

Waluchow agrees that democracy is, at least partly, about self-governance as Waldron and other critics of charters argue. But Waluchow insists that true self-governance cannot be achieved if attempts at it are made based on inauthentic moral opinions. Therefore, when judges ignore the moral opinions of the community (its *inauthentic wishes*) in favour of the community’s commitments they are not thwarting democracy, because inauthentic opinions and desires are not the desires of agents acting autonomously. To illustrate this point Waluchow uses the example of someone, let’s call her Liz, who has too much to drink at the local watering hole.⁵² Liz’s friends all know that she is vehemently opposed to drinking and driving as she has expressly said so on many occasions and has also volunteered with MADD.⁵³ Tonight, however, after having one too many, Liz drunkenly declares that she is perfectly capable of driving herself home.

⁵¹ Waluchow, *A Common Law Theory of Judicial Review*, 225-226.

⁵² I have changed the example slightly, but the basic idea is the same. I also use this example in my paper, “Charter Interpretation and a Community’s Constitutional Morality” (2015) *Problema Anuario de Filosofía y Teoría del Derecho* 9.

⁵³ Mothers Against Drunk Driving.

Waluchow contends that Liz's friends *do not* respect her autonomy by letting her drive because her desire to drive drunk is *inauthentic* insofar as it is fueled by gin. Rather, in order to respect Liz's autonomy her friends ought to prevent her from driving drunk and ensure that her actions remain consistent with her commitment to not drinking and driving. In this example, Liz's inauthentic wish is driven by alcohol, but inauthentic wishes and moral opinions can also be motivated by prejudice and hatred rooted in fear (especially fear of the unknown or different), inadequate evidence or information, or severe emotional hardship (for example, severe depression). Another useful example Waluchow utilizes to illustrate the difference between moral opinions and moral commitments is the decision to order the internment of Japanese Canadians during World War II. This decision was motivated by, "fear of the unknown that led to deep suspicion against Japanese and those of Japanese descent".⁵⁴ This decision ran contrary to the community's commitments to equality and freedom of the person.

Given this distinction between inauthentic moral opinions and authentic moral commitments, Waluchow argues that judges and legislatures alike are more than justified in ignoring a community's opinions when enacting legislation or deciding a charter case. For Waluchow a community's authentic moral commitment finds recognition within the law in the community's constitution and charter of rights, in its legislation, and in its past judicial decisions. These moral commitments, which have found recognition in law, Waluchow calls the community's constitutional morality (CCM). In fact, when judges are ruling in charter cases they ought to rule in accordance with a community's *constitutional*

⁵⁴ Waluchow, *A Common Law Theory of Judicial Review*, 100.

morality. That is, they ought to rule according to community commitments that have found recognition within the law through legislation, past judicial decisions, and/or constitutions or charters.⁵⁵

An example that Waluchow discusses to support his conception of charters is the Canadian legalization of same-sex marriages. Prior to its legalization same-sex marriage ran contrary to the popular sentiments of Canadians.⁵⁶ However, as Waluchow repeatedly stresses, the genuine commitments of a community are not revealed through simple opinion polls. Constitutions and charters, judicial decisions, and legal precedents are key parts of a community's constitutional morality and are furthermore, evidence of the community's genuine moral commitments. Thus in deciding the same-sex marriage case the judges, in an attempt to rule in accordance with the community's constitutional morality, would have looked to past judicial rulings, such as those that gave spousal benefits to same-sex couples, to constitutional commitments to equality, and to legal commitments that oppose sexism, racism, and the oppression of minority groups. These factors would have revealed that in fact CCM required the legalization of same-sex marriage. What is more, although the decision that a failure to recognize the validity of same-sex marriage was unconstitutional went against popular moral opinion, the judges

⁵⁵ Waluchow, "Constitutional Morality and Bills of Rights", 27; Waluchow, *A Common Law Theory of Judicial Review*.

⁵⁶ Many Canadian courts ruled that the opposite-sex requirement of civil marriage was inconsistent with the equality clause of S.15 in the Charter. For example, the Ontario Court of Appeal in *Halpern v. Canada (Attorney General)* [2003] O.J. No. 2268 and the Supreme Court in the *Reference re Same-Sex Marriage* [2004] 3 SCR 698. In the *Reference* case the Federal government requested the opinion of the Supreme Court on whether or not the common law definition of marriage (as applying only to opposite-sex couples) violated the Charter.

who decided the case in fact ruled according to the community's genuine commitments and, in doing so, respected the autonomy of the citizens and upheld democracy. They did this in the same way that Liz's friends respected her autonomy when they prevented her from drinking and driving in the example just looked at.

Accepting the common law conception of charters means acknowledging that having the word "equality" in a charter does some work in limiting the governments actions. After all, it seems true that it is important that the charter says equality and not inequality. So, we accept that equality means something, however, what it means and calls for at any specific time is revealed through interpretation of the CCM. The community's genuine commitments provide the relevant meaning for the vague terms. And, as I've tried to demonstrate here – the genuine commitments of the community are allowed to evolve democratically through legislation, judicial decisions, precedent et cetera.

At this point it seems there may be an objection. Waluchow seems to be arguing for two theses that cannot consistently be maintained. At first glance it may seem contradictory to maintain both that charters are key parts of a community's constitutional morality and that charters represent only a very modest commitment. What's more it seems that both of these theses are necessary for Waluchow's theory to get off the ground; the former is central to his claim about how the common law method will work and the latter is necessary to overcome Waldron's objection about radical disagreement. Thus, if he cannot give one theses up in favour of the other and both cannot be held together, it

seems there is no way forward for Waluchow's theory. But I think this objection is too hasty and that in fact the two theses are easily reconciled. Charters are central aspects to a community's constitutional morality because they represent sincere community commitments, but they are modest because they do not claim to know what those commitments will require. Importantly, however, the community in enshrining those rights is committed to thoughtfully and rigorously reflecting on what those commitments require and consistently trying to uphold those commitments. Commitments can be both important and modest. For example, if I commit to living healthily we can say that I have made a sincere commitment and that this commitment is now a key part of my conception of myself and of how I will live my life. We can just as easily see that in making this commitment I do not presuppose knowing exactly how I will be required to live day-to-day: that is how much exercise I ought to do, or how much sleep to get, or how much meditating to do, or how to choose among foods and so on. As well, given my new commitment we would also say that I am obliged to find out whether or not a new vitamin claiming to be a panacea that I am considering taking is in fact healthy. My commitment to live a healthy life requires both ongoing attempts to live according to that commitment and rigorous reflection on whether or not new activities or foods are healthy. In so far as I acknowledge that I do not know all that my commitment requires of me, it is a modest commitment, but in so far as it is defining and integral to how I live, it is central.⁵⁷

⁵⁷ I do not claim that the analogy I have sketched between charter commitments and personal commitments is perfect. But I think that it does show that commitments can be both defining limits on choices and modest.

With that objection responded to we can move on. The next section looks at the democratic evolution of the term “equality” in American jurisprudence to see how the common law method could work.

V The Common Law Method at Work

In his book, *The Living Constitution*, David Strauss, analyses the development of American supreme court decisions in a way that helps illustrates Waluchow’s conception of charters. Strauss’ fourth chapter aims to show how we can understand the decision in *Brown v. The Board Education* as both lawful and in line with the rulings that came before it. In sketching the legal history that led up to the decision in *Brown*, Strauss illustrates a large part of what Waluchow has in mind for judges to be doing in attempting to decide what CCM requires. Strauss claims that the rulings before *Brown* “had already left ‘separate but equal’ in shambles”.⁵⁸ Given this, “*Brown* was the completion of an evolutionary, common law process, not an isolated, pathbreaking act”.⁵⁹ If Strauss is right, the *Brown* case can be best understood using the common law methodology. I summarize some of the cases Strauss discusses that make up the “evolutionary, common law process” of *Brown*. One such case is that of *Missouri ex. rel Gaines v. Canada*.⁶⁰ In this case an African-American student was denied admission to the University of Missouri Law School which was all-white at the time. To appease African-American students, Missouri law authorized state officials to arrange transportation so that black students could attend law schools in nearby states and the state of Missouri would pay for their tuition. The

⁵⁸ Strauss, *The Living Constitution*, 85.

⁵⁹ Ibid 85.

⁶⁰ 2305 U.S. 337 (1938)

court ruled that this offer did not satisfy “separate but equal” – having to go out of state, even to a good school, did not satisfy the “*equal*” part of “separate but equal”.⁶¹

Another notable case Strauss discusses is *Sweatt v. Painter*.⁶² The central question in this case was whether or not a separate law school that Texas had established for African-American students was *equal* to the University of Texas Law School. The Court ruled that it was not. It identified concrete differences between the two schools, but as Strauss highlights, the court also explicitly drew on intangible differences between the schools: “those qualities which are incapable of objective measurement but which make for greatness in a law school”.⁶³ While “separate but equal” was technically still the law up until the decision in *Brown*, the Courts before had time and time again ruled that separate facilities were in fact not equal. There was nothing left of “separate but equal” by the time *Brown* came before the court, and thus *Brown* merely made the already developed interpretation of the law and the community’s constitutional morality explicit.

The *Brown* example nicely illustrates how Waluchow’s common law methodology could work. Imagine Warren, when *Brown* came before him, as attempting to decide what CCM required. Given that at the time the *Brown* decision was controversial and met with outrage in the South, it seems as if the community’s opinion was in favour of the racial segregation of students in schools. The community’s commitments, however, were

⁶¹ Strauss *The Living Constitution*, 87-88.

⁶² 339 U.S. 629 (1950)

⁶³ Strauss *The Living Constitution*, 98.

different and were revealed through the rulings in the cases that came before, and in past legislation that had chipped away at separate but equal. The Texas decision which had made reference to certain intangible aspects of schools made it clear that separate could not be interpreted in a way that could be reconciled with the community's constitutional commitments to equality. The legal and legislative history along with the American constitution's commitment to equality seem to make it clear that the community's commitments were *actually* against racial segregation. Thus, Warren's decision, though it went against widespread popular opinion, was in fact both lawful and democratic. By outlawing "separate but equal" Warren gave the community no choice but to recognize their own genuine commitments. The Brown example nicely illustrates how Waluchow's common law methodology could work. But it seems that even if we accept that it could work we might still have some serious worries about what such a common law methodology would amount to and what it means for judicial interpretation of charters. Waluchow is certainly aware that there may be some leftover concerns. In the following section I echo these worries and ask "are we sure"?

VI A Common Law Method: Are We Sure?

One worry we might have is that in the cases where a judge rules against what seem to be the community's morals the judge has replaced the community's morals with her own personal beliefs. In response Waluchow reiterates that CCM is based on the community's commitments. It is reasonable, according to CCM, for a judge to rule contrary to current moral opinion, and instead rule according to the commitments of the community. Thus, a judge who rules with the community's commitments does not act undemocratically and does not impose her own beliefs on the community. Additionally, judges will still be

required to rule according to legislation and legal precedent and therefore their rulings will necessarily be limited and informed by laws and decisions that have come before.⁶⁴

Even if we accept that the commitments of the community could be different than what the opinion polls seems to suggest, we might want to balk at the claim that judges can actually access these commitments, can access the CCM. The worry is that even if judges attempt to rule according to CCM they will inevitably rule according to their own subjective moral preferences. What is more, this will be especially likely if the moral questions at hand are highly divisive such as, for example, those surrounding abortion. In reply, Waluchow claims that when engaging in judicial review judges are making genuine attempts to discover the CCM – “the cases hinge not on a judges personal morality, but rather on her personal views about what the CCM requires”.⁶⁵ And furthermore, we can expect judges to make sincere conscientious decisions about CCM. We should be confident in judges’ abilities to engage in this type of decision making because we rely on judges’ personal judgments in controversial issues all time – for example, when they are given discretion to decide what is an appropriate sentence, or how to interpret a statute, or how to distinguish among cases and precedents.⁶⁶ Additionally, a judge, given her training and what her job requires, may be exceptionally qualified to discern what the moral commitments of a community are. On a daily basis judges are required to handle difficult and complex cases in an intelligent, thoughtful and

⁶⁴ Waluchow, “Constitutional Morality and Bills of Rights”, 79-80.

⁶⁵ Ibid 81.

⁶⁶ Ibid 81.

respectful manner.⁶⁷ A judge's interpretation of what equality means in a charter case is no more or less personal than her judgement of what "reasonable care" means in a civil case of a fall on an icy sidewalk.

Finally, we might worry that Waluchow's common law conception of charters renders charters unable to protect vulnerable minority groups. After all it seems that a community morality is in fact a *majority* morality and thus it is reasonable to question whether or not it can allow for the protection of minorities. Perhaps CCM will entrench the tyranny of the majority in the legal system. In reply, Waluchow reminds us that CCM does not amount to "popular sentiment". Deciding what CCM requires cannot be ascertained by merely taking an opinion poll – it is a much more nuanced and thoughtful process.⁶⁸

Another safeguard CCM has as a resource against the tyranny of the majority is constitutional commitments to such ideals as equality. As Waluchow writes, "the moral commitments of contemporary constitutional democracies [...] thoroughly reject any opinion that oppresses a minority group, harbors the prejudices of patriarchy, and so on".⁶⁹ He goes on to write that judges in such systems "will inevitably be led to protect to protect minorities from the tyranny feared by Mill".⁷⁰

⁶⁷ Ibid 86.

⁶⁸ Ibid 89.

⁶⁹ Ibid 89.

⁷⁰ Ibid 89.

Waluchow's theory is capable of answering the challenges from those who fear for democracy as well as from those who fear for the rights of minorities. His view allows for the meaning of the rights protected under the charters to evolve significantly and to do so in a way that we can understand as democratic and responsive to minority protection. However, my sense is that we even if we are persuaded by what has come so far in defense of Waluchow's theory of charter interpretation we are left with some residual questions. I take the most important of these to be those about what the relevant community in CCM is and the importance of a community morality for the theory; about what it means for morals to be recognized by law, but not be law; and what we should understand by the role of public reasons in CCM and therefore in charter review. In the next section we will look to see whether these questions need to be further elaborated and clarified by applying the theory to the issue Canadian case of physician-assisted suicide in Canadian law.

VII Physician-Assisted Suicide Laws in Canada

Before the 2015 Supreme Court of Canada decision in *Carter*, Canadian criminal law prohibited assisted suicide. Under 241(b) of the *Criminal Code* everyone who:

aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.⁷¹

The consequence of that section was that physician-assisted suicide was illegal.

Importantly, however, as of 1972, suicide and attempted suicide were removed from the *Criminal Code*.

⁷¹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 241 [*Criminal Code*].

On December 17, 1992, Sue Rodriguez launched a challenge against the *Criminal Code* S.241(b) to the British Columbia Supreme Court. Sue Rodriguez was suffering from amyotrophic lateral sclerosis (ALS). Given her prognosis Rodriguez felt that there would come a time in her future where her quality of life would have deteriorated such that she would not longer want to live. She also knew that when she reached that point in time she would no longer be physically able to commit suicide on her own. She would need assistance to end her life. She therefore sought to have the criminal prohibition on assisted suicide struck down on the grounds that it conflicted with her *Charter* rights. Specifically, she argued that the legislation violated her equality rights under S.15 and violated her right to security of the person guaranteed under S.7. In 1993, her case was by heard by the Supreme Court of Canada. And on September 30th, 1993 the majority ruled to uphold the legislation. They decided that there was no S.7 violation. Further, they assumed that there was a S. 15 violation, but held that the breach was saved by S.1 analysis. That is, that the breach was justified in a free and democratic society. Thus, section 241(b) of the *Criminal Code* was found to be constitutional.

In February 2015, twenty-two years after the *Rodriguez* decision, the Supreme Court of Canada decided another case on the constitutionality of the criminal prohibition on PAS. The plaintiffs in this case – *Carter* – argued against the same legislation’s constitutionality on the same grounds as those in the *Rodriguez* case. In fact, one of the plaintiffs, Gloria Taylor was suffering from ALS – the same disease Sue Rodriguez suffered from. The facts of the two cases are strikingly similar. Yet, on February 6, 2015, the Supreme Court of Canada struck down the legislation (the same legislation upheld in

Rodriguez) owing to its conflict with the *Charter*. This time the Court unanimously held that the criminal ban on PAS violated S.7 and S.15 and that such violations were not in accordance with the principles of fundamental justice and thus could not be saved by S.1 analysis of the *Charter*. Importantly, the Court did not declare *Rodriguez* incorrect, but rather distinguished it.

The shift in decisions from *Rodriguez* to *Carter* highlights the difficulties of the Standard Conception of charters. If we think that at the time of enactment of the *Charter* Canadians committed themselves to specific regulation of PAS then only one of the Supreme Court decisions can be correct. In 1982 either Canadians meant to prohibit PAS or allow it. Both decisions cannot be correct. But this is just what the Court said in *Carter*: both decision are correct.

Already we can see the benefit of abandoning the Standard Conception of charters in favour of a common law understanding. The common law conception allows for the meaning of rights enshrined in the charter to evolve. Thus, it can accommodate two different, but correct, Supreme Court decisions concerning the constitutionality of the same legislation. However, considerably more has to be said so that we can understand the change from *Rodriguez* to *Carter* as legally informed and constrained. For it seems perfectly open to Waldron and his fellow critics to claim that the meaning of rights change as the personal preferences of the judges on the bench change. Thus, unless we become quite clear about how the meanings of rights can evolve, this theory of charter

review remains vulnerable to the democratic worry. We must have a solid explanation for what it means to rule according to norms that have been recognised in law. Consider the case of PAS – given the laws prohibiting assisting someone in their suicide and the decision in *Rodriguez* weren't the norms recognised in law in favour of a prohibition on PAS? So how does appealing to norms recognised in law help us understand the *Carter* decision? What's more, once we do understand what it means for a norm to be recognised in law, what are judges to draw on when those materials run out? In that case, may judges then rely on their first order moral preferences? Without robust responses to these questions it seems the democratic challenge wins the day. Until we can show otherwise it seems that in judicial review judges decide according to their own first order moral preferences.

As well, it is not entirely clear yet, what role Waluchow's claim that communities are moral agents plays in the overall argument in favour of judicial review. How we can understand and make sense of the idea of a community as a moral agent. What does it mean, for example, to say that Canada is committed to protecting the right to PAS? And why is that commitment more important than the sum of the commitments of individual Canadians?

In the coming chapters I will attempt to answer these questions and in doing so I will provide a strengthened theory of charters and judicial review. In the final chapter of this work we will re-look at the legal history of PAS in Canada. The hope is that the

arguments articulated throughout this dissertation will allow us to adequately explain and constitutionally justify the shift from *Rodriguez* to *Carter*. And in doing so that we will defend charters and the use of judicial review from the charge that they are anti-democratic.

Chapter 2: There's No I in Team: Communities as Moral Agents

I Introduction

In *Law's Empire* Dworkin argues in favour of the “deep personification” of communities.⁷² He treats the political community as if it were a unique entity distinct from the individuals who make it up and attributes moral agency and responsibility to this entity. He suggests that we consider a corporation, and asks whether or not it is possible that a corporation might act wrongfully even though none of its individual members have done so. If we are drawn to this intuition, then it seems we ought to commit ourselves to the notion that some groups or collectives of people have the potential to be “deeply personified”. The orchestra plays the symphony, the football team wins the match, and the American citizenry elects the president of the United States. These collectives perform these actions as groups and in this way they can be “deeply personified”. Arguing in favour of the deep personification of groups, however, is not without its challenges – which include explaining the notion of collective action, and collective intention, and the question of fairness in ascribing collective blameworthiness, to name a few. Dworkin, however, demurs, ignoring most of these types of worries and rejecting any impetus to tell a complicated metaphysical story. For him, there is no need to posit a

⁷² Dworkin, *Law's Empire*, 167-175.

“spooky, all-embracing mind that is more real than flesh-and blood people...”.⁷³ He seems satisfied with general language use – noting that referring to groups as moral agents and to the groups’ praise or blameworthiness is vital to our moral discussions and moral evaluations.

Although the authority of ordinary language usage demands consideration and seems enough for Dworkin, this chapter re-opens the investigation of communities as moral agents. What’s more it argues that, insofar as communities are moral agents, having a bill or charter of rights⁷⁴ may make them a better moral agent (at least to the extent that their bill/charter is morally sound).⁷⁵ A charter will create a feeling of kinship and solidarity in moral principles and encourage thinking in favour of the common good instead of only individual wants. A charter will give a community a definite, if only vaguely fleshed out, reminder of the moral values that they are committed to, values never completely defined but always to be re-explored. Writings on collective agency and writings on charters and judicial review have not, to be the best of my knowledge, spoken to each other before. This is a mistake. This chapter brings together the literature from these two fields and highlights at least one way they ought to inform one another. I contend that accepting that nations are moral agents has consequences for the debate around charters. Namely, I contend that doing so provides an argument in favour of enshrining charters.

⁷³ Ibid 168.

⁷⁴ For reasons of convenience I will henceforth refer simply to charters.

⁷⁵ For reasons of convenience I will henceforth assume that the charter is morally sound. Thus, when I suggest that a charter would make a moral agent a better agent I mean that a morally sound charter would make them a morally better agent.

In my chapter I will provide reasons to motivate you to accept that the individual perspective of blame and responsibility is not exhaustive of the moral landscape. Further, I will try to show that it is reasonable to talk about collective agency and responsibility. Like Dworkin, I will not attempt to tell a complicated metaphysical story about collective agency. Rather, I will try and persuade you that talk of collective agency need not be metaphysically troubling. Next, after having said enough to convince you that it is meaningful and useful to talk about collective agency, I will present reasons why I think having a charter will make communities better moral agents.

But first some preliminaries. I will be making some controversial moves in this chapter and I would like to flag them now for fear of losing you in the introduction. As I said earlier, I will give no complex metaphysical story about collective agency or group intentions.⁷⁶ Secondly, in this chapter the group I am most concerned with is the political community: one that acts as a group through the governmental institutions of the legislature, judiciary, and the executive. This means, for example, that when the Canadian government acts in a certain way Canadians writ large act in that certain way and are to be praised or to be blamed. This claim is no doubt controversial. Many citizenries are dismayed by and deeply critical of the actions of their government and in

⁷⁶ Collectives do not have full blown-mental lives. Therefore, a collective does not have free-floating intentions that exist apart from its members. I accept this claim, however, I do not think it undermines the notion of collective agency. I believe this obstacle can be overcome, but if you are in search of a metaphysical story that explains group intentions that are entirely divorced from the intentions of the group's members you will be disappointed with what I say here. A group intends to do things but what it intends necessarily relies on the intentions of its members, although it cannot be completely reduced to the intentions of the individual members.

these cases would likely object profoundly to the suggestion that they have a hand in what their government does. How can I link the actions of the government to the actions of the citizens in a relevant way so as to justify treating the actions of the government as the actions of the political community? One possibility is that I can make use of John Gardner's distinction between natural concerted agency and artificial concerted agency⁷⁷ and suggest that the political community that is a nation becomes an artificial concerted agent with its government as its representative because certain norms are in play that make it the case that, for example, the Canadian government acts as the representative of the Canadian people. However, utilising Gardner's notion of artificial concerted agency to capture an entire nation's people and government would rely heavily on the idea of a very well-working democratic system: a system in which the will of the people is carried out by the government.⁷⁸ Such a system assumes meaningful political institutions that allow the people to speak and be heard and that allow for real and substantive political change. Some may object to this description and contend that there is too large a gap between the citizens and the government to talk about the collective agency of a community made up of both average citizens and those citizens who are also government officials. Thus, the objectors would claim that when we say that Canadians are blameworthy for the internment of Japanese Canadians during World War II – what we actually mean is that the Canadian government is responsible and blameworthy, not the citizenry. For these objectors, the Canadian populous had no say in the decision – only the Canadian government did and therefore the government alone bears the blame. Of

⁷⁷ John Gardner, "Reasons for Teamwork" (2002) 8 *Legal Theory* 495.

⁷⁸ David Miller comes to a similar conclusion in his paper, "Holding Nations Responsible" (2004) 114 *Ethics* 2.

course, this also means that when we praise a country for its tremendous steps forward in green energy we can actually only praise the government of that country and not the general population.⁷⁹ This type of objection does not undermine the notion of collective agency *per se*, but rather calls into the question the idea that we can praise or blame the political community as a whole. The objection seems to suggest that the group we should actually blame or praise is the government. Taking this objection on board would make the topic of my chapter whether or not governments were moral agents and whether or not charters would make them better moral agents. I am amenable to this tack; however, for the purposes of this chapter I will talk about political communities and assume that democracy works fairly well and that the government carries out the will of the people. That is, I will assume that the political community consisting of the citizenry and the government is the appropriate group to be discussing. The arguments of those, like Jeremy Waldron, who oppose charters and judicial review as undemocratic maintain that self-governance is properly achieved through voting and that therefore the legislation passed by democratically elected officials represents the peoples' desires for their community.⁸⁰ That is, they seem to be painting a picture of democracy which means that the Canadian people did have a role in the in the internment of Japanese Canadians. I am not trying to suggest that voting for officials and participating in referendums is undemocratic nor am I meaning to imply that proponents of charters think that voting is undemocratic. All I mean to draw attention to is the fact that once the populous votes for

⁷⁹ Granted, we could still praise the population's support of the government through both taxes and votes. This praise is, however, relevantly different from praise for participating in the act.

⁸⁰ For perhaps the strongest criticisms of judicial review see Waldron, *Law and Disagreement*.

an elected official that official may then go on to pass legislation that the people do not support and that if the people had known that the official would pass they would not have elected her. In situations like this it seems reasonable to question how responsible the citizenry is for the passing of that legislation. But again, my opponents in the charter debate argue as though most, if not all, legislation passed by elected officials accurately represents the will of the people. That is, the representative's decision or vote is a stand-in vote for the citizens who elected her - she expresses and carries out the democratic will. In supporting such an understanding my opponents seem to deny any gap or distance between the people and the government and the law-making decisions it makes. Given this, it seems that I can help myself to this assumption and maintain a strong connection between the people and the government and treat them as meaningfully connected. I am, however, sensitive to arguments that may push at my assumption. I have two responses to this sort of worry: one is to say that any suggestion that questions just how representative government actions are of their peoples' democratic will will work in favour of my overall argument in support of charters and judicial review. Roughly, this is so because, if it is the case that voting does not always ensure self-governance, then the opposition to charters and judicial review because they are not democratic is weakened. If we accept that governing based on majority voting is not always completely democratic or always a perfect tool for self-governance then we seem to be accepting that self-governance can never be perfectly carried out. We accept some sacrifice of self-governance if we have good reason to. For example, arguably direct democracy is more likely to achieve ideal self-governance, but most countries, partly for reasons of practicality, do not use a system of direct democracy. And yet, we still think of these countries as democratic. Hence, if

there are strong enough arguments in favour of charters and judicial review perhaps the potential sacrifice of self-governance may be worth it and charters and judicial review will be more obviously reconcilable with democracy. Secondly, even if you are resistant to thinking in terms of community responsibility, questions about government responsibility and how the government may be a moral agent that may be helped by having a charter are also important and interesting questions. I believe my arguments here will go just as far in answering questions about governments and charters as they do in answering questions about communities and charters. How far that is we shall soon see.

II Let's Go Team

In this section of the chapter I will present the strongest reasons in favour of endorsing the notion of collective agency. In beginning such a discussion it is important to note that not all groups of people are apt for collective agency – that is, not all groups of people form a collective in the relevant way. An obvious example of a group that is apt for characterization as a collective is a sports team. The Montreal Canadiens, for example, are a team and as a team they play games. As the saying goes, there's no I in team and thus no individual member of the team wins the game on their own. They win and lose together. On the other hand, a group of people shuffling down the street is likely not a group of people that is apt for collective agency.⁸¹ A collective is different from a set or a bunch of people who happen to be in the same location. Dwight Newman makes use of this distinction in his book *Community and Collective Rights*.⁸² He uses the term “set” to

⁸¹ Some, for example Virginia Held, go as far as to argue that a mob of people, in certain circumstances, can be held collectively responsibly. See Virginia Held, “Can a Random Collection of Individuals be Responsible?” (1970) 67 *Journal of Philosophy*.

⁸² Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights held by Groups* (Oxford and Portland, Oregon: Hart Publishing, 2011).

describe a group of persons defined by the identity of the persons who make it up.⁸³

Therefore, a different group of people means a different set. A collective, on the other hand, is a group of people that one would still identify as the same collective even when the members change (provided other criteria were met). To return to my earlier example – the Montreal Canadiens were the Montreal Canadiens when its team members included Maurice Richard in the 1940s and they are still are the Montreal Canadiens now in 2015 with P.K. Subban. Both Subban and Richard are Montreal Canadiens. A team is, therefore, importantly different from a set. Another distinction that may prove useful in our discussion of collective agency is between commonality of purpose and teamwork.⁸⁴

Commonality of purpose occurs in cases in which several people are trying to do the same thing and everyone is aware that they are all trying to do the same thing.⁸⁵

Teamwork, on the other hand, is as Gardner says, “... intentional coordination in a stronger sense, and it implicates a more radical idea of collective agency”.⁸⁶ Teamwork involves intentional action that is not only known by members of the team, but also action that is intended to coordinate with the intended action of the others. The members of the team intend to act as a team and to be members of the team, as well as whatever else they intend. What’s more, a team member treats her membership on that team as an extra reason to achieve what she and the other team members want to achieve.⁸⁷ This is an extra reason that does not exist in commonality of purpose. In commonality of purpose everyone has her own reasons to try to Φ . In teamwork, however, all the members may

⁸³ Ibid 4.

⁸⁴ Gardner, “Reasons for Teamwork” 500.

⁸⁵ Ibid 500.

⁸⁶ Ibid 500.

⁸⁷ Ibid 501.

have their own individual reasons to try and β , but they have an extra reason to β on top of their own which is their membership on the team. Being a member of a team gives one an extra reason, a reason that is absent from simple commonality of purpose. What's more, each team member recognises the efforts of all the other team members and together the efforts of the team members constitute a distinct effort, the *team* effort. The team effort is the product of an agent distinct from the team members; it is the product of the team. The team, as an agent distinct from its members, tries to do things and intends to do things that are distinct from, albeit a function of, the things that its members try to do. Furthermore, the intentions of each team member make essential reference to the intentions of the team.⁸⁸ In a similar way, the existence of the group or team is distinct from albeit dependent on its members.⁸⁹ Dwight Newman puts the point this way: “collectives supervene on their members but this does not imply reducibility to their members”.⁹⁰ Roughly, as Newman describes it, the concept of supervenience refers to a relationship in which something cannot differ in respect of certain characteristics (that things' supervenient properties) without a difference in other properties (base properties).⁹¹ For example, the aesthetic qualities of a building cannot be changed without a change in the physical qualities of the building, such as the main material used. The steel or stone or glass must be moved or altered. Thus, the aesthetic qualities of the

⁸⁸ John Gardner, “Some Types of Law in his *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) 63.

⁸⁹ This goes back to my earlier point that Richard and Subban, while playing roughly 75 years apart, both played for The Montreal Canadiens.

⁹⁰ Newman, “*Community and Collective Rights*”, 34.

⁹¹ *Ibid* 37.

building supervene on its physical qualities, the base qualities.⁹² Similarly, the team supervenes on the agents who make it up, but the team is an agent distinct from its members. Recognising that the existence of the team and the intentions of the team depend on the existence of the members and the intentions of the members, does not suggest that the team is simply reducible to its members. A famous example illustrates the point clearly: the orchestra plays the symphony, but the individual musicians play their particular parts.⁹³ What's more, each individual musician intends to play her part, but she also intends that when all the musicians each play their parts, the orchestra as a whole will play the symphony. As Gardner says, while there may only be 105 human agents playing musical instruments there are at least 106 agents in the orchestral performance.⁹⁴

What I am suggesting so far is that, when we talk about collective action and collective agency, we should have something like teamwork in mind. The team is an agent distinct from the agents who make it up and the team does things that are distinct from what its members do. The whole really is more than the sum of its parts. I further suggest that we think of political communities in this way: the government acts as a representative of the people and thus as the government acts so does the community. The community (composed of both the government and citizenry), however, is not a team or natural concerted agent strictly speaking, but is to return to Gardner's distinction, an artificial

⁹² Newman uses a very similar example in his explanation of supervenience. He discusses an example of a sculpture and its aesthetic and base properties. See *ibid* 37.

⁹³ Rawls, Dworkin, and Gardner all make use of the orchestra example in their respective discussions of collective action.

⁹⁴ Gardner, "Some Types of Law" 63.

concerted agent. For an artificial concerted agent, such as a community, to be able to act as a concerted agent depends upon the existence of norms that empower one agent to act in the name of another.⁹⁵ Perhaps the Germanic tribes described by Tacitus were natural concerted agents but the modern political communities I am concerned with are all artificial in the sense of depending on empowering norms of representation. I am assuming that at least some of the relevant norms that make the community an artificial concerted agent (comprised of everyday citizens and government officials) are the democratic voting systems and other meaningful procedures that connect the people to their government.⁹⁶ As said at the outset this assumes an ideal conception of democracy that may rightly be questioned.⁹⁷

Before attending to the idea of communities as concerted collective agents I think it will be helpful to look more closely at what Gardner says about legislatures: what they intend and how they act as agents. After this we will look to see if any of Gardner's insights can be applied to communities. In his discussion of legislative law Gardner asserts that legislation is both the act of an agent and the product of intention.⁹⁸ He recognises that in the literature on legislation there is a lot of discussion of and concern about whether or not an institution such as parliament can have intentions. Gardner suggests that doubts surrounding parliamentary intentions come mainly from worries about using

⁹⁵ Ibid 64.

⁹⁶ Interestingly, Gardner suggests that both a nation and a local community may become teams through artificial concerted agency see *ibid* 64.

⁹⁷ A country's government also likely gains the power for concerted agency through norms and thus my suggestions throughout this paper are ideally interesting to those who are not idealists about democracy.

⁹⁸ *Ibid* 56-65.

parliamentary intentions as guides in interpreting statutes.⁹⁹ Using parliamentary intentions as guides in interpretation is notoriously difficult not least because the members of parliament who passed the legislation almost certainly had diverse and conflicting intentions regarding a given bill's meaning, application and effects – intentions which varied even among the members who voted in favour of the bill. But all this shows is that parliament didn't have particular intentions as to the specifics of any given legislation. It does not show, as Gardner stresses, that when parliament legislates that it does not have intentions to change the law.¹⁰⁰ So, while the members of parliament may have diverse intentions at one level, at a more general level when the members of parliament participate in voting on a specific bill they intend for the law to change. Even the individual members who voted against a specific piece of legislation still intend for the law to change. That is, they intend for the law to change if parliament intends for the law to change where what parliament intends depends on what some of its members intend. While Gardner doesn't elaborate on this point it seems reasonable to suggest that the dissenters intend for the law to change if that is what parliament intends because the dissenters accept the voting process as representative of what parliament does and intends, and also consider the rules for deciding the outcome of the voting to be fair (rules such as whether a bare majority is enough or a 60% majority is required for the legislation to pass). Notice, however, that while they may accept the procedure that dictates how parliament acts, they may actually think the procedure should be changed. For example, some government officials may think a "first-past-the-post" voting system is a poor one, but they will accept that until that system is officially changed that it is the system that

⁹⁹ Ibid 60.

¹⁰⁰ Ibid 61.

decides which politically party gets which portion of the seats in parliament. This feature highlights that collective agents are not going to be characterized by perfect harmony. A collective agent can withstand some disagreement among its members.

The actions of an institution such as parliament depend on, but are not reducible to the actions of the human beings who make it up. This means that an institution with no members cannot act. But we must remember that when an institution acts those actions are distinct from the actions of its members (this point was made earlier about musicians and orchestras). As discussed above, Gardner relies on a distinction between natural concerted agency and artificial concerted agency. Natural concerted agency is teamwork and requires no special norms to make it the case that a particular group of people becomes an agent. A paradigm case of natural concerted agency is a team that forms during a pick-up game of hockey or basketball. Artificial concerted agency, on the other hand, requires certain norms to empower certain collectives to have the capacity for concerted agency. Gardner proposes that the actions of legislatures are a mix of both natural concerted agency and artificial concerted agency.¹⁰¹ Some of the legislature's actions can be described as the products of artificial concerted agency because there are officials whose actions are taken to be the actions of the legislature as a whole and there are norms in place that make this the case. On the other hand, some of the actions of the legislature come about through teamwork or natural concerted agency. Gardner suggests that legislative members, when voting, have intentions that take a form that is relevantly similar to those of team members in a match or orchestral members during a performance.

¹⁰¹ Ibid 64.

That is, the members of a legislature not only intend to vote and adjust their voting depending on the votes of the other members (in other words, they vote strategically with consideration of how others will vote and for what bills). They also intend that their votes will contribute to the action of the legislature –whether or not the legislature passes or does not pass a certain bill. In this case the legislature works as a team, a natural concerted agent (not as an artificial concerted agent). The legislature is an agent that acts and intends things (namely, it intends to change the law or keep it as it is). In sum: there are two ways for a group of people to be a concerted agent – one is simply through natural concerted agency: think of a sports team or orchestra. The other is through artificial concerted agency where norms make it the case that a group is an agent represented by an individual or multiple individuals, such as in some of the actions of the legislature.

The distinction Gardner draws between natural concerted agency and artificial concerted agency has much in common with other distinctions used in the literature on collective agency.¹⁰² Tracy Isaacs, for example, in her book *Moral Responsibility in Collective*

¹⁰² Yet another, slightly different distinction is drawn by David Miller in his article “Holding Nations Responsible”. Here he distinguishes between like-minded groups and cooperative practice group. The like-minded group is one whose members share aims and have a similar perspective and who recognise this like-mindedness in their fellow group members. Cooperative practice groups, on the other hand, involve members who participate in a system or structure and reap benefits from their participation, for example, in the form of a salary. Miller’s example of a cooperative group is a manufacturing firm. See Miller “Holding Nations Responsible”. On the other hand, some authors, for example Christopher Kutz, deny that a distinction is necessary. He provides a uniform analysis because the individual agents in collective effort understand themselves as acting in the service of or participating in a collective goal. See Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press 2000). Tracy Isaacs, on the

Contexts stresses a distinction between organizational collectives and goal-oriented collectives.¹⁰³ Goal-oriented collectives are those collectives whose members come together around the achievement of a particular goal. The shared goal is what allows them to be “deeply personified” to return to Dworkin’s phrase. Isaacs suggests that the tens of thousands of people “Running for the Cure” constitute a goal-oriented collective.¹⁰⁴ Goal-oriented collectives lack the organization and structure found in organized collectives. The notion of organized collectives has its roots in Peter French’s influential article, “The Corporation as a Moral Person”.¹⁰⁵ In this paper he contends that corporations are meaningful moral agents because corporations have corporate internal decision structures that delineate responsibility, designate the roles within the corporations, and define decision recognition rules.¹⁰⁶ A corporate internal decision structure makes it the case that the corporation itself intends to do things and does things. Thus, the corporation is the appropriate bearer of responsibility. Isaacs’ description of organizational collectives is quite similar to French’s characterization of corporations as moral agents. She writes that organizational collectives have internal structures that give rise to collective intentions and collective actions.¹⁰⁷ Organizational collectives have policies, procedures, mission statements, role definitions and structures of authority that

other hand, endorses the distinction because she thinks that the nature of the relationship between the individual and group is importantly different in the distinct types. See Tracy Isaacs, *Moral Responsibility in Collective Contexts* (Oxford University Press 2011).

¹⁰³ Ibid.

¹⁰⁴ Ibid 25.

¹⁰⁵ French, “The Corporation as a Moral Person” (1979) 16 *American Philosophical Quarterly* 3.

¹⁰⁶ Ibid 212.

¹⁰⁷ Isaacs, *Moral Responsibility in Collective Contexts*, 27.

enable the collectivity to act. Isaacs lists corporations, non-profit groups, universities, nations, and professional sports teams as examples of organizational collectives.¹⁰⁸

No doubt there are important subtleties between each of the authors' categories, but nothing in this work hangs on the nuances between them. In their writing on collective effort Gardner, Isaacs, and French each stress the differences between collectives that rely on an internal structure and norms for agency and those collectives that are animated by a shared goal. It is this rough distinction we should bear in mind: the distinction between organized and goal-directed collectives.¹⁰⁹

¹⁰⁸ Ibid 24.

¹⁰⁹ It is worth pointing out that acknowledging the different types of collective agents has consequences for our understanding of the formation of intentions of organized collectives and the intentions of goal collectives. The intentions of organized collectives come about through the group's internal structure, which limits and informs the intentions and actions of the collective. Isaacs uses a helpful example to illustrate the distinction between the organization's intentions and the member's intentions. Imagine that the artistic director of the Stratford Theatre Festival has carte blanche to select all the plays that the Festival will run this season. Imagine further that she does not like Broadway musicals and would not choose to include any if she were able to make the decision solely based on her preferences. The Festival, however, has a tradition of including at least two musicals each season; the shows are popular and provide a nice balance to the Shakespearean productions. The artistic director's decision is constrained by the Festival regardless of her personal tastes. The decision the director makes in selecting the productions can legitimately be described as the Festival's decision. See Isaacs, *Moral Responsibility in Collective Contexts*, 30-31. Understanding the intentions of goal collectives is slightly trickier and there is more disagreement about how to do so (See, for example Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press 1999); Isaacs, *Moral Responsibility in Collective Contexts*; Kutz, *Complicity*; Larry May, *Sharing Responsibility* (University of Chicago Press, 1992); Raimo Tuomela, "Joint Intention, We-Mode and I-Mode" XXX Midwest Studies in Philosophy.). For our purposes, however the intricacies do not matter as much; we need only a basic understanding of the intentions of goal collectives. Roughly, the intentions of the individual members of the collective combine and the members

While we should keep the differences between organized and goal collectives in mind, it would be a mistake to think that they are completely distinct in reality. Organized collectives and goal collectives are ideal models that real collectives will be more and less like. That is, in the real world we will not find pure organized collectives, on the one hand, and on the other, purely goal collectives. We will find a mix of both aspects in real-world collectives: some collectives being more organized than goal and others being more goal collectives than organized.¹¹⁰ We also may find some collectives that are both goal and organised to nearly the same degree; that is, they have a strong internal structure and its members also strongly unite around a common goal or purpose. It is this type of collective that I contend a nation with a charter becomes.¹¹¹ A nation with a democratic constitution and charter outlining its ideals is both an organised and a goal-directed collective.

With these distinctions in hand, I want to suggest that the government as a whole, including its various bodies, acts as a collective agent. For example, in a democratic country that uses the Westminster system and has a judiciary, legislature, and executive, these branches together make up the government and the government itself is an agent.¹¹²

meaningfully see themselves as members of the collective. They intend to be members and they stand in a relation of co-membership with the other members of the group.

¹¹⁰ David Miller makes a similar point in his discussion of like-minded groups and cooperative practice groups. See Miller “Holding Nations Responsible”.

¹¹¹ This paper argues that charters can play a large role in creating and engendering the “goal-oriented” aspect of collectives. I am not suggesting that enshrining a charter or bill of rights is the only way to do this.

¹¹² I recognize that there is a narrower use of the term government in which it is just the elected officials. I am using the term in a wider sense to mean something more akin to governance. Hence why I include the judiciary, legislature and executive.

Some may object that I cannot, after endorsing the view that legislatures are concerted agents, then, argue that the government itself is a further concerted agent. I have just relied on Gardner's characterization of the legislature as a concerted agent. What sense does it make for me to now propose that the whole of the government with whatever bodies make it up – including the legislature – form a concerted agent. Can a concerted agent be constituted by other concerted agents? I think it can and I think it is fairly straightforward to see why. If we take the case of an orchestra – perhaps a paradigm example of concerted agency – it seems uncontroversial to claim that the orchestral agent is made up of other agents – namely human musicians. In this example we have no trouble acknowledging that one agent (the orchestra) is constituted by other agents (the musicians. In fact, the orchestra is actually also constituted by other collective agents: the wind section, the horns, the percussion et cetera. None of this should be puzzling. Nor should a similar structure be puzzling in the case of the government. The government is a collective agent made up of other agents and some of its constitutive agents are collective agents themselves, like the legislature. It is an interesting question whether or not branches of government other than the legislature form concerted agents. Take, for example, the judiciary, especially in higher courts where the cases are often heard by a bench of judges. In these cases do the judges form a concerted agent – either a goal collective or organized collective? I am tempted to say that a bench of judges do form a collective agent: for example, when a court decision is penned by one judge and is taken to represent the decision of the Court. Whether or not I am correct, however, does not for present purposes matter. What matters is that the government as a whole acts as a concerted agent.

Gardner suggests that the work of the legislature is done both by teamwork and artificial concerted agency. I have already indicated that I think collective agency falls on a spectrum between organized collectives and goal-oriented collectives; thus it easily follows that some actions of collective agents may be more the product of teamwork and others more the product of artificial agency. The agency of the government and the actions of the government too fall on this spectrum. The government, given the norms, systems, and officials in place that make it the case that particular people represent the government and act for the government, is an apt candidate for organized or artificial agency. Therefore, just as we can say that the legislature is a concerted agent it seems reasonable that the government, by the same reasoning, is also a concerted agent. However, there may be times when government actions or certain governments themselves are animated around a collective goal.

Some may object that I have made this move too quickly. They may claim that the different bodies of government cannot form a concerted agent because at least some of those bodies seem in conflict with one another. The suggestion that a government could ever form an agent or act on the basis of a collective goal seems especially wrongheaded. For example, it may seem that the judiciary is out to thwart the efforts of parliament, especially in countries with strong judicial review where the judiciary can strike down legislation. Given this, what sense does it make for to talk about them as forming a concerted agent when their aims are in conflict?

This type of objection, I contend, stems from a mischaracterization of how the government works. I think we would do better to understand the branches of government as working towards the same end, but with the different bodies that make it up utilizing different machinery and reasoning to achieve that end. To return to the example of parliament and the judiciary – we should see both governmental bodies as trying to ensure that only constitutionally valid laws are enacted and see them as working together to achieve this. Sometimes the judiciary declares that an enacted law is unconstitutional or strikes down a law as unconstitutional and in these cases presumably the parliament thought the law was constitutionally valid.¹¹³ But even in these cases I think we should see both bodies as trying to ensure that constitutionally valid law is enacted. Given that the judiciary and parliament have different focuses and approaches it is not surprising that they may come to different answers about the constitutionality of some laws. The legislators when drafting laws must think in general terms covering a range of contexts. The laws they create are likely going to apply in cases where we think they ought not to and not apply in cases where we think they ought to. Fred Schauer has described these features of the law as its “over-inclusiveness” and its “under-inclusiveness”.¹¹⁴ Courts, on the other hand, by definition work in a case-by-case manor. Given their different approaches it is understandable that the court may think a law is unconstitutional even though parliament thought it to be constitutional when enacted.¹¹⁵

¹¹³ There are some cases where this may not be so. For example, in Canada parliament can use Section 33 of the *Charter*, often called the *Not Withstanding Clause*, to pass legislation that (may be) in violation of certain aspects of the *Canadian Charter*.

¹¹⁴ Frederick Schauer *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Oxford University Press 1991).

¹¹⁵ My characterization of the relationship between the different branches of government is perhaps at worst naïve and overly idealist and at the very least likely a description of

Also, even if it does seem that at times the different bodies of government want different things, they still accept the governmental structure and rules and they accept the process of governmental decision. We have seen that if one member of the legislature does not want a certain bill to pass she still intends for the law to change if it's the case that the legislature intends for the law to change because she accepts the norms in place that govern how the legislature acts. The same reasoning can be applied to the different branches of government who, at one level, seem to want different things. Both the dissenting members of parliament and the dissenting governmental bodies still in an important way intend for parliament and the government respectively to act in the prescribed way even if the particular result is different from what they want. Collective agency can withstand some disagreement.¹¹⁶ What's more, the government has clear hierarchical roles, policies, decision procedures, and mission statements that dictate how the government acts. Given these responses I maintain my claim that the government can form a concerted agent.

things when things are going well. That is, there is surely a spectrum of the types of relationships governmental bodies can have with each other ranging from acrimonious to harmonious. What I have described falls on the more harmonious and healthy end of that spectrum. There may be, however, relationships that fall on the more acrimonious and unhealthy end. These types of relationships are likely characterized by deep conflict and when they arise one governmental body may in fact try and thwart the plans and objectives of another body. One example of this may be when the courts ignore ouster clauses intended to shield political action from judicial review. In these cases it may not make sense to think of the government as forming a concerted agent. This is not, however, necessarily how the different governmental bodies must interact. When governments behave as I've described and fall on the healthy end of the spectrum I argue that it does make sense to think of the governmental bodies as forming a concerted agent. I am grateful to John Gardner and Thomas Adams for pushing me on this point.

¹¹⁶ Dissenters do not undermine collective agency as long as the dissenters are not revolutionaries.

Now, of course, the topic of this chapter is not, strictly speaking, governmental collective agency. Rather it is communities as collective agents. But, as mentioned at the outset, I am assuming, *arguendo*, that some sort of near-ideal democratic system exists such that there is no relevant causal gap between the government and the community; the government always expresses the democratic will of the people. Near perfect self-governance is achieved and the government only does as its citizenry would have it do. With this type of system assumed it seems fairly straightforward to endorse the notion that the community is a concerted agent. The same norms that allow for self-governance via democratic procedures also allow for collective agency in which the government represents the community.

I have said above that a community is an artificial agent, to use Gardner's term, or an organizational agent to use Isaacs. The citizens participate in the democratic system and it is by virtue of the system that they support that their representatives have the role and authority that they do and can act the way that they can. I want, however, to resist making too strong an analogy between a community and a corporation. I want to avoid such a comparison, in part, because I think when we "deeply personify" a community we mean to capture the genuine idea of community and a community has a positive valence. Being part of a community is a good thing and indicates certain types of bonds and feelings shared among its members.¹¹⁷ Given these positive characteristics associated with community and communities one might argue that artificial or organizational agency is

¹¹⁷ Presuming the community is not rooted in morally reprehensible beliefs.

too low a threshold for something to achieve the status of a community.¹¹⁸ That is, we may think that it is not appropriate to call a nation a community if there is little civility or respect among its members and if there is on-going civil unrest. And yet it may have a well enough working democracy to satisfy the requirements for artificial agency. I think that this worry is warranted and ultimately right. That is to say, that I do not think that every nation with minimally functioning representative norms forms a community. This means that bare artificial or organizational agency is in fact too low a threshold for community status.

In acknowledging that artificial agency or organizational agency is too low a threshold to animate an entire nation, government and citizenry included, I depart from Gardner, Isaacs, and French. While none of the authors author explicitly spells out what features of a nation, not merely the state or the government, make it an organized collective agent all claim that it is an example of one. Gardner suggests that artificial agency could make a nation a team and both Isaacs and French list nations as an example of an organized collective agent.¹¹⁹ This chapter attempts to be explicit about what features of a nation make it a collective agent and in doing so concludes that a whole nation cannot be animated by organizational agency alone. Communities should be at least partly animated by goal or natural agency. Another way to think about this might be captured by the idea that we think a community is similar to a team in that the description implies a certain emotional connection among the members. Being part of a community means something

¹¹⁸ I am grateful to John Gardner for illuminating discussion on this point.

¹¹⁹ See Gardner, "Reasons for Teamwork" 64; Isaacs, *Moral Responsibility in Collective Contexts*; and French, "The Corporation as a Person".

similar to what being on a team means. But, most nations are simply too large and its members separated by great distances such that they will never meet everyone or come to know everyone. Thus, they couldn't possibly have the same feelings that teams' members have for one another. Moreover, most nations have serious class, ethnic, and religious differences and antagonisms. They seem, therefore, precluded from forming a team.

It seems I face the following problem: on the one hand, I acknowledge that bare artificial agency is not enough for a group of people to actually form a community and have all the positive associations that come with it. On the other hand, I recognize that most modern nation states, for many reasons and most obviously because of their sheer size, are unable to be natural or goal oriented concerted agents – they can only be artificial agents.¹²⁰

I think the best way to overcome this objection is to take it on board, and in fact to use it in some way as part of my response. This is not to say that the objection is not a problem, but only that the problem may be part of the solution. Imagine the case of two best friends – Alex and Ann. Alex and Ann have a long-standing tradition of celebrating their birthdays together (their birthdays fall in the same week). But this year they are on different continents and neither can afford the money or the time to visit the other. Thus, they are forced to celebrate their birthdays apart. The only thing they can do by way of celebrating together is video chat with each other on the chosen day. The problem Alex

¹²⁰ If my response to the objection is successful I take it that is also a response to the problem of scale – that modern nations are simply too big to form agents.

and Ann face is that they can only celebrate together virtually with the power of the internet, but their tradition requires them to celebrate together. The ideal for Alex and Ann is to be together in the same city and this is what they would do if they could. But they cannot and being together virtually is the next best thing, so that is what they will do. What's more, because they sincerely want to be together, the video chat will be a meaningful, but not perfect way that they can celebrate their birthdays together and continue their tradition. Part of Alex and Ann's problem turned out to be their solution. I think a similar solution is available for the problem I described above. Celebrating virtually was the next best thing for Alex and Ann given various obstacles in their way. The same is true for modern nation states and agency – artificial or organized concerted agency is the next best thing short of natural concerted agency. A careful reader will notice that I have stacked the deck slightly in the case of Alex and Ann. That is, I stipulated that they wanted to be together and that this feeling is part of what made video chatting a meaningful compromise and a way for them to celebrate together. Something like this feeling of wishing for the ideal will also need to be part of the story for nations to be communities. In other words, for nations to be communities through artificial agency there has to be some desire for the kind of emotional bond characteristic of a natural or goal group. It has to be because of a lack of opportunity that they are united only in artificial concerted agency rather than because they wouldn't want to form a natural agent. Being a team or a goal-oriented agent must be seen as the ideal, but given obstacles like space being an artificial or organized agent is the best option available. There is a sort of sincerity involved in the artificial agency that makes a modern nation state a community. My idea of sincere artificial agency is, in some ways, an echo of part

of David Miller's characterization of national identity.¹²¹ He asks, "What does it mean for people to have a common national identity, to share their nationality?"¹²² He answers that it is about "... their shared beliefs: a belief that each belongs together with the rest ..."¹²³ and these beliefs come from "... a long history of living together which (it is hoped and expected) will continue into the future".¹²³ At times we see reflections of this kinship among citizens, for example, when countries rally around national teams as when Canada and Canadians felt pride at the hockey teams' gold medals at the 2014 Winter Olympics. I will suggest in the coming paragraphs that a major function of charters is to state the ideals which form the emotional bonds between members of the community beyond any of the differences which separate them. Members of modern communities will have very different, even contradictory views on the good life, on what it means to be human. Unless these societies can find some core values that they can agree on and celebrate some truths that they all take to be self-evident-it will be impossible for them to become a community. These are the values that will be enshrined in their constitution and charter. A sincere artificial agent is one that is goal oriented; in a nation this goal manifests itself in a desire to live together well.

The preceding discussion has outlined what I have in mind when I say that the community is a collective agent. In the following paragraphs I want to briefly look at some reasons why we would want to talk about collective agency and at what are and are

¹²¹ David Miller *Market, State, and Community: Theoretical Foundations of Market Socialism* (Oxford: Clarendon Press 1989).

¹²² Ibid 238.

¹²³ Ibid 238.

not some of the implications of endorsing collective agency. Some of the reasons for supporting the idea of collective agency were touched on in an earlier section in which we talked about the intentions of members of teams. When we describe team member intentions and their actions more generally we are necessarily required to refer to the group as a whole and what the group is trying to do. Let's look, for example, at a soccer team that plays a match, and attempt to describe what is happening. One might try and reduce the actions of the team to the actions of individual members on the team – the keeper, the defenders, the forwards, et cetera. But even in describing the actions of say, a forward, one cannot but refer to the collective, the team. To only talk about what the forward does makes no sense of and in fact distorts what she actually does. Consider Jane and Lisa. Jane and Lisa are both dribbling a soccer ball forward up a pitch. Lisa does it as a forward on her school team that's currently playing a match. Jane, on the other hand, is just practicing her skills and trying to improve the speed at which she can run up and down the pitch with a ball. Lisa and Jane are not trying to do the same thing. Jane wants to improve her skill and speed whereas Lisa is trying to create a situation such that she or another of her teammates has a clear shot on net. Her ultimate goal is for her team to win the match. The reductionist and individualistic characterization of Lisa and Jane's actions make them virtually indistinguishable: they are both running up the pitch with a ball. But to accurately capture what Lisa and Jane are doing, and for it to be obvious that they are doing different things, we need to make reference to a team. To put it simply, Lisa is playing forward for her team and Jane is practicing by herself. Notice that simply adding individuals to the reductionist picture still does not accurately capture what Lisa's doing. Saying that Lisa dribbles the ball and tries to score a goal while ten other players also try

and score a goal is ambiguous.¹²⁴ From this description Lisa could just be practicing her dribbling and shooting at the same time as ten other players do the same and practice on the same net. But this is not what Lisa is doing nor what the ten others are doing. The eleven of them are playing as a team and trying to win the match. Reference to the group is ineliminable if we are to have a meaningful understanding of what Lisa is doing.¹²⁵

A related point comes from Dworkin in his discussion of the “deep personification” of a community.¹²⁶ Here he asks us to imagine that an automobile manufacturer has produced defective cars that have caused tragic accidents in which hundreds of people are severely injured and killed. Further, imagine that none of the employees of the company have acted wrongly or negligently. In this case, if we do not deeply personify the car company - that is treat it as a collective agent - our moral criticism and explanation is silenced. That is to say, our moral language requires the invocation of a group. Thus, many people advocating in favour of collective agency assert that if we gave it up we would lose a large and important part of our moral vocabulary. I think it is important to say here that speaking about collective action and collective responsibility is not to ignore or downplay the importance of individual action or individual responsibility. Just because there may

¹²⁴ Arguably, this isn't even accurate because normally the keeper and defense are more focused on preventing the opposing team from scoring. Thus, in order to capture how the eleven players are united and have a shared intention we have to refer to the team. The team tries to win.

¹²⁵ Tracy Isaacs also points out that without the notion of collective agency we would not be able to see some acts true moral character: for example, a murder that is part of a genocide has a different moral character than an isolated murder. Genocide is aimed at eliminating a particular group of people where as isolated murders are not. See Isaacs *Moral Responsibility in Collective Contexts*.

¹²⁶ Dworkin, *Law's Empire* 169-171.

be a group that is blameworthy does not mean that the individuals who make up that group can shirk their individual responsibility. Acknowledging group responsibility does not let individuals off the hook – they ought to still consider the rightness or wrongness of their actions and their own responsibility.¹²⁷ In fact, endorsing group responsibility does not necessarily imply anything about the responsibility of the individuals who make up that group.¹²⁸ I should emphasize that I wish to remain neutral about how we ought to divvy up individual responsibility within collective responsibility. Once we identify the collective responsible there is room for the individuals who make-up the collective to bear different levels of responsibility and for some individuals to bear no responsibility for the act. For example, arguably political leaders are more responsible than the citizenry.¹²⁹

A similar point comes out of Christopher Kutz’s article “The Collective Work of Citizenship”.¹³⁰ In this paper he recounts an example known as the Desert March.¹³¹ Roughly, the example works as follows. There are two groups of people travelling across a desert – the Blue Group and the Red Group. Every member of each group is carrying a quart of water, which is roughly the amount of water that each individual will need to

¹²⁷ I am grateful to Alexandra Whelan for discussion on this point.

¹²⁸ Thus, while there may be no I in team, there is still a me.

¹²⁹ I am unsure how we ought to parse individual responsibility in collective action, but like Tracy Isaacs I do not think that accepting collective responsibility necessitates anything about the responsibility of the agents who make-up the collective. See Isaacs *Moral Responsibility in Collective Contexts*.

¹³⁰ Christopher Kutz, “The Collective Work of Citizenship” (2002) 8 *Legal Theory* 471.

¹³¹ This example, Kutz notes, is adapted from Derek Parfit who originally took it from Jonathan Glover. The story as provided by Kutz is more detailed, but I think I have retold it with all the relevant details pertinent to our discussion.

survive the journey back home. Notably, while a quart is a sufficient amount of water for the journey back each person could go with a few fewer drops of water and still have enough to get home. Blue Group's water is stolen overnight and they radio request to Red Group and ask for some water to be donated – enough water so that the members of Blue Group may each get home safely. Fortunately, each individual from Red Group can give up a few drops of water such that, if all of them do so, Group Red will collect enough water to give to Blue Group. That is, by the members of the Red Group each giving up an almost negligible amount of water the members of the both groups will have enough water to get home. In his discussion of this example Kutz contends that each member of the Blue Group has a claim upon the Red Group as a whole and that each Red Group member has an obligation to contribute to the group's effort to provide enough water for the Blue Group.¹³² If Kutz's understanding of the various obligations present in the case of the Desert March is correct, and it seems that it is, then we have another reason to support the notion of collective agency. This is so because the individuals of Blue Group have a claim on the Red Group as a whole, not strictly speaking on every individual member of the Red Group. That is to say, that if someone in the Red Group does not contribute their share of water, but nonetheless the Red Group is able to provide the necessary water for the Blue Group (imagine that the other members of Red Group were able to compensate for the non-cooperator) the Red Group still helps the Blue Group. If this is the case, the Red Group, despite the non-cooperator, is able to fulfil its obligation and, in turn, the Blue Group's claim is satisfied. But this is not the end of the story. The non-cooperator, the one who would not give up any of her water, has failed in her

¹³² Ibid 474.

obligations to her fellow Red Group members. This echoes my earlier point regarding the consequences individual responsibility of the acceptance of the idea of collective responsibility. Accepting collective responsibility does not necessarily imply a further claim about individual responsibility. The Red Group, as a collective, was praiseworthy for their actions in supplying the needed water to Blue Group. The non-cooperator, however, is blameworthy (assuming she does not have a good reason or an excuse).¹³³

The preceding has emphasized that discussion of and reference to groups is common and useful in our lives and I contend that this is not a trivial fact. What's more, I think the examples discussed previously give us serious reason to reconsider, if not reject entirely, the idea that when we talk about groups we do so because such talk works merely as a short hand for discussion about individuals. There are times when the reductionist picture (that falls out of the shorthand idea) fails to accurately capture what's going on – such as in the case of Lisa and Jane. Further, by using and adapting the broad distinction between organizational groups and goal groups articulated in different forms by Gardner, Isaacs, and French I have provided reasons to think that the government as a whole as well as the people they represent form a concerted agent. This means that we can talk about what, for example, Canada did, what it tried to do, and whether or not its actions were praise or blameworthy. All of these questions are interesting and valuable. In the following section, however, I want to ask a different question. Namely, I want to ask

¹³³ This example also shows that recognizing our membership in collectives gives us the ability to do *good* things that as individuals alone we could not do. No individual member of Red Group could have provided Blue Group with enough water, but as a collective they could. Isaacs also highlights the hopeful aspect of collectives in her book. See Isaacs *Moral Responsibility in Collective Contexts*.

what will make communities better collective agents. My suggestion is that enshrining a bill or charter of rights will make communities better moral agents insofar as the rights that it enshrines are morally sound.

III Play as a Team, Win As a Team

This section tries to answer the question: what would help make a community a better moral agent. A large number of the motivating arguments of this chapter have begun by looking to teams or other groups of people that seem like obvious examples of concerted agents. This portion will take that same approach. Thus, we will begin by asking what would make a team (in the traditional sense, for example, a sports team) a better one – I believe this discussion will be illuminating for our thoughts on communities as agents.

What makes a team, like a football team, better is not necessarily limited to just what improves the skill set of its individual players. To make a good team it is not enough to just stick the eleven best players on the field. As any team athlete or coach can attest, a good team amounts to more than the aggregate of the skill of the individual players. That is why a team that has played together longer has a strong chance of beating a new team that hasn't played together before, even if the new team's players are more skilled. There is something true, albeit trite, in the saying shouted by coaches "play as a team, win as a team".

Playing as a team means trusting fellow team members, relying on them, and working together with them. Teammates have to trust that when they pass the ball ahead the right

player will be there to accept the pass. Players must be confident that their teammates will play their individual positions and not interfere with their fellow teammates' ability to play their own positions. Thus, even if I could make an exaggerated leap to possibly catch a tricky ball I should refrain from doing so because I trust that my teammate is playing her position correctly and that she is therefore well placed to receive the ball. I can confidently play my position because I trust that my teammates are playing their positions. Trusting in teammates and sincerely playing with them, that is, not trying to win the match by oneself, helps make a team a good one and this feeling of trust needs to be cultivated among a teams' players.

In some of Gardner's writings on teamwork he makes a similar point about what occurs when a bunch of people become a team: their doing so can help overcome what he calls the "problem of instability".¹³⁴ Instability occurs when one agent comes to doubt whether or not the other agents that she is trying to work with will continue trying and then, because of this doubt, she begins to stop trying. These doubts create a feedback loop and as such are escalating and self-fulfilling. Therefore, we need to do something to undercut these doubts and work to solve the problem of instability. In these types of cases, where achieving the goal requires all the agents to work co-dependently, forming a team will benefit the group because doing so will help solve the problem of instability. Being on a team will lessen the number of these doubts and reduce the strength of the remaining ones. A charter and the judicial review it inspires is a very public way of recalling the team, the nation, to the values that it is committed to. Charter decisions are group

¹³⁴ Gardner, "Reasons for Teamwork" 499.

declarations of faith which remind everyone of what they are committed to and so fight against civic instability. Being a team member gives each person a new status, a new identity and a new relation to the other members of the team. This is so because being on a team gives team members one extra reason to try to Φ . If before being on a team one had five reasons to Φ after one is on a team one now has six reasons to Φ . Of course, there are still going to be some doubts even after a team has been established – perhaps one will worry about how committed to the team the other members are or whether or not some members have been bribed to, as the expressions go, take a dive or throw the game.¹³⁵ But once a team has been formed these types of doubts are mitigated by feelings of camaraderie, loyalty and cohesion. Ideally team members will think of their fellow teammates in a particular way – as people with whom you try to succeed and on whose efforts your success or failure depends.¹³⁶ The more the members feel this way about their team the better they will be as a team and the less likely it is for the problem of instability to occur. Feeling like a team and acting like a team make a team better. Similarly, feelings of camaraderie and trust will make a concerted agent work better even if it does not have the full emotional cohesion of a team.

This aspect of a team may seem true for groups of people that are, in fact, teams like the Montreal Canadiens or Arsenal F.C. Some may worry, however, that these characteristics

¹³⁵ White Sox fans may be reminded of the Black Sox Scandal surrounding the 1919 World Series when the Chicago White Sox lost to the Cincinnati Reds. Eight of the White Sox players were accused of deliberately losing the series in exchange for money. The eight players accused were subsequently banned from baseball.

¹³⁶ This is no doubt at least part of the reason team sports encourage bonding as well as skill development in practice.

are less applicable, if at all, to the kind of group we are primarily talking about here – communities. I suggest that this worry is off base. Granted, feelings of team bonding are not going to help a community win any sporting matches.¹³⁷ But encouraging and engendering feelings of teamwork in a community will make it a better community. It will discourage thinking that pits sub-communities against each other and prevent thinking in terms of “us versus them” generally. Thinking of others as fellow team members in a common venture will promote thoughtful and respectful dialogue even when people disagree. As well, it will encourage making decisions in favour of the common good instead of only one’s own good and encourage concern for others on issues that may not necessarily directly affect one’s life – for example the legalisation of same-sex marriage.¹³⁸ In this way a community becomes more than an organizational

¹³⁷ This brings up an important distinction between pride and teamwork. The idea of collective action is importantly different from what Dworkin calls vicarious or indirect pride. Parents who take pride in the achievements of their children have not acted with their child to achieve those achievements. In other words, despite the parents taking pride in the actions of their children this is not an example of concerted agency. The emotion of the parents, the vicarious pride, reflects, as Dworkin says, not participation in the act, but a special sort of relationship with the child. See Ronald Dworkin, ‘Liberal Community’ (1989) 73 California Law Review 479, 493. We should not confuse genuine teamwork with feelings of pride. Thus, the Canadians who felt pride when both the women’s and men’s hockey teams won gold medals at the 2014 Winter Olympics did so because they felt a particular connection to those teams not because they were members of those teams. But this communal pride is a reflection of the feelings of community shared among Canadians.

¹³⁸ At the time of writing, the Republic of Ireland had a referendum on the question of the legalization of same-sex marriage. Ireland was the first country to hold a referendum on the subject and as of the results being tallied on May 23rd, 2015, the majority of the nation voted in favour the legalization. A large part of the “Yes” campaign was premised on the idea that every family or extended family has someone who is gay in it and that they should be able to marry the person they love in their own country. It seems to me that the sentiment captured here is the idea that our community includes gay individuals and we must think of them, even if we ourselves are not homosexual and thus not immediately affected by the outcome of the referendum. We need to think about the type of community we want to be and the feelings we want to foster.

collective agent animated around procedures and policies only – it becomes goal oriented as well. In wanting to live together well, in making that its goal, a community takes steps to live together well. There is a sense in which acting like a team makes you a team; this is also true of communities.

Engendering feelings of community and an attitude of kinship will make a team a better one. In similar fashion, creating a feeling of togetherness and shared purpose and goals will make a community a better moral agent. I believe that entrenching a charter or bill of rights will do just this for a political community. For example, the *Canadian Charter of Rights and Freedoms* is often heralded as a document that speaks to the Canadian people's fundamental moral beliefs and commitments. And insofar as it is an embodiment of the Canadian people's commitments it helps create and maintain a feeling of being Canadian. Despite differences in religion, race, culture, sexual-orientation, gender, sex, socioeconomic status – Canadians are all in an important way united as citizens who stand for acceptance and justice and equality as they are entrenched in their *Charter*. The *Charter* creates and captures the Canadian ethos and makes Canadians think about what would be best for Canadians as a whole not just about what would be best for themselves as individuals. When the *Charter* was enshrined in Canada, the Prime Minister at the time and one of the biggest supporters of the Charter, Pierre Elliot Trudeau, said “We must now establish the basic principles, the basic values and beliefs which hold us together as Canadians, so that beyond our regional loyalties there is a way of life and a system of values which make us proud of the country that has given us such

freedom and such immeasurable joy”.¹³⁹ The *Charter* embodies what holds Canadians together and helps keep them bound to each other. Interestingly, it is not clear how exactly a charter does this. That is, does a charter help create a feeling of community by reflecting the moral commitments or ethos of the population or does a charter by its very existence create such an ethos for the population or does it work by way of some mixture of the two? The older the charter gets, the more likely it is to be the latter, or at least more the latter than the former. Most countries’ laws reflect, to a substantial degree, the people’s moral commitments. Obvious examples of this include legal prohibitions on murder, rape, and assault. But we must not forget or underestimate the law’s influence on morality. Wil Waluchow, in a discussion of charters and their connection to morality, stresses this point.¹⁴⁰ He quotes Tony Honoré from Honoré’s “Hart Memorial Lecture” on morality and law: “The picture of morality as a blueprint and law as a structure put up according to or in disregard of it is ... misleading. Morality is more like an outline from which details are missing. Laws, along with conventions, fill many of these in”.¹⁴¹ The law of a community and the morality of that community intersect and interact in complex and significant ways. Changes in the law can effect changes in behaviour and attitudes. In Canada the dominant attitude towards things as various as drinking and driving, smoking, women in the workforce, and homosexual rights, have all changed drastically in large part because of legislation, some of it inspired by the *Charter*. Legislation changes attitudes towards particular issues: charters can help establish the over-all commitments and help citizens see that a country must strive to embody basic values. Law both reflects

¹³⁹ The Right Honourable Pierre Elliot Trudeau, 1982 (cited in *The Charter of Rights and Freedoms*),1.

¹⁴⁰ Waluchow, “Constitutional Morality and Bills of Rights”.

¹⁴¹ Waluchow quoting Honoré see *ibid* 82.

and creates a community's morality and insofar as a charter does this it also helps create a feeling of community and makes it the case that the artificial agency of a nation is sincere.

While I have suggested that building on a feeling of team camaraderie will make both actual teams and communities better concerted agents, I recognize that communities are importantly different from sports teams. That is, political communities, by virtue of the types of concerted agents they are, can do and intend to do different things than a team. Political communities have lives that average sports teams do not have.¹⁴² Communities regulate the way people within them live; they control what's legal and illegal and influence what is conventionally approved of and disapproved of, and as a result help determine which of its members feel safe and accepted within the community and which do not. Additionally, a community affects those outside its borders – when it makes decisions about going to war, about whether or not to send foreign aid, about enforcing restrictive immigration policies, and about enacting effective climate control procedures – and in many other ways. Given the primary importance of what it means to be a political community we need to ensure that our questions about what will make a community a better moral agent takes this power of communities into account.

Above, I advanced the claim that charters that foster a feeling of kinship and camaraderie are helpful in doing away with prejudices that manifest themselves in thoughts like “us

¹⁴² Arguably, there are circumstances when teams should think about their political life and influence: for example, the NFL and their seeming indifference to accusations of domestic violence against some of their players.

versus them”. As well, feeling connected to fellow community members motivates us to think of their interests when we are considering political questions, we are deciding which political candidates to vote for, or when we are appraising various legislative bills. Charters are helpful because they unite members of a community around shared values. Similarly, a charter can help a community be a good moral agent by specifying the rights of minority groups within the community. As a concerted agent – that is an agent made up of other agents - what the community intends to do and what it does is, as I have stressed throughout, a function of what its members do. This in large part means that what a community intends and does is dependent on what the majority of its members intend to do and what they do. Given this, there is reason to worry about what Mill famously called “the tyranny of the majority”. It seems to me that a charter can help mitigate fears of the tyranny of the majority in at least two ways. One has already been discussed: a charter which enshrines equality beyond differences in gender, sexual identity, religion and ethnicity works to undermine the thinking that is likely behind problematic divides in the community, divisions that are often oppressive and hierarchical.¹⁴³ The worst side of communities can show when part of the community, animated by hatred or fear, turns against another part of the community in a situation of crisis. Democratic institutions tend to meliorate but not eliminate such situations. Charters with clear appeals to the values of justice and equality and liberty help associate patriotism and emotional loyalty to these values, making it more difficult for a demagogue to link love of country to hatred and contempt for those seen as other.

¹⁴³ I take it that a community can be divided into other smaller sub-groups in ways that are not necessarily problematic; for example, the groups that people form based on religion, culture, reading, or sports teams.

Canadians, for example, seem to identify with the *Charter* and thus with the values and ideals embodied in it. In this way Canadians can feel bound to one another at least for moments, as the members of a team are bound together. This can help prevent the kind of grotesque emotional communities, often spawned from distortions of ethnic or religious differences, that have so often devastated human history.

Secondly, by entrenching rights in charters we place those rights beyond the easy reach of the population. We thereby limit what the majority can do. For example, if a charter declares that people cannot be discriminated against based on their sexual orientation, a law that disallowed same-sex couples from receiving the same spousal benefits that heterosexual couples were allowed would clearly contravene the charter. But we could imagine that the majority of citizens and in turn the legislators might support such legislation because they do not think that a marriage between two people of the same-sex is the same type of union or marriage as one between a man and a woman. Alternatively, we could explain the legislation's passing because homosexuals are a minority of the population and those who are not homosexuals may feel unaffected by such legislation and be generally uninterested in whether or not it is passed. A charter would be useful in both situations. It would remind everyone of her commitment to equality and fundamental justice for all. It would help to do away with the attitude of "its not my problem" by encouraging instead a feeling of camaraderie and kinship – thus, members of the community irrespective of whether or not they were gay would not be uninterested and in fact would be opposed to the legislation. As well, a charter would make it the case that such a law could not be passed easily because it contravened the charter (or that such

legislation could be struck down or deemed incompatible with the constitution depending on the type of judicial review – strong or weak – the nation has). By having a charter a community reminds itself of what belonging to the community means and places moral and political limits on how the agent, that is the community, can behave and what it can do to sub-groups within it.

So far I have advanced the idea that entrenching a charter can make a community a better moral agent by creating and sustaining feelings of solidarity among its members and by placing limits on how the community can act. This discussion has focused on thinking about the community as a concerted agent (an agent made-up of other agents) and what this fact about it implies for making it a better moral agent. That is, how does a community's "team-ness" effect what it means for it to be a moral agent. One of these implications calls us to recognize that the community agent is made up of other agents whom the community agent as a whole may harm or oppress. This is the "tyranny of the majority" worry discussed above. That a concerted agent can harm agents who make it up is a concern distinct to concerted agency. When we think of individual agents we think about how the individual agent can harm others and itself. The concern about agents harming themselves is important but different from the worry about a concerted agent harming groups of agents who make it up. Thus when thinking about agents it matters whether or not the agent is a concerted one or an individual one. We, therefore, ought to be attentive to the fact that a community is a concerted agent. But we should not ignore that the community as a concerted agent acts as a single agent – a single agent in some important way similar to an individual agent. Therefore, we should not neglect what

would make an individual agent, like a person, a better one. That is, what do we expect of and require of an individual moral agent and thus of the community in its role as an agent?

One basic expectation that we might have is that an individual ought to be thoughtful and conscientious; that she reflects on her actions and thinks about her reasons for her actions. For example, we would likely want someone to distinguish their knee-jerk reactions from their well-considered and reflective commitments and to form a relatively coherent set of commitments that are genuine and based on sincere belief. What's more we would want her to act on those commitments rather than her knee-jerk reactions because her knee-jerk reactions are likely to be problematically influenced by prejudice or hatred rooted in fear (especially fear of the unknown or different), inadequate evidence or information, or severe emotional hardship (for example, depression).¹⁴⁴ For example, as we saw in Chapter 1, someone with a green thumb's knee jerk reaction to a local government imposing restrictions on outdoor water use may be that it is wrong for the government to do so. Upon reflection, however, she would likely see that, given her thoughts about the importance of recycling and composting, and her commitments to energy saving, her genuine moral commitment is actually in favour of limits on the use of water outdoors.¹⁴⁵

This example illustrates the perhaps obvious point that our knee-jerk reactions can

¹⁴⁴ My distinction between so-called knee jerk reactions and sincere commitments mirrors Waluchow's distinction between moral opinions and commitments. See Waluchow, "Constitutional Morality and Bills of Rights" .

¹⁴⁵ I use this example in an earlier paper of my own in which I begin to articulate the connection between a community's morality and a charter or bill of rights. See, O'Brien, "Charter Interpretation Judicial Review and a Community's Constitutional Morality".

conflict with our actual commitments. Because they can conflict with one another a responsible moral agent ought to continuously reflect on both her knee jerk reactions and her commitments and bring them in line with each other. Thus, we require that an individual moral agent reflect on her immediate reactions and act so as to remain consistent with her real commitments. Given that a community is a moral agent it too ought to maintain a consistent set of moral commitments and do its best to act according to them.

In fact, the consequences of a community acting on its knee jerk reactions rather than its commitments may be worse than those involved in an individual doing so, because the community can in most cases affect more people. Consider the decision of Canada to order the internment of Japanese Canadians during World War II. This decision was motivated by fear and prejudice that led to suspicion against Japanese Canadians. This decision ran contrary to the community's commitments to equality and freedom of the person. Canada acted according to its knee jerk response of fear and prejudice, and as a result hundreds were oppressed and unjustly vilified.

Alternatively, imagine a community whose knee-jerk reaction to legalization of same-sex marriage is negative. That is, popular opinion is against its legalization. However, further imagine that the community reflects on this immediate reaction and considers it in light of its other commitments. Some of these commitments include those that ensure spousal benefits to same-sex couples: commitments to equality, and to the rejection of sexism,

racism, and the oppression of minority groups. These commitments suggest that the community should reject its hasty reaction and actually support the legalization of same-sex marriage. If the community in this example acted on this realization and legalized gay marriage they would do tremendous good.

With these two cases in mind we can see that it is important for a community to act so that it may remain consistent with its commitments. I suggest that enshrining a charter or bill of rights will in fact help a community act according to its commitments. Charters can ensure that a community's moral short sightedness does not lead to questionable decisions and actions. The moral terms enshrined in charters, although not precisely defined, are acknowledgements that the government, for example the Canadian one, should take seriously concerns about the values of equality and justice and should not pass legislation that violates the right to equality. Charters are central aspects of a community's morality because they represent sincere community commitments. Charters help bring communities and individuals to consider what they are really committed to. The community in enshrining those rights is committed to thoughtfully and rigorously reflecting on what those commitments require and consistently trying to uphold those commitments.

Acknowledging that nations are moral agents adds a new complexity for the understanding the democratic nature of charters and judicial review. Charters and the judicial review of legislation should be seen as more democratic than previously

recognised because they attempt to hold communities to their own most deeply held moral beliefs. A charter reminds the nations of what it really is as a moral agent and reminds the citizens of who they are and of what they owe their fellows. The judiciary calls foul when they do not play by the rules.

IV Conclusion

In this chapter I have attempted to demonstrate that it is reasonable and meaningful to talk about collective agency. I have suggested that our understanding of various group activities would be incomplete if we were to give up the notion of collective agency. What's more, I have advanced the idea that political communities, through a form of what I've called sincere artificial agency, form a collective moral agent. This sincerity is often manifested in a moral and intellectual commitment to ideals entrenched in a charter: ideals with which all can identify and which forge a bond uniting the members as citizens striving to make their country the embodiment of those ideals. Further, I have argued that enshrining a charter or bill of rights will make a community a better moral agent.

Chapter 3: Norms Recognised in Law

I Introduction

In Wil Waluchow's more recent writings¹⁴⁶ he sets out to develop and defend a theory of charter interpretation that can overcome some of the traditional objections to charter review and in turn demonstrate how charter review can be reconciled with democracy.

Part of what his theory puts forward is the idea that in deciding charter cases judges ought to rule according to norms that have "found recognition in the law".¹⁴⁷ In his works up to this point, however, Waluchow admittedly does not fully explain what it actually means for a norm to be recognised in law.¹⁴⁸ Explicating this feature of the theory is the task I intend to take up in this chapter. I hope that by more fully working out this aspect I will have made a good step forward in strengthening my claim that charter review can be reconciled with democracy.

In the previous chapter, I argued that we ought to think of nations as moral agents who have made definite commitments. Commitments to certain values are embodied in constitutions and charters, others become instantiated in the law through legislation, lines of precedents et cetera and it is these legal commitments that constitute a community's constitutional morality and provide the resources for judges to look at and to base their decisions in constitutional cases on. The democratic norms that govern how laws are

¹⁴⁶ Waluchow, *A Common Law Theory of Judicial Review*; "Constitutional Morality and Bills of Rights"; "On the Neutrality of Charter Reasoning".

¹⁴⁷ See especially Waluchow, "Constitutional Morality and Bills of Rights".

¹⁴⁸ Ibid.

passed, how judicial decisions are made and so on, are the same norms that animate the nation as an agent. They are part of what Peter French called the internal decision structure that transform a collection of individual agents into organized collectives like corporations and nations. As I will show, this is the rough foundation of what it means for norms to be recognised in law.

Before beginning I would like to say a bit more about why answering the question “what does it mean for a norm to be recognised in law” is important. A fundamental commitment in Waluchow’s theory is that judges engaging in judicial review are working within a legal system and are making legal decisions. Given this, we should properly understand their decisions involving charter interpretation as constrained by the law and not just as rulings in which judges decide according to their own first order moral preferences. And Waluchow does argue that judges are constrained: they should rule according to norms recognized in law. Thus, what it means for a norm to be recognized in law is a crucial aspect of this theory and it must be clearly explained and understood.

Charter cases are not are *uniquely* moral types of legal cases. What I mean is that charter cases are not more particularly involved in moral issues than any other type of legal case, nor do they necessitate the judge to use a type reasoning in a way that is importantly different from how she uses it in other legal cases. Given the coercive nature of law, most, if not all, cases have moral aspects. Consider the obvious cases in which judicial rulings may send someone to jail or may even impose the death penalty. The possibility

of so severely limiting someone's liberty or sanctioning someone's death means that these sorts of cases most definitely have moral elements. The same is true in perhaps less obvious examples, such as cases that decide who will be the primary caregiver of children, how much remuneration someone should be forced to pay, and how long a sentence someone should serve. The decisions in all of these cases will change the financial or social situation of one or more people and as such make them more or less vulnerable. The judges, when ruling in these cases, are surely aware of how their decision will impact the lives of people. Such cases, even though they are not charter cases, have a moral component and serious moral consequences for the individuals involved, consequences that the judge will be no doubt be conscious of. In these cases judges may think, based on their own moral preferences, that, for example, one litigant should face a much harsher penalty than the law requires. But it is expected that the judge will rule according to the law, not their personal moral preferences. Thus, we should resist the idea that questions involved in charter cases are uniquely moral. Instead, we should remember that all legal decisions have a moral aspect and that all legal decisions ought to be constrained by the law. The theory of charter analysis explicated and defended throughout this project not only recognizes, but insists on this constraint – this is part of what requiring the norms to be recognised in law means.

Some may quickly accept that many, if not all, legal cases have *consequences* that affect people and that legal cases are therefore moral in *that* way. But they will just as quickly counter that charter cases are, in fact, unique because coming to a decision in charter cases requires moral reasoning that other legal cases do not call for and that, furthermore,

charters make explicit reference to vague moral concepts that obviously necessitate moral reasoning. But these objections are not strong; a number of laws refer to vague moral concepts and the legal reasoning judges rely on is the same in charter and non-charter cases. For instance, a law might require that employers pay their employees a fair wage. Many legal cases invoke moral norms insofar as the relevant legal standard incorporates them. What's more, the objections rest on the assumption that a theory of charter review cannot successfully demonstrate that charter cases can be decided according to what is already recognised in law. But this is just what I set out to do in this project. I aim to show how the reasoning required in charter cases can be democratic and can be legally constrained while acknowledging that charters invoke moral norms such as equality and justice. That is, I endeavour to show that in charter cases judges, when discussing moral concepts such as equality, can appeal to public norms which are recognised in law and which give definition to concepts like equality and that therefore charter cases do not have to be decided by judges using their own first order moral reasoning. Judges no more appeal to their own moral views in charter cases than they do in non-charter cases. It does not follow that judges must fall back on their own private beliefs just because most if not all cases have moral implications or consequences.

There is a moral aspect at play in most judicial decisions and judges have to negotiate it and its interactions with the law in most cases. Furthermore, there may be cases in which judges may wish that the law did not compel them to rule a certain way. Judges are often required to differentiate between what the law requires and what morality requires (or what they believe morality requires) and, when what the law requires and what morality

requires differ, judges are required to rule according to the law.¹⁴⁹ For example, in *Daniels v White & Tarbard*¹⁵⁰ the purchaser of a bottle of lemonade suffered injuries after drinking its contents because the lemonade contained carbolic acid. The purchaser and his wife were both harmed and sued the manufacturers. The manufacturers, however, were not found liable because they had not been culpably careless in their manufacturing and bottling of the lemonade. The seller of the lemonade, on the other hand, was found to be liable to the purchaser under the *Sale of Goods Act*, as she was the seller of goods that were not of merchantable quality. When making the decision, the judge acknowledged that the law was “rather hard” on the seller and what’s more, described the seller as “a perfectly innocent person in the matter.”¹⁵¹ Despite this admission the judge thought that the law was too clear to allow for any decision other than for the seller’s liability. This case, and particularly the judicial decision, offers us just one example where from the judge’s perspective what morality required and what the law required conflicted. The judge saw this conflict, and still ruled according to the law. I want to urge that we not think of charter cases as uniquely moral and I hope that by the end of the chapter I will have made some progress in persuading you that the reasoning involved in charter cases is very similar to if not the same as that in general legal cases.

In what follows, I will aim to explain what it means for a norm to be recognised in law. It is my hope that my explication will suggest that the type of reasoning judges use to

¹⁴⁹ For a thoughtful discussion of judicial deviation see Brand Ballard, *Limits of Legality: The Ethics of Lawless Judging* (Oxford University Press 2010).

¹⁵⁰ [1938] 4 All ER 258.

¹⁵¹ Neil MacCormick, *Rhetoric and the Rule of Law: A theory of Legal Reasoning* (Oxford University Press 2005), 49-50.

decide whether or not norms have been recognised in law will look very similar to run-of-the-mill legal reasoning. This chapter will proceed in the following way: first we will look to Waluchow's writing on the notion of a norm being recognised in law. Then using his work as a starting point for development, we will look to general types of legal reasoning such as precedential reasoning including distinguishing, which often involve arguments by analogy and more generally coherentist reasoning and how they help develop the idea of a norm being recognised in law. What will emerge from examining judicial reasoning and legal reasoning tools is the idea that there are two main ways that a norm can be recognised in law. I call these ways 1) analogically recognised in law and 2) implicitly recognised in law. Analogically recognised in law is perhaps the more straightforward way and it's that discussion with which we'll begin. Next we'll look at what it means for a norm to be implicitly recognised in law. Finally, we'll look to the Canadian same-sex marriage reference case to see these ways of norms being recognised in law at work.

Returning to our question – what does it mean for a norm to be recognised in law. A good place to begin is to look at what Waluchow has already said about the idea. One of the most explicit statements he makes is about what does *not* qualify as a norm recognised in law. Examples of such norms are the rules of gratitude. Waluchow writes, “even if there are norms of positive morality governing friendship, gratitude, et cetera these are not in the main, part of the CCM [community constitutional morality] because they lack legal

recognition”.¹⁵² It seems, given this, that, for example, norms of gratitude do not qualify because, though they may have some normative force in that they compel you to thank your uncle for the hideous jumper he got you for your birthday and even to wear it on various family occasions where he’ll be in attendance, they do not have legal authority. These social norms of gratitude are certainly very powerful and motivating, but have no legal force in and of themselves. There would be no legal consequences if you were to tell your uncle just how ugly you actually thought the jumper was and you’d have done nothing wrong legally speaking in doing so. There is a difference between what violates the norms of gratitude and what violates the norms of the law, although there can be overlap. For instance if in response to the jumper your uncle gave you, you punched him in the face you would have both broken the law (by committing assault and battery) and been far more than merely ungrateful. This distinction between social norms and norms recognised in law fits what Waluchow has said in other places about what it means for a norm to be legally recognised. In most of his work on charter interpretation he indicates that a community’s commitments or norms can find recognition within the law through judicial decisions, legislation, and/or constitutions or charters. There is a legal upshot to violating or conforming to a norm that has been recognised in law. Thus, one helpful way to think about what it means to have a norm recognised in law is to ask whether this norm counts as a satisfactory ground or reason for a legal decision. As well, this connection reminds us that an integral aspect of this theory of charter interpretation is the necessity of legal constraints on judicial reasoning in charter cases. The theory does not amount to only “Judge, what do you think is the best answer to this problem?”. Judges are bound in

¹⁵² Waluchow, “Constitutional Morality and Bills of Rights”, 73.

charter cases to decide according to the law; thus it makes sense to next look to judicial forms of reasoning to understand what it means for a norm to be recognised in law.

II Judicial Reasoning

The goal of this chapter is to flesh out what “recognised in law” means so that we can be sure what norms are part of CCM and what are appropriate resources for judges to rely on.

In beginning to flesh out this idea we must first reject the idea that either a) judges are legally bound to come to one answer that is a result of simply applying the law or b) judges are entirely unrestrained and can decide cases however they wish. Once we do this the notion of norms being recognised in law finds conceptual space. It is not the case that judges are always legally bound to come to one answer that they get by simply applying the law, nor is it just a free for all in which the judges can just decide however they wish. There is a spectrum of legal resources, from explicitly settled law that enforce strict constraints on judges, to entirely unsettled law where the law still provides constraints on judges although the specifics are less exacting or determinative. Judges have many tools that are part of legal reasoning and allow them to develop the law while remaining faithful to its constraints. And this is where we should begin to look to understand what it means for a norm to be recognised in law. What’s more, there are a variety of legal reasoning tools that mitigate against the seeming free for all and leave plenty of space for broadly legal activity. When judges are faced with legal questions that fall more on the unsettled side of the spectrum they are nevertheless equipped with tools that allow them to answer those questions and yet remain faithful to the law. Some of the most common of these techniques are part of precedential reasoning and involve using analogical

reasoning to motivate one decision over another.¹⁵³ The next part of this chapter will be devoted to exploring these judicial tools. In doing so we will see that, although none are simple applications of the law, they embody a nuanced form of reasoning that places clear legal constraints on judges. The notion of a norm being recognised in law will begin to take shape.¹⁵⁴

In this section I take-up and develop Waluchow's intuition about norms being recognised in law as distinct from, for example, social norms of gratitude, and use it as a guide for filling in the notion of norms being recognised in law. That is, I think my fleshing out of the notion is in keeping with what Waluchow has already said about norms recognised in law. For Waluchow, an important part of the role of norms recognised in law is to respond to worries about judges deciding cases based on their own moral reasons and therefore demonstrating how judicial reasoning constrains judges helps explain and support his theory.

A Precedent

The use of arguments from precedent is a central type of legal reasoning in countries with common law legal systems, such as, Canada, the United Kingdom, and the United States.

¹⁵³ They can also overrule. Generally, overruling is used when the law is settled but the judge thinks continuing this line of precedent would have seriously immoral consequences or the decision is "plainly" or "clearly" wrong.

¹⁵⁴ The proceeding section's discussion of the various elements of legal reasoning owes much to Grant Lamond's *Stanford Encyclopedia of Philosophy* article "Precedent and Analogy in Legal Reasoning". See "Precedent and Analogy in Legal Reasoning", *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/>>.

Roughly, following precedent means deciding the instant case the same way an earlier and alike case was decided because the cases are the same in the legally relevant respects.

Precedents have special significance because they are regarded as partly constituting the law. They are among the many elements including constitutions and legalisation that make up the law. Because judges are bound to apply the law, and since past precedent constitutes at least some of the law on the issue, later courts are bound to follow the decisions of earlier courts. That is, part of applying the law necessitates that judges follow binding precedent because precedents constitute at least part of the law. When later courts are bound to follow past decisions this is known as the doctrine of precedent or *stare decisis*.¹⁵⁵ What's more, common law legal systems endorse such a strong version of *stare decisis* that later courts are bound to follow earlier decisions even if those cases were wrongly decided according to the law (as opposed to wrongly decided according to the merits of the case).

The exact procedures of *stare decisis* vary from one common law system to another. Generally, however, there is a judicial hierarchy and lower courts are strictly bound to follow the decisions of higher courts; lower courts cannot overrule higher courts. Higher courts, however, can overrule lower court's decisions. Some high courts, like the Supreme Court of Canada, can overrule its own decisions. The honouring and respecting

¹⁵⁵ Ibid.

of the judicial hierarchy is another form of legal restraint on judges in all cases including charter cases.

A precedent only applies, and the decision in the earlier case is only binding on the later case, when legally speaking the cases are the “same”. What makes the cases the same is a matter of much debate. We can easily rule out the idea that in order for the cases to be legally speaking the same they must be identical. Any two cases will, at the very least, differ in respect to time and place. But in reality most cases will differ in much more significant ways and yet the two cases may still be legally speaking the same. Thus, it is often said that two cases are the same in all “relevant respects”. Of course, that leads to a further question about how to go about deciding what the relevant similarities are.

In most common law legal systems a judicial decision has five parts:¹⁵⁶

1. An account of the FACTS
2. identification of the disputed QUESTION OF LAW
3. the REASONING of the appropriate decision
4. the RULING that resolves the case
5. the RESULT or outcome of a case¹⁵⁷

¹⁵⁶ The following account of the doctrine of precedent and arguments by analogy comes from Grant Lamond’s, “Precedent and Analogy in Legal Reasoning”. And I take for granted his description of the phenomenon. There is a diverse literature on the doctrine of precedent but the intricacies of the debates do not matter much here. We can get what we need from a simplified picture.

There are three main theories about how precedents should be understood and what it is about precedents that gives them their normative force: 1. Precedents as rules – each precedent specifies in its *ratio*, a rule that becomes part of the law 2. Precedents as principles- lines of precedent, taken together, materialize a principle that underlies all the precedent decisions and that guides later decisions 3. Decisions on the balance of reasons – precedents determine that certain reasons are sufficient, necessary, or irrelevant for certain decisions.¹⁵⁷ The intricacies of these debates and the pros and cons of each theory do not matter much for the arguments here. For our purposes, a superficial understanding of what makes precedent cases binding is sufficient. In fact, what we are most interested in is the type of reasoning that allows judges to develop the law while remaining faithful to what has come before – and this is done mostly using arguments by analogy.

Following binding precedent does not really develop the law so it does not give us much insight into what it means for a norm to be recognised in law. What's of more value to this project is looking at what judges can do to avoid precedents and when there is no binding precedent. To recap: cases that are legally the same in the relevant ways are decided the same way the past decision was. What makes one case relevantly the same as another case, however, is a matter of debate. But that needn't concern us here – we are more concerned with are cases where the case is not legally the same as another and thus there is no binding precedent. There may be a *prima facie* precedent, but the instant case may be distinguished from a past case.

¹⁵⁷ The ruling may be something like “defendant is liable” and the result that “the defendant owes remuneration to the plaintiff”.

¹⁵⁸ This section greatly benefitted from discussion with Katharina Stevens whose PhD dissertation investigates reasoning by precedent as based on reasoning by analogy.

B Avoiding Precedent by Distinguishing

When faced with a precedent a judge can either follow or distinguish. That judges have the power to distinguish is part of the doctrine of precedent. When a judge distinguishes she does not follow precedent even though at least some of the facts of the instant case are legally relevantly similar to the earlier case. The practice of distinguishing allows courts to not follow some earlier case's decision by pointing to some important difference between the cases.

Distinguishing allows courts to deviate from a *prima facie* binding precedent. They do this by making a ruling that is narrower or more specific than the earlier case. The rules of distinguishing are 1) the factors that lead to the decision in the earlier case must be retained¹⁵⁹ 2) the ruling in the later case must be one that would support the result (part 5 of the *ratio*) of the earlier decision. That is, the ruling in the instant case cannot be inconsistent with the result in the precedent case. The doctrine of precedent requires judges to either follow or distinguish precedent and the reasoning that dictates doing one or the other is informed and constrained by the law. That is to say, when a judge either follows a precedent or distinguishes it she makes a legal decision in keeping with the law. The law authorizes the judge to distinguish. And in that sense the decision will be in keeping with the law – that is, in keeping with the rules that determine how to deal with precedents. Furthermore, the ground on which the power to distinguish is exercised, that is the relevant difference drawn on by the judge in the instant case is legally constrained by the rules of distinguishing.

¹⁵⁹ I am being deliberately vague here because what the “factors” are that must retained is highly contested.

I think it would be helpful here to look at an example for clarification about distinguishing from precedent. This example is taken from Grant Lamond's *Stanford Encyclopaedia of Philosophy* article on precedent and analogy.

Consider a case in which the trustee of a property that's held on behalf of the plaintiff has wrongfully transferred that property to the defendant. Call this Trust Case 1. The plaintiff in this case sues the defendant for recovery of the property which was transferred in breach of trust. The plaintiff argues the following: 1) the defendant has received trust property 2) this is in breach of trust and 3) the defendant has not paid for the property. Therefore, the defendant should return the trust property. The court assesses the situation and rules that the defendant must restore the trust property.

Now, imagine a later case: Trust Case 2. In this case the three factors of the Trust Case 1 remain. There is, however, one important difference – in Trust Case 2 the defendant, who is the recipient of the trust property has relied on the receipt of the trust property to enter into another arrangement, for example, she may have used the property as security in a loan. Given this extra fact the court may decide that the defendant can keep the property. The justification for their decision may be something like the following: where the defendant 1) has received trust property 2) and received it in breach of trust and 3) has not paid for the property, but 4) has relied upon the receipt to her disadvantage, then the defendant is entitled to retain the trust property.

Trust Case 1 was precedent for Trust Case 2, but it could be distinguished, so it was not binding. The court distinguished from it by making a ruling that was narrower than the decision in Trust Case 1. And, as is required of later courts who distinguish, the ruling in Trust Case 2 would support the result reached in Trust Case 1. In other words, the new ratio, with the new condition added, would have yielded, if applied to the facts of Trust Case 1, the very same result as was reached in that case. That is, the defendant in Trust Case 1, because she had not relied to her disadvantage, would not be entitled to the property she received in breach of trust.¹⁶⁰

If we return to our original question about what it means for a norm to be recognised in law we'll see that the justification in Trust Case 2 was in some sense recognised in law if similar reasons for distinguishing had been used in cases in other areas. That is, if the idea of someone relying on something to her disadvantage was marked as an important factor of case in another jurisdiction's tort law (for example, in British tort law) or in a different sub-area of the relevant jurisdictions tort law. And also because the ruling in Trust Case 2 while different from the one in Trust Case 1 still supports its decision. That is, even according to the ruling in Trust Case 2 the defendant in Trust Case 1 would have to return the trust property (which is the result of Trust Case 1).

¹⁶⁰ Raz has a similar idea about distinguishing that he describes in the *Authority of Law* (Oxford: Clarendon Press 1979), especially Chapter 3.

Some may object to my claim that rules of distinguishing tell us anything meaningful about what it means for norms to be recognised in law.¹⁶¹ After all, when we say, for example, that a norm is recognised in the Bible we mean something along the lines of: something in the Bible points to this norm or something in the Bible endorses this norm. We do not just mean that nothing in the Bible seems to exclude endorsement of that norm. So it seems that demonstrating that a later ruling would support the result of the earlier case is at the very least a strange way to think about something being recognised in the law. I think this is a fair worry – my use of the constraints on distinguishing does stretch the limits of how we normally think about things being recognised – especially if we take the instant case and its direct line of precedent in isolation. That is, if we don't consider other legal jurisdictions or types of law (criminal, tort, property et cetera) as having any bearing on the instant case. But it is a mistake to take them in isolation. Other legal jurisdictions and other sub-areas of a type of law are often considered to be persuasive authorities and hence to provide a reason to decide to a certain way.¹⁶² Thus we do look beyond direct lines of precedents for guidance – in a tort case we may look to property law or to a different country's tort law. Remember, the most important feature of the idea of norms recognised in law is that when judges rule according to these norms, these norms provide a legal constraint on judicial decisions. When judges distinguish from precedent they are not merely making a making a legal decision that is only not excluded by the law – they are making one that is meaningfully informed and constrained by the law. When a judge distinguishes the instant case from *prima facie* precedent based on an important factor that has been drawn on in other areas of the law her decision is

¹⁶¹ I am grateful to Wil Waluchow and Hillary Nye for pushing me on this point.

¹⁶² More on persuasive authorities later in this chapter.

meaningfully informed by the law. What's more the rules of distinguishing provide a clear legal constraint on judges. This constraint coupled with the idea that the distinguishing norm is found in other aspects of law is why we ought to see distinguishing as a legitimate means of ascertaining what norms have been recognised in law. Remember, the new factor drawn on in Trust Case 2 was also one that was recognised in some other case or another jurisdiction of the law. The result of Trust Case 2 is recognised as a legitimate result of adding together two elements already recognised in the law – the previous *ratio* and the added factor.

Distinguishing is an important judicial tool that allows courts to avoid decisions from earlier cases so long as the courts can identify one important difference (possibly more) between the cases. Identifying and drawing on this difference narrows the ruling of the later case compared to the earlier one (as we saw with Trust Case 1 and Trust Case 2). Distinguishing allows for incremental development of the law that has come before. The instant case is linked to the earlier case but the point or argument of difference is not found in the earlier case. Of course, the power to overrule also allows courts to avoid previous decisions. But overruling is importantly different from distinguishing. Not least because all common law courts can distinguish precedents – even precedents from higher courts can be distinguished so long as the narrower rule from the lower and later court would support the ruling in the earlier case. Overruling, on the other hand, is restricted to higher courts and can only be done with very strong reasons and support. The doctrine of precedent requires courts to treat earlier cases as correctly decided. When a court

distinguishes, the distinction does not suggest that the earlier case was wrongly decided (hence the requirement that the new ruling support the earlier one).

The rules of distinguishing from or following precedent are fairly straightforward. It is hotly debated how much of a role arguments by analogy play here. But at least one way to motivate that the instant case should be distinguished from the precedent case is through arguments by analogy. Furthermore, where all theorists agree is that analogy plays a big role in so called persuasive authorities. An example of such an authority another is precedent from another jurisdiction. Such a precedent is not binding, but rather is persuasive.¹⁶³ Next we'll look at arguments by analogy.

C Arguments by Analogy

The doctrine of precedent dictates that the decision in an earlier case is binding on a later case when that case is relevantly the same. Deciding about a later case based on an earlier one is reasoning by precedent. Reasoning using persuasive authorities is similar to reasoning by precedent: both look backwards at past cases for guidance about how to decide the current case. Precedents and persuasive authorities work alike in legal arguments because they illustrate how the instant case should be seen to instantiate a legal principle that fits with the reasoning about both the instant case and the past case(s) (the precedent(s)). Reasoning by persuasive authorities means arguing that the instant case ought to be treated a certain way because that is the way a similar (but not relevantly

¹⁶³ Persuasive authority means sources of law that the court consults in deciding a case. It may guide the judge in making the decision in the instant case. But it is not a binding precedent on the court under common law legal systems such as English law. Persuasive precedent may come from a number of sources such as lower courts, horizontal courts, foreign courts, statements made in dicta, treatises or law reviews.

the same) case was treated. Reasoning by analogy is thus complementary to reasoning by precedent. Fredrick Schauer stresses the differences between precedent and persuasive authorities. Strictly speaking, he contends, if the current case is directly ruled by a past precedent then the decision required by that precedent is *mandatory*.¹⁶⁴ A genuinely constraining precedent is different from a case (one that is a persuasive authority) that may be used analogically to motivate a certain decision.

Analogies can be used when deciding when two cases are relevantly similar and when looking for important differences between two cases. Arguments by analogy differ in strength. When it comes to binding precedent, if a case cannot be distinguished from its precedent the precedent is binding and must be followed (unless the court has the authority to overrule and there is good reason to do so). When it comes to persuasive authorities, arguments from analogy, on the other hand, can range from those that are very close, which will strongly support a result, to analogies that are more remote, which weakly support a result. In this way analogies fall on a spectrum. Arguments from analogy also differ from arguments from precedent because arguments by analogy are not binding – they are considered together with the other relevant reasons to reach a result.

¹⁶⁴ Fredrick Schauer, *Thinking a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009), 36.

In analogical reasoning, earlier cases are not binding precedents but rather provide potential analogies given the similarities between cases.¹⁶⁵ For example, if the instant case raises the issue of whether or not excluding some people as potential employees on the basis of their sexual orientation is discriminatory and undermines the dignity of people, past cases that deal with discrimination based on sex or race or religion provide potential analogical arguments and cases. The strength of the analogy and its persuasiveness is connected to the degree of similarity between characteristics of the cases highlighted and made salient by the analogy, as well as the relevance of the similarities to the issue at hand. Not just any similarity will do. For example, knives may be analogous to guns if the issue concerns weapons, but knives may also be analogous to spoons if the issue concerns cutlery. This means that two sets of facts cannot be analogous in the abstract, but only in the context of the legal issue at hand. The fact that the events of the later case happened on Leap Day and the events of the instant case also happen on Leap Day is not an important or relevant similarity between the two cases if the issue at hand is about understanding who is legally at fault for damages. This similarity would not make the cases analogical.

Most argue that reasoning by analogy depends upon the justifications for the past decisions in question, the analogous case. While the instant case may fall outside the scope of any existing precedent (that is, not have any binding precedent), the justification for that earlier case may nonetheless be applicable to the later case, and thus be an

¹⁶⁵ Also, the difference between binding precedent and persuasive precedent comes down to whether or not the two cases belong to the same or a different area or sub-area of law.

argument from a persuasive authority and provide an argument from analogy even though it does not provide an argument from binding precedent. Grant Lamond provides an illustrative example about the use of analogy in legal reasoning. Consider the legal question of whether or not the impersonation of a boyfriend/girlfriend vitiates the victim's consent in the law of rape.¹⁶⁶ Assume that it is legally settled that the impersonation of a husband/wife vitiates consent in rape law. Whether or not the impersonation of a boyfriend/girlfriend is analogous to the impersonation of a husband/wife such that it also vitiates consent depends on why husband/wife impersonation vitiates consent. If marital impersonation is thought to vitiate consent because part of the special significance of being married is the sharing of physical closeness and intimacy with that person, then that justification is applicable to other close personal relationships such as the one between a boyfriend and girlfriend or between a girlfriend and girlfriend. Thus, it provides an argument that boyfriend/girlfriend impersonation should also vitiate consent. If, on the other hand, it is thought that marriage itself is a uniquely special bond (perhaps rooted in religious views of marriage) and impersonating a marital partner in that relationship violates the sacrosanct nature of the relationship then it is not applicable to the relationship between a boyfriend and girlfriend or girlfriend and girlfriend because they do not share that type of relationship. Interestingly, Lamond uses a different alternative justification as part of his marital impersonation example to explain reasoning by analogy. Instead, he posits that if the rationale behind marital impersonation vitiating consent is that consent to a marital

¹⁶⁶ Assume spousal impersonation is not strictly speaking binding precedent in this case because the operative facts are not the same: in one case you have marital partners and in the other case you do not.

impersonator involves committing an act of adultery which is an act of a different kind than the one the victim thought they were consenting to, then that would be an important distinction between marital impersonation and boyfriend/girlfriend impersonation. I am not entirely sure that this would show that marital impersonation is disanalogous to girlfriend/boyfriend impersonation such that the former does vitiate the victim's consent but the latter does not. Presumably, committing adultery is bad and therefore a significant feature of marital impersonation because it means violating the trust of someone important to oneself— one's partner in marriage. But this seems to also be the case when someone cheats on a boyfriend or a girlfriend. Thus, this difference does not seem to be enough to maintain a strong distinction between marital impersonation and boyfriend/girlfriend impersonation. On the other hand, marital impersonation could constitute an act of adultery which would have particular consequences because of the special legal nature of marriage and the possible legal implications of a partner committing adultery. Perhaps, for example, if one partner commits adultery than any existing pre-nuptial agreement is voided or divorce laws in a given jurisdiction may show preference for the party who did not commit adultery. The legal implications of committing adultery do seem to be distinguishing features of marriage and marital impersonation such that the reasoning could not be analogously applied to the case of boyfriend/girlfriend impersonation. One could still argue that boyfriend/girlfriend impersonation ought to vitiate consent, but one would have to do so on grounds other than the fact that marital impersonation vitiates consent given the legal consequences aspect of the justification in marital impersonation. The reasoning we just went through in attempting to determine what was important similar or distinctive about the case of

marital impersonation compared to boyfriend/girlfriend impersonation was analogical reasoning and is just the sort of thing that an attorney would do when using analogy to present their case. We used analogical reasoning to look for important similarities and differences between the two cases. The judge would analyse the analogy and decided whether or not they found it convincing. To borrow a metaphor from Neil MacCormick – in legal systems lawyers or counsel are mainly “analogy hunters” and judges are primarily the assessors of the persuasiveness of the analogies offered by counsel.¹⁶⁷ Counsel look for judicial decisions that are relevantly similar to the instant case and that will motivate the decision that they want.

When using arguments by analogy it tends to be that the more specific the analogy is, the stronger and more persuasive it is. If an analogy is more abstract, on the other hand, it is weaker and less persuasive. This is because more abstract analogies leave more room for distinguishing the cases – more room to show them to be disanalogous. For example, analogical reasoning between boxing and sadomasochistic activities is something of a stretch even though they both involve the intentional infliction of a certain level of harm. Boxing and football, however, are more closely linked and conclusions about one sport could more easily be applied to the other given the strength of the analogy.

Most of the time when individuals argue about how a decision should be made in a personal, non-legal context they argue strictly about the merits of one choice over another.

¹⁶⁷ MacCormick, *Rhetoric and the Rule of Law*, 210.

For example, when arguing about where to eat dinner, friends will offer arguments about the quality of food at the available options, or the distance to the restaurants, or the expected wait time for a table, or the average price of a meal. Rarely, will it count much in one restaurant's favour that the friends ate there last time. Or if it does count in its favour it is likely because this gives the friends first hand evidence about the quality of food, quality of service et cetera. There are times, however, when even at the personal level we marshal arguments by analogy. For example, should you choose to argue with a member of the flight staff about whether or not your bag counts in the relevant way as carry-on you have a few options. You may motivate your claim that your bag does in fact count by pointing to someone else's bag: *"Our bags, are, in the important ways, the same and so if their bag counts as carry-on so does mine"*. You would not, however, be making a persuasive argument if the main similarities you could point to were that your bags were both royal blue and adorned with the Canadian flag. On the other hand, if you could show that your bags had the same dimensions, weighed almost the same, and that neither carried any of the prohibited items you should surely win your claim. And what is more, should the staff member respond to you with *"But actually your bag is royal blue and this traveller's bag is grey and what's more your bag has the Canadian flag while theirs has the Irish flag and therefore I can treat each of your bags differently"* - these should surely be insufficient arguments. We know that the preceding points both for and against count as either good or bad because we know that the purpose behind the rule limiting carry-on luggage is to prevent overfilling the overhead compartment and putting too much weight in the plane.¹⁶⁸ Colour and flag choice might be very relevant criteria for

¹⁶⁸ If this isn't the rule, just imagine it to be.

answering questions about which bag works best with a particular outfit or is most suitable in a country's parade. While the carry-on example is likely overly simplistic it is still illustrative of the type of analogical reasoning that goes on in common law legal systems. As Neil MacCormick writes, "the common law is about cases and analogies"¹⁶⁹ and he continues, about "pattern matching across similar but subtly different narratives."¹⁷⁰ Our fictional passenger argued that their bag was relevantly similar to one accepted as carry-on and that it should therefore be categorized according to the same rule.

When judges use arguments by analogy in persuasive authority reasoning to either highlight important differences or similarities between two cases they develop the law. Consider our discussion of boyfriend/girlfriend impersonation in rape law. If a judge decided that because of the important similarities to marital impersonation that such boyfriend/girlfriend impersonation did vitiate consent she would have developed rape law. Rape law would explicitly recognise boyfriend/girlfriend impersonation where it had not before. Given, however, that marital impersonation was recognised in the law to vitiate consent and that this law is a persuasive authority used to motivate the ruling, the decision to explicitly recognise boyfriend/girlfriend impersonation as vitiating consent was one that was very much informed by the law and one that was analogically recognised in the law. It was analogically recognised because arguments by analogy showed that the two cases were importantly similar and thus that the norm at work in marital impersonation

¹⁶⁹ Ibid 43.

¹⁷⁰ Ibid 44.

should also govern boyfriend/girlfriend impersonation. That is, both types of impersonation should be explicitly recognised to vitiate consent in rape law.

Arguments from precedent and arguments from persuasive authorities get at least some of their justificatory force in law from the importance of coherence for legal systems.¹⁷¹ The value of coherence has a lot to do with replicability: the ability of different judges in different courtrooms to come to the same decision. The law should also operate predictably - the average citizen should be able to predict how the law would treat her should she act a certain way. Thus, that legal decisions should cohere with and be in keeping with the spirit of the law is both a constraint on legal decisions and a way for judges to develop to the law. Appealing to coherence is an attempt to show that a decision one wants to make is consistent with, or makes sense in light of, norms – often principles and values – ready recognized in the law. They are recognized insofar as and to the extent that they figure in the laws and previous decisions.

One way the law remains coherent is that importantly analogous cases are decided in the same way: analogy is a type of coherentist reasoning. MacCormick calls it a “particularly vivid illustration of coherentist reasoning”.¹⁷² That a legal decision coheres with the law is another way to understand what it means for norms to be recognised in law. That is, we can ask questions about whether or not the judicial decision coheres with the system and

¹⁷¹ MacCormick, *Rhetoric and the Rule of Law*; Lamond “Precedent and Analogy in Legal Reasoning”.

¹⁷² MacCormick, *Rhetoric and the Rule of Law*, 207.

in doing so find out whether or not the norm at work in the decision has been recognised in law. If the judicial decision coheres with the legal system than an argument can be made that the norm is recognised in law. I am following McCormick on coherence, specifically his chapter “Coherence, Principles, and Analogies” in his book *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*. The most basic way to understand coherence is to think about it as asking whether or not something makes sense given a certain background or context. That is, does *X* make sense given *Y* where *Y* could be a system or a series of facts? Coherence is distinct from consistency and not necessarily a stricter requirement. Consider for example, the following statements: 1) Mars is the fourth planet from the sun, 2) Canada has ten provinces, 3) Oxford University has 38 colleges. Statements (1), (2) and (3) are strictly speaking consistent but they don’t, in any meaningful way, cohere. Consider, on the other hand, these statements: (A) McMaster University is in Hamilton, Canada, (B) McMaster’s Philosophy Department is housed in University Hall, (C) The Philosophy Department is on the third floor of University Hall. Statements (A), (B), and (C) are all consistent and coherent with one another. Complete consistency is not required for coherence and coherence can be a matter of degree whereas consistency cannot.¹⁷³ A law, for example, fails to cohere with a legal system or “fails to make sense” within a legal system if there is no value or family of values instantiated by the new law which is also found in the legal system. As MacCormick writes, “coherence ... is the property of a set of propositions which, taken together, ‘make sense’ in their entirety.”¹⁷⁴ Similarly, new rulings and decisions in the courts can be said to cohere with prior decisions and other laws if they can be understood to be

¹⁷³ Ibid 190.

¹⁷⁴ Ibid 193.

subsumed or explained by the same values and reasoning that underpin the legal system and the settled doctrine.

Coherentist reasoning asks general questions about whether or not things fit within a particular framework or make sense given what else we have accepted. For example, a commitment to conserving water coheres with an environmentalist framework. On the other hand, a commitment to Nazism does not cohere with a liberal egalitarian framework. Because coherentist reasoning is more general than analogical reasoning, because coherence is a matter of degree, and because more than one competing norm may cohere with any one system, coherentist thinking is likely not as persuasive as strict analogical reasoning.¹⁷⁵ For example, capitalist and socialist forms of government arguably both cohere with liberal democratic frameworks. Consider that when we ask, for example, whether or not it is in keeping with Jane's character to cheat on her partner we engage in coherentist reasoning.¹⁷⁶ On the other hand, when we look for specific examples of Jane betraying those close to her (friends and partners) we engage in analogical reasoning. Consider the legal context. Imagine, for example, that a judge in the distant future makes the following decision: "Martians are owed the same rights and privileges as human beings" and grounds her decision in respect for equality – a norm that coheres with the liberal democracy this judge presides in. This is a coherentist argument and on its own leaves more room than a strong analogical argument for people to point out reasons why

¹⁷⁵ If something follows from analogical reasoning it is more than likely true that it also coheres within that system.

¹⁷⁶ We are asking, in a sense, does Jane cheating make sense (to return to MacCormick's phrase) given what we know about Jane?

it fails. For example, someone may simply point out that Martians do not have the same biology as human beings and thus are not owed the same rights and privileges because the equality norm is concerned with equality among human beings. Or someone may point to a different value endorsed by the legal system and argue that it speaks to treating human beings and Martians differently. A stronger and more persuasive argument in favour of the judge's decision would be one that pointed to the incremental development of laws that recognise and protect a wider group of beings as persons, perhaps even beings who do not have the same biology as humans. As we will see, this is somewhat similar to what happened in the Canadian same-sex marriage reference case. The Court did not simply claim that Canada's equality clause in the *Charter of Rights Freedoms* required the legal recognition of same-sex marriages or that legally recognising the marriages would fit with the spirit of Canadian law. Rather, they pointed to specific cases that affirmed the right to same-sex marriage. What is more, the intuition that analogical reasoning is generally more persuasive than more general coherentist reasoning, is reflected in legal reasoning: only when there seems to be no relevant or helpful analogy and thus the instant case is entirely unprecedented will judges develop the law, in a way that is guided by coherentist reasoning and restrained by the existing law because whatever way the law is developed ought to cohere with existing law.¹⁷⁷ Thus, whatever norm underpins the instant case decision, or underpins the way the decision was reached in the instant case, was recognized in law insofar as it coheres with the rest of the laws and decisions and the legal system as a whole. Coherence is a weaker form of analogically being recognised in law compared to arguments by analogy, but they are

¹⁷⁷ Ibid, especially Chapter 10.

complimentary - what follows from analogical reasoning more than likely also coheres within the legal system.

Some may argue that I have stated the claim too strongly. After all, is it not the case that in landmark decisions that the courts strike down laws and deliberately set out in entirely new directions? Indeed, in these cases isn't it their aim to introduce a fundamental change in the law? In response to these objectors I would say that coherence is broad enough to cover radical change. Indeed, in these landmark decisions what I think is going on is that the courts are striking down laws that do not or no longer cohere with the legal system, for example in *Brown*. What coheres with a legal system may change and develop. Separate but equal may at one time have cohered with the American legal system, but it no longer did by the time of *Brown*. While coherence is broad enough to cover much legal change it is perhaps not broad enough to cover revolutions.

A norm may be said to be not coherent with the legal system, if for example, it explicitly contradicts the settled law. Consider the claim, albeit a repulsive one, that the United States should re-instate the legal institution of slavery. Such a suggestion is clearly one that explicitly contravenes U.S. law and runs in direct opposition to the development of U.S. constitutional law and amendments and thus can easily be said to be incoherent within the United States' legal system. However, the idea of something being incoherent within a legal system is usually a trickier and more complicated point. Things are tricky because there are, of course, many examples of cases in which people argue for changes

in the law; changes that as of right now contradict the laws on the books. For example, in Canada there was a campaign to have PAS legalized. The push to legalize PAS contradicted at least parts of Canadian law because before the Supreme Court of Canada struck down the legislation PAS was illegal under the *Canadian Criminal Code*.¹⁷⁸ Yet, despite this obvious contradiction the campaign went on and the case was eventually heard by the Supreme Court and PAS was legalized. How can this be? What legally distinguishes the Canadian PAS case from the fictional case about re-instating slavery in the U.S.?¹⁷⁹ One important legal difference, I think, is nicely expressed in Adam Samaha's paper "On the Problem of Legal Change". In it he writes, "[t]he notion of legal change might be part of every legal argument. Sound legal arguments require grounding in the status quo..."¹⁸⁰ And later, "... someone who argues *for nothing but legal change* is supposed to lose the argument ...".¹⁸¹ And this it seems to me is the crux of the legal

¹⁷⁸ Before 2015, PAS was illegal according to Section 241 of the *Canadian Criminal Code*. I have cautiously written that PAS contradicted at least *part* of the Canadian law. This is because whether or not PAS contradicts the entirety of Canadian law is a complicated and debated jurisprudential question. Suppose we accept that that the criminal ban on PAS unjustifiably infringes Section 7 of the *Charter* and suppose we accept that any provision which violates the constitution, of which the *Charter* is a part, is invalid and of no force and effect. If we accept both those claims then it follows that any act taken in contravention of the criminal ban is not in violation of valid law. This view is known as inclusive legal positive and is defended in Wil Waluchow's *Inclusive Legal Positivism* (Oxford: Clarendon Press 1994). If this view is correct then the push to legalize PAS does not contradict Canadian law. There is an alternative view, exclusive legal positivism, according to which the law is valid until the law is struck down by a court with the authority to do so. Without getting embroiled in the debate between inclusive legal positivists and exclusive legal positivists I think we can still see the difference between pushing to reinstate slavery in the US and the push to legalize PAS in Canada and why one seems to be an obvious cases of contradicting the law.

¹⁷⁹ Obviously slavery is morally repugnant in a way that physician assisted suicide is not. And PAS does not have the same colonial or oppressive history that slavery does.

¹⁸⁰ Adam Samaha "On the Problem of Legal Change" (2014) 97 *The Georgetown Law Review* 103, 4, *supra* note 14.

¹⁸¹ *Ibid* 4, my emphasis.

difference between pushing to reinstate slavery and pushing to legalize PAS. The Canadian case for PAS, while arguing for legal change, also argues that the main thrust of Canadian law supports the change.¹⁸² That is, part of the argument in favour of decriminalizing PAS is that doing so would actually cohere with Canada's legal system and thus those mounting the case for the change of the laws criminalizing PAS are not arguing for nothing but legal change. They are using the implications of already made legal decisions to take a new look at PAS legislation and to support a change in the law. On the other hand, those who would argue for re-instating slavery would be, the suggestion is, arguing only for legal change with nothing in the law or constitution to support them. Such a law would not cohere with American law as it stands today. In Samaha's paper he makes a distinction between the process and the result in legal change. The process, roughly, can be understood as the law's development over time and the result as a particular legal decision. Thus, a successful legal argument has to show that what it calls for remains consistent with the result of previous legal decisions or with the process of the legal system.¹⁸³ In doing so the proponents demonstrate that their argument is grounded in some part of the status quo of the legal system. In helping to explain the idea of process Samaha draws on American slavery theorists writing before the civil war.¹⁸⁴ He argues that while certain American pro-slavery theorists used conservative values (conservatism understood as a principle that favours the status quo when it can) to motivate their cause, a conservative argument could also have been used to support

¹⁸² For example, the argue that the right to PAS is protected specifically be Section 7 and Section 15 of the *Charter*.

¹⁸³ I think, as you will see, that there are strong similarities with Samaha's notion of process and my notion of coherence.

¹⁸⁴ Ibid 18.

emancipation given the legal process up until then. That is, “[a]t the time, one could have concluded that the nineteenth century showed a trajectory of emancipation”.¹⁸⁵ To put it another way, at the time emancipation better cohered with American law than maintaining slavery did. Accordingly, when emancipation happened the “result” changed – the laws went from legalizing slavery to criminalizing slavery, but the “process” did not because the values underpinning the American legal system were ever more coherent with the norms of emancipation rather than the norms supporting the maintenance of slavery. Emancipation cohered more with the law at the time than slavery did.

Earlier I said that Waluchow does provide us with a brief sketch of a positive account of what it means for norms to be recognised in law. He writes that judges can look to past judicial decision, legislation, and or constitutions and charters. I think these are also places one can look to make analogical or coherentist arguments. What’s more I think there are subtler, more refined factors within legal systems that can be drawn on. For example, Waluchow suggests that judges might look to judicial decisions. Judicial decisions, however, contain both a *ratio decidendi* and *obiter dictum*. The *ratio* is, roughly, the principle or legal rule to be derived from the judicial decision. It is binding on future and lower courts. The *obiter*, on the other hand, is a remark made by the court that is not directly relevant to the issue being discussed, but is tangential to it. Thus, the *obiter* is not binding, but it may be referred to and be persuasive in future cases and thus the norm referred to the *obiter* may eventually be part of binding law. Hence, the *obiter* may be a place to look for coherence and analogies.

¹⁸⁵ Ibid 18.

Some may be suspicious of my claim that the *obiter* can give us clues as to what counts as being recognized in law because traditionally the *obiter* is understood as an unnecessary statement by the court that, unlike the *ratio*, can be legitimately disregarded by other courts. However, as Schauer notes, this traditional distinction between the *ratio* and the *obiter* isn't strictly accurate. At the very least the *obiter* has a burden-shifting effect.¹⁸⁶ A statement, including the *obiter*, by the Supreme Court that directly supports one side in a subsequent case (at either a lower court or even a subsequent case at the Supreme Court) gives that side a distinct advantage. The opposing lawyer has to persuade the court that for some reason or another they ought to ignore that particular statement. Thus, the *obiter* can serve as evidence that the law can be developed in a certain way. The *obiter* is often understood as a commentary on some aspect of the law and even in some cases predictive of how law the will develop. The *obiter* may also point to elements that the law needs to be more attentive to, for example, societal norms surrounding the legal regulation of what qualifies as indecent and obscene. The same can also be said about a dissenting opinion in a judicial decision. A dissenting opinion is one that disagrees with the majority opinion in a case. A dissenting opinion, like an *obiter*, may provide evidence about the trajectory of the law or reasons to motivate a decision in a future case. Thus, Waluchow is certainly correct to assert that judicial decisions are evidence of what norms have been recognised in law. In addition, though, we should note and look for the subtleties that are at play in decisions and what can count as evidence of a norm being recognised in law.

¹⁸⁶ Schauer, *Thinking Like a Lawyer*, 281.

There is no doubt that charters and bills of rights alike make explicit reference to morals. But we do not need to think that it is inevitable that the only way judges can or will be able to give content to these morals is on the basis of their own moral preferences and first order moral reasoning. In fact, this is exactly what I have tried to argue against thus far. I have suggested that by asking questions about what norms fit with the reasoning of past judicial decisions and the legal system as a whole judges can coherently develop the law with respect to moral matters in charter cases. Again, the necessity of interpreting charters and their necessarily vague statements about values demonstrates the importance of coherence in determining norms recognised in law.

It will have become obvious by now that I am not going to provide a formulaic account of what it means for norms to be recognised in law or to list the exact references or materials judges can rely on when asking questions about what norms have been recognised in law and therefore what provides a valid justification for ruling a certain way.¹⁸⁷ What I have set out to do is to illustrate the sort of reasoning judges can use and gesture at the sort of material judges can look to.

¹⁸⁷ David Strauss makes a similar comment in his discussion of common law reasoning in his book *The Living Constitution*. He writes, “For the most part, there are no clear, definitive rules in a common law system. The common law is, as I said, not algorithmic.” See Strauss, *The Living Constitution*, 41.

There is a certain sense in which arguments by analogy and coherentist reasoning in the law more generally that we've discussed above make use of explicitly accepted patterns, rules, or categorizations in the law. These arguments work by motivating the claim that the rule or law explicitly at work in this part of the law, for example, contract law, should be applied to this different area of law where it previously was not endorsed, for example, tort law. That was what happened, for example, in our discussion of partner impersonation in rape law: it was argued that we ought to apply the marital impersonation rule to boyfriend/girlfriend impersonation because of the important similarities between the two cases. It was also what happened in Trust Case 1 and Trust Case 2: the distinctive factor between the two cases was taken to be important because it was recognised as an important factor in some other area of law. In this way, when we use arguments by analogy we say that that these two cases are importantly similar so the explicitly accepted norm that governs the first case ought to also govern the second case (even though it was previously not recognised as applicable). And this is one way to understand what it means for a norm to be recognised in law when norms are analogically recognised in law.

There is also, however, another (although not entirely separate) way in which a norm may be recognised in law – what I call implicitly recognised in the law. This is the sense in which the past cases speak to a new and meaningfully different understanding of the law on the books. This strikes me as different from arguments by analogy like the ones we've been discussing because it says that the understanding of the law that the judges or courts explicitly claim to endorse is not the one that actually fits with the way the past cases have been decided. Arguments by analogy, on the other hand, claim roughly, that the law

(and the way its been understood by the courts) that has explicitly been accepted in this area or sub-area of the law should also be applied and accepted in this other part of the law.

To see more clearly what I have in mind with respect to this second type of recognised in law, the implicit kind, let's look to *MacPherson v. Buick Motor Co*¹⁸⁸ case – specifically Judge Benjamin Cardozo's opinion which has become according to Strauss “a classic in the common law cannon [...] [and] held out as reflecting common law reasoning in its most sophisticated form”.¹⁸⁹

Buick Motor Company negligently made a car with a defective wheel and Mrs. MacPherson was injured as a result of that defect. What made *MacPherson* a particularly difficult case was that at the time the accepted common law rule in such cases was the “privity-of-contract” requirement. Accordingly, manufactures were not liable to any party with whom they did not have a contract. And Mrs. MacPherson did not have a contract with Buick. Buick sold the car to a retailer and this is whom Mrs. MacPherson dealt with. There was, however, a generally recognised exception to the privity –of-contract requirement – that was an exception for “inherently dangerous objects”. A consumer could recover damages from a manufacturer for injuries caused by an inherently dangerous objects – even in cases where there was no privity-of-contract.

¹⁸⁸ 217 N.Y. 382, 111 N.E. 1050

¹⁸⁹ Strauss, *The Living Constitution*, 80.

From 1852 what we now call product liability cases were decided according to the privity requirement unless the object was inherently dangerous.¹⁹⁰ The key question in many such cases became whether or not the defective product in question was inherently dangerous. In 1870, the New York Court of Appeals provided some insight into what counted as such an object: they ruled that a flywheel in a machine was not an inherently dangerous object. The court wrote: “Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, loaded rifle, or the like.”¹⁹¹ On the other hand, a flywheel, like “an ordinary carriage wheel, a wagon axle, or common chair in which we sit” was not inherently dangerous. Given that the flywheel was not the sort of object that was inherently dangerous, the privity of contract rule applied and barred the consumer from recovering damages.

A few years later the court held that a steam boiler was also not an inherently dangerous object.¹⁹² Over the next thirty years the New York court continued to add objects both to the inherently dangerous and not inherently dangerous columns. They decided that scaffolding, a defective building, an elevator, and a rope supplied to lift heavy objects were all inherently dangerous objects. In 1908, The New York Court of Appeals decided that a bottle of “aerated water”¹⁹³ was inherently dangerous. That same court, a year later,

¹⁹⁰ Ibid 81.

¹⁹¹ Ibid 81.

¹⁹² Ibid 81.

¹⁹³ Commonly referred to as sparkling water.

ruled that a large coffee urn was also inherently dangerous.¹⁹⁴ As Strauss highlights in his chapter, time and time again in these liability cases these New York courts said they were just applying the accepted “inherently dangerous object” exception and if that failed then the privity of contract rule.¹⁹⁵

Such was the state of the law when the MacPherson case came before Cardozo’s court. The lawyers on either side agreed that the key question in this case was whether or not an automobile was an inherently dangerous object. Mrs. MacPherson’s attorney argued that it was and that thus the privity-of-contract requirement did not apply. Buick’s lawyer, on the other hand, argued that a car was not an inherently dangerous, so the privity rule applied.

Cardozo’s decision dispensed with the privity requirement entirely; instead the court held that a negligent manufacturer would be liable to anyone who could foreseeably be hurt by its negligence. Thus, the new rule to be adopted required consumers to demonstrate negligence and foreseeability in order to recover damages from manufacturers. Cardozo’s decision, while not strictly speaking dictated by the law of the day (the established law was the privity-of-contract requirement) did draw on the lessons provided by earlier cases – and this is what makes it an exemplar of common law reasoning and an example of norms being implicitly recognised in law.

¹⁹⁴ Ibid 82.

¹⁹⁵ Ibid 82.

According to Strauss, Cardozo drew specifically on two important lessons from past cases. First, the earlier cases demonstrated that the privity requirement no longer worked. Perhaps at one time the distinction between inherently dangerous objects and those that were not or those that were part of “the ordinary intercourse of life” could be maintained, but by the time the MacPherson case came before Cardozo it no longer worked. Too many objects were both inherently dangerous and part of ordinary life. After all, courts apparently applying the same distinction, had ruled that a steam boiler was not inherently dangerous, but that a coffee urn and a bottle of sparkling water were. That the distinction had clearly broken down and was no longer workable supported Cardozo’s decision to do away with the privity rule.

Secondly, the earlier cases showed that while the courts claimed (likely in good faith) that they were applying the privity rule, they were actually (quite likely without knowing it) generating a new rule. Cardozo claimed, reasonably, that regardless of what the opinions of the earlier cases said, the results of those cases were consistent with the principle that a manufacturer is liable when foreseeability and negligence can be demonstrated. In the earlier cases the judges may have thought their decisions were tracking the distinction between inherently dangerous objects and objects of ordinary use, but they were really tracking cases where negligence and foreseeability could be demonstrated and those where it couldn’t. This is particularly clear in the more recent of the cases – the scaffolding, coffee urn, and sparkling water – these decisions make more

sense if they are understood has applications of the foreseeability rule rather than the privity rule.

Cardozo's decision was thus implicitly supported by the previous decisions even though it threw out the established law they claimed to apply. The foreseeability rule instituted by Cordozo was in an important sense implicitly recognised in law – even though it was not explicitly recognised. Strauss puts the point this way, “[In *MacPherson*] the court could fairly say that it was just making explicit the conclusions that the earlier decisions had arrived at in fact, but had not acknowledged in name: there was no distinct category of inherently dangerous product ...”¹⁹⁶

In the first chapter of this thesis I drew your attention to the *Brown* decision and how it could be understood as both lawful and in line with the decisions that came before it. This decision, like the *MacPherson* decision, uprooted the established law, but was nevertheless not a revolutionary decision. While “separate but equal” was technically still the law up until the decision in *Brown*, the Courts before had time and time again ruled that separate facilities were in fact not equal. There was nothing left of “separate but equal” by the time *Brown* came before the court, and thus *Brown* merely made the already developed interpretation of the law explicit. We might say that both *MacPherson* and *Brown* explicitly recognised principles in the law that had previously only been implicitly recognised.

¹⁹⁶ Ibid 92.

This implicit type of recognised in law says something like judges may have, in good faith, thought they were applying this law in this way – privity-of-contract or separate but equal – but if we look at the past cases we can see that the law no longer makes sense. Privity-of-contract and separate but equal had become all but meaningless by the time of *MacPherson* and *Brown* respectively. The lines of precedent in each of these cases actually speak to another understanding of the law and we can meaningfully say that that understanding was implicitly recognised in the law. This is not what happens in arguments by analogy – we are not asked to question whether the ruling actually makes sense of the law on the books. But in both types of recognised in law the decisions that have come before meaningfully inform the decisions of the instant case.

In my analysis of these ways in which a norm can be recognised in law – implicitly or analogically - I have treated them as though they are separate, but in reality this is likely an artificial separation. We can easily imagine each type being combined to motivate a certain decision. For example, we might argue that this line of precedent makes more sense using rule X (as Cardozo did). And add strength to this claim by pointing to the use of rule X by a persuasive authority. As well, both are types of coherentists reasoning (and this likely explains why they seem to blur together at times). Remember coherentist reasoning asks “does this make sense?”. In the second type of recognised in law, the implicit type, we ask questions about what rule or understanding of the law makes best sense of the way the cases were decided (even if that understanding differs from the law

on the books). Arguments by analogy suggest that given the important similarities between the two cases that it makes sense to decide them the same and maintain the coherence of the legal system. They are both coherentist types of reasoning, but they use different markers for testing coherence – arguments by analogy tend to use the laws on the books, whether it be laws on the books in other types or sub-types of laws or other country’s laws, arguments about what norms are implicitly recognised use actual judicial decisions with less regard for the law the judges claim to be using.

III An Example: The Canadian Same-Sex Marriage Reference Case

At this point I think it would be useful to look to a particularly pellucid example of the reasoning I’ve tried to describe. The case is the Canadian *Re Same-Sex Marriage* (2004)¹⁹⁷ case. It is particularly useful because it deals with the issue of whether or not the opposite-sex requirement of civil marriage was inconsistent with the equality clause of S. 15 of the *Canadian Charter*. Questions about what equality requires and what it prohibits require reasoning about moral issues. However, the reference case is best understood if we see the judges as following the development of the law as it had come before, not as judges using their own first order preferences to assert what equality requires. That is, the judges followed the incremental exploration of what equality means in Canadian law when examining the rights of same-sex couples. What is more, I think upon analysis of the cases leading up to the reference case, we will see that the norm(s) that provided the basis for the decision in the same-sex reference case had been recognised by the law and were revealed in previous decisions. As Peter Hogg claims, in an article in which he looks at the Canadian legal history of the expansion of the legal

¹⁹⁷ [2004] 3 SC.R. 698

definition of marriage to include same-sex couples, “ ... developments in Canadian law ... made this decision [the reference case] and the legislative step that followed it, more or less *inevitable*”.¹⁹⁸ The same-sex marriage reference case was the next appropriate step given the laws trajectory. In this same article, Hogg suggests that two related but distinct aspects of Canadian law, particularly concerning S.15 of the *Charter*, also developed in such a way as to make the decision in the reference case “inevitable”.¹⁹⁹ Both developments have to do with the list of grounds upon which one cannot be discriminated against. It was evident, Hogg claims, that the enacted list of unconstitutional grounds for discrimination was not exhaustive. The use of the phrase “in particular” in describing the list made this clear. The grounds listed are particular grounds upon which one cannot be discriminated against, but the law did not list all the ways one could not be. What was unclear, however, was how the list could be added to or what other grounds could be derived from the list. It is in this regard that two important developments happened in Canadian law. According to Hogg, the *Andrews*²⁰⁰ case established that the grounds had to be *analogous* in order to be added to the list while the *Law* case²⁰¹ established that the relevant way in which the grounds needed to be analogous was that differentiation based on them had in some way to impair human dignity. Subsequently, many Canadian courts ruled that sexual orientation was such an analogous ground of discrimination. Following

¹⁹⁸ Peter Hogg “Canada: The Constitution and Same-Sex marriage” (2006) 4 *International Journal of Constitutional Law* 3, 6.

¹⁹⁹ The equality guarantee is contained in Section 15 of the *Charter* and reads as follows: “every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in, particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical ability.”

²⁰⁰ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143

Hogg's account of some of these cases I summarize their facts below. I hope doing so will be illustrative of how norms can be recognised and can justifiably be relied on in charter cases.

In the *Egan*²⁰² case the Supreme Court of Canada ruled that public pension legislation violated S. 15, the equality clause, of the *Charter* because they only made spousal benefits available to spouses of the opposite sex, but not to a partner of the same sex. In *Vriend*,²⁰³ the SCC unanimously ruled that Alberta's human rights code offended S.15 because it did not include sexual orientation as a ground for discrimination. In *M. v. H*²⁰⁴ the SCC held the Ontario family law legislation that excluded persons in same-sex relationships from spousal support obligation was discriminatory on the basis of sexual orientation and therefore contravened S.15. What is more, in this case the relevant family law legislation covered common law marriages but excluded same-sex relationships. The court found that the impairment of dignity was established because the law implied that same-sex relationships were less valuable than opposite-sex relationships. Finally, in the *Little Sisters*²⁰⁵ case, the Court found that a practice by customs officials violated S.15. The officials had been interfering with and delaying the importations of books and magazine by "Little Sisters", a bookstore in Vancouver, Canada that catered to gay and lesbian communities. The court found that the definition of "obscenity" in customs legislation was applicable to both homosexual and heterosexual material without

²⁰² *Egan v. Canada*, [1995] 2 S.C.R. 513

²⁰³ *Vriend v. Alberta*, [1998] 1 S.C.R. 493

²⁰⁴ [1999] 2 S.C.R. 3

²⁰⁵ *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120

differentiation. Thus, homosexual material was not, by its nature alone, more obscene than heterosexual material. Time and time again Canadian courts found that sexual orientation was an illegitimate legal ground for discrimination and ruled over and over again that attempts to discriminate on that basis were violations of the equality clause of the *Charter*.

Given these and other cases that continually reaffirmed the rights of gays and lesbians, same-sex couples began challenging the traditional legal definition of marriage that excluded them. In three provinces – British Columbia, Ontario, and Quebec – the respective courts held that the exclusion of gay couples from legal marriage was in fact in violation of S.15. The decisions in these provinces meant that same-sex couples could now marry legally and freely in these provinces. The Federal Government did not appeal any of the three provincial court decisions; instead it proposed a new law that would provide a national statutory definition of marriage as, “ the lawful union of two persons to the exclusions of all others” – removing the opposite-sex requirement from the legal definition. The Federal Government went on to request the opinion of the Supreme Court of Canada on the constitutionality of various aspects of the proposed legislation – *the Civil Marriage Act*. The Federal Government posed four questions to The Court. In their response to three of the four questions the Court answered in favour of the constitutionality of the *Civil Marriages Act*. The Court, however, refused to answer the fourth question, which directly pertained to the issue of whether or not the opposite sex-requirement of the traditional legal definition of marriage violated the *Charter*. It would be a mistake to assume from the Courts refusal to answer the fourth question that they

thought that the opposite-sex requirement did not violate the *Charter*. Abstaining is importantly different from answering with “no – the opposite-sex requirement does not violate the *Charter*”. What’s more, Peter Hogg’s interpretation of why the court refused to answer this question seems like a reasonable one. He suggests that that even though it was clear that the opposite-sex requirement did violate the *Charter*, they did not want the project of the legalization and the acceptance of same-sex marriage by the Canadian people to be hindered or seen as tainted at all because it might be seen as pushed by judges. As Hogg says, “ If Parliament acted, it could not be claimed that such a controversial project was entirely driven by judges”.²⁰⁶ In case, this legal and legislative history along with the *Canadian Charter’s* commitment to equality, demonstrates, that the law was developing towards legalizing same-sex marriage – the Same-Sex Reference Case and the *Civil Marriages Act* simply made this explicit.

The brief and abridged analysis of the same-sex reference case demonstrates a lot of what I have in mind when I talk about what it means for a norm to be recognised in law. At the time the law on the books, that is, the legal definition of marriage included an opposite sex requirement, but by drawing on past cases and provincial statutes to show that such a definition no longer matched with what was implicitly recognised in law. That coupled with arguments by analogy that demonstrated that sexual orientation was not a legitimate ground for discrimination showed that the definition of marriage prescribed by the *Civil Marriages Act*, a definition that did not include an opposite sex requirement, was more in

²⁰⁶ Hogg, “Canada: The Constitution and Same-Sex Marriage”, 720.

keeping with Canadian law than a marriage definition that did. For these reasons it's more than fair to say that the same-sex marriage decision was recognised (both analogically and implicitly) in the law.

Understanding what it means for norms to be recognized in law in the way I have suggested places this theory of charter interpretation in substantial agreement with standard accounts of methods of judicial reasoning such as arguments from precedent, distinguishing, and arguments from analogy. All these ways of reasoning are used in ordinary legal cases as well as in charter cases. As I suggested earlier in the chapter, I think that the fact that reasoning about charter cases turns out to be very similar to general legal reasoning is an asset to this theory of charter interpretation. In deciding charter cases judges are not thrown back on their own subjective moral beliefs: they can look to the law and the norms recognised in it for a legitimate basis for deciding the meaning of moral terms in the cases before them and thus for the laws development.

IV Conclusion

In this chapter I have suggested that there are two main ways that a norm may be recognised in law – analogically recognised and implicitly recognised. Both ways are meaningfully informed by the law that has come before; they allow for constrained and incremental development of the law; and they allow for vague moral terms like equality to be continually fleshed out, examined, and for the precisification of those terms. As this happens what, for example, a constitutional commitment legally requires will become

clearer and will in all likelihood evolve as it did in *Brown* and in the *Same-Sex Marriage Reference Case*.

Chapter 4: Public Reason and Judges

I Introduction

In the previous chapters I have set out to demonstrate that, when judges engage in judicial review in charter cases, there is a substantial endowment of legal materials – including precedents and legislation, which they can rely on when deciding cases. In fact, I urge that we abandon the notion that cases of judicial review are somehow profoundly unique. Instead I contend that what judges do in these cases is not so different from what they do in what we would think of as everyday, run-of-the-mill cases. Just as in ordinary cases, judges of charter cases engage in judicial reasoning and by doing so often develop the law in a way that is faithful to the settled legal materials. The legal materials that judges rely on inform the community's constitutional morality (CCM), which is in large part informed up by legislation, past judicial decisions, and other standard legal materials. Given CCM's roots in the community's commitments, most obviously in its connection to legislation passed by the community's elected officials, judges who decide charter cases according to it do not thwart democracy. I contend that charters and the judicial review of legislation are democratic because they attempt to hold communities to their own most deeply held moral beliefs. The past few chapters have articulated the arguments in support of this claim and in doing so it is my hope that they have gone a long way toward answering the democratic challenge. There may, however, be charter cases that lack such a robust legal history of related cases on which judges can draw and such a clear connection to CCM. Or the standard legal materials may not provide grounds for deciding between two or more possible answers. That is, interpretation of formal

legal materials (those described in Chapter 3) of CCM may not provide a definitive answer for a judge. David Strauss, in his book, *The Living Constitution*, contrasts the decision in *Roe v. Wade* with the decision in *Brown v. The Board of Education*.²⁰⁷ Strauss details the legal evolution that led up to the *Brown* decision to demonstrate that the case was not “ground-breaking”. He argues that *Roe v. Wade*, on the other hand, does not have the same continuous legal evolution behind it, and is therefore an example of a case that, given its lack of formal legal materials on which the judges could draw in justifying their decision, was a ground-breaking decision. That is, there was little history of development in the law that culminated in the decision. This, according to Strauss, is why the outcome of the case is not as settled as *Brown*.²⁰⁸ That is, the ruling in *Brown* is not considered controversial by most; whereas there is still considerable controversy and debate surrounding the *Roe* decision and surrounding abortion access throughout the United States.²⁰⁹ Given the existence of cases like *Roe*, some may argue that, even if they could accept that judges who rule according to the requirements of CCM in cases of judicial review do not thwart democracy, there will still be cases where CCM does not provide an answer. In these cases, they will further contend, judges have no choice but to make their decision about the case based on their own first order moral principles, principles that need have no meaningful connection to the community in the way CCM

²⁰⁷ Strauss, *The Living Constitution*.

²⁰⁸ *Ibid*, especially Chapter 5.

²⁰⁹ Some of this controversy surrounding the *Roe* decision has to do, I think, with the fact that the importance of a woman’s right to access abortion services is still a deeply controversial issue in the United States (in other words it is not only because the decision was legally “ground-breaking”). The explicit racism inherent in the “separate but equal” of the law previous to *Brown*, on the other hand, is largely recognised as morally repugnant. Thus, I suspect that even if *Brown* was a ground-breaking legal decision it would still not be as controversial a decision as *Roe* is now.

does. The existence of such cases rearms the democratic challenge; judges, in at least some cases it seems, will decide based on their own opinions on the matter at hand and in doing so may thwart democracy.

This chapter sets out to answer this new version of the democratic challenge. In responding to it I argue that judges should use public reason to decide cases in which the standard legal materials seem to be unable to provide a definitive answer. Public reason may seem like an odd choice of ally in my quest to defend judicial review. Certainly, public reason is controversial and in no way universally accepted. But I think we have good reason to support the claim that public reasons are the right sorts of reasons for judges to use in deciding charter cases. Presenting arguments in favour of this claim is the task of this chapter.

The chapter proceeds in the following way: first I define public reason, staying faithful to Rawls' conception and in doing so provide some grounds for arguing that public reasons are appropriate reasons for judges. Secondly, I present what I take to be the most powerful objection to public reason, an objection that could jeopardise public reason's role in my project. This is a worry about public reason's incompleteness. Finally, I look to some of the less pressing worries about public reason and set out to provide a brief response to them. In doing so I hope to show that we have good reason to think that these worries too can be met even though I cannot argue the case fully here. It should be noted that I am only advocating that judges use public reason when deciding cases, not that

legislators or citizens ought to use only public reason when conducting themselves in the public forum.²¹⁰

II Public Reason

Public reason at its most basic rests on the idea that in a liberal society all laws that govern and coerce people must be based on arguments and reasons that no reasonable member of the society could reject. Note, the claim is not that all reasonable members of the society must accept or approve of all the laws but rather that they would not reject the reasons the laws are based on. Rawls characterizes a reasonable person as one who is willing to cooperate on fair terms, who recognizes and accepts that others have different but reasonable conceptions of the good life, and who has a sense of justice. A reasonable person has to be sincerely open to listening and being responsive to the reasons of others.²¹¹ Public reason involves a set of shared considerations which count as fair.²¹² Public reasons are reasons that refer only to values that are publically accessible, that is one does not have to subscribe to a particular religion or philosophy to understand or endorse them. Further, public reasons are typically the kind of reasons found in constitutions or charters. Public reason is deliberately separate from the specific dogmas of any religion or philosophical ideas of what the good life is. The theory of public reason has its roots in the writing of Hobbes, Kant and Rousseau and in the 20th century became increasingly influential in moral and political philosophy through the work of John Rawls.

²¹⁰ I do this not because I think the use of public reason by individuals or other government officials cannot be endorsed, but because meaningfully contributing to that debate (either pro or con) is beyond the scope of this paper and doing so would take us too far off track.

²¹¹ Samuel Freedman, “Public Reason and Political Justifications” (2004) 72 Fordham Law Review 2021.

²¹² Ibid.

This chapter follows public reason as developed by Rawls in works such as *Political Liberalism*²¹³ and “The Idea of Public Reason Revisited.”²¹⁴

Public reason places a limit on the sorts of reasons that can be used or offered in support of certain laws. For Rawls public reason is in some ways a result or consequence of reasonable pluralism. Each reasonable citizen has her own view about religion and life, right and wrong, good and bad. That is, each citizen has her own comprehensive doctrine.²¹⁵ Reasonable pluralism in a society means that there will be a plurality of conflicting but reasonable comprehensive doctrines or ideas about what the good life consists in. A comprehensive doctrine is reasonable when its pursuit does not infringe on the rights of others, particularly their right to pursue their own comprehensive doctrine. Given reasonable pluralism, members of a liberal society realize that they will likely not be able to reach agreement on certain questions because of the irreconcilable differences that stem from their distinct comprehensive doctrines. But a liberal society still must make decisions and enact laws that will govern how all will live. The members cannot simply agree to disagree. In order to respect the equality of all persons and all persons’ reasonable comprehensive doctrines, a liberal society would limit the types of reasons citizens may reasonably offer one another when advocating for certain laws.²¹⁶ They must offer reasons that are separable from their comprehensive doctrines. This will mean, for

²¹³ Rawls, *Political Liberalism*.

²¹⁴ Rawls, “The Idea of Public Reason Revisited”.

²¹⁵ fl. John Rawls

²¹⁶ Rawls, “The Idea of Public Reason Revisited”.

example, abandoning arguments for the legal prohibition of acts that rest on claims that the act is sinful and prohibited by a particular religion.

Public reason is about providing certain kinds of reasons in the public forum when considering certain political issues, what Rawls called constitutional issues.²¹⁷ Rawls doesn't explicitly define what counts as a constitutional issue and what does not, but he does give us examples to help illustrate the distinction he has in mind. Questions about who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property are as Rawls says, the "special subject of public reason".²¹⁸ On the other hand, questions about taxation and property, about environment and pollution, national parks and the preservation of wilderness and species protection, and government support for culture and the arts are not constitutional issues.²¹⁹ In most Western liberal democracies there is wide and deep disagreement about what the good life consists in and thus how constitutional issues should be decided. That is, different people have different comprehensive doctrines that form around religion, philosophy, morality, and economics. In some cases these differences appear to be irreconcilable, and when the disagreement is deep enough people seem unable to reach agreement based on their comprehensive doctrines. For example, those who oppose abortion based on religious doctrine and teachings seem to come to an intractable stalemate with atheists who support abortion access. The religious pro-lifers believe that the soul enters the body at the moment of conception and thus that the foetus is a person

²¹⁷ There is more to come on what exactly the certain public issues are.

²¹⁸ Rawls, *Political Liberalism*, 214.

²¹⁹ *Ibid* 214.

of full moral standing from that moment. The atheist pro-choicers, on the other hand, would deny the existence of the soul and so deny that that could possibly be what gives a foetus moral status (if it has any). With one side asserting the existence of the soul and a God and the other side denying the existence of both its hard to see what progress towards a resolution could ever be made. But even in these cases of profound disagreement decisions about fundamental political morality have to be made – for example, about how the law will, if it will at all, regulate abortion. In such cases, Rawls argues that people need to move away from their own conceptions of the good and the good life and engage with and use public reasons.²²⁰ Public reasons are those that people cannot only be expected to understand, but that all people can also reasonably be expected to accept. Public reasons make reference to public values and public standards rather than idiosyncratic or religious beliefs. In a representative democracy in which citizens are asked to vote for their representatives, and sometimes, although less often, to vote on particular laws in the case of referendums, Rawls calls on citizens to vote as though they were ideal legislators.²²¹ For Rawls an ideal legislator is not a Platonic guardian but rather someone who uses public reason to guide their voting for both officials and for legislation in the case of referendums: someone who asks herself which potential officials seem to best represent the ideal of public reason and which laws seem best supported by public reason. Rawls writes, “thus citizens fulfil their duty of civility and support the idea of public reason by doing what they can to hold government officials to it [public reason]”.²²²

²²⁰ Rawls, “The Idea of Public Reason Revisited”, 766.

²²¹ Ibid 769.

²²² Ibid 769.

It would be a mistake to think of someone who engages in public reason as someone who simply provides or uses public reasons. It is in some ways more accurate to see someone who engages in public reason as adopting a certain perspective: a perspective that takes seriously that her fellow citizens are her equals and that she owes them respect and consideration. Rawls writes “ public reason is characteristic of a democratic people: it is the reason of its citizens as such, of those sharing the status of equal citizenship.”²²³ The adoption of the perspective of public reason requires that citizens limit the type of reasons they provide – and this is likely why it is easy to fixate on the reasons of public reason. But we should not neglect its perspectival aspect. Samuel Freedman emphasizes this important feature of public reason. Commenting on Rawls he writes, “ From this point of view one is to focus on the reasons and interests of free and equal democratic citizens and what they require in order to function in their role as citizens and to freely pursue a conception of their good.”²²⁴ The perspective calls on citizens to acknowledge that there are different reasonable conceptions of the good life and that we cannot force a specific conception on citizens. Thus, when I engage in discussion of constitutional essentials in the public forum I must not provide sectarian reasons in favour of my position for doing so would be an attempt to force my comprehensive doctrine onto others. Furthermore, I understand that I may not agree with the outcome of the debate but if everyone has done their best to engage in public reason then the answer that’s chosen will be a reasonable one. Thus, advocating throughout this chapter that judges use public reason, I also mean that they should adopt this perspective throughout their decision-making. It is

²²³ Rawls, *Political Liberalism*, *supra* note 8 at 213

²²⁴ Freedman, “Public Reason and Political Justification”, 2029-2030.

immediately apparent that recognising the perspectival aspect of public reason responds in part to the democratic worry. A judge who in good faith does her best to engage with public reason and reason from its point of view does not deliberately decide charter cases based on her own first order moral preferences. She decides based on reasons that all citizens can accept.

The point of view of public reason, while it does call on agents to remove themselves from their own perspective, is not the view from nowhere. It is a view rooted in the community – its content is informed by that community’s constitution, legislation, and precedent.²²⁵ Rawls says that the content of public reason is formulated by a political conception of justice.²²⁶ A political conception of justice does three things according to Rawls “ first is specifies certain basic rights, liberties, and opportunities [...]; second, it assigns a special priority to these rights, liberties, and opportunities, especially with respect to claims of the general good and of perfectionist values; and third, it affirms measures assuring all citizens adequate all-purpose means to make effective use of their basic liberties and opportunities.”²²⁷ There is more than one reasonable political conception of justice. Rawls himself favours justice as fairness, but acknowledges that it is but one example of a liberal political conception.²²⁸ Public reason, “specifies at the deepest level the basic moral and political values that are to determine a constitutional

²²⁵ This is why public reason may provide different answers in different communities.

²²⁶ Rawls, *Political Liberalism*, 223.

²²⁷ Ibid 223.

²²⁸ Ibid 224.

democratic government's relation to its citizens and their relation to one another."²²⁹ A constitution, legislation, precedent et cetera are reflections of a nation's own political conception of justice in which they weigh and balance political values. Rawls notes that examples of political values include those listed in the preamble to the United States Constitution: a more perfect union, justice, domestic tranquillity, the common defense, the general welfare, and the blessings of liberty for Americans and American posterity.²³⁰ Democratic societies may favour different political values or weigh values different – that is, they will have different political conceptions of justice.²³¹ Particular statutes and laws are meant to be enacted in accordance with public reason and in service of the nation's political conception of justice. What's more public reason shapes and informs a nation's fundamental institutions.²³² Judges by virtue of their work are especially familiar with these sources and are thus specially equipped to take up the perspective of public reason.

III Why Public Reason

In the previous chapter we looked at what it means for norms to be recognised in law and saw that the most basic norms and commitments of a legal system are recognised in a nation's constitution, most notably in its bill of rights or charter. These norms are not necessarily found explicitly in particular laws but in what Rawls calls the higher law – the constitution and the ideals embodied in it such as justice, liberty, and equality. The meaning of these ideals is not spelled out completely, but their direction and importance are articulated in the constitution and/or charter. These ideals are to be appealed to in the public, political sphere and in this way they are public reasons. They are ideals that all

²²⁹ Rawls, "The Idea of Public Reason Revisited", 766.

²³⁰ Ibid 776.

²³¹ Ibid 766.

²³² Ibid 771.

citizens, whatever their comprehensive moral or religious doctrines, can be expected to accept as reasonable and just. It is especially important that judges, in particular Supreme Court judges, appeal to such public and universally accepted values when giving their judgements.²³³ If judges, following public reason, appeal only to values enshrined in the public commitments of the constitution, values to which all citizens are expected to subscribe, then they make good faith attempts not to judge according to their private values or doctrines.

We will see that Rawls' characterization of public reason closely aligns with the description of a community's constitutional morality as discussed throughout this work. There is a deep similarity between public reason, as articulated by Rawls, and a community's constitutional morality. The similarities are most explicit when Rawls describes why the Supreme Court is the exemplar of public reason. Consider Rawls' claim:

A democratic constitution is a principled expression in higher law of the political ideal of a people to govern itself in a certain way. The aim of public reason is to articulate this ideal. Some of the ends of a political society may be stated in a preamble – to establish justice and to promote the general welfare – and certain constraints are found in a bill of rights or implied in a framework of government – due process of law and equal protection of the laws. Together they fall under political values and its public reason.²³⁴

He goes on,

By applying public reason the court is to prevent that [higher] law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way. If the court

²³³ At least by reasonable liberal persons.

²³⁴ Rawls, *Political Liberalism*, 232.

assumes this role and effectively carries it out, it is incorrect to say that is straightforwardly antidemocratic. It is indeed antimajoritarian with respect to ordinary law, for a court with judicial review can hold such law unconstitutional. Nevertheless, the higher authority of the people supports that. The court is not antimajoritarian with respect to higher law when its decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations.²³⁵

The ideas from these passages of Rawls should sound familiar. Drawing on what Waluchow has said, I have argued throughout this project that judges engaging in judicial review ought to rule according to a community's constitutional morality. That is, they ought to rule according to community commitments that have found recognition within the law through legislation, past judicial decisions, and/or constitutions or charters and that these commitments represent the community's authentic moral commitments rather than mere moral opinions. Waluchow writes, "why should judges deciding moral questions under a system of judicial review be required, for reasons of democracy, fairness and the like, to respect the moral opinions on the matter – as opposed to the community's *true* moral commitments...? Why should they bend to the community's *inauthentic wishes*, and not its *authentic ones*?"²³⁶ The authentic commitments of a community are those that are in line with the nation's constitution and bill of rights and thus are similar to Rawls' higher law. While Waluchow has never made explicit the congruence of public reason and a community's constitutional morality there is

²³⁵ Ibid 233-234.

²³⁶ Waluchow, "Constitutional Morality and Bills of Rights" 225-226.

significant overlap which makes it reasonable to see public reason as a continuation of a community's constitutional morality.²³⁷

In the quoted passages from Rawls, he highlights the difference between the potential antimajoritarian nature of judicial review with respect to a particular law versus the potential antimajoritarian nature of judicial review with respect to higher law (Rawls argues that judicial review is not ultimately antimajoritarian when done in keeping with the higher law).²³⁸ In Chapter 2 I argued for a similar shift in perspective. I contended that we ought to think about the agency of nations, not just the agency of individuals, and about what nations are committed to. I argued that a charter reminds the nation of what a nation really is as a moral agent and that it reminds the citizens of who they are and of what they owe their fellow citizens. If we move away from focussing on individual laws and individual citizens and begin to focus on citizens as citizens of a nation, and on the agency of nations and the legal commitments of nations, we are provided with a new perspective on the nature of judicial review: a new perspective with which to judge whether or not judicial review is democratic. This new perspective supports the democratic nature of judicial review as a means of keeping a nation true to its authentic commitments. Similarly, Rawls argues that when judges decide based on public reason –

²³⁷ Although he does draw on public reason and gesture at their similarity. See Waluchow, "On The Neutrality of Charter Reasoning" especially *supra* note 47 at 222. In this footnote he discusses how arguments and responses to the potential incompleteness of public reason equally apply to the case of a community's constitutional morality potential incompleteness.

²³⁸ I say potential because it may seem as if it could be antimajoritarian, even though Rawls says its not. Rawls argues it is in line with higher law which reflects the majority's true belief just as CCM reflects community's authentic commitments.

that is based on reasons found in higher law, in charters and constitutions – they do not thwart democracy.

In the previous chapters I have argued that we need to think of nations as moral agents who can act and whose actions can be more or less consistent with their commitments. These commitments are expressed through the nation's constitution, although not exclusively. The fundamentals of these commitments are often expressed in a charter or bill of rights. Legislation, judicial decisions, et cetera are attempts (or should be) by the legislature and judiciary to fulfil these commitments and act in accordance with them. Along with the constitution and bill of rights, the acts of the legislature and the judiciary together meaningfully inform a community's constitutional morality. When judges rule according to the commitments that make up a community's constitutional morality, they do not thwart democracy. They are defending the values that citizens are committed to. Part of this chapter will argue that public reason is part of a community's constitutional morality.

One important feature of public reasons is that they aim to remain neutral among different reasonable conceptions of the good life. In this way they pay special respect to the understanding that all persons are free and equal under the law because they do not prefer or grant special privilege to one particular conception of the good life. That means they are reasons devoid of the prejudices of racism, sexism, homophobia et cetera. They are necessarily uninfluenced by these prejudices because all these prejudices are

inconsistent with accepting all persons as free and equal.²³⁹ All the liberal democracies with which we are concerned with have constitutions which embrace this political ideal. In Waluchow's words, "contemporary constitutional democracies [...] [that] thoroughly reject any opinion that oppresses a minority group, harbors the prejudices of patriarchy, and so on".²⁴⁰ Public reasons are the right sort of reasons for judges to rely on because they cohere with liberal democratic political and legal systems.

In Chapter 3 I argued that relying on norms that cohere with a legal system provides judges with proper reasons to base their decisions on. Public reasons are similar in that they also cohere with the constitution and the laws of a nation. Public reasons are those that treat all persons and reasonable ways of life as equal; they are not bound to any particular comprehensive doctrine – they are not biased in favour of the religious or the atheist, nor the consequentialist or the deontologist. In this way public reasons cohere with the legal system of the western liberal democracies with which we are here concerned. This makes public reasons appropriate reasons for judges to rely on in charter cases. And because they cohere with a country's constitution and laws these reasons are part of a community's constitutional morality. Judges must consider how the established legal sources discussed in Chapter 3 control a given matter; and then they begin to fill the remaining spaces with consideration of public reason. These considerations are informed

²³⁹ The reasons, strictly speaking, are uninfluenced by these prejudices. This of course, is not to suggest that the people engaging in public reason would be entirely uninfluenced by these prejudices, despite their best efforts to avoid them. Try as we might our prejudices might still be affecting how we think and decide, even if we're trying to be impartial.

²⁴⁰ Waluchow, "Constitutional Morality and Bills of Rights", 89.

and constrained by the sources of law. Public reason is exercised in the spaces which are left underdetermined by arguments from the text of the law, precedent, et cetera. In Chapter 3 I spoke of a spectrum of broadly legal activity. Broad appeals to public reason falls on the far end of this spectrum.

It is worth pausing here and addressing a potential concern. It may sound as if I am treating public reason as separate from the legal and constitutional materials normally drawn on to decide cases. And that seems to run counter to my earlier suggestion that public reason includes these materials or more specifically that it includes the commitments they represent. I endorse the latter understanding of public reason. Let me be clear about what I mean when I say that they “begin to fill the remaining spaces”. Legislation and other legal materials are ideally specifications of public reason. For example, legislation regulating hate speech likely gives important clues as to how the given polity weighs political values of liberty against concerns surrounding harm. But there may be times that these specifications leave gaps unfilled and it is in these cases that I suggest that we use broad appeals to public reasons that are more basic commitments to fill these gaps. In a sense it is to go back to the drawing board and rethink what the commitments require of the polity. Legislation and other legal materials help give content to public reason in so far as they specify the nation’s political conception of justice.²⁴¹ As well, we must remember that public reason is also a point of view and that even when the traditional materials seem to leave gaps that judges should

²⁴¹ Again, this should sound very familiar to CCM. A bill of rights makes broad and somewhat vague commitments to equality and legislation begins and attempts to fill in what that commitment means.

continue to embody the perspective of public reason in the necessary task of filling whatever gaps remain.

The democratic worry questions the types of reasons judges will rely on in cases of judicial review. Those who espouse it seem most concerned that judges will use reasons that are idiosyncratic to their belief systems: reasons derived from, for example, religious doctrine, atheistic beliefs, consequentialist arguments et cetera. In Chapter 3 I argued that there is a spectrum of available legal resources for judges to rely on in charter cases such that we can properly understand the decision as legally constrained. Decisions that come from broad appeals to public reason are not as easily categorized as those that are meaningfully informed by the law. They are, I contend throughout this chapter, still appropriate reasons for judges to rely on. By definition public reasons are not idiosyncratic reasons. Thus, a judge who ruled according to public reasons could not be found guilty of deliberately inserting their own first order moral opinions into the law. While not arguing entirely from settled law, the judge would be making a good faith attempt to argue from values like justice and equality in a way consistent with the constitution and with public norms of argument, evidence, and rules of inference.²⁴² Not all citizens will agree with her decision, but all should accept the legitimacy of her reasons and argumentation. And thus the democratic challenge is met. Public reason as much as a community's constitutional morality is embodied in a nation's constitution and bill of rights and is therefore acceptable to the nation's citizens.

²⁴² Freedman, "Public Reason and Political Justification".

It should also be emphasized that public reason is the correct perspective and public reasons the right sort of reasons for judges because judicial decisions made from this perspective using these reasons will be reasonable ones. They are decisions that are politically justified.²⁴³ Rawls writes that, “political justification is justification to persons in their capacity as reasonable democratic citizens; it is justification in terms of public reasons and hence relies on political values and their ordering in terms specified by a freestanding political conception of justice.”²⁴⁴ Rawls contrasts political justification with full justification that takes into account all moral and other values, as they might be ordered by a reasonable comprehensive doctrine.²⁴⁵ Thus, a decision that is politically justified is, “one that is framed in terms of political values of public reasons and is an argument to a conclusion which reasonable persons in their capacity as democratic citizens can reasonably expect other citizens in the same capacity reasonably to accept.”²⁴⁶ Thus, when judges rule faithfully according to public reason their decisions will not be rooted in sectarian beliefs, but in publically accepted reasons that are those of all citizens.

IV Public Reason is Incomplete?

There is a vast amount of writing on public reason: some devoted to defending it and some to refuting it. As well, there are arguments internal to public reason that debate its

²⁴³ I use publically and politically justified interchangeably. I mean them both to capture the idea of something, a decision or law for example, that is justified according to public reason.

²⁴⁴ Rawls, *Political Liberalism*, 386.

²⁴⁵ *Ibid* 386.

²⁴⁶ Freedman, “Public Reason and Political Justification”, 2054.

finer points (for example, which agents should use public reason, what should be the limits to the content of public reason).²⁴⁷ Needless to say I cannot defend public reason from all its objectors or pick a side in all the internal debates, for that would surely be a project unto itself. What's more, the debates internal to public reason are for the most part irrelevant to the arguments I present here. Rather, what I aim to do in the coming pages is to defend public reason from the most serious objection to it, an objection which would affect its place in my defence of judicial review. This most serious objection is the worry about public reason being incomplete.

In the final section I discuss some other standard objections to public reason and provide some preliminary responses. These responses will be limited, but I hope fruitful, and they will suggest plausible ways forward in defending public reason, thus giving us good reasons to endorse it.

Throughout this project I have worked to demonstrate that there are significant resources for judges to rely on in charter cases, such that we can meaningfully understand judicial decisions in those cases as informed and constrained by the law. What's more I have

²⁴⁷ See, for example, Steven Wall, "Is Public Justification Self-Defeating?" (2002) 39 *American Philosophical Quarterly* 385; Michael Sandel, *Liberalism and the Limits of Justice: Second Edition* (Cambridge University Press 1998); Kevin Greenawalt, *Religious Convictions and Political Choice* (Oxford University Press 1988); Kevin Greenawalt, "On Public Reason." (1994) 3 *Chicago-Kent Law Review* 69; Kevin Greenawalt, *Private Consciences and Public Reasons* (Oxford University Press 1995); Charles Larmore, "The Moral Basis of Political Liberalism," (1999) 12 *The Journal of Philosophy* 96.

argued that this fact goes some way in answering the worry that judges will just decide charter cases based on their own first order moral preferences. There is, however, a worry that even these resources will run out and that when they do judges will have no choice but to rely on their first order moral preferences. In response to this worry I have marshalled public reason. I have argued that judges ought to rely on public reasons to fill these gaps and to come to a decision. The decision they come to using public reason will be one that is publically justified according to the community's beliefs – not one based on the judges' sectarian beliefs. If, however, it turns out that public reason is incomplete, that it is unable to provide an answer, then another gap appears and leaves room again for judges to decide charter cases based on their first order moral opinions. The re-emergence of this gap is why I take it that the incompleteness worry about public reason is the most serious for our purposes.

The incompleteness worry about public reason can mean two things. As was shown by Gerald Gaus in *Justificatory Liberalism*²⁴⁸, it can mean either that public reason is inconclusive or that public reason is indeterminate. The next few sections explicate the differences between these two possibilities.

A Incomplete as Inconclusive

Public reason may be inconclusive if citizens or, in our case, judges support competing decisions on the same issue, decisions that are all based on public justifications. That is to say that public reason is incomplete because it fails to generate convergence among

²⁴⁸ Gerald Gaus, *Justificatory Liberalism* (Oxford University Press 1996).

reasonable judges (or citizens or legislators) on a single outcome.²⁴⁹ In the case of judges this would happen when judges hearing a trial each justifies their decision on the basis of public reason, but they reach different decisions and disagree amongst themselves about which of their positions is the most in accord with public reason. Each judge believes her position is the conclusive answer as determined by public reason, but is unable to persuade the other judges of her opinion or conclusively demonstrate that she is right. In other words, each judge believes that public reason provides a conclusive answer; they just disagree about what that answer is. When we say that public reason is inconclusive we mean that no judge can show another judge's position to be unreasonable to that other judge's satisfaction.²⁵⁰ The most any judge can claim is that she sincerely believes her position is the most publically justified, but she must also concede that hers is not the only reasonable position because she cannot demonstrate that the others are unreasonable.²⁵¹

B Incomplete as Indeterminate

Public reason may also be incomplete if its content provides insufficient reasons for choosing among a plurality of reasonable options. In this way public reason may be indeterminate. To clearly see the difference between inconclusiveness and indeterminacy consider what Micah Schwartzman says about both the interpersonal and intrapersonal dimensions of public reason's potential incompleteness.²⁵² When public reason is inconclusive it is because at least two judges support competing decisions and they fail to

²⁴⁹ Micah Schwartzman, "The Completeness of Public Reason" (2004) 3 *Politics Philosophy and Economics* 2, 194.

²⁵⁰ There is, of course, nothing to rule out the possibility of a reasonable person coming to an unreasonable decision.

²⁵¹ *Ibid* 194-195.

²⁵² *Ibid* 198.

agree about which is the most publically justified – this is interpersonal. On the other hand, cases of indeterminacy are intrapersonal; the reasonable judge cannot herself decide which position is the most publically justified.

Incompleteness of either kind can result, for example, from disagreements about how to balance and weigh public reasons. Consider cases that require the balancing of freedom of expression against equal respect for all persons; for example, cases involving hate speech laws. Those against the legislation of hate speech laws often argue that freedom of expression is one of the most important liberties and its curtailment should be done with great caution – even if people use free speech to say reprehensible things. On the other hand, those in favour of hate speech laws argue that they protect vulnerable groups from meaningful harm. When one side cannot show conclusively that the other side is unreasonable, disagreement remains and public reason is inconclusive. When one individual cannot decide using public reason which liberty should outweigh the other, public reason is seemingly indeterminate. It is worth emphasizing the difference between these two – if public reason is inconclusive it means only that it cannot be demonstrated (conclusively) to everyone's satisfaction that a certain answer is the correct one (even if there is a uniquely correct answer). On the other hand, if public reason is indeterminate that means there is no uniquely correct answer.

In the next section I will consider if either public reason's potential inconclusiveness or its potential indeterminacy raise a serious objection to my case in favour of public

reason's use by judges in charter cases. Indeterminacy is the more worrying failure of public reason. In responding to it I shall argue that in many cases public reason can provide determinative answers, and that, even when it fails to provide sufficient reasons to decide between reasonable options, judges still ought to use public reason.

C Public Reason is Inconclusive(?)

If public reason is inconclusive it means that people may not come to agree about what public reason requires. Disagreement about what the correct answer is, however, as was stressed by Dworkin, does not demonstrate there is not a correct answer.²⁵³ But a lack of agreement about what position is the most publically justified has unique consequences for public reason's use by judges in the context of judicial review. When a charter case is heard, a bench of judges will likely hear it. For example, a charter case that reaches the Supreme Court of Canada could be heard by as many as nine sitting judges. This means that there are potentially nine different positions about what answer is the most publically justified. Most cases of judicial review, however, would not in reality have such a diverse number of positions because the questions put to judges will likely be more straightforward yes or no questions: does legislation X violate the constitution? "Yes" or "No" are the positions available. Judges, nevertheless, may think that different reasons, different aspects of the constitution or its values apply most directly to the case; thus they may provide different reasons for supporting the same conclusion. Consider, by way of example, the case of decriminalizing PAS. Two judges may think that its criminalization is unconstitutional, but think this way for different reasons – one because such legislation

²⁵³ Dworkin's claim that the mere fact of disagreement in no way entails that there is no fact of the matter in such cases appeared and played a prominent role throughout his career, including some of his most recent work. See for example, *Justice For Hedgehogs* (Harvard University Press 2011), *passim*, but especially Chapter 5.

conflicts with the right to security of the person, the other because such legislation conflicts with equality clauses insofar as it unjustifiably discriminates against persons with disabilities. Disagreement among judges about what is the right decision and about what reasons best support that decision is not unusual.

Disagreements among judges, government officials, and citizens about what public reason requires are to be expected. Public justification is about offering people good reasons. They are good reasons because they are absent ignorance, irrationality, or self-interest.²⁵⁴ But even when such reasons are provided, disagreement is understandable. Reasonable disagreement can likely be best explained by the complexity of evidence, the need to balance values whose boundaries are difficult to determine, and the differences in life experiences which inform how people interpret and make judgements about the evidence and values at stake.²⁵⁵ As Schwartzman writes, “There is no reason to think that the idea of public reason will exclude controversy about fundamental moral and political issues. Its purpose is not to suppress such conflict but to permit it to take place within the bounds of a legitimate democratic process.”²⁵⁶

In the absence of consensus judges ought to advocate for their position by doing their utmost to demonstrate how it is the most justified according to publically accepted criteria. And each judge, as a reasonable judge, ought to actively listen to the other

²⁵⁴ Schwartzman, “The Completeness of Public Reason”, 199.

²⁵⁵ Ibid 199.

²⁵⁶ Ibid 201.

positions and sincerely be open to adjusting their own position. Eventually such an exchange must end and if a consensus still has not been reached the judges vote and one position will win. Ideally, the fact that more judges supported position X than supported position Y reflects the fact that position X is more publically justified than Y. It is true though that this is not necessarily the case. Regardless, the decision will be one that is publically justified and even those who dissent should be able to say that, while they disagree, they can see how a reasonable person would decide that way. The aim of public reason is not consensus around one most publically justified answer, but rather consensus that the decision is reasonable.

D Public Reason is Indeterminate (?)

This section considers the indeterminacy objection to public reason and its specific consequences for judges and judicial review. Recall that public reason is indeterminate if its resources are insufficient to provide a single answer. Thus, unlike when public reason is inconclusive, this is not a case of disagreement about what the uniquely correct answer is, but of an inability to choose among possible answers. This section considers whether public reason is in fact incomplete in this way, and, to the extent that it is, what the repercussions are for judges and judicial review.

To begin, we should acknowledge that public reason can eliminate some options from consideration. For example, it seems impossible for public reason to justify any laws that prohibit abortion when the mother's life is at stake.²⁵⁷ A sincere commitment to public

²⁵⁷ Judith Jarvis Thompson in "A Defense of Abortion" argues that public reason is unable to justify any laws that prohibit abortion in cases of rape, or incest, or when the

reason excludes reliance on reasons based in religious doctrine. Public reason is certainly able to exclude some positions, even if it cannot always choose among those positions left over. Thus, public reason is not likely to be entirely indeterminate even on the most controversial issues.

Those who argue that public reason is indeterminate often argue that it is so on the basis of the abstractness of the political values to be considered, the tendency of these values to conflict, and the apparent inability of public reason to reach answers about the moral status of various beings (such as animals or fetuses).²⁵⁸ However, these are the same factors that make public reason inconclusive. That is, that can lead to disagreement among people about what the uniquely correct answer is. That is, these characteristics also lead to disagreement among different people about what public reason's conclusive answer is. For example, let's return to the question of hate speech legislation. That I may be unsure how to conclusively weigh values of free speech against protection of vulnerable minorities makes public reason potentially indeterminate, and the fact that you and I may disagree about how to conclusively weigh these values makes public reason potentially inconclusive. Thus these considerations are insufficient to demonstrate that

mother's life is at risk. I cannot argue for the point here so in my discussion I only included the least controversial claim. See, Judith Jarvis Thompson, "A Defense of Abortion" (1971) 1 *Philosophy & Public Affairs* 1. Robert George, who argues that the prohibition of abortion can be justified on publicly accessible grounds, thinks that restrictions on abortion in cases of rape and incest are a "close call". For George's view, see his essay on "Law, Democracy, and Moral Disagreement: Reciprocity, Slavery, and Abortion", in *Deliberative Politics: Essays on Democracy and Disagreement*, edited by Stephen Macedo (Oxford University Press 1999), 184–197.

²⁵⁸ Greenawalt, *Religious Convictions and Political Choice*, 147.

public reason is indeterminate rather than inconclusive.²⁵⁹ To point the a bit crudely, that it may be difficult to ascertain what public reason requires shows only that engaging in public reason can be complex and difficult, it does not show that public reason has a no answer. And the factors that people point to demonstrate that public reasons is indeterminate only show that assessing public reason can be difficult. Furthermore, as many have argued, claiming that public reason is indeterminate requires just as much of an argument as any other position – it cannot be assumed.²⁶⁰ Whether or not public reasons have been exhausted can only be determined in a case-by-case manner. In addition to carefully spelling out actual cases of indeterminacy, those who contend that public reason is indeterminate must also face the possibility that they have not considered or addressed all of the public reasons pertinent to an important and complex issue.²⁶¹ Any proponent of indeterminacy may have abandoned the argument just before its force and determinacy appeared. Thus we should certainly not concede in the abstract that public reason is indeterminate and should be more than wary even in specific cases.

It seems that we ought to be especially wary of conceding public reason's indeterminacy because doing so is a potentially self-fulfilling prophecy. People who are inclined to think public reason is indeterminate have a reason to cut thoughtful deliberation short and stop

²⁵⁹ Schwartzman, "The Completeness of Public Reason", 208.

²⁶⁰ See for example, Den Otter, *Public Reason and Judicial Review*; Micah Schwartzman, "The Completeness of Public Reason"; Gerald Gaus, *Liberal Justification*.

²⁶¹ Schwartzman, "The Completeness of Public Reason", 207.

the search for the most publically justified answer.²⁶² For this reason, judges most especially should work under the assumption that public reason is determinate.

I have tried here to show that we have good reason to reject, in the abstract, the idea that public reason is indeterminate. In what follows I aim to show that the case for public reason's determinacy is even stronger when we consider the case of judges and judicial review. The incompleteness worry is even more clearly mitigated by the way courts and judicial review are set up. They are not set up to treat judges as philosopher Queens and Kings.

Let's consider the circumstances under which judicial review takes place. In most cases in which judicial review occurs (in fact, to my knowledge, all systems work this way) a citizen or group of citizens challenges an existing law on constitutional grounds. Or, in what in Canada is called a reference case, the government asks a court before it introduces legislation, to clarify a constitutional issue. The government may even ask whether a proposed law that it sketches is likely to meet with Supreme Court approval. This was the case in the *Canadian Same-Sex Marriage Reference Case*. Charter cases are not normally reference cases. What is important to note here is that some party brings a question or questions to the judiciary. This means that the number of cases where judges are asked to make decisions using public reason is limited. The judiciary cannot simply pick legislation it wishes to review. All this is to say that the actual number of times

²⁶² Ibid 207.

judges engage in judicial review is low compared to the number of laws passed. Judicial review only happens rarely. As Aileen Kavanagh notes in a paper responding to Waldron on judicial review,

While there is a sense in which the court's authority under judicial review is superior to that of the legislature (i.e., because the courts can strike down legislation enacted by parliament), judicial authority relates to a more limited range of decisions. So, in political systems which possess American-style judicial review, most political decisions, including important policy-making issues, are left to the democratic process, accountable to the citizen-body.²⁶³

She goes on, "judicial review is a limited decision making procedure designed to deal with a limited range of issues".²⁶⁴ Judicial review is not designed to consider all questions of political morality; it has a specific and *limited* role in a constitutional democracy.

Furthermore, some of the issues in cases of judicial review may have answers that might be quite clear from a legal perspective. For example, Peter Hogg, writes that the decision in the same-sex reference case was "inevitable".²⁶⁵ The cases that follow clearly from legal precedents make the number of cases where judges will be relying solely on broad appeals to public reason even smaller. Not every disagreement qualifies as reasonable, and not every case is bound to be so hard that the balance of reasons does not clearly support one conclusion over its opposite. And not every argument is good enough to inform the law. Not every argument is based in public reason despite the intensity of the feelings of those pushing that argument. For example, an argument that we ought to criminalize attempted suicide based on the fact that many religions prohibit suicide is not a good argument and is not one based in public reason. This is the case no matter how

²⁶³ Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron", 454.

²⁶⁴ Ibid 455.

²⁶⁵ Hogg, "Canada: The Constitution and Same-Sex marriage", 6.

strongly advocates of this position believe themselves to be providing a good argument. Sometimes the answers will be clear.

Another very important aspect of the structure and set-up of judicial review that is worth stressing is the fact that judges are called on to review legislation; they are not called on to give pronouncements on difficult and controversial moral questions. Judges are not asked to declare what the moral status of the foetus is, or if morality requires a form of universal healthcare. The courts are asked whether or not certain legislation or proposed legislation conflicts with the constitution or charter. Granted some of the resources judges look to will make reference to moral terms like “equality” or “justice” but these terms, as I have argued, are given part of their meaning via legislation and past judicial decisions. This is in fact what a significant number of the previous pages have argued. Thus, we should dispel the notion that, when judges are called on to use public reason they will do so in an attempt to answer large questions of morality such as that of the moral status of the foetus. Certainly, there may be some cases that do turn on questions like whether a foetus has moral status. But the important fact here is that judges do not answer these questions unprompted, in the abstract, and in terms of their own, unrestricted moral views. The decisions they come to are seriously constrained by the factors I discuss and explore throughout this work. And the questions they address are not the grand questions of moral theory that they choose to answer of their own initiative, but questions that others raise and that are much more narrowly focussed.

In a footnote on a paper on judicial reasoning and charter cases Wilfrid Waluchow suggests that public reason may run out in “cases where controversy runs deep,” cases like that of abortion.²⁶⁶ This claim, as I see it, is too concessionary to critics of public reason and judicial review and ultimately only serves to muddy the waters. This is so because it reinforces the notion that judges pontificate from the bench and dictate to the citizens and the legislators the answers to controversial moral questions as if they were the Oracle of Delphi. It does this because it suggests that questions of abortion regulation from one jurisdiction to another will be the same, and that legal materials the judges will be able to draw on will be the same. It suggests that public reason is meant to settle or resolve “cases where controversy runs deep” when we know that it is not. It is meant to ensure that reasonable answers are arrived at. Furthermore, it implies that the questions judges are asked to answer are the same questions grand moral theories set out to answer. In other words, it reinforces a picture I have done my best to dispel throughout.²⁶⁷ This is not what judges do in their role as judges, nor even what they are asked to do. Even in reference cases the legislators ask the judges specific questions that they are to answer from the perspective of the law. For example, in the Canadian same-sex marriage reference case the Supreme Court of Canada answered the following questions:

1. Does the definition of marriage as between a man and a woman violate the Charter?
2. Does the federal government have the authority to define the scope of marriage or is this a provincial issue?

²⁶⁶ Waluchow, “On the Neutrality of Charter Reasoning”, *supra* note 16 at 209.

²⁶⁷ And one Waluchow rejects as well. See, Waluchow, “Constitutional Morality and bills of Rights”, especially the section on judges as Platonic Guardians and Philosopher Kings).

3. Does the freedom of religion section of the charter protect religious officials from being forced to perform marriages they do not want to.

All of these are specific legal questions, albeit ones with more or less of a moral dimension.

A lot of ink has been spilt over the question of whether or not public reason provides an answer to the debate over the moral status of the foetus.²⁶⁸ Perhaps this ongoing controversy explains why Waluchow makes the statement about abortion that he does. The use of public reason to solve the abortion debate has not led to a consensus – people still disagree. But, as we have seen from the discussion of the inconclusiveness of public reason, disagreement is not necessarily the sign of a flaw in public reason and does not show that public reason is indeterminate. Thus Waluchow is right that in the case of abortion, perhaps matters are not quite so conclusive as they are in the question of same-sex marriage. But let's consider the abortion case as it has appeared in judicial review in the Canadian case of *Morgentaler*.

In 1988 the Supreme Court of Canada ruled that section 251 of Canada's *Criminal Code* was unconstitutional.²⁶⁹ That particular section of the criminal code made it illegal to “procure a miscarriage of a female person”. The section went on to detail the

²⁶⁸ See, for example, Judith Jarvis Thompson “A Defense of a Abortion”; Robert George “Law, Democracy, and Moral Disagreement: Reciprocity, Slavery, and Abortion”; Jeremy Williams, “Public Reason and Prenatal Moral” forthcoming in the *Journal of Ethics*.

²⁶⁹ *R. v. Morgentaler* [1988] S.C.R. 30, 385

circumstances which would provide a defence for use of the procedure. A pregnant woman could petition a therapeutic abortion committee from an accredited hospital for the termination of her pregnancy on the ground that continuing her pregnancy would be detrimental to her health or put her life in danger. If the petition was granted by the committee, and the abortion was performed by a qualified medical practitioner, neither the woman nor the abortion provider could be found guilty of the offense under S.251 of the *Canadian Criminal Code*. The Supreme Court of Canada declared this legislation unconstitutional owing to its conflict with S.7 of the *Canadian Charter of Rights and Freedoms* – the right to life, liberty, and security of the person. Across the country different hospitals followed different guidelines about the regulation and availability of abortion.²⁷⁰ For example, some hospitals refused to provide abortions to married women. What's more, some hospitals refused to provide abortions under any circumstances. The Supreme Court ruled that the varied access and heavy restrictions on access to abortion prevented women who needed abortions from accessing them in a timely and safe manner and therefore put their health at risk. The Canadian parliament chose not to re-draft any legislation concerning the regulation of abortion. Thus, as it stands in Canada, there are no laws regulating the provision of abortions.

²⁷⁰ Justice Wilson wrote her concurring opinion that agreed that the legislation violated S. 7, but she also contended that it violated S.2 (a) of the *Charter* – freedom of conscience and religion. She argued that it did so because the legislation removed the decision about whether or not to abort from the hands of the woman. She wrote, “ I say this because I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state?” (See *Morgentaler* at p. 175-176 paras J and A). Her reasoning allowed for a broader discussion about abortion access' significance to women's status. I am grateful to Elisabeth Gedge for bringing this aspect of the decision to my attention.

Notice that in the *Morgentaler* case the judiciary did not make its decision based on any controversial views on the moral status of the foetus. To strike down the legislation all that needed to be shown was that this legalisation was endangering the lives of women. And the Court ruled that it did. Women who needed abortions quickly in order to save their lives were unable to get them because a committee had to first gather and assess whether they would approve the abortion or not.²⁷¹ I take it that even the staunchest reasonable anti-abortion advocate can see that it's a reasonable position to provide abortions when the mother's life is at risk, if an abortion can save the mother's life.²⁷² For example, even the Roman Catholic Church accepts that the position is reasonable. Given that the section of the criminal code in question prevented abortions, or at least made accessing abortions even in extreme circumstances very difficult, and given that some of the abortions needed to be provided quickly in order to save the mother's life, it doesn't seem overly controversial to contend that the section of the criminal code did unjustifiably infringe on women's right to life, liberty, and security of the person. And that is all the judiciary decided. They did not rule on the moral status of the foetus nor were they asked to. It would be a mistake to confuse the question before the court in *Morgentaler* with a question about the moral status of the foetus.

²⁷¹ Waluchow, *A Common Law Theory of Judicial Review*.

²⁷² It is worth pointing out that not all reasonable people or reasonable comprehensive doctrines are always capable of accepting the politically reasonable resolution to constitutional disputes provided by public reason. An otherwise reasonable person can willingly dissent from specific conclusion because her comprehensive doctrine compels her to treat the value in question as more important. See Freedman, "Public Reason and Political Justification", 2056-2061. When she consciously does this she fails, in this regard, to respect her fellow citizens as free and equal citizens. A judge, however, should not abandon public reason while being a judge, but it may be more acceptable for her to do so as a citizen.

What should be taken away from the example of the Canadian Supreme Court decision with respect to abortion laws is that not all legal questions regarding abortion require or even ask judges to decide on the moral status of the foetus. Thus, we cannot say beforehand whether or not public reason will be able to provide answers in cases involving abortion despite abortion being a case where “controversy runs deep”. On the other hand, I do not want to imply that serious moral issues including the moral status of the foetus could never come up. The Canadian *Morgentaler* case is just one example of a judiciary hearing a case on abortion laws. And while in this case I have argued that the judges did not have to make a decision about the moral status of the foetus, other cases may not be so clear.

The United States case of *Roe v. Wade* was a landmark decision on the issue of abortion. In this case The Court ruled that the right to privacy under the Due Process Clause of the 14th Amendment included a woman’s right to have an abortion. Part of their ruling included a balancing of this right against the state’s interest in protecting foetal life. The Court went on to conclude that the state’s interest in foetal life grew stronger in the later stages of pregnancy and thus allowed for state regulation of abortion during the third trimester. *Roe v. Wade* almost certainly involved more complex moral issues than *Morgentaler*. The balancing of rights and interests arguably does require some opinion about the moral status of the foetus. That *Roe v. Wade* is more complex than *Morgentaler* supports my point that we cannot know beforehand whether public reason will be able to

answer questions about abortion or what answer it might offer. Questions about abortion and its regulation will vary from country to country. That some questions will be more difficult and more complicated does not render public reason nugatory. And while some conflicts about what reasonable people can agree on remain, interrogating the law in the light of public reason is still the best way for judges to decide to charter cases. And it is surely much more reasonable than the simple majority rules, Catholic versus Protestant, Sunni versus Shia approach that critics such as Waldron ultimately advocate.

In the case of judges deciding charter cases they will have a substantial number of resources to draw on. And these resources will inform the public reasons they draw on. As Rawls points out (look to the earlier passages cited in the beginning of this chapter) and as Freedman also emphasizes principles developed legislatively and constitutionally count as the ideal of public reason.²⁷³ Given the nature and specificity of the types of questions posed to judges there is good reason to think that public reason will provide conclusive answers. But, of course, I cannot demonstrate that for every possible case. Although I think it is worth emphasizing that in the Canadian *Morgentaler* case, a case that dealt the deeply controversial topic of abortion rights, that public reason did provide a conclusive answer to the question of the constitutionality of the legislation.²⁷⁴ We have much less reason to think public reason will be indeterminate with respect to other less controversial questions posed to judges. I must concede, however, that there is at least the possibility that public reason will not provide a determinate answer to constitutional

²⁷³ Freedman, “Public Reason and Political Justification”, 2069.

²⁷⁴ Given the overlap between public reason and CCM it is fair to say that public reason or CCM provided a conclusive answer.

questions.²⁷⁵ If and when this happens public reason will at least have eliminated all the unreasonable positions and those positions that are demonstrably less publically justified than other options. This means that all the left over options are those that can be publically justified and thus whatever decision the court comes to will be a justified decision. It will be one that is reconcilable with the equality and freedom of all citizens. Samuel Freedman goes so far as to say, “ That is, far from being incomplete, public reason is overdetermined in so far as it provides more than one politically reasonable answer to many constitutional issues.”²⁷⁶

It is important to remember that public reason is not just a pool of appropriate reasons. It is also a point of view. As Samuel Freedman writes, “ Public reasoning implies the general adoption of a general standpoint, one where people abstract from their ordinary perspectives guided by their particular interests and comprehensive views and take up the point of view of a democratic citizen.”²⁷⁷ When judges make good faith attempts to take on this point of view they cannot be said to decide based on their own first order moral principles – they leave those out of their deliberations. The use of public reason by judges does respect and indeed embody the authentic constitutional commitments of the community and in this way answers the democratic challenge brought by its critics.

²⁷⁵ I take my concession to be importantly different from Waluchow’s concession because I do not give a specific example of an issue nor do I suggest that the criterion rendering public reason indeterminate is deep controversy. I am only conceding that that I cannot demonstrate the conclusiveness of public reason for every possible constitutional question. Further, by highlighting that it is a constitutional question I do not suggest that judges are asked to answer the same moral questions as grand moral theories.

²⁷⁶ Ibid 2055-2056.

²⁷⁷ Ibid 2030.

Finally, given that we cannot know ahead of time whether or not public reason will run out with respect to a specific political issue – judges should work under the assumption that it will not. That way they will do their utmost to find the most publically justified ruling and will not shirk their responsibility and give up before all the arguments have been considered and carefully weighed.

In the foregoing pages I have tried to show both that public reasons are the right sort of reasons for judges to rely on in cases of charter review, and that public reason's potential incompleteness can in large part be overcome. In the following pages I present two of the standard worries about public reason and begin to articulate a response to them. My goal is not to respond to them fully but rather to suggest promising ways forward.

V The Agents Limited to Public Reason

The agents who are obliged, according to Rawls, to use public reason are not limited to government officials. He calls on citizens as well. Requiring everyday citizens to limit themselves to public reason has raised some criticisms. For example, some writers think that it is unfair to call on citizens to abandon their comprehensive doctrines when voting in referendums.²⁷⁸ Consider Robert who is deeply religious. His religion is very important to his sense of self and his conception of the good life. Robert's religion teaches him that marriage is a sacred bond and can only be entered into by a man and a woman. Given the

²⁷⁸ See, for example, Jürgen Habermas, "Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism," (1995) 3 *The Journal of Philosophy* 92.

centrality and importance of religion to Robert's life, shouldn't he be able to vote against the legalization of same-sex marriage and be able to vote for the official who promises to oppose its legalization? And what's more, shouldn't Robert be able to vote that way *because* his comprehensive doctrine compels him to do so and shouldn't he be able to offer that as a reason when asked? Isn't that the truth of why he votes the way he does? And others might argue that it is wrong to force public reasons onto elected representatives because, at least according to most theories of democracies, elected representatives are supposed to act on behalf of the people they represent and were elected by. Thus, if a representative is elected by a constituency of people who share the religious doctrines and teachings of Robert – specifically, they believe that marriage can only be between a man and a woman and that the law should reflect this – shouldn't their elected official reflect this commitment? Is it fair, the worry goes, to ask the elected officials to be guided only by public reason and abandon the will of her constituents? And is it fair to ask citizens to abandon the reasons and beliefs of their comprehensive doctrines? Even more troubling is the objection that this requirement is not only unfair but more importantly that it is a violation of moral autonomy and integrity. Surely it matters how I've decided to live my life and the personal projects I've committed myself to.²⁷⁹ Our personal attachments, loyalties, and identifications, matter morally speaking and the requirement of public reason seems to ask us to abandon these integral aspects of

²⁷⁹ This is quite similar to one of Bernard Williams' critiques of utilitarianism. Utilitarianism only allows someone to be a utilitarian; there is no room left for other personal projects. See his *Morality: An Introduction to Ethics* (Cambridge University Press 1972). This critique is also found in objections to effective altruism. See for example, Amia Srinivasan "Stop the Robot Apocalypse" in the London Review of Books: <http://www.lrb.co.uk/v37/n18/amia-srinivasan/stop-the-robot-apocalypse>.

ourselves. Not only is it unfair and unrealistic to require people to abandon their comprehensive doctrines when voting on issues of fundamental importance, it is a violation of their moral autonomy and undermines their sense of who they are.

Arguing about the range of individuals required to use public reasons is, however, a debate in which this paper does not have to partake. I do not need to argue that judges ought not base their judicial decisions on their comprehensive doctrines because that is already the accepted state of play. Judges are required to rule according to the law.

Instead of thinking about Robert, who was an average citizen, consider a deeply religious judge who sincerely believes that abortion is murder. This judge could not convict an abortion provider of murder, or of any related crime, if the laws in her jurisdiction do not criminalize abortion, no matter how sincerely she believes that abortion providers are guilty of murdering a foetus. What's more, we should not be troubled by this restriction of judicial reasons. To be a judge is to accept that the reasons on which one can rely when making a judicial ruling are limited. We always limit the accepted reasons judges can rely on – that is part of what it is to be a judge and to rule according to the law. The worry about the unfairness or disingenuous nature of using public reasons does not apply in the case of judges. They are not supposed to decide cases based on their comprehensive doctrines. And what's more their explicit decision not to decide based on their comprehensive doctrines, that is, to accept their role as a judge, means that they are not dishonest or insincere in doing so. Assuming the judicial role restricts one's moral autonomy, in the sense that one may not decide on what one considers to be the balance of moral (and other) reasons. One may act autonomously in accepting the role of judge,

of course, but acceptance of that role entails accepting a justified restriction on one's ability to decide as one sees best. Judges autonomously chose to be a judge rather than an actor, professor, chef, et cetera. Choosing to become a judge is, in fact, one of their personal projects and identifications that matter morally.

VI Public Reason is Not Necessarily a Way to the Truth

Another worry is that public reason does not always align with the truth. That is, the answer that one is called on to support by public reason may not necessarily be the one that is the truth. What guides you in making your decision is not a search for the truth primarily, but rather it is a search for the answer or choice that is most supported by public reason. Consider, for example, the moral status of a foetus and the question of criminalizing abortion or restricting access to it.²⁸⁰ Imagine, for the sake of argument, that the members of a liberal state come to the universally accepted conclusion that the ability for play, the ability to contemplate, and the capacity to have a sense of self are the necessary and sufficient characteristics of personhood. And further suppose that they all agree that these characteristics bestow moral status on any being who has them, be that being a foetus, a dolphin, a Martian et cetera such that is *prima facie* wrong to kill them. Consider that science, because it can detect the presence or absence of these characteristics, can tell us which beings are persons. Now, imagine, that science will eventually and conclusively establish us that a foetus never gains these qualities in gestational development, that is, a foetus never gains personhood – but that the science necessary to discover these truths won't be developed for another 50 years. In the

²⁸⁰ This example presumes that the state will decide to regulate (or not) abortion based on the moral status of the foetus alone. It puts aside issues of state interest in protecting life or the rights/dignity of women.

meantime our liberal state will presumably have to decide whether, and if so how, it will regulate abortion. Suppose this state decides that it will craft legislation according to public reason, rather than say religious doctrine or deontological principles, and it chooses to enact laws that criminalise abortions performed after the first trimester except those that are deemed medically necessary. In this case the decision that was reached and the legislation drafted using public reason do not reflect the truth – foetuses even in the second and third trimester do not have personhood and it is not *prima facie* morally wrong to kill them. The decision was, however, still one to which no reasonable person could object (assume it was a good faith attempt to assess what public reason required) but the conclusion does not reflect the truth of the matter. If the conclusions that public reason leads to can only be described as reasonable and not necessarily as the truth why should individuals accept or follow these conclusions, especially when they believe that they know the truth about the matter? For example, consider an abortion provider who believes she knows that a foetus never gains a moral status that ought to lead to restrictions on abortions after the first trimester. Why should she have to follow a law based on erroneous public reason? And what about other important issues, even life or death issues? Rawls requires us to use public reason in the case of constitutional issues – and often times, as in the case of the abortion provider, these will concern issues of great importance to people: the death penalty, healthcare, education, and religious freedoms. Given the importance of the issues shouldn't we be after the truth regarding these issues rather than just the answer best supported by public reason? Shouldn't we be after the truth about the moral status of the foetus? And shouldn't the search for truth guide us in

our quest for answers and in our attempts to form policy and legislation around our answers.

Arguably, this objection is even more poignant when we consider the context of the court. The court exacts decisions that actively coerce people – not hypothetical people but specific people: people who may have their rights violated or may be sent to jail. Surely, people should only be coerced by the state when it is true that what they have done or what they plan to do warrants the coercion.

My response to this worry is in part borrowed from Rawls. Namely, that just because we limit the types of reasons or limit strict appeals to some absolute truth does not mean that we are unconcerned with the truth.²⁸¹ It means that we recognize that our search for the truth has to be informed by fairness and due process and a recognition that we are epistemically fallible and have no agreed upon access to the truth: the truth can be difficult to ascertain. In Rawls' discussion of this objection he reminds us that in a criminal trial we exclude certain types of evidence and follow strict procedures about how evidence can be acquired and how it needs to be submitted to the court.²⁸² Only certain types of evidence that have been acquired in the proper way – for example, with the appropriate warrant – are admissible in court. Hearsay is not allowed in criminal courts. And there is a high burden of proof in a criminal court– beyond a reasonable

²⁸¹ Rawls, *Political Liberalism*, 220.

²⁸² *Ibid* 221.

doubt – in order to find someone guilty of a crime. What these restrictions reflect is not, as some may argue, a disregard for the truth, but rather an acknowledgment that humans are fallible and that when we are judging and sentencing others or enacting laws (as the case may be) we have to account for that fallibility. The best way to do that is have clear procedures about how to deliberate, communicate, and justify decisions to one another. Public reason is an attempt to provide procedures to which we can all agree.

Secondly, judges ought to avoid proclamations about the truth because – as has been stressed by many critics of judicial review – judges are not philosopher kings and do not have, as Waluchow has said, “a pipeline to the truth”.²⁸³ Thus judges should not use beliefs and principles concerning the truth about the way things are that are rooted in their comprehensive doctrines alone (some parts of some comprehensive doctrines may overlap with public reason). Because the truth is so elusive, there is merit in requiring decisions based on reasons to which no reasonable person could object. If we can’t be assured that a decision is based on the truth, at the very least we can be assured that it is a reasonable one – that is, one based on generally accessible reasons to which no person could reasonably object. This applies even if the judge strongly believes in the truth of her comprehensive doctrine and tries to live by it in her personal life. Again, we already do this: even if a judge whole-heartedly believes that abortion is murder she cannot convict an abortion provider of murder on that basis alone. Judges, as I have emphasized, have the types of reasons they can rely on limited – that is part of what it means to be a judge. A judge of course is in a position where she could use reasons that were

²⁸³ Waluchow, “Constitutional Morality and Bills of Rights”. 82.

idiosyncratic to her comprehensive doctrine, but this judge would be shirking the responsibilities of a judge. Thus I submit that while it may be troubling or hard to justify compelling citizens to abandon appeals based on the perceived truth of their comprehensive doctrines it is not difficult to justify this restriction in the case of judges. Judges are not meant to make their decision based on what they would want if they were Queen or King for the day. Rather, they are to decide according to the law. Deciding as though they were absolute monarchs would seemingly require no restriction on the types of reasons they used. Deciding as a judge necessarily enforces restrictions on reasons.

VII Conclusion

In my defence of the ease with which we accept limiting the sort of reasons judges can use I have repeatedly relied on the example of a judge who sincerely believes that abortion constitutes murder. Such a judge, would not, I have stressed, be entitled to convict an abortion provider of murder or of any crime if the law in her jurisdiction does not criminalise abortion.²⁸⁴ It may be appropriate for a legislator, or for citizens who believe that abortion is murder, to advocate to have the laws changed so that they reflect their views on the moral status of a foetus. What's more it may be appropriate for them to argue for this change because their religion calls on them to do so; they may not be required to only use public reasons. Or perhaps legislators or other governmental officials are required to limit the reasons they offer to public ones, but citizens are not. I aim, as said at the outset, to remain neutral on the use of public reason by individuals who are not

²⁸⁴ Presuming, of course, that the abortion provider provides safe and medically accurate abortions.

judges or acting in their role as judges. But surely the case is much more straightforward when we consider the types of reasons appropriate for judicial decisions.

The preceding section was meant to acknowledge that there are some worrying objections to the use of public reason, but that these objections miss the mark when we consider the context of judges. The role and responsibility of judges and the courts is already defined and set up in such a way that is more than amenable to the use of public reason. Rawls, himself, called the supreme court the exemplar of public reason.²⁸⁵ This was in part because the court has to offer a written decision and provide reasons for its rulings that are based on the law of land. It would be a mistake on the part of judges to include reasons that echoed “The Court thinks X because our religion or consequentialist moral theory requires us to do so”. These are clearly not public reasons and are unacceptable as judicial reasons. Rawls recognized that judges by definition are called on to limit the sorts of reasons they rely on and that therefore the court is a good exemplar of public reason: “... this is because the justices have to explain and justify their decision as based on their understanding of the constitution and relevant statutes and precedents”.²⁸⁶ Public reason, as I argued in the beginning of this chapter, is part of a community’s constitutional morality, and thus provides acceptable reasons for judges to rely on in charter cases.

²⁸⁵ Rawls, *Political Liberalism*, 221.

²⁸⁶ *Ibid* 221.

Chapter 5: Case Study of Physician-Assisted Suicide Laws In Canada From *Rodriguez* to *Carter*

I The Facts of *Rodriguez* and *Carter*

In Chapter 1 of this project we looked briefly at the history of Canadian law governing physician-assisted suicide (PAS). By way of reminder: in the 1993 *Rodriguez* case the Supreme Court of Canada held that the criminalisation of PAS under S. 241 of the *Criminal Code* was not unconstitutional. Under Section 241 everyone who

- (a) counsels a person to commit suicide, or
- (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.²⁸⁷

Twenty-two years later in the *Carter* case, the Supreme Court of Canada unanimously struck down that same legislation as unconstitutional. The cases were strikingly similar – British Columbia women were at the heart of the both cases: Sue Rodriguez and Gloria Taylor and Kathleen Carter, all suffered from serious and painful diseases. Sue Rodriguez and Gloria Taylor suffered from amyotrophic lateral sclerosis (ALS) and Kathleen Carter had spinal stenosis which left her in prolonged agony but would not kill her. All the women believed that, because of their illness, at some point in the future their quality of

²⁸⁷ *Criminal Code*, R.S.C. 1985, c. C-46, s. 241 [*Criminal Code*].

life would deteriorate such that they would no longer wish to continue living. Further, they all realized that by that time they would no longer physically be able to end their own lives – they would need assistance. They, therefore, each sought to have the criminal prohibition on assisted suicide struck down on the grounds that it violated their *Charter* rights – Sue Rodriguez in the *Rodriguez* case and Gloria Taylor and Kathleen Carter in the *Carter* case. In fact, each woman argued that the criminal ban infringed S. 15 and S. 7 of the *Canadian Charter of Rights of Freedoms*. Those sections in the *Charter* read:

S.15: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

S. 7: Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.²⁸⁸

As we know, the decisions in the two cases turned out quite differently. On September 30th, 1993 the majority (5 judges) in the *Rodriguez* case ruled that while the legislation engaged S.7 there was no breach of S.7. That is, they acknowledged that the legislation infringed on the security of the person but claimed that it did so in accordance with the principles of fundamental justice. Further, they assumed, without arguing the point, that there was a breach of S. 15 (there was discrimination on the basis of physical disability),

²⁸⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*.

but held that the breach was saved by S.1.²⁸⁹ That is, the breach was demonstrably justified in a free and democratic society.²⁹⁰

Twenty-two years later, on February 5, 2015, in *Carter* the Supreme Court of Canada unanimously held that S. 241 of the *Criminal Code* violated the equality clause of the *Charter* (as was assumed in *Rodriguez*) and that such a violation was not saved by S. 1 (unlike the ruling in *Rodriguez*). Further, the Court held that the legislation breached S.7 of the *Charter*. That is, the legislation not only engaged the right to security of the person but also infringed it in a way that was not in accordance with the principles of fundamental justice. The crux of the Court's decision in *Carter* was determined by the analysis and application of S.1 and S.7 to the *Criminal Code*'s absolute ban on PAS. Not only did the Court strike down the law which was upheld in *Rodriguez*, but the decision was unanimous and penned, in fact, simply by The Court, rather than by a singular judge. This was done to show their confidence in their decision, to emphasize its importance, and to add extra weight to it.²⁹¹ The *Carter* decision represents not just a change, but an emphatic change in the law by the Supreme Court of Canada.

²⁸⁹ S.1 "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." *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*.

²⁹⁰ Jocelyn Downie, and Simon Bern, "Rodriguez Redux" (2008) *Health Law Journal* 16.

²⁹¹ Many authors have recognised the force behind the choice to author the decision by The Court. See, for example, Sean Fine, "Supreme Court Rules Canadians Have Right to Doctor-Assisted Suicide" *The Globe and Mail* (February 6th, 2015) <<http://www.theglobeandmail.com/news/national/supreme-court-rules-on-doctor-assisted-suicide/article22828437/>>; Joceyln Downie, "In a Nutshell: The Supreme Court of Canada Decision in *Carter V. Canada (Attorney General)*" *Impact Ethics* (February

II The Problem: What Changed?

As we saw in Chapter 1, it is hard to understand how to make sense of the radical change in decision from *Rodriguez* to *Carter* by the Supreme Court of Canada, given the strong similarities of the facts in the two cases. In fact, in the *Carter* case both Canada and British Columbia (the defendants) submitted that, “*Rodriguez* is binding on this Court [the Supreme Court of Canada] because the facts pertaining to Gloria Taylor are virtually identical to those in *Rodriguez*, and the *Charter* provisions upon which the plaintiffs rely in this case are the same as those raised in *Rodriguez*. They say that it is not open to this Court to do anything other than dismiss the plaintiffs’ claim.”²⁹² But the Court did not dismiss the plaintiffs’ claims and in fact distinguished *Rodriguez*. How can we make legal sense of this? How can this be reconciled with democracy? If we admit that the judges just changed their minds about the constitutionality of the criminal ban, then we seemingly grant that judges in judicial review are able to change the law according to their personal preferences, and that understanding of the shift in court decisions leaves open the democratic challenge. We are left with judges just deciding according to their own first order opinions and in doing so thwarting democracy. We might, instead of admitting that it is just an example of judges deciding according to their own first order preferences, be tempted to return to the understanding of charters as representing strong pre-commitments that we looked at in Chapter 1. With this conception in hand, we could claim that the judges were simply deciding according to those pre-commitments. We already saw, however, in Chapter 1 that the notion of a charter representing a strong pre-commitment to specific rights does not work. In fact, such an understanding of charters

11th, 2015)<<https://impactethics.ca/2015/02/11/in-a-nutshell-the-supreme-court-of-canada-decision-in-carter-v-canada-attorney-general/>>

²⁹² *Carter* at para 891.

would be particularly troublesome given that the law regulating PAS was heard twice by the Canadian Supreme Court – once the court found that the law was in keeping with the constitution, and then the next time the Court found that the law was unconstitutional. If we accept a robust notion of pre-commitment, how can we tell which decision of the Supreme Court accurately maps the pre-commitment? When Canadians enacted the *Charter* in 1982 they could not have committed to both a right guaranteeing PAS and to the criminal prohibition of PAS.

The shift from the *Rodriguez* decision to the *Carter* decision raises many difficult questions because it is not just a case of judicial review, but involves in fact two cases of judicial review. The two cases followed appeals based on the same grounds in each case and produced a change in the Court's position – constitutional to unconstitutional (a case of double judicial review²⁹³). These cases pose a particularly interesting challenge for those who wish to defend judicial review from its detractors. In fact, at first glance it gives more fodder to the critics of judicial review because it seems to be a glaring example of judges deciding according to their first order moral preferences. The most obvious thing that had changed between *Rodriguez* and *Carter* was the make-up of the Court, although some members were on the bench for both cases. Notably, Justice Beverly McLachlin who wrote the dissent in the *Rodriguez* case was the serving Chief Justice when *Carter* was heard. Perhaps, in *Carter* she was finally able to have her way. This is the view I will attempt to refute in the following pages.

²⁹³ By double judicial review I mean to capture cases like PAS in Canada where the laws came under judicial review twice. Another Canadian example is the criminal laws regulating activities related to sex work – the *Prostitution Reference Case* and *Bedford*.

One possibility in seeking to justify the change in decisions is to pursue the claim that the *Rodriguez* case was decided incorrectly and thus that the *Carter* decision merely corrected what was wrong before. That is, we could argue that when Canadians enacted the *Charter* they intended to prohibit criminal bans on PAS and that the *Carter* decision decided correctly according to this pre-commitment. This approach would mean avoiding having to explain an apparent change in the law – the criminal ban on PAS was always unconstitutional. This route, however, presents a fairly heavy argumentative burden.²⁹⁴ What's more, even if we assumed *arguendo* that *Rodriguez* was decided incorrectly, this would only alleviate the explanatory burden in this particular instance of judicial review. But the aim of this project is to provide an account of judicial review that can be reconciled with democracy in principle, not just in the particular instance of PAS in Canada. Thus, even if we could accept that the initial decision was incorrect, I could hardly plausibly claim that every instance of double judicial review was a case of one decision correcting the other one. Furthermore, the Supreme Court of Canada in the *Carter* decision did not rule that *Rodriguez* had been decided incorrectly, but rather asserted that the facts had changed such that *Carter* could be distinguished.

²⁹⁴ There are those who have argued that the *Rodriguez* decision was incorrect. See, for example, Eugene Bereza, "The Private and Public Deaths of Sue Rodriguez" (1994) 39 McGill Law Journal 719; Benjamin Freedman, "The Rodriguez Case: Sticky Questions and Slippery Answers," Case Comment, (1994) 39 McGill Law Journal 644; Lorraine Weinrib, "The Body and the Body Politic: Assisted Suicide Under the Canadian Charter of Rights and Freedoms," Case Comment on *Rodriguez v. British Columbia (Attorney General)*, (1994) 39 McGill Law Journal 618.

III A Community's Constitutional Morality and Physician-Assisted Suicide

I hope that, given what I have put forward in the preceding chapters, the fact that a judicial decision runs contrary to the law on the books, or in fact even noting that one judicial decision is different from another dealing with very similar facts, does not show that the latter decision was lawless and so does not provide an argument against charters and judicial review. I have argued throughout that the theory of charter interpretation explained and defended here is ultimately more than capable of answering the democratic challenge in part because it allows for the meaning of the legal rights protected under the *Canadian Charter of Rights and Freedoms* to evolve significantly and to do so in a way that we can understand as democratic. Thus, I will assume *arguendo* that *Rodriguez* was correctly decided. That is, at the time *Rodriguez* was decided there was no *Charter* protected right to PAS. I will further assume that *Carter* was decided correctly. That is, by the time that case was heard there was a *Charter* protected right to PAS. In the previous chapters of this project I have articulated the idea of the evolution of legal rights by drawing on the view that a community is a moral agent (Chapter 2), that norms can be recognised in law even if they aren't the explicit law on the books (Chapter 3), and that the perspective and reasons of public reason help ameliorate worries about judges deciding according to their own first order moral preferences (Chapter 4). I contend that charters and the judicial review of legislation are democratic because they attempt to hold communities to their own most deeply held moral beliefs. And that a community's understanding of its moral commitments can develop just as an individual's can. With this more fully developed theory of charter interpretation in hand I plan to argue that it is

capable of adequately explaining and constitutionally justifying the shift from *Rodriguez* to the *Carter* decision that found the ban on PAS unconstitutional.

I should note before beginning that the decisions in both the *Rodriguez* and *Carter* case are complex and I have undoubtedly been unable to capture all the complexities and nuances. But my goal here is not to parrot the decisions. I aim to demonstrate that the reasoning involved in *Carter* maps on to the arguments I have developed in the previous chapters. It is also worth noting that I cannot and will not be able to provide a formulaic recounting of the decision that exactly fits with the precise arguments raised in this dissertation. Rather I hope to show that the reasoning in the decision is of the sort I suggest in this project. But I will highlight what I think are more specific instances of the congruence of the reasoning used by the Court in *Carter* and the type of reasoning I have argued for. Before moving on to the analysis of the decision in *Carter* I will go through the relevant changes that did happen between *Rodriguez* and *Carter*.

IV What Did Change?

It is true that there are a significant number of similarities between *Rodriguez* and *Carter*: they both challenged the constitutionality of S.241 of the *Criminal Code* and did so on almost the same grounds. But there are also a number of important changes that happened between the decisions. These changes are significant and were drawn on in the *Carter* decision and thus it is worth highlighting them here.

1. Changes in social facts
2. Changes in legislative facts

3. Developments in S.7 jurisprudence

By evidence as to “legislative and social facts” the court referred to topics such as “legislation and experience in jurisdictions with legalized physician-assisted death or assisted death, palliative care practice including palliative sedation, end-of-life decision making, Canadian public opinion regarding euthanasia or physician-assisted death, Parliamentary and other reports since *Rodriguez*, and medical ethics.”²⁹⁵ The Court highlighted that the most notable differences between *Rodriguez* and *Carter* include evidence about the experiences with legal PAS in Oregon, Washington, Belgium, Luxembourg and the Netherlands and with assisted death in Switzerland; opinion evidence of medical ethicists and practitioners informed by the experience in jurisdictions with legalized assisted death; specific evidence pertaining to current palliative care and palliative or terminal sedation practices; and evidence regarding prosecution policies in British Columbia and the United Kingdom formulated since *Rodriguez*.²⁹⁶ This new evidence showed that PAS could be regulated in a way that protected the rights of the vulnerable and that Canadian public opinion was in favour of legalizing the practice. The role these facts play in the *Carter* decision will be clear when we look at the reasoning in the decision.

The changes in S.7, however, are more complex and worthy of a closer examination. The changes in S.7 jurisprudence that happened after *Rodriguez* involved the understanding of the requirements of the principles of fundamental justice. At the time of the *Rodriguez*

²⁹⁵ *Carter* at para 942.

²⁹⁶ *Ibid* at para 944.

decision the primary standard for principle of fundamental justice was that legislation could not be arbitrary. Between the decisions, however, there were important expansions in standards of fundamental justice, specifically having to do with legislation's possible grossly disproportionate character or its overbreadth.

A Section 7 Developments

In *R. v. Heywood*,²⁹⁷ the Supreme Court of Canada struck down a law on the basis that it was overbroad. That is, the law was broader than necessary to accomplish its purpose. The Court held that overbreadth was a breach of the principles of fundamental justice, and therefore was a basis for finding the law unconstitutional.²⁹⁸ The law challenged in *Heywood* was a provision of the *Criminal Code* that criminalized vagrancy on the part of a person previously convicted of a sexual assault who is found loitering in or near a school ground, playground, public park, or bathing area. The majority of the Court found the law to be overbroad in three respects: 1) its geographic scope was too wide because parks and bathing areas included some places where children were unlikely to be found; 2) its duration was too long because it applied for life with no possibility for review; and 3) the class of persons whom it applied to was too broad because some convicted sex offenders would not be a continuing danger to children.²⁹⁹ Thus the law was found to be overbroad and to infringe on people's life, liberty, and security of the person.

²⁹⁷ [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.)

²⁹⁸ Peter Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) *Supreme Court Law Review*.

²⁹⁹ *Ibid* 203.

In *Malmo-Levine*,³⁰⁰ the Supreme Court again added a standard to the principles of fundamental justice. The Court established the doctrine of disproportionality as a breach of the principles of fundamental justice.³⁰¹ A law is grossly disproportionate if its effects are too extreme. The issue in *Malmo-Levine* was the criminalization of marijuana. In this case, the majority ruled that there was a legitimate state interest (the prohibition of marijuana use) and that criminalization of possession with the possibility of imprisonment was not too extreme a response. Justices LeBel and Deschamps, however, dissented holding that the “harm caused by using the criminal law to punish the simple use of the marihuana [sic] far outweighs the benefits that its prohibition can bring.”³⁰² And thus another standard that a piece of legislation must meet to be in accordance with the principles of fundamental justice was established.

The doctrines of arbitrariness, gross disproportion, and overbreadth were even more fully and carefully spelled out in the *Bedford*³⁰³ case which was heard shortly before *Carter*. In *Bedford* the Court treated each of these standards as distinct from the others. In his article on the structure of S.7 Hamish Stewart has given a helpful account of the implications of *Bedford*. A law is arbitrary, according to the Court if there is no rational connection between its objectives and its effects on life, liberty or security of the person.³⁰⁴

Arbitrariness can be demonstrated by showing either that law undermines its own

³⁰⁰ *R v. Malmo-Levine*, 2003 SCC 74

³⁰¹ Hogg, “The Brilliant Career of Section 7 of the Charter”, 205.

³⁰² decision, at para 301, *per* Deschamps J., at para. 280, *per* LeBel J.

³⁰³ 2013 SCC 72

³⁰⁴ Hamish Stewart, “*Bedford* and The Structure of Section 7” (2015) 60 McGill Law Journal 3, 584.

purpose or that the law does not connect with that purpose at all.³⁰⁵ A law is overbroad if it is “so broad in scope that it includes some conduct that bears no relation to its purpose.”³⁰⁶ The norms against arbitrariness and overbreadth are related – they ask questions about the effects of law and the purpose of the law. A grossly disproportionate law, however, may well be rationally connected to its purpose and it may well affect only the appropriate people in order to achieve its purpose. But the law’s impact on the life, liberty, or security of the person of people “is so severe that it violates our fundamental norms.”³⁰⁷ As Stewart writes, “ a grossly disproportionate law is one which, even if it achieves its purpose completely, does so at too high a cost to the life, liberty, and security of individual persons.”³⁰⁸

The new norms for evaluating compliance with the fundamental principles of justice highlight distinctive possible defects in legislation. When *Rodriguez* was heard the only norm to evaluate the legislation against was the norm of arbitrariness. The Court at the time ruled that the *Criminal Code* legislation banning PAS was not arbitrary. However, the developments of S.7 jurisprudence created the new standards of gross disproportionately and overbreadth with which to assess the legislation.

³⁰⁵ Stewart, “*Bedford* and the Structure of Section 7”, 584.

³⁰⁶ *Bedford* at para 119.

³⁰⁷ Stewart, “*Bedford* and the Structure of Section 7”, 585.

³⁰⁸ *Ibid* 585.

With the important changes in social and legislative facts and the developments in S.7 jurisprudence noted we can move on to looking out how these changes affected the *Carter* decision.

V The *Carter* Decision

A Stare decisis

As we saw, the plaintiffs in the *Carter* case claimed that the legislation criminalizing PAS infringed two of their *Charter* rights. The Court recognised, however, that before it could begin engaging in *Charter* analysis it needed to decide whether or not *stare decisis* applied and whether or not *Rodriguez* was binding.

We looked at the doctrine of *stare decisis* and its role in common law reasoning in Chapter 3. *Stare decisis* is the doctrine according to which courts are bound to follow the decisions from past cases when those cases are in the relevant legal ways the same. In Chapter 3 in fact I highlighted *stare decisis* as one the legal constraints on judges in cases of judicial review. The decision in *Carter* may make it seem like it is no constraint at all. Given the undeniable similarities between the facts of *Rodriguez* and the facts of *Carter* that were highlighted above, at first glance it's difficult to see how *Rodriguez* could not be binding. And this is just what the defendants argued.

The Court, however, found that *Rodriguez* was not fully binding and that it could in large part be distinguished. In coming to this decision the Court relied on the reasoning in *Bedford* concerning *stare decisis*. The issue in *Bedford* was the constitutional validity of a

section of the *Criminal Code* that made it illegal to live off the avails of prostitution, to keep a common bawdy house, and to communicate for the purpose of prostitution. In the *Prostitution Reference* case, a case that came before the court 20 years *Bedford*, the Supreme Court of Canada had upheld the constitutionality of those precise provisions. At trial, Madam Justice Himel in *Bedford* concluded that she was able to revisit the S. 7 challenge because the issues were different from those argued in the *Prostitution Reference* case and because the jurisprudence on S.7 of the *Charter* had evolved since the reference case. As well, she also cited the breadth of new evidence concerning sex work that had been gathered over the twenty-year interim between the *Prostitution Reference* case and *Bedford* and its relevance to the S.7 analysis. She questioned whether the social, political and economic assumptions underlying the *Prostitution Reference* remained valid given this new evidence. Thus, there were solid legal reasons to believe that the decision in the *Prostitution Reference* case was not binding. The Court in the *Carter* case agreed with this reasoning and rejected a narrow interpretation of *stare decisis*. The Court agreed that the so-called adjudicative facts – the “who, what, when, and where” of the two cases (*Rodriguez* and *Carter*) were very similar and not different enough to distinguish in any meaningful way the two cases.³⁰⁹ The evidence as to legislative and social facts, did, however, differ significantly and were enough to distinguish the two cases despite the similarity in adjudicative facts.

What’s more the Court concluded that the jurisprudence of S.7 had evolved since *Rodriguez* particularly with respect to the articulation of the requirements of the

³⁰⁹ *Carter* at paras 938-939.

principles of fundamental justice, specifically the inclusion of concerns with overbreadth and gross disproportionality in the analysis.³¹⁰ And further the Court ruled that the evidentiary record about the social and legislative facts bore on the assessment of the legislation's consistency with the principles of fundamental justice under S.7 and on justification in S. 1 analysis. The Court ruled that that the new standards of S. 7 combined with new evidence of social and legislative facts gave them reason to reinvestigate the constitutionality of the *Criminal Code* provision.³¹¹ Thus, according to *stare decisis* the Court in *Carter* ruled that it was bound by *Rodriguez* with respect to the *Rodriguez* ruling on whether or not the legislation was arbitrary and that the legislation engaged S.7. It was still left to the *Carter* Court, however, to decide whether the legislation infringed S.15 and whether such infringement is saved under S.1 analysis. As well, the *Carter* Court, decided that it could raise the question of whether the legislation engages S.7 rights in a way that is not in accordance with the principle of fundamental justice regarding a law's overbreadth and gross disproportionality. The reasoning at play in the Court's decision to reject a narrow interpretation of *stare decisis* mirrors what I have described in Chapter 3 – the Court relied on existing legal materials – the developments in S.7 jurisprudence as well as the availability of new evidence about social and legislative facts, in its determination that *stare decisis* did not dictate the decision in *Carter*.

B Section 15 Analysis

For the purposes of S. 15 analysis it is important to note that, while the *Criminal Code* once included prohibitions on attempted and assisted suicide, attempted suicide and

³¹⁰ Ibid at para 973.

³¹¹ Ibid at para 985.

suicide itself were both removed from the *Criminal Code* in 1972.³¹² On the basis of this change, the Court held that the part of the criminal code governing suicide and assisted suicide now embodied the following principles (1) persons who seek to take their own lives, but fail to do so, are not criminally responsible, and (2) persons who are rendered unable, by physical disability, to take their own lives are legally prevented from receiving assistance in ending their own lives by the *Criminal Code* that makes it an offence to assist with suicide. These two principles, according to the Court, created a distinction between suicide and assisted suicide based on physical disability.³¹³ The defendants had claimed that this distinction is not discriminatory because the law's purpose is to protect vulnerable people.³¹⁴ The Court disagreed – the distinction is discriminatory because it worsens and perpetuates a disadvantage experienced by persons with disabilities. The Court wrote “ The dignity of choice should be afforded to Canadians equally, but the law as it stands does not do so with respect to this ultimately personal and fundamental choice.”³¹⁵ Thus, the Court found that the legislation infringed the right to equality under S. 15 of the *Charter*.³¹⁶

The reasoning at work here echoes the judicial reasoning described in the third chapter of this dissertation. The Court looked to the law as it stood, specifically the lack of criminalization of suicide and attempted suicide, and saw that the criminal ban on assisted suicide unfairly discriminated against those with disabilities who are unable to

³¹² *Criminal Law Amendment Act, 1972*, S.C. 1972, c.13, S16.

³¹³ *Carter* at para 1161.

³¹⁴ *Ibid* at para 1160.

³¹⁵ *Ibid* at para 1161.

³¹⁶ *Ibid* at para 1163.

take their own lives. The Court, at least in this point in its analysis³¹⁷, saw no reason why those with disabilities should be treated differently by the law with respect to taking their own lives. The norm articulating the importance of choice over end of life matters was firmly recognised in the law. But the law on the books created a disjunct between the applicability of that norm to those who were disabled and its applicability to those who were not. In Section 1 analysis the Court looked to see if such a limit could be justified.

C Section 1 and Section 7 Analyses

The claims of both the defendants and plaintiffs regarding minimal impairment under S. 1 and overbreadth under S. 7 overlapped.³¹⁸ And the Court drew on both of their submissions in both contexts.³¹⁹ Thus, the reason the legislation was found not to meet the minimal impairment requirement of S. 1 and not to be in accordance with the principles of fundamental justice (S.7) are quite similar. The *Rodriguez* decision held that the *Criminal Code* legislation had a pressing and substantial purpose – the protection of the vulnerable who might be induced in moments of weakness to commit suicide.³²⁰

As was mentioned in the discussion of *stare decisis* the jurisprudence of S. 7 analysis had developed since *Rodriguez*. Specifically, the Court had interpreted the phrase “in accordance with the principles of fundamental justice” to require not just that the aim of

³¹⁷ S.1 analysis still gives the Court the opportunity to say that while there is a discriminatory distinction the distinction is in keeping with the reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

³¹⁸ Ibid at para 1217.

³¹⁹ It is worth noting that the burden lies on the plaintiffs under S. 7 but on the governments for S.1

³²⁰ Ibid at para 1166.

the legislation could not be arbitrary (as was the issue in *Rodriguez*), but also that the infringement could not be overly broad or grossly disproportionate.

Following from these developments in S.7 jurisprudence, the Court in *Carter* found that the prohibition of physician-assisted death infringes the right to life, liberty and security of the person as it “deprives some individuals of life, as it has the effect of forcing some individuals to take their own lives prematurely”; it “denies people in this situation the right to make decision concerning their bodily integrity and medical care and thus trenches on their liberty”; and “by leaving them to endure intolerable suffering it impinges on their security of the person”.³²¹ What’s more the Court concluded that the total ban on PAS “catches people outside this class [vulnerable persons]” and “sweeps conduct into its ambit that is unrelated to the law’s objective”.³²² The ban was thus found to be overbroad and not justifiable in a free and democratic society. An absolute prohibition would seem necessary if the evidence showed that physicians are unable reliably to assess competence, voluntariness and non- ambivalence in patients, or that physicians fail to understand or apply the informed consent requirement for medical treatment. An absolute prohibition might also be called for if the evidence from permissive jurisdictions showed abuse of patients, or carelessness or callousness on the part of physicians, or evidence of the reality of a practical slippery slope. However, that was not what the evidence showed. The Court found that the evidence supports the conclusion that a system with properly designed and administered safeguards could, with

³²¹ *Carter* at paras 1376-1378.

³²² *Ibid* at para 1379.

a very high degree of certainty, prevent vulnerable persons from being induced to commit suicide, while permitting exceptions for competent, fully-informed persons acting voluntarily to receive physician-assisted death. The Court's reasoning is clearly informed by the law. The standards with which the judges assessed the law – the norms of overbreadth or gross disproportionality – were ones developed through a long line of jurisprudence. The availability of new evidence, evidence not around at the time *Rodriguez* was decided, demonstrated that although the aim of the criminalization was worthwhile its effects were too far reaching. Additionally, the evidence showed that the aim of protecting the vulnerable could be accomplished with better, more particular, and more specific legislation. The new evidence meaningfully changed the S. 7 and S. 1 analysis. Imagine, for example, that legislation was enacted to ban harmful jungle-gym equipment in schoolyards. At Time 1 (T1), equipment, Extreme Seesaw, passed the relevant tests and met the required standards and was deemed not harmful. At Time 2 (T2), however, someone retested Extreme Seesaws using more sophisticated tests than those available at T1, and Extreme Seesaws failed the new tests. At T2 Extreme Seesaw equipment was found to be harmful. We can even imagine that between T1 and T2 the environment changed which in part contributed to Extreme Seesaws becoming harmful even though they were not harmful at T1.³²³ Something similar happened in the case of the criminal ban of PAS – the standards that the legislation had to meet changed and the evidence about the effects of the legislation changed. We should understand the reasoning in both the case of the harmful equipment and the PAS law as similar – the

³²³ Perhaps, in this particular area there was a growing increase in the number of earthquakes making Extreme Seesaws a particularly dangerous type of schoolyard equipment.

decisions in both cases rely on publically available evidence rather than on the judges personal moral beliefs about harmful schoolyard equipment or PAS. These are cases of the use of public reason –arguments from new publically accessible facts, not from the private moral beliefs of judges.

In the S. 1 analysis of *Rodriguez* the majority held that the *Criminal Code* legislation had a pressing and substantial purpose – the protection of the vulnerable who might be induced in moments of weakness to commit suicide – and that the legislation is rationally connected to that purpose. According to S. 1 analysis, limits on rights must be prescribed by law, they must serve a pressing and substantial objective, and the means used must be proportionate to the ends. For the means to be proportionate to the ends there must be a rational connection between the means and ends; the means chosen must minimally impair the rights being limited, and there must be proportionality as between the deleterious and salutary effects of the rights' limitation.

Given *Rodriguez*, the Court was bound to acknowledge that the prohibition of assisted death was rationally connected to the purpose of S. 241 of the *Criminal Code*. It concluded, however, that the legislation did not minimally impair the *Charter* rights at issue. There was a significant group of competent Canadians who should be allowed to access PAS, and this access could be provided while still protecting the vulnerable. The Supreme Court's decision was based on evidence from jurisdictions, which had legalized PAS. The Court found that there was, "no evidence from permissive regimes that people

with disabilities are at heightened risk of accessing physician-assisted dying;” “no evidence of inordinate impact on socially vulnerable populations in permissive jurisdictions;” and “no compelling evidence that a permissive regime in Canada would result in a practical slippery slope.”³²⁴ The evidence available post- *Rodriguez* and the jurisprudential development of S.7 changed the *Charter* analysis of section 241 of the *Criminal Code*. After taking account of the new evidence and the developments in jurisprudence, the Court unanimously decided that the legislation clearly violated S.7 and could not be saved by S.1 of the *Charter*.

VI A Return to the Democratic Challenge and A Community’s Constitutional Morality

I hope that it is now obvious that it would be wholly unfair to argue that a new set of judges just disagreed with the decision in the *Rodriguez* case based on their personal views. In fact, I hope that it is clear that the decision in *Carter* can be understood as democratic, as can the shift in the law from *Rodriguez* to *Carter*. According to what I have put forward throughout this project, the reasoning in *Carter* can be seen as an attempt to determine what the community’s constitutional morality required regarding PAS. We are not forced to understand the decision as one arrived at on the basis of the first order moral preferences of the judges hearing the case. One of the main arguments in this project is that communities are moral agents. As moral agents communities have commitments and the judicial review of legislation is democratic because it attempts to hold communities to their own most deeply held commitments. It is this that took place when the Supreme Court decided *Carter* differently than it had earlier decided *Rodriguez*.

³²⁴ Ibid at para 1366.

It is worth pausing here and highlighting how what I have just said about nations as moral agents fits into and develops the standard debate around charters and judicial review. As noted above, judicial review is the process by which judges review legislation for consistency with a nation's constitution, bill of rights, or charter. Opponents of judicial review claim that it is undemocratic.³²⁵ The standard democratic objection goes something like this: judicial review is a process in which unelected judges determine the legal validity of legislation passed by the people's elected representatives: hence judicial review cannot be reconciled with democracy and the principle of self-governance. Thus, someone may claim that in the *Carter* case the judges replaced the considered judgment of Canada's elected representatives with their own preferences about PAS. Yet as we have seen such an objection overlooks the fact that a nation is itself an agent. A nation, like an individual, can act and do things, and its actions, like an individual's, can be more or less in line with its commitments. Thus, as I argue above, claims that charters and judicial review thwart democracy fail to attend to the agency of nations. Attempts at self-governance must be made based on the sincere commitments of the agent. To see this more clearly let's return to the example of Liz that we examined at the beginning of the project – an example that involves self-governance and autonomy at the individual level. Remember, Liz has had too much to drink. Liz is vehemently opposed to drinking and driving and her friends all know this. Tonight, however, after having one too many, Liz drunkenly declares that she is perfectly capable of driving herself home. In order to respect her autonomy Liz's friends ought to prevent her from driving drunk. They should

³²⁵ Waldron, *Law and Disagreement*.

do this because her wish to drive drunk is inauthentic and fueled by gin. By stopping her from drunk driving her friends ensure that her actions remain consistent with her commitment to not drinking and driving. In this example, Liz's inauthentic wish is driven by alcohol. But prejudice and hatred rooted in fear (especially fear of the unknown or different), or in inadequate evidence or information can also make agents, individuals and communities alike, act in ways that are in contradiction with their commitments. I suggested earlier in this dissertation that this is what happened in the case of the Canadian internment of Japanese Canadians in WWII. Charters provide a bulwark against this moral impulsiveness and wrongheadedness. Judicial review helps prevent temporary majority decisions from going against the nation's authentic moral commitments.

Acknowledging that nations are moral agents adds a new complexity to our understanding of the democratic nature of charters and judicial review. Charters and the judicial review of legislation should be seen as more democratic than previously recognised because they attempt to hold communities to their own most deeply held moral beliefs. Individuals have a moral centre or best self whose principles they sometimes ignore or contradict. Nations likewise have a moral centre whose principles they sometimes infringe. A charter reminds the nation of what it really is as a moral agent and reminds the citizens of who they are and of what they owe their fellows. The judiciary calls foul when they do not play by the rules.

With this shift in perspective we can understand judges in charter cases as trying to assess what the community is committed to through its constitution, its charter and its laws. Or we can see them as taking on the perspective of public reason and ensuring that the community remains faithful to its authentic commitments. In deciding whether the *Criminal Code's* prohibition of PAS violated the *Charter*, the judges needed not only to engage in analysis of the community's commitments surrounding suicide and attempted suicide, they also needed to clarify what the principles of fundamental justice required. In both areas there was substantial development for the judges to draw on, developments that enabled them to come to a different decision from *Rodriguez* without declaring *Rodriguez* incorrect. As we saw in our discussion of the *Carter* decision the judges engaged in reasoning very similar to that which I described in Chapter 3. They drew on other aspects of the law – most importantly observing that the law did not criminalize suicide or attempted suicide and protected the patient's right to make important end-of-life decisions. As well they drew on previous court decisions involving *stare decisis* and on developments in S.7 jurisprudence. Drawing on the legal developments surrounding the requirements of the principles of fundamental justice is a particularly vivid illustration of the norms of CCM being recognised in law. That these legal materials are evidence of the norms that the community is committed to makes judges, who are selected for their legal expertise, particularly apt to discern these commitments. That the norms recognised in law are to be discovered in many instances according to standard common law reasoning again makes judges, given their judicial training and experience, especially qualified for their role.

Had the court lacked evidence involving the effect of PAS in other jurisdictions it might very well have rightly concluded that a total ban on assisted suicide was the most publically justified answer in the debate. Given that the aim of the legislation was justified and that there would have been no evidence concerning the effectiveness in achieving that aim of any decision other than a total ban, the ban would probably have been justified. A similar conclusion might have been justified, had the S. 7 jurisprudence not developed beyond the criterion of arbitrariness. However, the most publically justified answer, given the new evidence and S.7 jurisprudential developments, was not a total ban. The evidence demonstrated that the government could protect the vulnerable people it was concerned about while not infringing on the rights of those competent adults who wanted to use PAS.

What is more, a judge in a good faith attempt to assess what the community is committed to does so from the perspective of that community. She decides according to what she thinks the community is committed to in the same way when she makes a decision in a tort case and she decides according to what she thinks the law requires. There is an important difference between deciding according to what she thinks is the best and deciding according to what she thinks the community is committed to. Only the former necessitates the judge decide according to her own first order moral preference. True, the second requires the judge's judgment, but again this is not unusual as we rely on judicial judgments all the time (this aspect of nearly all court cases was highlighted in Chapter 3). Think of a judge trying to decide whether or not a person took reasonable care to ensure the safety of others. We expect her to look to the legal requirements of reasonableness,

not to her own feelings about what's reasonable care and what's not. Similarly, in the *Carter* case the judges looked to legal specifications of the principles of fundamental justice and of what's justifiable in a free and democratic society. The decision in *Carter* was not a case of the Court thwarting democracy, but rather of the Court ensuring that Canada stayed true to its constitutional commitments.

Thus, while at first glance it may have seemed difficult to understand the shift from *Rodriguez* to *Carter*, I hope that I have provided sufficient argument throughout this project to show that the change can be adequately explained and constitutionally justified. There were ample legal resources and evidence for judges to rely on in making their decision. And those materials pointed to finding the criminal ban on PAS – as of 2015 – unconstitutional. What's more the theory of charter and judicial review articulated here can make sense of the Court's claim that both *Rodriguez* and *Carter* were decided correctly.

Conclusion

This dissertation has set out to defend charters and bills of rights and the judicial review that often accompanies them. Following Wilfrid Waluchow, I have argued that we have good reason to reject the standard conception of charters that sees them as representing robust pre-commitments about the meaning and requirements of the rights therein in perpetuity. I have taken up Waluchow's theory of charters and judicial review and after pointing out some of the areas in which it is still vulnerable (Chapter 1) I have aimed to develop and strengthen it. I provided an argument for why we should think of communities as moral agents and how doing so alters the traditional landscape of the debate about charters (Chapter 2); I demonstrated what it means for the commitments of the community to be recognised in law (Chapter 3); and I explained why the perspective of public reason and the reasons of public reason are appropriate for judges in charter cases (Chapter 4).

The theory of charters and judicial review articulated and defended here is better quipped to respond to the democratic challenge than the standard conception or Waluchow's less-worked-out theory. It allows for the meaning of rights to evolve and change over time because the community commitments can change and evolve over time in much the same way an individual's commitments can change. Charters and the ideals enshrined in them point the direction for a community's constitutional morality to evolve in and judicial review helps insure that this evolution keeps to a principled and a reasonable path. The theory provides a stronger explanation and defense of charters and judicial review.

However, it is in many important ways a modest defense of the practices, as I think all arguments in favour of charters should be. In this project I have not attempted to argue that charters and judicial review will always give us the morally preferred answer or that they will engender a consensus around that answer. I do not think they can in all cases. But this does not mean we should abandon them. If we understand that charters outline a modest but important pre-commitment to rights and ideals and that the meaning of that commitment is never fully fleshed out, but is always open to be re-examined, we have good reason to keep charters. They stand as a declaration and symbol of what a nation and its citizens owe their fellow citizens. Charters also function as a way for citizens, especially women and minorities, to demand what is owed to them and for them to be counted and not overlooked. Legislative harm to minorities is not always deliberate: it is not the case that every time legislation infringes someone's rights that the legislators set out to do that. Oftentimes the infringement may not have been foreseen or the legislators may have felt that it could not be avoided. Enshrining a charter provides a platform for people to challenge legislation and call on the state to look more closely at how such legislation may infringe some citizens' rights.³²⁶

In acknowledging the benefits of charters, we should not, as I hope I have stressed throughout, mistake them for a moral panacea. Sometimes a nation may have a morally

³²⁶ Further discussion of the importance of being able to go to trial see Alon Harel and Adam Shinar, "Between judicial and legislative supremacy: A Cautious Defense of Constrained Judicial Review" (2012) 10 *International Journal of Constitutional Law* 4, especially section 4: "Judicial review and the right to a hearing: Courts as voicing claimants' grievances".

bad constitutional morality or a constitution that is ignored and flouted by the state – legislature and judiciary included. In these cases having a charter or judicial review is more than likely not going to be enough to protect minority rights or ensure equal treatment of citizens before and under the law. Sometimes a transformation of the political regime, and a totally new constitution may be called for: in such cases, as the American Declaration of Independence reminds us, a revolution may be necessary and justified.³²⁷

This brings me to another point worth reiterating. One of the main arguments of this dissertation is that judges ought to rule according to authentic community commitments rather than inauthentic wishes, because doing so helps ensure that the community's attempts at self-governance are sincere and true to itself. This distinction is not necessarily a moral one. Natalie Stoljar seems to think that, in making the distinction, Waluchow, who first emphasized the distinction with respect to judicial review, wants to be able to “classify preferences denying rights to minorities as inauthentic”³²⁸ and thus that the distinction between the two *is* a moral one. But this, as I have argued elsewhere, is a mistake.³²⁹ The distinction is meant to do just what Waluchow says – distinguish between knee-jerk reactions and well-considered commitments. Certainly, the hope is that the distinction will catch moral failings, but it will not always do so. Nor is it the

³²⁷ Waluchow acknowledges this as well. See, Waluchow, “Constitutional Morality and Bills of Rights”.

³²⁸ Stoljar, Natalie, “Waluchow on Moral Opinions and Moral Commitments” (2009) *Problema. Anuario de Filosofía y Teoría del Derecho* 3.

³²⁹ O'Brien, “Charter Interpretation and a Community's Constitutional Morality: Responding to Natalie Stoljar on Wil Waluchow”.

purpose of the distinction to do so. For example, the distinction enables us to say that the view that black and white people should not marry each other is a sincere commitment of a member of the KKK. According to this theory of community constitutional commitments, prejudice does not make a belief inauthentic. The constitution of the Confederate States of America would seem to have been an authentic, although prejudiced and immoral, expression of the majority of its citizens' commitments. But a modern liberal democracy's constitution commits its citizens to equality before the law for all, so that any legislation motivated by prejudice and hatred is clearly an inauthentic expression of the community's wishes and a violation of its sincere commitments. Sometimes, depending on the legal system, a community's constitutional morality may be morally questionable. Judges who engage in judicial review according to the theory I have developed herein are not engaging in moral theorizing separate from the community's commitments, but rather are attempting to answer legal questions, albeit ones that may have a moral component, from the perspective of the community. And sometimes that answer may not be the best morally speaking, but it will be constitutionally justified. Again, I take this to be a benefit of the theory.

This brings me to another point about enshrining charters. Waldron thinks that there is a deep and problematic inconsistency inherent in charters. To enshrine a charter, is according to him, to combine

self assurance and mistrust: self assurance in the proponent's conviction that what he is putting forward really is a matter of fundamental right and that he has captured it adequately in the particular formulation he is propounding; and mistrust, implicit in his view that any alternative

conception that might be conceived by elected legislators next year or in ten years' time is so likely to be wrong-headed or ill-motivated that his own formulation is to be elevated immediately beyond the reach of ordinary legislative revision.³³⁰

He goes on to say, "if the desire for entrenchment is motivated by a predatory view of human nature and of what people will do to one another when let loose in the arena of democratic politics, it will be difficult to explain how or why people are to be viewed as essentially bearers of rights."³³¹ But there needn't be any deep inconsistency in enshrining charters, especially once we give up the notion that they represent a strong pre-commitment to specific understandings of rights. Rather, charters are simply an acknowledgement that sometimes our fear or our prejudices get the better of us and in these times we can compromise our own values.³³² It is helpful to have a public reminder of what we really believe in. We don't need to take a predatory view of human nature; we merely need to look at the history of democracies that have infringed peoples' rights sometimes in mild ways but sometimes in horrendous ones. The list of offenders would certainly include the United States, Australia, and Canada. Charters are not an indictment of "other" people's human nature as Waldron seems to suggest: they are a reminder to all of us of our ideals and the possibility of our failing to live up to our ideals. In the first chapter I made a comparison of a community with a charter to a person who makes a commitment to healthy living. A person who makes such a commitment ought both to make ongoing attempts to live according to that commitment, and to rigorously reflect on whether or not new activities or foods are healthy. There is nothing inconsistent in such a person making a commitment - it does not infantilize her or patronize her or make light

³³⁰ Waldron, *Law and Disagreement*, 221-222

³³¹ Ibid 222.

³³² I am deliberately being vague about whether I mean an individual or a community. I think it applies to both.

of her autonomy. Her commitment is just a recognition that at times she may suffer from a weakness of will or feel as though some concerns should come before her own well-being. Perhaps, during a particularly a stressful and busy time at work she might think it's ok to sacrifice her health by sleeping less in order to work more. But if she has a made a public commitment to healthy living, perhaps by writing it down or telling her close friends, she gives herself the opportunity to reflect on that choice and see that she is not making a choice in keeping with her commitments.

I Going Forward

A The Judges in Judicial Review

Many critics have pointed out that judges tend to come from privileged social, political, and financial backgrounds. And that they thus bring with them to the bench a privileged perspective, one that does not include much knowledge of or connection to the struggles and life experiences of groups such as women, racial minorities, sexual minorities, the poor et cetera. Waluchow refers to this as the problem of judges as the elites of society.³³³ And it is a worry that judges (perhaps even unconsciously) may suppress the concerns of minority groups and allow the concerns of the elite to dominate the interpretation of charters and the law generally.³³⁴ One might be tempted to think that, given what I have argued throughout this dissertation, that the background of judges should not matter. After all, in cases of judicial review judges are not to decide according to their own first order moral preferences. The judge's social position should have no bearing on their

³³³ See in particular Waluchow, "Constitutions as Living Trees: An Idiot Defends", 8; *A Common Law Theory of Judicial Review*, 166.

³³⁴ For concerns of this especially regarding the *Canadian Charter of Rights and Freedoms* see Michael Mandel, *The Charter of Rights and the Legalization of Politics* (Toronto: Thompson Educational Publishing, Inc. 1994).

decision.³³⁵ Judges, I have argued, ought to rule according to the community's constitutional commitments and thus it does not matter much who the judge is provided, of course, that they have the appropriate legal training and experience. This is not, however, the position I take. The fact that judges tend to come from the elites of society is a problem for legal systems as a whole, not a problem unique to charter review. I think we ought to work hard to diversify the bench, in part because I am inclined to think that doing so will get us better legal answers. That is, answers more reflective of what the law requires. I do not think that maintaining that we ought to diversify the make-up of the bench, and also maintaining that the judges should not rule according to their own moral preferences leads to any contradictions. If we turn momentarily from law to science, we see that feminist philosophers of science, particularly feminist empiricists, have long argued that diversifying the make-up of scientists will get us better science.³³⁶ They do not argue that the current scientific method is invalid, or that we ought to abandon science, but rather that we can improve empirical adequacy if our community of scientists includes more minorities.³³⁷ For example, Sarah Blaffer Hrdy in her article "Empathy, Polyandry and The Myth of the Coy Female" discusses how male researchers in primatology, likely because of androcentric thinking, seemingly ignored relevant data

³³⁵ One might of course think that having a more diverse group of people as judges is good because is it evidence of society making progress in overcoming oppressive barriers for many minority groups.

³³⁶ See, for example Helen Logino and Ruth Doell, "Body, Bias, and Behavior: A Comparative Analysis of Reasoning in Two Areas of Biological Science." (1983) *Signs* 9; Logino, "Can There Be a Feminist Science?" (2009) 2 *Hypatia* 3; Longino, 'Subjects, Power, and Knowledge: Description and Prescription in Feminist Philosophies of Science'. In *Feminist Epistemologies*. Ed. L. Alcoff and E. Potter (New York: Routledge 1984).

³³⁷ Feminist empiricism often calls itself a "successor science" to highlight that it is not a rejection of science nor a radical rethinking of it. See again, Longino "Can There Be a Feminist Science?"

regarding female primate behavior that was contrary to traditional understandings of the coy female. She argues that it was the influx of women into the field in the 1970s that improved the research and the sexual- selection theories that particularly focused on the role of female primates and the promiscuity of female primates. The conception of the coy, discriminating, female and aggressive male has been shown to be empirically inadequate.³³⁸ The work of feminist empiricists gives us good reason to think that our legal systems would benefit from having a more representative judiciary. To return specifically to charters and judicial review, I am inclined to think that a more representative judiciary would be better able to determine the community's commitments especially on issues of equal of rights for all. Judges from more diverse backgrounds will inevitably have noticed different aspects of how the law impacts on and is applied to various minorities, including how their rights are or are not protected. Such awareness can only be a benefit to the judiciary.³³⁹ This is something worthy of further consideration and nothing in this dissertation's argument implies otherwise.

B Another Reason in Favour of Charters

Moving forward in the debate about charters it may be helpful to consider other issues than just their support for democracy. The fact that they ultimately support and protect democracy is not the only thing about charters that is beneficial. Throughout this dissertation I have suggested various ways that a charter may make a community a better moral agent and demonstrated how this strengthens the case for charters and judicial review. I contend that charters and the judicial review of legislation are democratic because they attempt to hold communities to their own most deeply held moral beliefs.

³³⁸ Sarah Blaffer Hrdy, 'Empathy, Polyandry, and the Myth of the Coy Female. In *The Gender of Science*. Ed. J. Kourany. (Upper Saddle River, N.J.: Prentice Hall 2002).

³³⁹ I also think this gives us good reason to have a more diverse group of elected officials.

This role of communities as moral agents is a central aspect of my doctoral work. But I also want to emphasize how a charter can make individuals better political citizens. This suggestion is part of a response to Waldron's claim that charters reduce the level of debate concerning political matters and make such debates artificial and warped by "verbal rigidity".³⁴⁰ For example, Waldron contends that Americans are obsessed with deciding whether or not capital punishment is "cruel and unusual" instead of debating the merits and demerits of the practice. But I suggest, *contra* Waldron, that entrenching charters of rights provides the grounds upon and the vocabulary with which citizens can respectfully and sincerely engage with and address others. Charters help citizens engage in civil and rational debate with their fellows because they provide an example of an appeal to public reasons.

This section discusses what role a charter can play in an individual's life and in her understanding of her responsibilities as a political citizen. My suggestion is that entrenching a charter will help a citizen live up to the standard of an ideal legislator as that role has been limned by John Rawls. My discussion of this point will be limited, but I hope, fruitful.

In most Western liberal democracies, as we have discussed, there is wide and deep disagreement about what the good life consists in. That is, different people have different comprehensive doctrines that form around religion, philosophy, morality, and economics.

³⁴⁰ Waldron, *Law and Disagreement*, 226.

In some cases these differences appear to be irreconcilable and when the disagreement is deep enough people seem unable to reach agreement based on their comprehensive doctrines. But even in these cases decisions about fundamental political questions still have to be made – for example, about how the law will, if it will at all, regulate abortion. In such cases, Rawls argues that people need to move away from their own conceptions of the good and the good life and engage with and use what Rawls calls public reasons.³⁴¹ Public reasons are those reasons that people cannot only be expected to understand, but that people can also reasonably be expected to accept. Public reasons make reference to public values and public standards rather than idiosyncratic or religious beliefs. They make reference to the community's constitutional morality or to arguments that are reasonable extrapolations from it. In a representative democracy in which citizens are asked to vote for their representatives and sometimes, although less often, to vote on particular laws in the case of referendums – Rawls calls on citizens to vote as though they were ideal legislators.³⁴² For Rawls an ideal legislator is not a Platonic guardian but rather someone who uses public reason to guide their voting for both officials and for legislation in the case of referendums: someone who asks herself which potential officials seem to best represent the ideal of public reason and which laws seem best supported by public reason. Citizens, of course, are not legally required to be ideal legislators, only judges have to follow public reason (and perhaps the legislative role requires that too). But even though the use of public reason is not legally mandated for individual citizens, charters are a reminder to all citizens of their commitment as citizens to a set of a public reason.

³⁴¹ Rawls, "The Idea of Public Reason Revisited", 766.

³⁴² Ibid 769.

Charters help provide the framework in which engagement in public reason can best be done. They help formulate the issues of the debate in terms of public reason and help move people away from their comprehensive doctrines. In the public forum people can argue for the same conclusions as their comprehensive doctrine would lead them to, but should do so in terms and with reasons that their interlocutors can accept. This will mean, for example, abandoning arguments for the legal prohibition of acts that rest on claims that the act is sinful. By including a commitment to equality charters remind everyone that others who are non-Christians or non-Muslims, or non-post-modernists also have rights. Charters provide the language for the basic values of the community, language that citizens can use to deliberate, debate, and exchange views with each other, all the while respecting each other as free and equal citizens. Rawls stresses that, “public reasoning aims for public justification” and it is not reasoning that is simply logically valid but is reasoning that is sincerely addressed to others, that takes account of the background and beliefs of others and that proceeds in consideration of the context in which these arguments happen.³⁴³ Charters provide the grounds upon which citizens can respectfully and sincerely engage with and address others and charters remind us all that our arguments should make sense in terms of concepts like liberty, equality, and justice.

What I have suggested in this section has taken for granted the soundness of Rawls’ argument that people ought to use public reasons when engaging in debates and discussions in the political sphere. Chapter 4 made clear that the idea of public reason is quite contentious and certainly not universally accepted. Some object that theories of

³⁴³ Ibid 786.

public reason such as Rawls' are self-defeating because no such theory can be justified to all those to whom it would apply.³⁴⁴ However, at least in so far as they are citizens of a country with a charter and a constitution all citizens are committed to the public reason found in those documents. And they can be subjected to legal sanction if they seriously infringe the rights found enshrined in those documents. Others claim that public reason is unfairly exclusionary, particularly of religious arguments and thus that it cannot maintain its claim to impartiality.³⁴⁵ I am not going to defend public reasons here for that would surely be a paper unto itself. My objective here is more modest. Namely, I am proposing that if we think that Rawls might be correct about public reasons or even if he merely seems on the right track, then it seems important to point out how charters or bills of rights could fit with and compliment this aspect of Rawlsian theory. And I believe the theory of charters and judicial review I have put forward here finds support in Rawls' powerful and influential theory of public reason and in turn provides it with support.³⁴⁶

II Final Remarks

It is a privilege to live in a democratic society in which the rights of all are valued. This project hopes to take its small part in the effort to make sure that our aspirations for liberty and justice become even more of a reality.

³⁴⁴ See, for example, Steven Wall, "Is Public Justification Self-Defeating?" (2002) 39 *American Philosophical Quarterly* 385.

³⁴⁵ See, for example, Michael Sandel, *Liberalism and the Limits of Justice: Second Edition* (Cambridge University Press 1998).

³⁴⁶ Arguments from authority, as Aquinas says *secundum* Boetium, might be the weakest, but it certainly does not lessen one's confidence in one's line of argument to have it align with that of a figure like Rawls. (S.T.1.1.8.)

Bibliography

- Bereza, E (1994). "The Private and Public Deaths of Sue Rodriguez" *McGill Law Journal* 39(719).
- Brand-Ballard, J (2010). *Limits of Legality: The Ethics of Lawless Judging*. Oxford; New York: University Press.
- Bratman, M (1999). *Faces of Intention: Selected Essays on Intention and Agency*. New York: Cambridge University Press.
- Coleman, D (2010). "Assisted Suicide Laws Create Discriminatory Double Standard for Gets Suicide Prevention and Who Gets Suicide Assistance: Not Dead Yet Responds to Autonomy, Inc" *Disability and Health Journal* 3(1).
- Downie, J & Simon Bern (2008). "Rodriguez Redux" *Health Law Journal* 16.
- Downie, J "In a Nutshell: The Supreme Court of Canada Decision in Carter V. Canada (Attorney General)" *Impact Ethics* (February 11th, 2015)
<<https://impactethics.ca/2015/02/11/in-a-nutshell-the-supreme-court-of-canada-decision-in-carter-v-canada-attorney-general/>>.
- Dworkin, R (1986). *Law's Empire*. London: Belknap.
- (1989). "Liberal Community" *California Law Review* 77(479).
- (2011). *Justice For Hedgehogs*. Harvard University Press.
- Fine, S "Supreme Court Rules Canadians Have Right to Doctor-Assisted Suicide" *The Globe and Mail* (February 6th, 2015)
<<http://www.theglobeandmail.com/news/national/supreme-court-rules-on-doctor-assisted-suicide/article22828437/>>.
- Freedman, B (1994). "The Rodriguez Case: Sticky Questions and Slippery Answers" Case Comment, *McGill Law Journal* 39(644).
- Freedman, S (2004). "Public Reason and Political Justifications" *Fordham Law Review* 72(2021).
- French, P (1979). "The Corporation as a Moral Person" *American Philosophical Quarterly* 16(3).
- Gaus, G (1996). *Justificatory Liberalism*. Oxford University Press.
- Gardbaum, S (2013). *The New Commonwealth Model of Constitutionalism*. Cambridge University Press.
- Gardner, J (2002). "Reasons for Teamwork" *Legal Theory* 8(4).

- (2012). *Law as a Leap of Faith*. Oxford: Oxford University Press.
- Greenawalt, K (1988). *Religious Convictions and Political Choice*. Oxford University Press.
- (1994). “On Public Reason” *Chicago-Kent Law Review* 69.
- (1995). *Private Consciences and Public Reasons*. Oxford University Press.
- George, R (1999). “Law, Democracy, and Moral Disagreement: Reciprocity, Slavery, and Abortion”, in *Deliberative Politics: Essays on Democracy and Disagreement*, Stephen Macedo (ed). Oxford University Press.
- Hart, H. L. A (1994). *The Concept of Law*, 2nd ed. Oxford: Clarendon Press.
- Habermas, J (1995). “Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism” *The Journal of Philosophy* 92(3).
- Harel, A & Adam Shinar (2012). “Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review” *International Journal of Constitutional Law* 10(4).
- Held, V (1970). “Can a Random Collection of Individuals be Responsible?” *Journal of Philosophy* 67.
- Hutscroft, G & Miller B.W (eds.) (2011). *The Challenge of Originalism: Theories in Constitutional Interpretation*. New York: Cambridge University Press.
- Hogg, P (2006). “Canada: The Constitution and Same-Sex marriage” *International Journal of Constitutional Law* 4(3).
- (2012). “The Brilliant Career of Section 7 of the Charter” *Supreme Court Law Review*.
- Hrdy, S (2002). ‘Empathy, Polyandry, and the Myth of the Coy Female. In *The Gender of Science*. J. Kourany (ed). Upper Saddle River, N.J.: Prentice Hall.
- Isaacs, T (2011). *Moral Responsibility in Collective Contexts*. Oxford: Oxford University Press.
- Kavanagh, A (2003). “Participation and Judicial Review: A Reply to Jeremy Waldron” *Law and Philosophy* 22(5).
- (2003). “The Idea of a Living Constitution” *Canadian Journal of Law and Jurisprudence* 1(January).
- Kutz, C (2002). “The Collective Work of Citizenship” *Legal Theory* 8(4).
- Logino, H & Ruth Doell (1983). “Body, Bias, and Behavior: A Comparative Analysis of Reasoning in Two Areas of Biological Science” *Signs* 9.

- Longino, H (1984). 'Subjects, Power, and Knowledge: Description and Prescription in Feminist Philosophies of Science'. In *Feminist Epistemologies*. L. Alcoff and E. Potter (eds) New York: Routledge.
- (2009). "Can There Be a Feminist Science?" *Hypatia* 2(3).
- Lamond, G "Precedent and Analogy in Legal Reasoning", *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/>>.
- Larmore, C (1999). "The Moral Basis of Political Liberalism" (1999) *The Journal of Philosophy* 12(96).
- MacCormick, N (1978). *Legal Reasoning and Legal Theory*. Oxford: Clarendon Press.
- (2005). *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*. Oxford: Clarendon Press.
- Mandel, M. (1994). *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Thompson Educational Publishing, Inc.
- (1998). *Liberalism and the Limits of Justice: Second Edition*. Cambridge University Press.
- Manfredi, C (2001). *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd edition. Don Mills, Ontario: Oxford University Press Canada.
- May, L (1992). *Sharing Responsibility*. Chicago: University of Chicago Press.
- Miller, D (1989). *Market, State, and Community: Theoretical Foundations of Market Socialism*. Oxford: Clarendon Press.
- (2004). "Holding Nations Responsible" *Ethics* 114(2).
- (2007). *National Responsibility and Global Justice*. Oxford University Press.
- Newman, D (2011). *Community and Collective Rights: A Theoretical Framework for Rights held by Groups*. Oxford and Portland, Oregon: Hart Publishing.
- O'Brien, M (2015). "Charter Interpretation and a Community's Constitutional Morality" *Problema Anuario de Filosofía y Teoría del Derecho* 9.
- Otter, D (2009). *Judicial Review in an Age of Modern Pluralism*. Cambridge University Press.
- Rawls, J (1993). *Political Liberalism*. New York: Columbia University Press.
- (1997). "The Idea of Public Reason Revisited" *The University of Chicago Law Review* 64(765).

- Raz, J (1979). *The Authority of Law*. Oxford: Clarendon Press.
- Samaha, A (2014). "On the Problem of Legal Change" *The Georgetown Law Review* 97(103).
- Schauer, F (1991). *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life*. Oxford University Press.
- (2009). *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*. Cambridge, Mass.: Harvard University Press.
- Schwartzman, M (2004). "The Completeness of Public Reason" *Politics Philosophy and Economics* 3(2).
- Stewart, H (2015). "Bedford and The Structure of Section 7" *McGill Law Journal* 60(3).
- Stoljar, N. (2009). "Waluchow on Moral Opinions and Moral Commitments" *Problema. Anuario de Filosofía y Teoría del Derecho* 3.
- Strauss, D (2010). *The Living Constitution*. Oxford University Press.
- Srinivasan, A (2016). "Stop the Robot Apocalypse" in the London Review of Books: <http://www.lrb.co.uk/v37/n18/amia-srinivasan/stop-the-robot-apocalypse>
- Thompson, J (1971). "A Defense of Abortion" *Philosophy & Public Affairs* 1(1).
- Williams, B (1972). *Morality: An Introduction to Ethics*. Cambridge University Press.
- Sumner, W (2011). *Assisted Death: A Study in Ethics and Law*. Oxford University Press.
- Tuomela, R (2006). "Joint Intention, We-Mode and I-Mode" *Midwest Studies in Philosophy* XXX.
- Waldron, J. (1999). *Law and Disagreement*. Oxford University Press.
- Wall, S (2002). "Is Public Justification Self-Defeating?" *American Philosophical Quarterly* 39(385).
- Waluchow, W (1994). *Inclusive Legal Positivism*. Oxford: Clarendon Press.
- (2005). "Constitutions as Living Trees: An Idiot Defends" *Canadian Journal of Law and Jurisprudence* 18 (Spring).
- (2007). *A Common Law Theory of Judicial Review: The Living Tree*. Cambridge University Press.
- (2008). 'Constitutional Morality and Bills of Rights' in *Expounding the Constitution: Essays in Constitutional Theory*. Grant Huscroft (ed). Cambridge: Cambridge University Press.

— (2013). ‘On The Neutrality of Charter Reasoning’ in *Neutrality and Theory of Law*. J. Ferrer Beltrán et al (eds). Dordrecht; New York: Springer.

Weinrib, L (1994). “The Body and the Body Politic: Assisted Suicide Under the Canadian Charter of Rights and Freedoms” Case Comment on *Rodriguez v. British Columbia (Attorney General)*, *McGill Law Journal* 39(618).

Williams, J (forthcoming). “Public Reason and Prenatal Moral” *Journal of Ethics*.

Wolf, S (1996). ‘Gender, Feminism, and Death: Physician-Assisted Suicide and Euthanasia’ in her *Feminism and Bioethics: Beyond Reproduction*. Oxford University Press.

Cases Cited

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

Canada (AG) v Bedford 2013 SCC 72, [2013] 3 SCR 1101

Carter v Canada (Attorney General) 2012 BCSC 886

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9 (*The Security Certificates Case*).

Edwards v. A.-G. Canada [1930] A.C. 124

Egan v. Canada, [1995] 2 S.C.R. 513

Halpern v. Canada (Attorney General) [2003] O.J. No. 2268

Little Sisters Book and Art Emporium v. Canada, [2000] 2 S.C.R. 1120

Rodriguez v British Columbia (Attorney General) [1993] 3 SCR 519

R. v. Butler [1982] 1. S.C.R. 452

R. v. Keegstra [1990] 3 S.C.R. 697

R. v. Heywood [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.)

R v. Malmo-Levine, 2003 SCC 74

Reference re Same-Sex Marriage [2004] 3 SCR 698

Vriend v. Alberta, [1998] 1 S.C.R. 493

2305 U.S. 337 (1938)

339 U.S. 629 (1950)

347 U.S. 483 (1954)

410 U.S. 113 (1973)